

CONFLICTS BETWEEN THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA AND THE INTERNATIONAL COURT OF JUSTICE

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I. INTRODUCTION

The growth in number of international courts and tribunals, sometimes labeled with the slightly derogatory term “proliferation,” raises questions of coordination and conflict between these various courts and tribunals and brings concepts to the attention of international lawyers whose interest was previously restricted to the domestic law of the jurisdiction of courts, such as the effect of *lis pendens* and forum shopping.

These problems are made particularly acute because international courts and tribunals are growing in number within an international system that has no unified judiciary. The Appeals Chambers of the International Criminal Tribunal for the Former Yugoslavia (ICTY) remarked, “In international law, every tribunal is a self-contained system (unless otherwise provided).”¹ Consequently, there are no general rules by which to sort questions of coordination and conflict. These questions are to be solved within each “self-contained system”—in other words, within the context of the international court or tribunal to which the case has been brought. Sometimes these questions are addressed by the instruments regulating a specific court or tribunal. To quote again from the ICTY, these instruments sometimes “provide otherwise.” When this is the case, the questions are solved by applying the applicable rules of the international court or tribunal in which a case has been brought. When the international instruments regulating that court or tribunal do not envisage such problems directly, it will be a matter of interpretation. In the remarks that follow, I will

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1. Prosecutor v. Tadic, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, para. 11 (Int'l Crim. Trib. Former Yugo., App. Chamber, Oct. 2, 1995), *reprinted in* 35 I.L.M. 32 (1996).

explore some of these questions in regard to possible conflicts between the International Court of Justice (the Court) and the new International Tribunal for the Law of the Sea (the Tribunal).²

Two kinds of conflicts might develop: conflicts of jurisdiction and conflicts of jurisprudence. Many views have been expressed regarding the possibility that the jurisprudence of the Tribunal might diverge from that of the Court, either on questions concerning the law of the sea or on general problems of international law. These views range from concern over a looming risk of fragmentation in international law³ to the idea that "the risk should not be exaggerated"⁴ and that the coexistence of various—and not necessarily unanimous—judicial voices can improve the growth of international law and the settlement of disputes.⁵ While I share the latter view,⁶ I do not wish to enter into this discussion here. Leaving aside conflicts of jurisprudence, this paper addresses conflicts of jurisdiction between the Court and the Tribunal.

In discussing such conflicts of jurisdiction, I will consider whether there are cases in which the same dispute falls within the jurisdiction of the Court and of the Tribunal and whether these cases entail legal or practical problems for the parties and for the judicial body seized of a dispute.

2. See United Nations Convention on the Law of the Sea of 10 December 1982, Annex VI: Statute of the Tribunal for the Law of the Sea, U.N. Doc. A/CONF.62/121 (1982), reprinted in 21 I.L.M. 1245, 1345-50 (1982) [hereinafter Convention on the Law of the Sea]. See generally Tullio Treves, *Le Tribunal International du droit de la mer: Débuts et perspectives*, 1996 ANNUAIRE DU DROIT DE LA MER 27.

3. See Shigeru Oda, *Dispute Settlement Prospects in the Law of the Sea*, 44 INT'L & COMP. L.Q. 863 (1995); Shigeru Oda, *The International Court of Justice Viewed from the Bench (1976-1993)*, 244 RECUEIL DES COURS 9, 144-55 (1993); G. Guillaume, *The Future of International Judicial Institutions*, 44 INT'L & COMP. L.Q. 848 (1995); E. LAUTERPACHT, ASPECTS OF THE ADMINISTRATION OF INTERNATIONAL JUSTICE 19-22 (1991).

4. Stephen M. Schwebel, Address by the President of the International Court of Justice to the General Assembly of the United Nations (Oct. 27, 1998) (on file with the author).

5. Bernard H. Oxman, *The Rule of Law and the United Nations Convention on the Law of the Sea*, 7 EUR. J. INT'L L. 353, 370 (1996).

6. See Tullio Treves, *New Trends in the Settlement of International Disputes*, 1 BANCAJA EUROMEDITERRANEAN COURSES OF INTERNATIONAL LAW 395, 433-36 (1997).

