

Dispute Resolution in the Law of the Sea

by

Igor V. Karaman

Moiu cin 7
(To my family)

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Chapter Four

The Convention and Its Dispute Settlement in the Context of General International Law

4.1. *The Growth of International Adjudication*

Whilst some 50 years ago the main concern of international lawyers was to convince States in the utility of international adjudication, the present state of international dispute settlement is characterised by a significant multiplication of the judiciary. This is a direct consequence of the corresponding expansion of international treaties, many of which establish their own dispute settlement systems, including the creation of permanent and *ad hoc* courts and tribunals. Never before has international law experienced such a large number of treaties setting forth new dispute settlement mechanisms. Indeed, the last decade of the 20th century gave birth to more international judicial bodies than any other period in the history of international law. The process of institutionalization of international law continues to develop even today and yet more tribunals are proposed.¹

Starting from the 1794 Jay's Treaty,² there have been 132 existing, extinct, aborted, dormant or nascent international judicial, quasi-judicial, implementation control and other dispute settlement bodies in the world. Of these, 84 are currently in operation.³ The phenomenon of adjudicative multiplication has been caused not only by new treaties establishing new tribunals, but also by the expansion of international law into domains that were once either solely within the State's domestic jurisdiction, were not the object of multilateral regime or

¹ Romano mentions nine such tribunals: Southern Africa Development Community Tribunal, MERCOSUR Court of Justice, International Islamic Court of Justice, Arab Court of Justice, Inter-American Court of International Justice, International Court for the Environment, International Loans Tribunal, International Human Rights Court and Special War Chamber for Bosnia-Herzegovina; see: C.P.R. Romano, *The International Judiciary in Context: A Synoptic Chart*, available at http://www.pict-pcti.org/publications/synoptic_chart/Synop_C4.pdf.

² Treaty of Amity, Commerce and Navigation between the Great Britain and United States, of 19 November 1794, 1 *BFSP* 784.

³ Romano, *Synoptic Chart*, *supra* n. 1. For the description of many of these courts, see further: P. Sands *et al.* (eds.), *Manual on International Courts and Tribunals*. London: Butterworths, 1999.

were simply *vacua legis*. Other reasons include transformation of international relations following the dissolution of the Soviet Union, the need to address specialized areas of international law that may not be within the competence of a court having a general jurisdiction, the need to control the membership or to preclude intervention rules, the possibility of non-State entities participation, historical, cultural and political considerations, etc.⁴

There is general disagreement on the impact of this growth of the international judiciary, ranging from the cautious and sceptical⁵ to optimistic and encouraging attitude towards it.⁶ While the multiplication of international

⁴ See further: F.K. Tiba, What Caused the Multiplicity of International Courts and Tribunals? 10 *GJIL* 2006, pp. 202–226.

⁵ See P.-M. Dupuy, The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice, 31(4) *NYUJILP* 1999, pp. 791–807; G. Guillaume, The Future of International Judicial Institutions, 44 *ICLQ* 1995, pp. 848–862; The Proliferation of International Judicial Bodies: The Outlook for the International Legal Order, Speech to the Sixth Committee of the UNGA of 27 October 2000, available at <http://www.icj-cij.org/court/index.php?pr=85&pt=3&p1=1&p2=3&p3=1>; R.Y. Jennings, The Proliferation of Adjudicatory Bodies: Dangers and Possible Answers, in: M.E. O'Connell (ed.), *International Dispute Settlement*. Aldershot: Ashgate/Dartmouth, 2003, pp. 441–446; The Role of the International Court of Justice in the Development of International Environment Protection Law, 1 *RCADI* 1992, pp. 240–244; The Judiciary, International and National, and the Development of International Law, 45 *ICLQ* 1996, pp. 1–12; P.C. Jessup, Do New Problems Need New Courts?, in: K. Rao & M. Nawaz (eds.), *Essays in Honour of Krishna Rao*. Leiden: Sijthoff, 1976, pp. 206–213; M. Lachs, Some Reflections on the Settlement of International Disputes, 68 *ASILB* 1971, pp. 323–331; The Court and Other International Tribunals, in: C. Peck & R.S. Lee (eds.), *Increasing the Effectiveness of the International Court of Justice. Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court*. The Hague: Kluwer, 1997, pp. 280–323; E. Lauterpacht, Aspects of the Administration of International Justice. Hersch Lauterpacht Memorial Lectures, No. 9, Cambridge: CUP, 1991, pp. 19–22; S. Oda, Dispute Settlement Prospects in the Law of the Sea, 44(4) *ICLQ* 1995, pp. 848–862; The International Court of Justice Viewed from the Bench (1976–1993), 244(9) *RCADI* 1993, pp. 9–190; Shany, The Competing Jurisdictions of International Courts and Tribunals. Oxford: OUP, 2003; and Thio Su Mien, Commentary, in: Peck & Lee, *supra*, p. 311.

