THE PROBLEM OF COMPETING JURISDICTION FROM THE PERSPECTIVE OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA*

Uluslararasi Deniz Hukuku Mahkemesi Perspektifinden Yarışan Yargı Yetkisi Sorunu

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Özet

İkinci Dünya Savaşı sonrası uluslararası hukukun gelişimi ve uzmanlık alanlarına ayrılmasıyla birlikte uluslararası yargı mercilerinin hızlı şekilde çoğalması ihtilafların her bir alt disiplinin gerekleri doğrultusunda çözümlenmesini sağlamıştır. Bununla birlikte yaşanan bu gelişme bazı sorunlara da neden olmuştur. Bu sorunlardan önemli bir tanesi de yarışan yetki olarak isimlendirilen aynı uyuşmazlığın farklı yönleri itibariyle birden fazla uluslararası yargı merciinin yetkisine girebilmesidir. Uluslararası hukuk henüz bu konuda bir yeknesaklık getirmeye yönelik genel çaplı bir düzenlemeye gitmemiştir. Bu doğrultuda her bir uluslararası yargı merci kendi kurucu antlaşması veya statüsü doğrultusunda önüne gelen ihtilafı çözmekte veya diğer yargı merciinin vereceği nihai karara kadar bekletmektedir. Uluslararası alanda en yeni yargı organlarından birisi olan Uluslararası Deniz Hukuku Mahkemesi de şimdiye kadar karşılaştığı bazı uyuşmazlıklarda bu sorunu deneyimlemiştir. İşbu çalışmada bilhassa Uluslararası Deniz Hukuku Mahkemesini merkeze alarak yeri geldikçe de 1982 BMDHS kapsamındaki deniz hukuku uyuşmazlık çözüm sistemi çerçevesinde diğer uluslararası yargı mercileri ile yarışan yetki kapsamında karşılaşılan olaylara hem kuramsal açıdan hem de uygulama açısından örnekler verilmek suretiyle mesele izah edilmeye çalışılacaktır.

Anahtar Kelimeler: Uluslararası Deniz Hukuku Mahkemesi, Uluslararası Adalet Divanı, Uluslararası yargı organları, Yarışan yargı yetkisi, 1982 BMDHS

Summary

With the development of international law after the Second World War and its division into areas of expertise, the rapid proliferation of international judicial authorities enabled the resolution of disputes in line with the requirements of each sub-discipline. However, this development also caused some problems. One of these problems is

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that the same dispute, which is called competing jurisdiction, can come under the jurisdiction of more than one international judicial body due to different aspects. International law has not yet made a general regulation to bring uniformity in this regard. In this respect, each international judicial body resolves the conflict that comes before it in accordance with its founding treaty or status or makes it wait until the final decision of the other judicial authority. The International Tribunal for the Law of the Sea which is one of the newest judicial bodies in the international arena has experienced this problem in some disputes it has faced so far. In this study, the issue will be explained by giving examples both theoretically and practically, of the events encountered within the scope of the dispute resolution system of the law of the sea under the 1982 UNCLOS, especially by centering the International Tribunal for the Law of the Sea.

Keywords: International Tribunal for the Law of the Sea, International Court of Justice, International judicial bodies, competing jurisdictions, 1982 UNCLOS

INTRODUCTION

Today, with the proliferation of international courts and tribunals, international law reached a new level. Surely, such proliferation represents the development of international law towards a complex legal system, but this progress also has caused some problems like the so-called fragmentation of international law and competing jurisdiction among international judicial authorities. In this study, I will try to elaborate on the competing jurisdiction issue by putting the center on the International Tribunal for the Law of the Sea and comparing it with the main international judicial bodies.

In particular, until 1997, when the International Tribunal for the Law of the Sea was established, since the International Court of Justice dealt with the disputes on the law of the sea before, that situation caused the establishment of the Tribunal to be met with suspicion by some authors. Because, the International Court of Justice has improved its capabilities in this field by looking at various law of the sea disputes since the Corfu Channel case, which is the first case it dealt with.

Hence, as expressed by skeptic writers, the fact that two permanent judicial authorities are currently dealing with the law of the sea disputes has been met with doubt, especially regarding the jurisdiction issue and uniformity of case law.[1]

[1] See, e.g., Elihu Lauterpacht, *Aspects of the Administration of International Justice* (Grotius Publications Limited 1991) 21. (Lauterpacht argues that this newly established tribunal would not be sufficient since it was not given exclusive jurisdiction by the 1982 UNCLOS (art. 187 and art. 292) provisions, which allowed non-state organizations to apply to the court.); Shigeru Oda, 'Dispute Settlement Prospects in the Law of the Sea' (1995) 44 The International and Comparative Law Quarterly, 864. (According to Judge Oda, if the development of the law of the sea is separated from international law and left to the jurisdiction of another judicial body, this may lead to the undermining of international law.); Deniz Kızılsümer, 'Onuncu Kuruluş Yılında Uluslararası Deniz Hukuku Mahkemesi', (2005) 2 Galatasaray Üniversitesi Hukuk Fakültesi Dergisi, 58. (According to the author, although the resolution of disputes is regulated in detail in UNCLOS, the

In this direction, in this study, I will examine whether these doubts are right and whether competing jurisdictions have caused a problem in practice so far.