II. CONFLICTS OF JURISDICTION BETWEEN THE COURT AND THE TRIBUNAL IN GENERAL

There is no doubt that the jurisdiction of both the Court and the Tribunal may encompass cases concerning the “interpretation or application” of the 1982 United Nations Convention on the Law of the Sea (the Convention).⁷ The conflict is more theoretical than practical, however, as submission of the same case to the Court and to the Tribunal is not possible.

When a case is submitted by notification of a special agreement, the parties will inform either the Court or the Tribunal. The potential jurisdiction of the body to which the case has *not* been submitted becomes irrelevant. From the parties’ perspectives, however, the choice between these two judicial bodies entitled to judge the case *is* relevant. In the negotiation leading to the special agreement, the problem of forum selection will take on a new dimension that goes beyond the usual dilemma of choosing between arbitration and the Court. This new dimension is the choice between two permanent judicial bodies with different characteristics: one is an old, well-established body with general jurisdiction, and the other is a new, specialized body.

When a case is submitted by application, one could imagine the possibility of “forum shopping,” in the sense that the disputing party that takes the initiative has the advantage of choosing, as between the Court and the Tribunal, the forum that it prefers. This is not the case, however, in practice. Article 282 of the Convention is a mechanism that efficiently precludes forum shopping as well as questions of overlapping litispendence—questions that might follow from conflicting choices made by the disputing parties. Article 282 states:

If the states parties that 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 deci-

7. Articles 279 and 286 of the Convention specify that the provisions on the settlement of disputes of the Convention refer to disputes concerning the interpretation and application of the Convention. See Convention on the Law of the Sea, *supra* note 2, arts. 279 and 286, *reprinted in* 21 I.L.M. at 1322.

sion, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.⁸

Article 282 favors any compulsory dispute settlement mechanism that is binding on the disputing parties, at the expense of both the Tribunal and other dispute settlement bodies with compulsory jurisdiction under Articles 286 and 287 of the Convention. If the disputing parties have agreed previously to confer jurisdiction on a given dispute settlement body, then neither party can object to that body's jurisdiction on the grounds that jurisdiction belongs instead to the court or tribunal competent under Articles 286 and 287.

In the relationship between the Court and the Tribunal, the most interesting aspect of Article 282 is that the acceptance by all parties to a dispute of the Court's compulsory jurisdiction, under Article 36, paragraph 2 of the Court's Statute, can be considered the "agreement" mentioned in Article 282. This may be disputed in formal terms, but the consensual aspect—which seems to be the fundamental requirement of Article 36, paragraph 2—undoubtedly exists,⁹ so that it is reasonable to conclude that the parties have agreed "otherwise." Thus, in light of Article 282, whenever both parties to a dispute have accepted the "optional clause," the Tribunal, if seized by an application, and so requested, should declare that it has no jurisdiction. Conversely, if the Court is so seized, it should reject the defendant's claim that, because the parties have chosen the Tribunal under Article 287, the Court lacks jurisdiction.

According to Article 282, the jurisdictional priority given to the Court over the Tribunal, as between states that have accepted the optional clause, applies to all cases of compulsory jurisdiction of the Tribunal "provided for" in Part XV of the Convention. Consequently, Article 282 does not seem to apply to the compulsory jurisdiction of the Seabed Disputes Chamber of the Tribunal because this jurisdiction is provided for in Article 187, which is in Part XI—not Part XV—of the Convention. The impact is relatively minor because it concerns only disputes between states. The other disputes under Article 187,

8. *Id.* art. 282.

9. *See* Preliminary Objection, Anglo-Iranian Oil Case (U.K. v. Iran), 1952 I.C.J. 93, 106, 110 (July 22).

which involve non-state parties, are outside the Court's jurisdiction *ratione personae*.

A real conflict, however, might arise. It is theoretically possible that, in a dispute concerning the interpretation of Part XI of the Convention, one state party would seize the Court under Article 36, paragraph 2, while the other state party would seize the Seabed Disputes Chamber under Article 187.