⁶ See G. Abi-Saab, Fragmentation or Unification: Some Concluding Remarks, 31(4) *NYUJILP* 1999, pp. 919–933, at p. 925; The Normalization of International Adjudication: Convergence and Divergencies, 43(1) *NYUJILP* 2010, pp. 1–14, at p. 6; J.I. Charney, Is International Law Threatened by Multiple International Tribunals? 271 *RCADI* 1998, pp. 101–382; The Impact on the International Legal System of the Growth of International Courts and Tribunals, 31(4) *NYUJILP* 1999, pp. 697–708; C.-A. Fleischhauer, The Relationship between the International Court of Justice and the Newly Created International Tribunal for the Law of the Sea in Hamburg, 1 *MPYUNL* 1997, pp. 327–333; R. Higgins, A Babel of Judicial Voices? Ruminations from the Bench, 55 *ICLQ* 2006, pp. 791–804; B. Kingsbury, Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem? 31(4) *NYUJILP* 1999, pp. 679–696, at p. 688; F. Orrego Vicuña, International Dispute Settlement in an Evolving Global Society, Hersch Lauterpacht Memorial Lectures No. 16, 2001. Cambridge: CUP, 2004; B. Oxman,

tribunals may indeed have both positive and negative reverberations, the prevailing view is that such a multiplication is in general a positive phenomenon, that strengthens the rule of international law and its development, enlarges the scope of justiciability of international disputes and contributes to the institutionalization and constitutionalization of international law. This in turn triggers the process towards the construction of a coherent international order based on justice, where all participants can seek redress or be held accountable through an independent and objective judicial institution.

The 'forumphobia' is usually accounted for by two groups of problems. The first one comprises the problem of concurrent jurisdictions and the associated phenomenon of 'forum shopping', i.e. the possibility of submitting a dispute in parallel to more than one tribunal, each of them allegedly having jurisdiction. Indeed, if some decades ago the ICJ was practically the only international tribunal to examine the law of the sea disputes, human rights disputes and international crimes, these cases are now also considered by, respectively, ITLOS, ECtHR and IACtHR, International Criminal Court (ICC), International Criminal Tribunal for Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR). As a consequence, the possibility of several tribunals being seized with the same dispute (ICJ and ITLOS, for example) entails procedural fragmentation of international law. More danger, however, lies in the second group – substantive fragmentation of international law, which may be caused by inconsistent jurisprudence of two or more tribunals reflected in a different application and interpretation of the same legal rules and principles.

The ILC Study Group, which in the period between 2002 and 2006 conducted a research on the fragmentation (diversification) of international law, outlined three patterns of conflicts relevant to the issue of fragmentation: (a) conflict between different understandings or interpretations of general law; (b) conflict arising when a special body deviates from the general law, not as a result of disagreement as to the general law but on the basis that the special law applies; and (c) conflict arising when specialised fields of law seem to be in conflict with each other.⁷ As follows from these patterns, the last two denote

The Rule of Law and the United Nations Convention on the Law of the Sea, 7 *EJIL* 1996, pp. 353–370; P.S. Rao, Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or Its Fragmentation? 25 *MJIL* 2003–2004, pp. 929–962; Romano, The Proliferation of International Judicial Bodies: The Pieces of the Puzzle, 31(4) *NYUJILP* 1999, pp. 709–751; T. Treves, New Trends in the Settlement of International Disputes, 1 *BECIL* 1997, pp. 395–436; Conflicts between the International Tribunal for the Law of the Sea and the International Court of Justice, 31(4) *NYUJILP* 1999, pp. 809–821; and Advisory Opinions of the International Court of Justice on Questions Raised by Other International Tribunals, 4 *MPYUNL* 2000, pp. 215–231.

⁷ Report of the ILC Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, of 18 July 2003. ILC 55th

'original' types of conflicts where the general rule of law (in contrast to some putative interpretation of it) appears differently depending on which normative framework is used to examine it (for example, diplomatic protection of natural persons by the State of their nationality under general international law as opposed to the protection of crew members by the flag State in the law of the sea), or where two different rules of law from different specialized fields of international law conflict with each other if applied to the same dispute involving both these fields (for example, trade law promoting the freedom of trade and the requirement to open borders for free movement of certain goods, as opposed to environmental law relying on precautionary principle and justifying the closure of the borders). In other words, the substantive fragmentation of international law, which results from the normative conflicts of a general rule as applied in general international law and in its specialized field and from the normative conflicts between two specialized rules as applied to the same dispute, is 'predetermined' in these two patterns, regardless of the interpretative involvement of any tribunal. It is only the first pattern of conflicts, where the functioning of a tribunal may lead to substantive fragmentation ('institutional fragmentation'),⁸ where the creation of a new tribunal may pose a danger of deviation from the settled interpretation of a rule of international law and the creation of a situation of two conflicting judgments. This is the only possible scenario in which the functioning of a new international court may lead to a substantive fragmentation of law. Fears about the growth of international judiciary and ensuing fragmentation are thus significantly limited to a narrow category of possible conflicts which may arise from a divergent perception of the same rule of law by different tribunals.

When one tribunal deviates from the general rule because the special law or regime within which it functions applies, it is not the tribunal which creates fragmentation. The fragmentation already exists due to the potential normative conflict arising, *inter alia*, from the adoption of a specific treaty, whose rules may be in variance with the general rules. Likewise, fragmentation pre-exists when two tribunals arrive at conflicting judgments by applying different rules to different aspects of the same dispute which conflict.⁹ When one tribunal adjudi-

Session, A/CN.4/L.644, available at <http://www.un.org/law/ilc/>, paragraph 9; and Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, of 13 April 2006. ILC 58th Session, A/CN.4/L.682, available at <http://www.un.org/law/ilc/>, paragraph 47.