I. The Causes of Competing Jurisdiction Among International Judicial Bodies

The matter of competing jurisdiction is not new to the law in broad terms. Indeed, in domestic laws, this phenomenon frequently has been experienced between civil and administrative courts or trial courts and constitutional courts. However, for international law, the matter of competing jurisdiction became a significant topic due to the improvements in the international legal system.[2] For avoiding overlapping jurisdictions, some international treaties contain special provisions that govern the dispute settlement procedure like in the instances of Article 35 of the ECHR, Article 281 and 282 of the UNCLOS, and Article 2005 of the NAFTA. However, these types of provisions are meaningful and useful for regulating the jurisdictional relationships in the same field of international law.[3] On the other hand, since most of the specialized universal tribunals and courts look at separate branches of international law (commercial, maritime, criminal, human rights, investment, development, environmental law, etc.), overlaps can be detected between the powers of some of them.[4] There are various reasons for this situation. One of these reasons is the predominance of common parties in some international disputes that concern different treaty regimes and courts, or jurisdictions established under these treaty regimes.[5]

For example, if the property of a foreign investor is expropriated through a discriminatory intervention, the dispute would be brought before regional and universal human rights mechanisms (e.g., ECtHR and UN Human Rights Committee) or investment arbitration court (e.g., ICSID) or interstate proceedings (e.g., International Court of Justice).[6] In this example, the dispute

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extensive exceptions and limitations introduced by UNCLOS, along with other mandatory procedures, have significantly limited ITLOS's powers.)

2 Nikolaos Lavranos, *On the Need to Regulate Competing Jurisdictions between International Courts and Tribunals*, EUI MWP, 2009/14 – p. 1. http://hdl.handle.net/1814/11484

3 Jasper Finke, 'Competing Jurisdiction of International Courts and Tribunals in Light of the MOX Plant Dispute' (2006) 49 German Y.B. Int'l L. 307, 310-311.

4 Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (OUP 2004) 47.

5 See also, Report of the Study Group of the International Law Commission**,** Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Geneva, 2006, p. 14, para. 15.

6 Shany, *The Competing Jurisdictions of International Courts and Tribunals,* 84. In this regard, Lowe illustrates such a competing jurisdiction with a different example. According to his example, if a merchant ship flying the flag of State A is seized by State B, the jurisdiction of various international jurisdictions may come to the fore. If these two states

whose parties and subject are the same; due to the right to "property", can be subjected to the relevant human rights courts, due to the violation of the contract between the state and the investor or the interstate bilateral investment treaty, can be subjected to the investment arbitration court, and finally, if it is entered to the jurisdiction of an interstate judicial authority when the foreign investor's national state uses the "diplomatic protection" right of the state.

Another reason for competing jurisdiction is that some sub-branches of international law do not have a special judicial body of their own. An example is international environmental law. Despite various calls, an "international environmental law court" has not been established and it is not likely to be established in the near future. Since there is no special court specific to this field, it can be stated that several international courts have special importance in terms of environmental law. Examples include the International Court of Justice, the International Court of Law of the Sea, the World Trade Organization Appeal Body and Panels, the European Court of Justice, and regional human rights mechanisms.[7]

Regarding the competing jurisdiction matter, Lowe resorts to a triple categorization. Accordingly, both judicial bodies can have general authority, one general and the other special authority, and finally, both can be special authorities.[8] To give an example in this direction, both the Permanent Court of Arbitration and the International Court of Justice are in the position of two general competent jurisdictions as they have developed their capacities to resolve disputes regarding environmental law.[9] For both special jurisdictions, we can give examples of WTO Dispute Resolution Bodies dealing with disputes under the 1994 GATT and tribunals dealing with maritime law disputes (ITLOS and arbitral tribunals).[10] I will discuss the competing jurisdiction between one specific and one general authorized dispute resolution mechanism under a sub-

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have accepted the jurisdiction of the Court by Optional Clause under Article 36/2 of the Statute of the International Court of Justice, the jurisdiction of the Court will come into question. If they chose the ITLOS under 1982 UNCLOS Part XV, the jurisdiction of the Tribunal may come into question. Apart from these, if a Bilateral Joint Commission is established within the framework of the Treaty of Friendship, Trade, and Navigation the authority of such Commission between the two states may arise. Finally, State A may apply to the WTO dispute resolution system, claiming that its commercial rights were damaged within the framework of the 1994 GATT. (See, Vaughan Lowe, 'Overlapping Jurisdiction in International Tribunals' (1999) 20 Aust. YBIL 191.

7 Philippe Sands, *Principles of International Environmental Law*, Second Edition, (CUP 2003) 214.

8 Lowe, 'Overlapping Jurisdiction in International Tribunals' 192.

9 Tim Stephens, *International Courts and Environmental Protection* (CUP 2009) 273.

10 Lowe, 'Overlapping Jurisdiction in International Tribunals' 203.

title 1982 UNCLOS article 282.[11] Subsequently, I will examine the jurisdiction of ITLOS that competes with other courts and jurisdictions.