III. THE IMPACT OF RESERVATIONS TO THE ACCEPTANCE OF COMPULSORY JURISDICTION OF THE COURT

The priority set out in Article 282 functions only if the dispute is encompassed by the compulsory jurisdiction agreement in force between the parties. When either party has excluded the dispute from their agreement, the priority cannot apply. Reservations to declarations accepting the compulsory jurisdiction of the Court are a means of obtaining such exclusion.

These reservations may have a general purport or may be specific to law of the sea matters. For example, general reservations may exclude disputes for which the compulsory jurisdiction of the Court was accepted by the other party less than twelve months prior to the filing of the application (such as the reservations of New Zealand,¹⁰ the Philippines,¹¹ and the United Kingdom¹²) or disputes with states not recognized by the state making the reservation (such as the declaration of India¹³). Reservations addressing the law of the sea may be very broad (such as those made by India¹⁴ and by Malta,¹⁵ which exclude all disputes concerning maritime areas under their sovereignty and jurisdiction, including the delimitation of these areas) or may be focused on specific issues (such as those made by New Zealand¹⁶ and the Philippines,¹⁷ which concern only disputes regarding fisheries in the exclusive eco-

10. See *Declarations Recognizing Jurisdiction: New Zealand*, para. 2, 1995-1996 Y.B. I.C.J. 106, 107.

11. See *Declarations Recognizing Jurisdiction: the Philippines*, *id.* at 110, 111.

12. See *Declarations Recognizing Jurisdiction: the United Kingdom*, *id.* at 120.

13. See *Declarations Recognizing Jurisdiction: India*, para. 8, *id.* at 95, 96.

14. See *id.* para. 9, at 99.

15. See *Declarations Recognizing Jurisdiction: Malta*, *id.* at 102.

16. See *Declarations Recognizing Jurisdiction: New Zealand*, *id.* at 106.

17. See *Declarations Recognizing Jurisdiction: the Philippines*, *id.* at 110.

nomic zone and, respectively, natural resources of the seabed of archipelagic waters and of the continental shelf).

It emerges clearly from these reservations that states have excluded disputes from compulsory jurisdiction of the Court that they cannot exclude from compulsory jurisdiction of a court or tribunal under the Convention. The recent fisheries case between Spain and Canada is an interesting example because, when the underlying events occurred, neither state was a party to the Convention.¹⁸ The case concerned the boarding on the high seas of a Spanish fishing vessel (the *Estai*) by a Canadian patrol boat, in pursuance of the Canadian Coastal Fisheries Protection Act of the Northwest Atlantic Fisheries Organization (NAFO). Canada claimed that its acceptance of the compulsory jurisdiction of the Court did not apply to the case because the dispute was covered by a reservation excluding disputes "arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory area . . . and the enforcement of such measures."¹⁹ In its judgment of December 4, 1998, the Court relied on the Canadian reservation in finding that it had no jurisdiction. Had both Spain and Canada been parties to the Convention at the time the boarding occurred, the situation would have been quite different. No provision in the Convention excludes, or permits the exclusion of, conservation or management measures and their enforcement on the high seas from the compulsory jurisdiction of the courts and tribunals mentioned in Article 287. Article 297, paragraph 3, excludes from such compulsory jurisdiction disputes relating to the coastal state's sovereign rights with respect to living resources and makes it clear that these are resources in the exclusive economic zone.²⁰ Article 298, paragraph 1(b), which

18. See Fisheries Jurisdiction Case (Spain v. Can.), 1998 I.C.J. (Dec. 4), (visited July 6, 1999) <[http://www.icj-cij.org/icjwww/idocket/iec/iecjudgment\(s\)/iec_ijudgment_981204_frame.htm](http://www.icj-cij.org/icjwww/idocket/iec/iecjudgment(s)/iec_ijudgment_981204_frame.htm)>. See generally A. Anna Zumwalt, *Straddling Stock Spawn Fish War on the High Seas*, 3 U.C. DAVIS J. INT'L L. & POL'Y 35 (1997); Andrew Schaefer, *Canada-Spain Fishing Dispute (The Turbot War)*, 8 GEO. INT'L ENVTL. L. REV. 437 (1996-1997).