⁸ ILC Study Group Report of 13 April 2006, *supra* n. 7, paragraph 489.

⁹ The ILC generally defines conflict between the treaties as a "situation where two rules or principles suggest different ways of dealing with a problem"; see ILC Study Group Report of 13 April 2006, *supra* n. 7, paragraph 25. For the examples of treaty conflicts, see: Abi-Saab, *The International Court of Justice as a World Court*, in: A.V. Lowe & M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice*. Cambridge: CUP, 1996, pp. 3–17, at pp. 3 and 13;

cates on the trade-related aspects and another one on the environmental aspects of an otherwise single dispute, both tribunals may reach different decisions conflicting with each other, which will render the issue of their implementation problematic. Indeed, these two examples of conflicting decisions represent substantive fragmentation. However, this type of fragmentation is caused not by the tribunals (which merely apply and interpret the law), but by the pre-ordained normative conflicts, which may never come into play unless a dispute between States arises. The tribunals only detect such conflicts (by giving effect to the relevant treaties' norms in their decisions), but do not create them.

Both procedural and substantive fragmentations are closely interconnected, as the choice of one tribunal out of several, all potentially having jurisdiction, may bear upon the characterisation of a dispute and associated jurisprudential conflicts. In other words, there would not be conflicting jurisprudences if there were no competing jurisdictions, i.e. if there was no choice between several tribunals. Whilst municipal judicial systems resolve jurisdictional conflicts (choice of forum, or forum shopping) by principles of hierarchy of judicial system, *forum non conveniens*, *res judicata*, *lis pendens* etc., international law does not abide to any subordination, hierarchy or any overarching framework within which the international courts could operate and interact.¹⁰ As the ICTY held in *Prosecutor v. Tadić*, "in international law, every tribunal is a self-contained system".¹¹ Albeit somewhat haughty, this view is fair from the purely legal standpoint, as there is no obligation for an international tribunal to stay its

G. Hafner, Pros and Cons Ensuing from Fragmentation of International Law, 25 *MJIL* 2003–2004, pp. 849–863, at pp. 851–854; L.R. Helfer, Forum Shopping for Human Rights, 148(2) *UPLR* 1999–2000, pp. 285–400, at pp. 335–340; J. Pauwelyn, *Conflicts of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*. Cambridge: CUP, 2003, p. 5; Bringing Fragmentation and Unity: International Law a Universe of Inter-Connected Islands, 25 *MJIL* 2003–2004, pp. 903–916, at pp. 907–909; and Shany, *The Competing Jurisdictions*, *supra* n. 5, at p. 74.

¹⁰ For the detailed account of the domestic law principles addressing forum shopping between domestic courts and their inability to resolve potential concerns of forum shopping between international tribunals, see J. Pauwelyn & L.E. Salles, *Forum Shopping Before International Tribunals: (Real) Concerns, (Im)Possible Solutions*, 42 *CILJ* 2009, pp. 77–118.

¹¹ *Prosecutor v. Dusko Tadić aka "DULE"*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, 35 *ILM* 1996, pp. 35–74, paragraph 11. See also *Prosecutor v. Miroslav Kvočka et al.*, Decision on Interlocutory Appeal by the Accused Zoran Zigić against the Decision of Trial Chamber I dated 5 December 2000, of 25 May 2001, available at <http://www.icty.org/x/cases/kvočka/acdec/en/10525JN315907.htm>, where the ICTY held that "no legal basis exists for suggesting that the International Tribunal must defer to the International Court of Justice such that the former would be legally binding by the decisions of the latter". It further added that while it necessarily took into consideration the Court's interpretation of international law, it might "after careful consideration, come to a different conclusion"; paragraphs 16 and 17.

own proceedings because the same dispute is pending in another tribunal, or to take into account the decisions of any other tribunals or even its own jurisprudence so as to avoid possible diverging interpretations of the same rules of law. Indeed, Article 59 of the ICJ Statute expressly states that the decision of the Court has no binding force except between the parties and in respect of the particular case.¹² To draw just one example: there have been some discrepancies in the maritime delimitation law within the ICJ itself evidenced not only by separate and dissenting opinions, but also by the adjustments of the Court over the time.¹³ If inconsistent jurisprudence may exist within the premises of one judicial forum, should the newly-created tribunals be blamed for their occasional inconsistency with the general jurisprudence?

Having said that, it must be observed that the 'side effects' of judicial multiplication are not solely theoretical. The main attention to this issue was drawn after one specialized tribunal adopted a doctrine contrary to that elaborated by the ICJ. The most frequently quoted example in this respect (and arguably the only one)¹⁴ is the aforementioned *Prosecutor v. Tadić*, where the ICTY deviated from the test of 'effective control' employed by the ICJ in *Military and Paramilitary Activities* as a legal criterion for establishing when, in an armed conflict which is *prima facie* internal, an armed military or paramilitary group may be regarded as acting on behalf of a foreign power. Instead, the tribunal chose to create an 'overall control' test that required a lower threshold.¹⁵ One of the purposes of this monograph is to find out whether the LOSC dispute settlement system, in particular the functioning of the newly-created and permanent ITLOS and, to a lesser extent, of the *ad hoc* tribunals, has brought about any similar side effects.