II. The Dispute Settlement Mechanism under the 1982 United Nations Convention on the Law of the Sea (UNCLOS)

At the Conference of the 1982 UNCLOS, it clearly occurred that there was significant disagreement among the states regarding which dispute settlement method should be preferred in the disputes derived from the interpretation or application of the Convention. Whereas some states wanted the continuance of the ICJ as an exclusive judicial body on the matters concerning the law of the sea disputes, the second group of states considered that the new law of the sea regime should be entrusted to the authority of a tribunal that will be created specifically for this purpose.[12]

On the other hand, the third group of states defended that arbitration is a more preferable method in terms of flexibility compared to the standing courts and tribunals. Finally, the fourth group of states (particularly socialist states) indicated the need for specialized arbitral bodies for resolving technical issues. In the end, negotiators of the UNCLOS found a practical solution by adopting the principle of freedom of choice which is enshrined in art. 287 of the Convention.[13]

Article 287 requires the State Parties to make a declaration regarding which procedure they choose. According to paragraph 3 of Article 287 if a State, party to a dispute did not make a declaration it shall be deemed to accept Annex VII arbitration procedure. In the preparatory phase of the Convention when this issue was discussed, first it was offered that the parties would use the tribunal chosen by the defendant. But some states expressed their dissatisfaction since they do not want to accept the jurisdiction of the ICJ in case of the defendant selects the International Court. Upon that, the Annex VII arbitration method was preferred as a default procedure.[14] Similarly, if the parties of a dispute chose different procedures, the plaintiff-side may submit it only to Annex VII arbitration if the parties do not agree otherwise.

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11 1982 UNCLOS Article 282 *Obligations under general, regional or bilateral agreements*: "If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree".

12 John G Merrills, *International Dispute Settlement* (CUP 2011) 170.

13 Ibid; Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (CUP 2005) 56; Shabtai Rosenne and Louis B. Sohn, *United Nations Convention on the Law of the Sea 1982: A Commentary* Volume V (Martinus Nijhoff Publishers 1989) 42.

14 Klein, *Dispute Settlement in the UN Convention on the Law of the Sea,* 57.

III. The Problems Encountered by the International Tribunal for the Law of the Sea within the Scope of Competing Jurisdiction Issue with Other Judicial Bodies

A. The Approach of the International Tribunal for the Law of the Sea to the Dispute Resolution Procedures in the Non-UNCLOS Documents and Criticisms Against That

The jurisdiction of the judicial bodies regarding international law disputes mainly arises from the consent of the states. In this context, if for the settlement of certain types of disputes, a different method is agreed upon by the states, it is necessary to resort to a special court or settlement procedure (*lex specialis*) instead of the general competent international court, unless the states decide otherwise.[15]

The MOX Plant dispute[16] is a good example of developments in the competing jurisdiction among international bodies. The MOX Plant cases refer to three linked sets of litigation arising out of a decision of the United Kingdom to authorize the construction and operation of a plant to make mixed oxide fuel (MOX).[17] Thereby, the dispute was brought before three different dispute resolution mechanisms by Ireland. These tribunals are the 1982 UNCLOS Annex VII arbitration, the OSPAR Convention, and finally the ITLOS. Until Annex VII arbitration court is formed for resolving the dispute under 1982 UNCLOS article 287, it was brought before the International Tribunal for the Law of the Sea to order interim measures under article 290/5. Apart from these, the European Commission applied to the European Court of Justice against Ireland on October 30, 2003, on the grounds that Ireland applied to the competent judicial authorities under the 1982 UNCLOS instead of going to the competent European Community authorities in the decision-making process.[18]

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15 Lowe, 'Overlapping Jurisdiction in International Tribunals' 195. However, it is also expressed by the author that a special judicial authority may decide that it is unauthorized or that it may indeed be unauthorized. (*Ibid*, footnote 7).

16 *MOX Plant (Ireland v. the United Kingdom), (Provisional Measures, Order of 3 December 2001),* ITLOS Reports 2001; Judgment of the ECJ (Grand Chamber) of 30 May 2006, Case C-459/03, Commission v. Ireland; Arbitral Tribunal Constituted Pursuant to Article 287, and Article 1 of Annex VII, of the United Nations Convention on the Law of the Sea for the Dispute Concerning the MOX Plant, Ireland v. The United Kingdom, PCA Case No. 2002-01; Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention, Ireland v. The United Kingdom, PCA Case No. 2001-03.

17 Robin R Churchill, "Mox Plant Arbitration and Cases" in Rüdiger Wolfrum and Anne Peters (eds.), *The Max Planck Encyclopedia of Public International Law* (OUP 2018).

18 Yuval Shany, 'The First MOX Plant Award: The Need to Harmonize Competing Environmental Regimes and Dispute Settlement Procedures', (December 2004) 17 Leiden Journal of International Law 815, 816; Kerem Batır, 'Birleşmiş Milletler Deniz Hukuku Sözleşmesi Uyarınca Uyuşmazlıkların Çözümü: Mox Plant Davası ve Yargı Yetkilerinin

Just before this application, on 24 June 2003, the 1982 UNCLOS Annex VII arbitration court adjourned the next hearing in its Order no. 3 no later than 1 December 2003, approved the interim measures ordered by the ITLOS on 3 December 2001, and rejected the requests for interim measures and asked the parties to facilitate the resolution of unresolved issues individually or jointly within the institutional framework of the European Community and to inform the arbitral tribunal of developments.[19] In the next hearing on 14 November 2003, it decided to suspend the case until the European Court of Justice decides otherwise. However, it stated that it would continue to hold the dispute.[20]