19. See Counter-Memorial of Canada (Jurisdiction) (Spain v. Can.), 1996 I.C.J. Pleadings (Fisheries Jurisdiction Case) (Feb. 29, 1996), (visited July 6, 1999) <http://www.icj-cij.org/icjwww/idocket/iec/iecpleadings/iec_ipleading_860200_counter memorialcanada.HTM> (visited July 6, 1999).

20. See Convention on the Law of the Sea, *supra* note 2, art. 297.

permits declarations excluding disputes concerning law enforcement activities from compulsory jurisdiction, specifies that these activities must be “in regard of the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under Article 297, paragraph 2 or 3”—that is to say, in the exclusive economic zone.²¹

Once a reservation excludes a dispute from the compulsory jurisdiction of the Court, Article 282 cannot function, and the rules on compulsory jurisdiction of the Convention are to be applied.

IV. THE RELEVANCE OF LIMITATIONS AND OPTIONAL EXCEPTIONS TO THE COMPULSORY JURISDICTION OF THE TRIBUNAL

To determine which disputes can be brought to the Court and to the Tribunal unilaterally, it is insufficient to examine the impact of the reservations on the acceptance of the optional clause by the disputing parties. It is necessary to verify whether one or more of the limitations of, or optional exceptions to, the applicability of the rules on compulsory jurisdiction, set out in Articles 297 and 298 of the Convention, apply.

For instance, if one of the parties has accepted the optional clause with a reservation concerning disputes regarding the “determination and delimitation of its maritime boundaries,” the ability to bring a case to a court or tribunal depends on whether one of the parties has made a declaration stating it does not accept the jurisdiction of such courts or tribunals under Article 298, paragraph 1(a). If such a declaration has been made, there would be no compulsory settlement clause in force between the parties, unless the requirements for “compulsory” conciliation under Article 298 are satisfied. If such a declaration under Article 298, paragraph 1(a), has not been made—as is the case for India and Malta, which have made the above-mentioned reservation to their acceptance of the optional clause—a party will be entitled to invoke the obligation under the Convention to submit the dispute to the jurisdiction of a court or tribunal.

Some aspects of a complex dispute may come under the jurisdiction of the Court, while others fall under the jurisdic-

21. *Id.* art. 298, para. 1(b).

tion of the Tribunal or of another court or tribunal competent under the Convention. This can happen for several reasons: 1) the effect of reservations to acceptances of the optional clause of Article 36, paragraph 2; 2) the Statute of the Court; or 3) limitations and optional exceptions under Articles 297 and 298 of the Convention. In any such situation, each court would be competent to rule on different questions. While there would be no overlapping litispence strictly speaking, the connection between the questions submitted to the Court and to the Tribunal would make it impractical and risky that the Court and the Tribunal hear in parallel (or in sequence) the different connected questions.

The parties must be flexible and must try to concentrate the whole of their dispute before one court or tribunal. They should consider granting competence over the entire case to the one court or tribunal that has been seized. The parties may do this by their acquiescence, and by the *forum prorogatum* clauses included in the Rules of the Court and of the Tribunal.²²

States also can prevent such a situation by drafting skillfully their declarations. An interesting example is the declaration of June 25, 1996, in which Norway modified its acceptance of the Court's compulsory jurisdiction. The declaration confirms such acceptance:

provided, however, that the limitations and exceptions relating to the settlement of disputes pursuant to the provisions of, and the Norwegian declarations applicable at any given time to, the United Nations Convention on the Law of the Sea of 10 December 1982 . . . shall apply to all disputes concerning the law of the sea.²³

Through this declaration, Norway excludes all disputes that cannot fall under the compulsory jurisdiction of a court or tribunal according to the Convention, either because of the limitations set out in Article 297 or because of a declaration by Norway utilizing an optional exception set out in Article 298. In this way, with respect to disputes concerning the law of the

22. See Rules of Court, International Court of Justice, art. 38, para. 5; Rules of the Tribunal, Tribunal for the Law of the Sea, art. 54, para. 5.

23. *Declarations Recognizing Jurisdiction: Norway*, 1995-1996 Y.B. I.C.J. 108, 109.

sea, Norway accepts the jurisdiction of the Court, under Article 36, paragraph 2, of the Statute, with exactly the same scope as it has under the Convention's compulsory jurisdiction clauses—and their limitations and exceptions.