¹² For the discussion of the role of precedent in the ICJ, see M. Shahabuddeen, *Precedent in the World Court*. Cambridge: CUP, 1996, pp. 97–109.

¹³ *Ibid.*, pp. 132 and 133 and 149–151; and P. Weil, *The Law of Maritime Delimitation – Reflections*. Cambridge: CUP, 1989, p. 172.

¹⁴ There are some other examples drawn in the literature, e.g. the discrepancies between the ICJ and the ECtHR on treaty interpretation, between the ECJ and ECtHR on privacy of business premises, and between the ECJ and the Dispute Settlement Body of the World Trade Organization (WTO DSB) on consistency of the EU law with the WTO law. However, since the reference to these examples is sporadic and not broadly cited as the real examples of inconsistent jurisprudence (see K. Öllers-Frahm, *Multiplication of International Courts and Tribunals and Conflicting Jurisdiction – Problems and Possible Solutions*, 5 *MPYUNL* 2001, pp. 67–104, at pp. 81 and 82; and Higgins, *The ICJ, the ECJ and the Integrity of International Law*, 52 *ICLQ* 2003, pp. 1–20, at p. 18), they are not examined here either.

¹⁵ See *Prosecutor v. Tadić*, Judgment in the Appeals Chamber of 15 July 1999, 38 *ILM* 1999, pp. 1518–1623, paragraphs 115–145; and *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States*), ICJ Judgment of 27 June 1986, *ICJ Rep.* 1986, pp. 14–150, paragraphs 109–116. But see R. Higgins, *A Babel*, *supra* n. 6, who considers that the problems allegedly presented in *Prosecutor v. Tadić* should not be exaggerated, at p. 794.

4.2. *General Implications for the Law of the Sea*

Being one of the main fields of international law, the law of the sea has not remained unaffected by recent trends towards the establishment of new tribunals. The Convention contains a detailed (one could say 'over-detailed')¹⁶ dispute settlement system, including the pre-existing ICJ and introducing three other compulsory dispute settlement bodies: a permanent ITLOS and two *ad hoc* arbitral tribunals, with both general and specialized jurisdictions. The introduction of these bodies – especially of ITLOS – further adds to the multiplication of international jurisdictions and gives rise to a question as to whether the aforementioned fears have also found their reflection in the law of the sea. Already at the UNCLOS III some States objected to the creation of ITLOS because of the risks it could allegedly present to the uniformity of law from possible inconsistent decisions.¹⁷ Therefore, the question arises as to whether there is any evidence of procedural fragmentation (concurrent jurisdictions) and/or substantive fragmentation (conflicting jurisprudences) as a result of the introduction and functioning of ITLOS and the arbitral tribunals.

As far as the concurrent jurisdictions are concerned, the phenomenon of forum shopping is evident in the Convention probably like nowhere else. Two sets of concurrent jurisdictions can be identified: (a) the internal competition between the LOSC tribunals and (b) the competition between any of these tribunals with the external dispute settlement regimes. The first group of concurrent jurisdictions is evidenced by Article 287 LOSC, which allows the applicants to unilaterally choose one or more courts out of four available. Since many States make declarations under Article 287 choosing one, two or more tribunals without indicating any order of preference, the disputes between them may be submitted to several tribunals. The most illustrative example would be Portugal, which in its declaration chose all four tribunals without having given any preference between them.¹⁸ Ten States Parties to the Convention, which have made declarations under Article 287 and have also chosen ITLOS and the ICJ without preference, can in their possible maritime disputes with Portugal unilaterally choose either the ICJ or ITLOS, or probably both of them.

In his statement before the UNGA Sixth Committee on 27 October 2000, the ICJ former President Guillaume expressed the concern that the existence of several tribunals capable of declaring themselves competent to hear a particular dispute enables the parties to select the forum which best suits them. In his

¹⁶ E.D. Brown. *Dispute Settlement and the Law of the Sea*, 21(1) *MP* 1997, pp. 17–43, at p. 18.

¹⁷ UNCLOS III, 4th Session, 59th Meeting, V *UNCLOS III Off. Rec.*, pp. 15–48.

¹⁸ See the Declaration of Portugal at http://www.un.org/Depts/los/settlement_of_disputes/choice_procedure.htm.

opinion, the negative side of this possibility is that certain tribunals could, as a result, be led to tailor their decisions so as to encourage a growth in their caseload, to the detriment of a more objective approach to justice. He then assumed that the main reason why the applicants had chosen ITLOS in the *SBT* case had been the ready enforceability of the measures which they had sought.¹⁹ Undeniably, Article 287 LOSC is an open invitation for the potential applicants to race for the tribunal which is the best suited for them. But is there anything negative in having such an opportunity? The quintessence of the LOSC dispute settlement and, more broadly, of the general international dispute resolution, is a freedom of choice of a dispute settlement means. If the party has an option between different tribunals and sees that one of them better meets its expectations in a particular dispute, there is nothing which could legally or morally prevent it from choosing that tribunal in a particular case. There is really no danger in a possibility of choosing the tribunal which is more proper for the applicant.