The European Court of Justice, on the other hand, in its decision on 30 May 2006, determined that under the 1982 UNCLOS article 282, the system envisaged in the European Community Treaty for the settlement of disputes between member states has priority over the dispute resolution procedures in the UNCLOS Part XV.[21] The Court, among other reasons[22], decided that Ireland

Örtüşmesi', (2008) 16 Uluslararası Hukuk ve Politika 57, 76. The arbitral tribunal established pursuant to the OSPAR Convention concluded that it is competent for the dispute, despite United Kingdom's objections. However, in the end, it refused Ireland's demands. (Dispute Concerning Access to Information under Article 9 of the OSPAR Convention, Ireland v. the United Kingdom, Final Award, p. 58 ff., para. 185). The arbitral tribunal's refusal to harmonize the OSPAR Convention with the environmental information access regime in European Community law and its failure to apply international law other than the OSPAR Convention was considered a regrettable aspect of the decision. (Shany, 'The First Mox Plant Award' 826).

19 Arbitral Tribunal Constituted Pursuant to Article 287, and Article 1 of Annex VII, of the United Nations Convention on the Law of the Sea for the Dispute Concerning the MOX Plant, Ireland v. The United Kingdom, PCA Case No. 2002-01, Order No. 3, p. 20.

20 Arbitral Tribunal Constituted Pursuant to Article 287, and Article 1 of Annex VII, of the United Nations Convention on the Law of the Sea for the Dispute Concerning the MOX Plant, Ireland v. The United Kingdom, PCA Case No. 2002-01, Order No. 4, p. 2 ff. The decision to suspend the case was seen as positive in that it alleviates jurisdictional conflict, reduces the risk of conflicting judgments, and helps maintain compliance with international law. (Shany, 'The First Mox Plant Award' 827).

21 Judgment of the ECJ (Grand Chamber), Case C-459/03, Commission v. Ireland, p. I-4708, para. 125.

22 One of the important issues emphasized by the Court is Ireland's defense before the Annex VII arbitration court that the relevant provisions of the various directives of the European Community have been violated. According to the Court, these claims were presented not only for the purpose of interpreting the general provisions of the 1982 UNCLOS but also as international law rules to be applied by the arbitration court pursuant to article 293. This indicates that Ireland intends to obtain a decision from the Annex VII arbitration court that the provisions of the European Community law instruments have been violated by the United Kingdom. On the other hand, in accordance with Article 292 of the European Community Treaty, the jurisdiction of the Court is exclusive in resolving disputes arising from the interpretation and application of the provisions of Community law. (Ibid, pp. I-4713 et al., para. 148-152).

did not comply with its obligations arising from Articles 10 and 292 of the European Community Treaty by applying the dispute resolution procedures stipulated in the 1982 UNCLOS regarding the MOX Plant dispute.[23] Thereupon, on 6 June 2008, the Annex VII arbitration court concluded the proceedings by stating that Ireland withdrew its request with Order No. 6.[24]

One of the important consequences of Article 282 of the 1982 UNCLOS is that it limits the possibility of the parties to the dispute to unilaterally choose the judicial authorities to which they will apply (forum shopping) and prevents the use of dispute resolution procedures in both the 1982 UNCLOS and the non-UNCLOS legal documents.[25]

Regarding article 282, it is stated in the Virginia Commentary that states can choose different judicial bodies for certain types of disputes in bilateral friendship, trade, and navigation agreements.[26] Apart from this, it was stated that in the multilateral agreements concluded under the auspices of international organizations such as IMO, provisions regarding the use of arbitration for possible disputes are included. Finally, it was emphasized that the parties can take the dispute to another judicial body with a special agreement between them.[27] Therefore, the dispute resolution systems introduced in such agreements within the scope of Article 282 have been given superiority compared to the resolution procedures in the 1982 UNCLOS Part XV.

Concerning the competing jurisdiction topic in the Southern Bluefin Tuna dispute, which is another important dispute on the subject, the problem was taken place between the mandatory and binding dispute resolution provisions of the 1982 UNCLOS Part XV and the optional and non-binding procedures of the 1993 Convention on the Conservation of Southern Bluefin Tuna[28] which was signed by Australia, New Zealand and Japan.[29] In the dispute arising from the application of this Convention, New Zealand and Australia started the proceedings under the 1982 UNCLOS Part XV and applied to the ITLOS for interim measures. Before the ITLOS, New Zealand asserted that Japan has

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23 *Ibid,* s. I- 4720, para. 184/1.

24 Arbitral Tribunal Constituted Pursuant to Article 287, and Article 1 of Annex VII, of the United Nations Convention on the Law of the Sea for the Dispute Concerning the MOX Plant, Ireland v. United Kingdom, PCA Case No. 2002-01, Order No. 6, p. 3; Batır, 'Birleşmiş Milletler Deniz Hukuku Sözleşmesi Uyarınca Uyuşmazlıkların Çözümü' 77. (Batır describes the termination of the process two years after the decision of the Court as noteworthy in that it left the issue of the exclusive jurisdiction of the Court controversial).