In light of this, it makes sense for states that have accepted the optional clause to make a declaration of preference for the Court under Article 287 with regard to disputes with states that also have made the declaration—not only when they have not accepted the optional clause, but also with regard to disputes with other states having accepted the clause. The Court's jurisdiction, when excluded by reservations to the acceptance of the optional clause, may be “restored” on the basis of Articles 286 and 287. It also makes sense for states that have accepted the optional clause to prefer the Tribunal in their declarations under Article 287. The states that are in this category (Austria, Greece, Portugal, and Uruguay) will be under the compulsory jurisdiction of the Court for disputes with other states accepting the optional clause and under the jurisdiction of the Tribunal for disputes with other states preferring the Tribunal under Article 287. If reservations to the optional clause exclude the jurisdiction of the Court, in most cases, due to the low number of preferences for the Tribunal, arbitration will be the applicable procedure.

V. THE COURT, THE TRIBUNAL, AND DECLARATIONS MADE UNDER ARTICLE 287 OF THE LAW OF THE SEA CONVENTION

It may be said that the Court and the Tribunal are in competition (not in conflict!) to attract declarations of preference under Article 287 by states parties to the Convention. It seems more important, however, to note that the Court and the Tribunal are in competition, together and not one against the other, with arbitration. Arbitration is the procedure that states parties can declare under Article 287, that they are presumed to prefer in the absence of a declaration, and that applies whenever two parties to a dispute have not expressed the same preference.

What has happened in practice? Out of 127 states parties, only twenty have expressed a preference under Article 287. These preferences are as follows:²⁴

- ten for the Tribunal (Argentina, Austria, Cape Verde, Chile, Germany, Greece, Portugal, Tanzania, and Uruguay),
- six for the Court (Algeria, the Netherlands, Norway, Spain, Sweden, and the United Kingdom),
- four for the Tribunal and the Court without stating a preference between the two (Belgium, Finland, Italy, and Oman), and
- one for arbitration (Egypt).

This data must be considered in light of acceptances of the optional clause of Article 36, paragraph 2, of the Statute of the Court, made by states parties to the Convention. There were forty-four (out of sixty-one) states at the beginning of 1998. Of these forty-four, thirty two have made no declaration under Article 287, while twelve have made one such declaration. These declarations demonstrate:²⁵

- five prefer the Court (the Netherlands, Norway, Spain, Sweden, and the United Kingdom),
- one prefers the Court and the Tribunal (Finland),
- four prefer the Tribunal (Austria, Greece, Portugal, and Uruguay),
- one prefers arbitration (Egypt), and
- one has declared that it rejects the jurisdiction of the Court for any dispute. (This is the position taken by Guinea-Bissau even though such a declaration is not, it would seem, within the terms of Article 287).

The states parties bound to the compulsory jurisdiction of the Court (either under the optional clause or under Articles 286 and 287) number forty-six, including Italy and Oman.

24. See Division for Ocean Affairs and the Law of the Sea, U.N. Office of Legal Affairs, *Settlement of Disputes Mechanism: Choice of Procedure by States Parties Under Article 287 of the Convention* (last modified Feb. 17, 1999) <http://www.un.org/Depts/los/los_sdm1.htm>. Algeria accepts the jurisdiction of the Court only with a prior agreement between both parties concerned in the case.

25. See *id.*

Those bound by the compulsory jurisdiction of the Tribunal number thirteen, including Belgium, Finland, Italy, and Oman. The obligation of these states to submit to the jurisdiction of the Court or of the Tribunal only applies to disputes between states having accepted the jurisdiction of the Court or of the Tribunal. For all other disputes, arbitration remains competent according to Article 287.