The 'dark' side of forum shopping under the Convention is the situation where a dispute is submitted simultaneously to two tribunals: either the same dispute is submitted to two tribunals or two parts of it are split between the two tribunals. Another possibility is the successive submission of the dispute to other tribunals after the first one has rejected it or awarded an unfavourable decision. At first sight, there is nothing in the Convention which could preclude simultaneous submissions of disputes to two tribunals. To take one hypothetical example: Italy and Mexico both chose the ICJ and ITLOS in their declarations under Article 287 LOSC, without making any order of preference. Were they to have a dispute under the Convention, Italy could unilaterally seize the Court, while Mexico could seize the Tribunal. And yet, there are some tools which may be used for the prevention of such scenarios.

First of all, assistance may be sought in Articles 281 and 282 LOSC. If the declarations of two States under Article 287 LOSC, which choose both ITLOS and the ICJ, are recognized as the Articles 281 and 282 LOSC 'agreement' to settle their dispute (as is argued also in respect of the declarations under Article 36(2) of the ICJ Statute), an earlier application to the ICJ, where the case is pending, should preclude the subsequent application to ITLOS. Certainly, this is true if the identical choices of fora under Article 287 are treated as the 'agreement' for the purposes of Articles 281 and 282. Besides, Articles 281 and 282 seem to be primarily intended to combat the 'external' competing jurisdictions, i.e. between the LOSC tribunals and those outside the LOSC framework, and not between each other. The role of Articles 281 and 282 in resolving the jurisdictional competition between the LOSC tribunals thus remains to be answered in the future jurisprudence.

¹⁹ Guillaume, *The Proliferation*, *supra* n. 5.

Secondly, the LOSC tribunals may rely on the *lis pendens* principle,²⁰ if the same dispute between the parties is submitted for adjudication to two tribunals.²¹ Although it is true that there is no legal obligation for the tribunals to follow this originally private-law principle and some tribunals even expressly rejected it,²² in general most tribunals respect it and there is no reason to believe why the LOSC tribunals will not. Coming back to the previously mentioned example of Italy and Mexico, ITLOS should decline the application of Mexico. But once again, the tribunals are not legally bound to apply *lis pendens* principle, and the danger of simultaneous applications, at least theoretically, still exists.²³

As far as successive applications are concerned, the relitigation of the same dispute already adjudicated by one LOSC tribunal by way of applying to another one is precluded by virtue of Article 296(1) LOSC. According to this provision, any decision rendered by the LOSC tribunal is final, binding and to be complied with by the parties. This implies that one LOSC tribunal should not admit an application concerning a dispute that has already been adjudicated (or dismissed) by another LOSC tribunal.

²⁰ For this principle and its application by international tribunals, see generally: P. Guggenheim, *Traité de droit international public*. Vol. II. Geneva: Librairie de l'Université, 1954, p. 149; A.V. Lowe, *Overlapping Jurisdiction in International Tribunals*, 20 *AYIL* 1999, pp. 191–204, at p. 202; D.P. O'Connell, *International Law*. Vol. I. London: Stevens; Dobbs Ferry: Oceana, 1965, p. 13; Pauwelyn & Salles, *Forum Shopping*, *supra* n. 10, pp. 106–110; P.S. Rao, *Multiple International Judicial Forums*, *supra* n. 6, at p. 961; and A. Reinisch, *The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcome*, 3 *LPICT* 2004, pp. 37–77, at pp. 44–72.

²¹ Reinisch, *The Use and Limits*, *supra* n. 20, pp. 50–51; *Case Concerning Certain German Interests in Polish Upper Silesia (Polish Upper Silesia)* (Germany v. Poland), PCIJ Judgment No. 6 of 25 August 1925, A(6) *PCIJ Series* 1925, pp. 3–28, at p. 20.

²² See e.g. *Polish Upper Silesia*, p. 20, where the PCIJ held: "It is a much disputed question in the teachings of legal authorities and in the jurisprudence of the principal countries whether the doctrine of *litispendance*, the object of which is to prevent the possibility of conflicting judgments, can be invoked in international relations, in the sense that the judges of one State should, in the absence of a treaty, refuse to entertain any suit already pending before the courts of another State, exactly as they would be bound to do if an action on the same subject had at some previous time been brought in due form before another court of their own country". Further, in the Advisory Opinion OC-16/99 of 1 October 1999 (*The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law*) the IACrHR declined to suspend its proceedings being aware that the same question of interpretation of Article 36(1)(b) of the Vienna Convention on Consular Relations was pending in the ICJ in the *LaGrand* and *Breard* cases; available at <https://www.law.kuleuven.be/iir/nl/activiteiten/documentatie/OldActivities/DeathPenalty/Advisory%20Opinion%20IACHR.pdf>, paragraphs 54 and 61. See also "*Other Treaties*" *Subject to the Advisory Jurisdiction of the Court* (Article 64 of American Convention on Human Rights), IACrHR Advisory Opinion OC-1/82 of 24 September 1982, Series A, No. 1, paragraph 50.