25 Shany, *The Competing Jurisdictions of International Courts and Tribunals,* 203.

26 Rosenne and Sohn, *United Nations Convention on the Law of the Sea 1982: A Commentary*, 26.

27 Ibid.

28 United Nations Treaty Series, Vol. 1819 (1994) 359 ff.

29 Stephens, *International Courts and Environmental Protection,* 274.

breached its obligations under Articles 64 and 116 to 119 of the United Nations Convention on the Law of the Sea regarding the conservation and management of the southern bluefin tuna stocks.[30]

The ITLOS, in its interim measures in the Southern Bluefin Tuna case, contrary to the position taken by the Annex VII arbitration of the legal documents other than 1982 UNCLOS, did not take into account their privileged status under article 282 of the UNCLOS.[31] Shany argues that such an overly restrictive interpretation of the Tribunal's competing jurisdiction would make article 282 largely meaningless.[32] In line with this idea, he stressed that in the Mox Plant case, in their separate opinions some of the judges expressed their concerns about this overly restrictive approach of the ITLOS regarding the competing jurisdiction.[33]

In my opinion, article 282 should not be interpreted too broadly to allow states to escape from the mandatory judicial procedures established by the 1982 UNCLOS. Because in Article 282, it is clearly mentioned that the parties have agreed that the dispute will "be submitted to a procedure that entails a binding decision" other than the 1982 UNCLOS. In this context, the provision of Article 16/2 of the 1993 Convention[34] between the parties in the Southern Bluefin Tuna dispute does not impose a mandatory judicial procedure, as it states that it can be appealed to the International Court of Justice or arbitration with the consent of all parties to the dispute.[35]

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30 Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, p.285, para. 28.

31 Ibid, p. 294, para. 54.

32 Shany, *The Competing Jurisdictions of International Courts and Tribunals,* 238.

33 Judge Jesus argued that the Court had interpreted Article 282 too narrowly, precluding the possibility of its applicability in some cases. In this context, he stated that he agreed with the decision but did not agree with the reasoning. Because, although the OSPAR Convention is essentially a regional agreement within the scope of article 282, Ireland's claims in the OSPAR arbitration court are narrower than the UNCLOS Annex VII arbitration court. Therefore, these two disputes are different disputes and article 282 cannot be applied to this case. (Separate Opinion of Judge Jesus, MOX Plant (Ireland v. The United Kingdom), Provisional Measures, Order of 3 December 2001, p. 1). Judge Anderson also stated that the Court had examined the question of whether the arbitral tribunal had prima facie jurisdiction on the basis of the limited resources available to it. In this regard, the judge stated that by applying the test introduced by Lauterpacht, an answer was sought to the question of whether article 282 "clearly excludes" the authority of the arbitration court and that the same question was valid for article 283 as well. The court gave a negative answer to both questions. However, he stated that he had some doubts regarding the reasoning made on the basis of the facts. (Separate Opinion of Judge Anderson, MOX Plant (Ireland v. The United Kingdom), Provisional Measures, Order of 3 December 2001, p. 1 ff.).

34 See, Text of the Convention for the Conservation of Southern Bluefin Tuna, https://www.ccsbt.org/sites/default/files/userfiles/file/docs_english/basic_documents/convention.pdf

35 The Annex VII arbitration court decided that in accordance with the "1993 Convention

In this respect, I would like to state that I do not agree with Shany, especially with his view on the Southern Bluefin Tuna case. As a matter of fact, it was stated in the doctrine in the Southern Bluefin Tuna case that "the decision of Annex VII arbitration court in many respects undermines the compulsory judicial regime stipulated by the Convention".[36] Similarly, it was stressed that the effectiveness of mandatory judicial procedures was reduced by Articles 281 and 282 of UNCLOS 1982, which could create a procedural obstacle to the dispute resolution system in Part XV, as seen in the *Southern Bluefin Tuna* and *Mox Plant* cases.[37]

B. Competing Jurisdiction Between the International Tribunal for the Law of the Sea and the International Court of Justice

In the event of a law of the sea dispute regarding the interpretation or application of the 1982 UNCLOS, there are different possibilities and opinions as to whether the Convention will be bound by the dispute resolution procedures in accordance with the 1982 UNCLOS article 282.

According to the first view, if both parties to the dispute have accepted the compulsory jurisdiction of the ICJ in accordance with Article 36/2 of the Statute of the Court, this situation is considered an agreement within the meaning of Article 282 of UNCLOS 1982, and it is argued that the dispute should be brought before the Court. However, it was argued by Shany that this interpretation would bring with it various drawbacks. First of all, it is

for the Conservation of Southern Bluefin Tuna" signed between the parties to the dispute, the parties could not resort to compulsory judicial remedies unless they reached an agreement between them regarding the dispute. Despite the fact that it gave a decision of lack of jurisdiction, the arbitral tribunal concluded that when the "1995 Agreement on the Application of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 on the Protection and Management of on Straddling Fish Stocks and Highly Migratory Fish Stocks" came into force, it would not only be effective in resolving the procedural problems that came before but further if this Agreement is implemented sincerely and effectively, it will also resolve the substantive problems. (Southern Bluefin Tuna Case, (Australia, and New Zealand v. Japan) Award on Jurisdiction and Admissibility August 4, 2000, rendered by the Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea, p. 109 ff. para. 71). Unfortunately, on 11 December 2001, approximately 1.5 years after the final decision was made in this dispute, the 1995 Agreement entered into force.