An initial observation prompted by this data is that the overwhelming majority of states having expressed a preference have selected permanent judicial bodies. Only two states have expressed a preference for arbitration. It may be added that the policy of limiting the impact of the rules in Article 287 favoring arbitration can be pursued by declarations such as those made by Finland, Italy, and Oman—choosing the Court and the Tribunal without expressing a preference. This policy was clearly expressed by Italy in its declaration choosing the Court and the Tribunal:

In making this declaration under Article 287 of the Convention on the Law of the Sea, the Government of Italy is reaffirming its confidence in the existing international judicial organs. In accordance with Article 287, paragraph 4, Italy considers that it has chosen “the same procedure” as any other state party that has chosen the International Tribunal for the Law of the Sea or the International Court of Justice.²⁶

A second observation prompted by the data is that the great majority (approximately two-thirds) of states parties to the Convention have neither accepted the optional clause nor made a declaration under Article 287. In light of this observation, one may ask whether the states that have expressed no preference are satisfied with the “residual rule” of Article 287, paragraph 5, stating that “if the parties have not accepted the same procedure for the settlement of the dispute,” compulsory jurisdiction under the Convention belongs to an arbitral tribunal. The answer may be affirmative in some cases, when the state in question has a deeply rooted attachment to arbitration

26. *Multilateral Treaties Deposited with the Secretary-General, Status as of 31 December 1997*, at 812, U.N. Doc. ST/LEG/SER.B/16 (1998). In the original French version of its declaration, Italy expresses its confidence in the “*organes permanents de justice internationale*.” A better translation thus would have been “permanent” instead of “existing” international judicial organs.

or equally deeply rooted reasons for mistrust of the Court and the Tribunal. This might be the case for the United States, whose government, in transmitting the Convention to the Senate for its advice and consent, made it clear that it intends to express a preference for special arbitration and, for disputes not covered by special arbitration, general arbitration.²⁷ This also should be the position of any states making the choice for arbitration, such as Egypt.

In most cases, however, the lack of declarations may well have explanations different from a preference for arbitration. One may think of bureaucratic passivity—the well-known trend of bureaucracies (including foreign affairs bureaucracies) not to make moves that are not strictly necessary or required. One may also think of the assumption, closely allied with bureaucratic passivity—and in this case clearly wrong—that inaction has no consequences. It is also possible that inaction is a “wait-and-see” attitude derived from a lack of knowledge about the Tribunal.

VI. CONCLUSION

States parties to the Convention must consider seriously the issues surrounding declarations they are entitled to make under Article 287. More than the choice between the Court and the Tribunal, the important choice states must make is the one between permanent dispute settlement bodies and arbitral tribunals.

The *M/V “Saiga” Case (No. 2)* demonstrates why states should consider seriously the pros and cons of their choices under Article 287.²⁸ Neither party to the dispute, Saint Vincent and the Grenadines and Guinea, had made a declaration under Article 287. Consequently, when Saint Vincent and the Grenadines started proceedings on the merits, it requested the establishment of an arbitration tribunal, as arbitration was the only procedure competent to deal with the case under Article

27. See *Letter of Submittal of the Secretary of State to the President of the United States* (Sept. 23, 1994), reprinted in *Special Supplement: Message from the President of the United States and Commentary Accompanying the United Nations Convention on the Law of the Sea*, 7 *GEO. INT'L ENVTL. L. REV.* 77, 79 (1994); *Commentary on the 1982 United Nations Convention on the Law of the Sea*, reprinted in *id.* at 87.

28. See *M/V “Saiga” (No. 2) Case*, Order on Provisional Measures (*St. Vincent v. Guinea*), 37 *I.L.M.* 1202 (*Int'l Trib. L. Sea*, Mar. 11, 1998).

287. At the same time, invoking Article 290, paragraph 5, Saint Vincent and the Grenadines also requested that the Tribunal prescribe provisional measures pending the constitution of the arbitration tribunal. When the parties discussed the organization of the case between themselves and with the President of the Tribunal, during the days preceding the hearings concerning the request for provisional measures, they agreed to transfer jurisdiction on the merits of the case from the yet-to-be-constituted arbitral tribunal to the Tribunal.²⁹ Even though the reasons were not publicized, it is reasonable to infer that this agreement may have been influenced significantly by the cost and organizational burdens that international arbitration imposes on the parties. In this case, two states that had made no declarations under Article 287 consequently found their situation uncomfortable when a dispute arose and an arbitration panel was to be constituted.

29. *See id.* para. 28.