²³ There is also a possibility (albeit more putative than real) that two States seize ITLOS and the ICJ simultaneously, i.e. the same day and the same hour.

Thus, the only negative side of forum shopping in respect of the LOSC tribunals is a possibility of simultaneous seizure of two or more LOSC tribunals. The likelihood of this scenario is quite slight, however. But even if it takes place, it is expected that the tribunals will resolve the situation either by applying Articles 281 and 282 LOSC or by appealing to common sense and *lis pendens* principle.

Other than that, granting the possibility for the States Parties to the Convention to select between various LOSC tribunals does no more than reinforce the principle of a freedom of choice being of paramount significance in international dispute settlement. Theoretically, this rich freedom of choice may be compromised with the law espoused under the Convention, which may be more susceptible to fragmentation when applied and interpreted by four different tribunals. Therefore, one of the objectives of this monograph is to find out whether the rules of the Convention have indeed been exposed to divergent application and interpretation by the LOSC tribunals.

Another type of jurisdictional competition between the tribunals is an 'external' one, that is, the competition between the LOSC tribunals and those created under other jurisdictional regimes. In this respect, the 'sister' Articles 281 and 282 LOSC, which have a purpose similar to that of *lis pendens* (avoidance of parallel dispute settlement proceedings), are specifically designed to stand at watch to prevent this type of competition. By virtue of Article 281, the LOSC tribunals will have jurisdiction only where no settlement has been reached by recourse to the means agreed upon by the parties to a dispute concerning the interpretation or application of the Convention and where the agreement between them does not exclude any further procedure, including these LOSC tribunals. By virtue of Article 282, the LOSC tribunals will have jurisdiction only where the parties have not agreed through a general, regional or bilateral agreement, or otherwise, that such a dispute, at the request of any party, be submitted to a procedure entailing a binding decision, unless the parties agree otherwise. Apparently, there is less potential for the external jurisdictional competition in light of Articles 281 and 282 LOSC than for the internal competition where only *lis pendens* may be relied upon. But as will be demonstrated, Articles 281 and 282 have not always been effectively applied in preventing the external concurrent jurisdictions, due to the very fact that the tribunals interpret them in different ways. Besides, Articles 281 and 282 are meant to cover only those situations of external concurrent jurisdictions where the dispute relates to the interpretation or application of the Convention. In other words, they may help resolve those situations where there is a single dispute both under the Convention and under another treaty, which was adopted in the implementation of the Convention and which has its own dispute settlement framework, or agreement between the parties to seek the settlement of dispute by peaceful means of their own choice. Accordingly, under Article 282 both the

Convention and any specialized treaty which covers the same dispute will operate, and the tribunal's task is solely to identify which dispute settlement system will come into play. But if a dispute has a diversified subject-matter liable to be covered by different treaties, which deal with different subject-matter (for example, the Convention and the trade agreement), there will no longer be a single dispute in the sense of interpretation and application of the Convention. Articles 281 and 282 will then be of no avail.

4.3. *The Law of the Sea Disputes and Jurisdictional Competition*

Based on the foregoing discussion, one can distinguish three categories of jurisdictional competitions which have occurred as a result of the functioning of the LOSC dispute settlement system and its interaction with the other jurisdictional regimes. The first one is the competition of jurisdictions belonging to the treaties dealing with identical subject-matter. The second one is the competition of jurisdictions belonging to the treaties dealing with different subject-matters. The third category represents a 'hybrid' of both aforementioned types of jurisdictional competitions: the main elements of a dispute are covered by two different jurisdictional regimes, which deal with identical subject-matter, and one regime is subsumed by the other, whereas some elements of the dispute belong to a treaty dealing with different subject-matter.

4.3.1. *Competing Jurisdictions Belonging to Treaties Dealing with Identical Subject-Matter: The Convention and Its Implementation Agreements*

The first category of the competing dispute settlement regimes which belong to different treaties dealing with identical subject-matter ('treaty parallelism'), lies in the fact that both the Convention as a framework agreement and another treaty as an implementation treaty cover the same subject-matter of the same dispute. The problem of the competing jurisdictions is meant to be resolved through the application of Articles 281 and 282 LOSC. This type of competing jurisdictions was evident in the *SBT* case, where the dispute settlement system under the Convention interacted with that under the CCSBT.²⁴ Theoretically, this case could potentially be submitted to two different standing tribunals and to three arbitrations: to the tribunals under the Convention, which represents a general 'umbrella' regime and to which all the litigants were parties (the ICJ, ITLOS, arbitral tribunal and special arbitral tribunal); to the ICJ or arbitration under Article 16 CCSBT concluded between the parties for the implementation

²⁴ For the factual background and pre-arbitration events, see *SBT* (arbitration), paragraphs 21–37.

of the Convention; and to the ICJ under Article 36(2) of its Statute, pursuant to which all parties made declarations.²⁵ One of the possible reasons why the applicants chose not to bring the case to the ICJ under Article 36(2) of its Statute could be that they were not convinced, given the terms of the relevant declarations by the three States, that the Court would have jurisdiction, since all of them had conditions excluding compulsory jurisdiction for disputes where there is provision to use alternative methods of settlement.²⁶ Another consideration might have been the Court's allegedly unsatisfactory environmental case law, which recommended against its selection.²⁷ Whatever was the reason, the applicants resorted to the LOSC dispute settlement and, furthermore, had to go to the arbitral tribunal, since none of the parties made declarations under Article 287 LOSC at the time of the institution of the proceedings.