36 Berat Lale Akkutay, *1982 Birleşmiş Milletler Deniz Hukuku Sözleşmesi Çerçevesinde Uyuşmazlıkların Çözüm Yolları* (Adalet Yayınevi 2012) 41. For the names of international lawyers of this opinion, see, Yoshifumi Tanaka, *The International Law of the Sea* (CUP 2019) 500, footnote 29).

37 James Crawford, *Brownlie's Principles of Public International Law* (OUP 2012) 736. The author states that a similar situation could have occurred in the Swordfish Stocks case between the European Community and Chile if the dispute had not been resolved by agreement of the parties.

problematic to accept notifications made under Article 36/2 of the Statute as agreements establishing the jurisdiction of the Court.[38] Because it is a completely fictional assumption that the declarations made by the state parties to the dispute under Article 36/2 of the Statute of the Court are accepted as an "agreement" within the meaning of Article 282 of UNCLOS 1982. In addition, it is not reasonable to rank among the judicial authorities independently of the 1982 UNCLOS article 287. Except for the dispute resolution procedures in article 287, the cases that the Court deals with are essentially non-UNCLOS cases.[39]

According to the second view, the acceptance of the Court's compulsory jurisdiction under Article 36/2 of the Statute of the Court should be considered as a choice of dispute resolution proceedings under Article 287 of UNCLOS 1982. Because it may be deemed unnecessary for a state that has accepted the compulsory jurisdiction of the Court to also make a declaration that it accepts the jurisdiction of the Court in accordance with Article 287 of UNCLOS 1982.[40] According to Treves, such an approach would be wrong. Even in cases where one of the parties to the dispute accepts the jurisdiction of the Court under Article 36/2 of the Statute of the Court and the other party under Article 287 of UNCLOS 1982, it is debatable whether they can be deemed to have accepted the same procedure under Article 287/4 of the Convention.[41]

We can say that the current approach of the relevant states and the International Court of Justice is in line with the first view, namely the approach that the adoption of the Court's compulsory jurisdiction under Article 36/2 of the Statute would fall within the scope of 1982 UNCLOS article 282. As a matter of fact, in the case of Maritime Delimitation in the Indian Ocean between Somalia and Kenya, according to the Court's judgment of 2 February 2017 regarding the preliminary objections, both states did not notify which jurisdiction they had chosen under Article 287/1 of the 1982 UNCLOS. However, except for Kenya's reservation, both states accepted the jurisdiction of the Court under article 36/2 of the Statute.[42]

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38 Shany, *The Competing Jurisdictions of International Courts and Tribunals,* 204.

39 *Ibid,* 205.

40 *Ibid,* 206.

41 Tullio Treves, "The Jurisdiction of the International Tribunal for the Law of the Sea", in Chandrasekhara Rao, and Rahmatullah Khan (eds.), *The International Tribunal for the Law of the Sea Law and Practice* (Kluwer Law International, 2001) 129. Treves' approach is to take the first view. Accordingly, if both parties to the dispute have accepted the compulsory jurisdiction of the Court, this situation is considered as an "agreement" in accordance with Article 282.

42 Maritime Delimitation in the Indian Ocean, (Somalia v. Kenya), Preliminary Objections, I.C.J. Judgment of 2 February 2017, p. 14, para. 33. Kenya stated that since both they and Somalia failed to notify which jurisdiction to resolve maritime disputes pursuant to

Kenya stated that it accepted that such acknowledgment of the Court's discretionary jurisdiction by both parties to the dispute constituted an agreement under 1982 UNCLOS article 282, thereby replacing the dispute resolution system of Chapter XV Chapter 2 of the Convention. However, Kenya argued that the reservation it made while accepting the jurisdiction of the Court under Article 36/2 of the Statute constituted an obstacle to the formation of such an agreement. Kenya, therefore, argued that its reservation highlighted the dispute resolution system in 1982 UNCLOS Part XV as *lex specialis* and *lex posterior*.

Although Somalia did not accept this last claim, it stated that agreed with Kenya that accepting the optional jurisdiction of the Court constitutes an agreement within the meaning of article 282 of the Convention, and therefore, emphasized that it preceded the dispute resolution system in article 287.[43] The Court first emphasized that, in the preparatory works (*travaux préparatoires*) of the 1982 UNCLOS, there was no sign of intent that Article 282 excludes optional clauses acknowledging the Court's jurisdiction. It concluded that it did not ensure that Chapter 2 could be appealed, and therefore the appeals for authorization should be dismissed.[44] As can be seen, both the parties to the dispute and the Court accept that in accordance with Article 36/2 of the Statute, the optional clauses accepting the jurisdiction of the Court are an agreement that falls within the scope of Article 282 of UNCLOS 1982.