Similar to the provisional measures stage in ITLOS, the main issue in *SBT* (arbitration) was whether the dispute arose solely under the CCSBT or also under the LOSC. Australia and New Zealand claimed that the unilateral experimental fishing programme conducted by Japan had been in breach of both the CCSBT and the LOSC. This made a single dispute under both conventions and, more importantly, a dispute concerning the interpretation or application of the Convention; this fact allowing the arbitral tribunal to find its jurisdiction under Article 282 LOSC. The applicants submitted that the CCSBT did not provide for a compulsory dispute settlement procedure entailing binding decision as required by Article 282 LOSC and that during the negotiation of the CCSBT nothing had been said about derogating from the comprehensive and binding procedures under Part XV LOSC in relation to the LOSC obligations. Therefore, in the applicants' opinion Part XV LOSC was applicable.²⁸

Japan disagreed, stating that the dispute was under the CCSBT only, which made Article 282 inapplicable. Even assuming that the dispute under the CCSBT could also be the dispute under the LOSC, Japan considered that recourse to Part XV LOSC was excluded. This was because the CCSBT contained its own dispute settlement regime, which was applicable by virtue of Article 281 LOSC: the parties to the CCSBT had agreed through its Article 16 to settle their dispute by a peaceful means of their own choice, which they had not exhausted. Such agreement, moreover, excluded any further procedure,

²⁵ It is sometimes submitted that the declarations of two (or more) States seizing the ICJ under Article 36(2) of its Statute may be viewed as the Article 282 LOSC 'agreement' to submit a dispute to a specified procedure, which, *inter alia*, may be reached 'otherwise' i.e. through the identical declarations under Article 36(2) of the ICJ Statute; see e.g. *V Virginia Commentary* 1989, p. 27.

²⁶ *SBT* (arbitration), paragraph 39(c).

²⁷ Romano, *The Southern Bluefin Tuna Dispute: Hints of a World to Come... Like It or Not*, 32 *ODIL* 2001, pp. 313–348, at p. 320.

²⁸ *SBT* (arbitration), paragraph 41.

because everything which was beyond Article 16(1) could not come into play, unless the parties agreed otherwise: no resort to the ICJ or arbitration under Article 16(2) could be made without all parties' consent. Japan also referred to a number of other maritime conventions, including those adopted prior to the LOSC, which have dispute settlement procedures with no compulsory element. It submitted that if the applicants' approach in espousing the governance of the LOSC dispute settlement provisions were to be applied to these treaties, the parties to these treaties, who had no intention of entering into compulsory jurisdiction, would find themselves so bound.²⁹

It will be recalled that at the provisional measures stage ITLOS held that the fact that the CCSBT applied between the parties did not exclude their right to invoke the LOSC provisions in regard to the conservation and management of the SBT.³⁰ It thus concluded that there was a single dispute under both conventions, the arbitral tribunal had a *prima facie* jurisdiction and ITLOS had jurisdiction to prescribe provisional measures. The Tribunal based its findings mainly on Article 282 LOSC, taking note of the applicants' assertion that they were not precluded to refer to Section 2 of Part XV LOSC, since the CCSBT did not provide for the compulsory dispute settlement procedure entailing binding decision.³¹

However, during the arbitral proceedings the tribunal stated that the main elements of the dispute related to the implementation of the parties' obligations under the CCSBT.³² At the same time, it agreed with ITLOS and the applicants that the dispute could indeed relate to both treaties. In particular, the arbitral tribunal stressed that it recognizes

that it is a commonplace of international law and State practice for more than one treaty to bear upon a particular dispute. There is no reason why a given act of a State may not violate its obligations under more than one treaty. There is frequently a parallelism of treaties, both in their substantive content and in their provisions for settlement of disputes arising thereunder.³³

The arbitral tribunal continued with elaborations on the issue of treaty parallelism and described the current range of international legal obligations as benefiting from a process of accretion and cumulation, which in turn explained the fact that "in the practice of States, the conclusion of an implementing convention does not necessarily vacate the obligations imposed by the framework convention upon the parties to the implementing convention".³⁴ As an exam-

²⁹ *Ibid.*, paragraphs 38 and 39.

³⁰ *SBT* (provisional measures), paragraph 51.

³¹ *Ibid.*, paragraphs 54 and 55.

³² *SBT* (arbitration), paragraph 49.

³³ *Ibid.*, paragraph 52.