It is also possible for the jurisdiction to compete between the ICJ and the ITLOS with the notification of which jurisdiction the states have chosen in accordance with the 1982 UNCLOS article 287. Because some states such as Belgium, Finland, and Oman have declared both the ICJ and the ITLOS without making a preference order between them. While Italy declared that it chose both jurisdictions, it clearly emphasized that it preferred both of them, without giving priority to one over the other.[45]

In the event of a dispute between two states, both of which have made such a declaration, how should one act if one of the parties applies to the ICJ, but

article 287/1 of UNCLOS 1982, the dispute should normally go to Annex VII arbitration. However, according to Kenya, since the bilateral memorandum of understanding signed between the parties in 2009 on the boundary of the continental shelf in the Indian Ocean foresees the settlement of the dispute through the Commission on the Delimitation of the Continental Shelf, they put forward in accordance with Article 36/2 of the Statute, "another method for the settlement of the dispute between the parties. or unless it is decided to resort to methods" constitutes an obstacle to the jurisdiction of the Court in the context of the reservation. (*Ibid*, p. 21 ff., para. 52). This claim was not accepted by the Court.

43 *Ibid,* s. 38, para. 109-111.

44 *Ibid,* s. 43-44, para. 129-134.

45 Lowe, 'Overlapping Jurisdiction in International Tribunals' 196; Tullio Treves, "Conflicts Between the International Tribunal for the Law of the Sea and the International Court of Justice", (1999) 31 International Law and Politics, 809, 819.

the other party considers the ITLOS authorized and files a lawsuit before the ITLOS? Regarding this issue, Lowe recommends that the first applied judicial authority suspend the proceedings if it is thought that the second applied judicial authority may also be competent. In this way, the second judicial authority will be expected to make its decision as to whether it is authorized or not.[46]

In this respect, the findings of the Permanent Court of International Justice regarding jurisdiction in the Chorzów Factory case are also important. In the aforementioned case, the PCIJ explained the situation regarding the jurisdiction between itself and the German-Polish Mixed Arbitration Court with the following words. "*...the Court, when it has to define its jurisdiction about that of another tribunal, cannot allow its own competency to give way unless confronted with a clause which it considers sufficiently clear to prevent the possibility of a negative conflict of jurisdiction involving the danger of a denial of justice*".[47]

Lowe has rightly stated that despite the above-mentioned decision, the situation may not always be so clear.[48] Therefore, it is not possible to generalize, and it is necessary to examine the situation of the relevant judicial authorities in terms of the authority in each case.

C. Competing Jurisdiction Between the International Tribunal for the Law of the Sea and World Trade Organization Dispute Settlement Mechanism

Towards the end of 2000, there was a dispute in which the ITLOS and the WTO Dispute Settlement Mechanism were in such competing jurisdictions. The subject of the dispute concerns the legality of transit restrictions imposed by Chile, which prevented European Community fishing vessels from entering their ports due to their failure to fulfill their obligations regarding the maintenance of swordfish stocks in international waters. The dispute in question was brought before the WTO Dispute Settlement Mechanism by the European Community on the grounds that the freedom of transit of European goods was not complied with in accordance with GATT Article V (Chile also relied on the environmental exception in the GATT).

Thereupon, Chile applied to the International Tribunal for the Law of the Sea (on the grounds that the European Community's fishing practices are in violation of the provisions of the 1982 UNCLOS Articles 116-119), and upon the request of both parties, a special chamber was established by the ITLOS to look into the

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46 Lowe, 'Overlapping Jurisdiction in International Tribunals' 197.

47 Collections of the Permanent Court of International Justice Series A9, Factory at Chorzów (Jurisdiction), Judgment of 26 July 1927, p. 30.

48 Lowe, 'Overlapping Jurisdiction in International Tribunals' 197.

dispute. Later, after the mutual negotiations of the parties, and upon reaching an agreement on 16 October 2008, the dispute was resolved by non-judicial means, although an important case emerged regarding the competing jurisdiction. This case is important in that it shows that the law of the sea is not a stand-alone field and that it may conflict with other fields of international law.[49]

Well, on the assumption that such a dispute has been decided by the ITLOS, will it be possible for the WTO Dispute Settlement Mechanism to decide the case before it? More generally, will the decision of an international judicial body constitute *res judicata* before another international judicial body? As it is generally accepted, *res judicata* can only be applied if the following three conditions are met: *1. The parties must be the same, 2. The subject of the lawsuit/claim (petitum) must be the same, 3. The cause of action (causa petendi) must be the same.*

The third condition will usually prevent a decision of one international court from being considered *res judicata* in another international court. Because, as I mentioned before, the jurisdiction of international courts and tribunals is established on the basis of their founding treaties. Therefore, for example, a dispute that ITLOS has previously decided can be brought before the WTO Dispute Settlement Mechanism even if the parties and material subject are the same. Because *causa petendi* (reason for action), which is the third condition required in terms of *res judicata*, is 1982 UNCLOS in the case before the ITLOS, while the relevant WTO Agreement in the case before the WTO Dispute Settlement Mechanism.[50]

As a different possibility, on the assumption that the ITLOS decides that it would be better for the dispute to be resolved by the WTO, despite this decision, WTO will not be able to examine the disputes arising from the allegations of violation of the 1982 UNCLOS. Therefore, it is not possible to refer the case from the ITLOS to the WTO within the framework of the *forum non-conveniens doctrine* used in domestic law.[51] Because each international judicial authority can only rule on the violation of international agreements related to its field of duty. Otherwise, it will be possible for international judicial authorities to make their legitimacy controversial by violating each other's jurisdictions. As a result, it would be more accurate to talk about the competition of different jurisdictions in parallel with each other, rather than the overlap of jurisdiction between these two international judicial bodies specialized in certain fields.[52]

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49 Shany, *The Competing Jurisdictions of International Courts and Tribunals,* 51 ff.; James Harrison, *Making the Law of the Sea* (CUP 2011) 290.

50 Joost Pauwelyn and Luiz Eduardo Salles, "Forum Shopping before International Tribunals: (Real) Concerns, (Im)Possible Solutions", (2009) 42 Cornell Int. Law J., 77, 103.

51 *Ibid,* 111 ff.

52 Stephens, *International Courts and Environmental Protection*, 275.

D. The Other Side of the Coin in the Competing Jurisdiction: An Example of the Relationship Between the International Tribunal for the Law of the Sea and the European Court of Human Rights

The decision of the Grand Chamber of the ECtHR in the *Mangouras v. Spain* case is important in terms of evaluating the relationship between the two judicial bodies within the scope of jurisdiction. In this case, the Grand Chamber of the ECtHR revealed the differences in jurisdiction between the two forums by examining the case law of the International Tribunal for the Law of the Sea to release the ship and its crew on reasonable bond, adjudicated under Articles 73 and 292 of UNCLOS 1982.

The ECtHR stated that it is interesting to examine the approach of the ITLOS in its case law regarding the detention of foreign nationals by the coastal state and the determination of the amount of bond. However, ECtHR drew attention to three main differences. The first of these is that the ITLOS is tasked with establishing a balance between the conflicting interests between the two states and the ECHR between the state and the individual. The second is that the cases before ITLOS are related to the detention and release of both the ship and its crew. Thirdly, unlike this case, which is currently before the ECtHR due to an environmental disaster, the majority of the cases before the ITLOS stem from the violation of fishing regulations.[53]

The ECtHR noted that the ITLOS was aware that its jurisdiction was different from its own, however, similar criteria were applied in determining the amount of security required for the detainee. Referring to the case of *Hoshinmaru* (*Japan v. Russian Federation*), the ECtHR has compiled the methods of determining the reasonable bond amount in the previous cases of the ITLOS in this case and the criteria stated here are; the gravity of the crimes alleged in the present case, the fines that were or may be imposed in accordance with the law of the detaining state in a reasonably proportionate manner, and the monetary value of the detained ship and the confiscated cargo were among the elements within the scope of the assessment.[54]

As a result, the ECtHR seems to have drawn a clear line between its own jurisdiction and that of the ITLOS. Because, pursuant to article 292 of UNCLOS 1982, the procedure of prompt release of the ship and its crew upon the payment of a reasonable bond or other financial security is an authorization granted to ITLOS. The ECtHR, on the other hand, does not have the authority to determine a reasonable bond for such release. In short, there is no overlapping jurisdiction

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53 Judgment on the merits delivered by the Grand Chamber, *Mangouras v. Spain* [GC], no. 12050/04, ECHR 2010, s. 15, para. 46.

54 *Ibid,* s. 16, 28; para. 47, 89.

between the two international courts under the procedure for the release of the ship and its crew. However, we can say that there is a competing jurisdiction in terms of the demands of the crew. In this respect, it is possible to appeal to the ECtHR due to allegations of violations arising from the European Convention on Human Rights, and to the ITLOS in accordance with 1982 UNCLOS article 292 for the prompt release of the ship and crew in return for a reasonable bond.

CONCLUSION

Although it is a relatively newly established international judicial authority, the International Tribunal for the Law of the Sea has a similar working style to the International Court of Justice and sees the Court not as a competitor, but as a partner with which international law has been co-developed, so far in terms of competing jurisdiction in the law of the sea disputes, it did not encounter any major problems. Since ITLOS's relationship with other international mechanisms is more specialized in a certain field compared to the ICJ, the competing jurisdiction issue makes it possible for the plaintiffs to apply to more than one judicial authority in different aspects of a dispute. Particularly, if we consider that the ICJ has more comprehensive authority regarding the matters that came before it in terms of *ratione materiae*, it is quite possible for the ICJ to encounter overlapping jurisdictional situations with other judicial bodies.

This situation, in my opinion, poses much more danger than the possible problems that may arise in ITLOS's mutual relations with the ICJ. As a matter of fact, as I mentioned above, until now, ITLOS has not had a fundamental problem in its relations with the ICJ over the issue of jurisdiction. On the other hand, on the assumption that a dispute concerns both law of the sea and environmental law or both law of the sea and human rights law, there is no obstacle in terms of international law for plaintiffs to apply to both ITLOS and WTO dispute settlement mechanism or regional human rights mechanisms.

Consequently, despite the views on the fragmentation of international law, ITLOS has become a specialized judicial body that will respond to the needs of the law of the sea in line with the jurisprudence of the International Court of Justice, by fulfilling the unique requirements of the law of the sea which has become a more specific area and strengthened its normative aspect with the 1982 UNCLOS. Nevertheless, inevitably the proliferation of international courts and tribunals caused some jurisdictional problems at the international level. Although, the emergence of that new problem type in international law, it is fair to say that the ITLOS has coped with those challenges well even though it has not had enough judicial experience.

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