³⁴ *Ibid.*

ple, the arbitral tribunal referred to the UN Charter, whose broad provisions for the promotion of universal respect for and observance of human rights, and the international obligation to cooperate for the achievement of those purposes, had not been discharged for States Parties by their ratification of the human rights treaties. Moreover, argued the tribunal, if the CCSBT were to be regarded as having fulfilled and eclipsed the LOSC obligations that bear on the conservation of the SBT, these obligations would not revive if the party to the CCSBT exercised its right under Article 20 CCSBT to withdraw from CCSBT on twelve months' notice. Additionally, the arbitral tribunal rejected the situation, in which the obligations under the LOSC in respect of the migratory species did not run between the parties to the CCSBT, but could still run to the third States that are parties to the LOSC, but not to the CCSBT. Furthermore, it recognized that in some respects, the Convention might be viewed as extending beyond the reach of the CCSBT. It drew the examples of Articles 117 and 119 LOSC, which impose obligations not found in the CCSBT.

Based on these considerations, the arbitral tribunal concluded that a dispute concerning the interpretation and implementation of the CCSBT was not completely alien to the interpretation and application of the LOSC due to the reason that the former convention was designed to implement broad principles set out in the latter. With this in mind, it held that the *SBT* dispute, while centred in the CCSBT, also arose under the LOSC³⁵ and, as a result, there was a single dispute under both conventions. The arbitral tribunal explained that it reached this conclusion because the parties to the dispute were the same parties grappling not with two separate disputes but with what in fact was a single dispute under both conventions. In the tribunal's opinion, to find that there was a dispute arising under the LOSC, which was distinct from the dispute arising under the CCSBT, would be 'artificial'.³⁶

Thus, the arbitral tribunal did not deny that the *SBT* dispute was covered by two treaties. In turn, this fact could trigger the exercise of jurisdiction under Part XV LOSC. Yet it was not dispositive for the arbitral tribunal. The arbitrators looked at Article 281 LOSC and construed Article 16 CCSBT as the Article 281(1) LOSC 'agreement' between the parties to seek settlement of their dispute by peaceful means of their own choice. The tribunal did not find it difficult to conclude that the first requirement of Article 281(1) had been fulfilled, because indeed no solution had been reached by the parties through negotiations. What was of determinative importance for the arbitral tribunal was the second requirement of Article 281(1), that the agreement between the parties did not exclude any further procedure. Although the arbitral tribunal

³⁵ *Ibid.*

³⁶ *Ibid.*, paragraph 54.

admitted that the terms of Article 16 CCSBT did not “expressly and in so many words exclude the applicability of any procedure”, including that under Part XV LOSC,³⁷ this fact was not decisive for the tribunal. It construed Article 16(2) CCSBT in a way that any reference to the ICJ or arbitration, envisaged in that proviso, could be made only upon the parties’ consent. If the parties did not find consensus on reference to the ICJ or arbitration under Article 16(2) CCSBT, then they excluded any further procedure and had to go back to negotiations under Article 16(1) CCSBT. For some reason, the arbitral tribunal concluded that the consent required to trigger the procedures under Article 16(2) CCSBT was likewise required for the referral of the dispute to the Part XV LOSC procedures. Furthermore, it compared Article 16 CCSBT with the ‘analogous’ Article XI of the Antarctic Treaty (which, however, could not refer to the LOSC compulsory procedures back in 1959, when it was adopted) and found it obvious that those provisions were meant to exclude compulsory jurisdiction.³⁸ Based on these considerations, it found that

the intent of Article 16 [of the CCSBT] is to remove proceedings under that Article from the reach of the compulsory procedures of section 2 of Part XV [LOSC], that is, to exclude the application to a specific dispute of any procedure of dispute resolution that is not accepted by all parties to the dispute.³⁹

The arbitral tribunal thus came to a conclusion that, by virtue of Article 281 LOSC, Part XV LOSC was inapplicable and, as a result, it lacked jurisdiction – the first instance of the international arbitral tribunal having rejected its own jurisdiction. This prevented the tribunal from examining the case on the merits. Besides, it revoked the provisional measures prescribed earlier by ITLOS. When doing this, the arbitrators held that such revocation did not mean that the parties could disregard their effects or the parties’ own decisions made in conformity with the measures.⁴⁰ However, this logic of paying regard to the ITLOS order, while simultaneously revoking it, seems difficult to follow. Admittedly, this was some sort of ‘preventive diplomacy’⁴¹ exercised by the arbitral tribunal towards ITLOS.

Comparing the findings of ITLOS and the arbitral tribunal, one will observe that, whilst the former did not even attempt to see if Article 16 CCSBT had any notion of excluding the compulsory dispute settlement procedures under Part XV LOSC, the latter interpreted that provision in a way that the absence

³⁷ *Ibid.*, paragraph 56.

³⁸ *Ibid.*, paragraph 58.

³⁹ *Ibid.*, paragraph 57.

⁴⁰ *Ibid.*, paragraph 67.

⁴¹ B. Kwiatkowska, *The Southern Bluefin Tuna Arbitral Tribunal Did Get It Right*, 34 *ODIL* 2003, pp. 369–395, at p. 385.

of an express exclusion of Part XV in it was not decisive.⁴² With all due respect, the latter tribunal's reasoning is hardly convincing. It is true that the parties developed a dispute settlement system under Article 16 CCSBT. It is true that they did not settle the dispute by means provided for in that article. But it is also true that the above provision did not – expressly or otherwise – exclude any further procedures, Part XV LOSC being one of them. Indeed, Article 16 CCSBT excluded compulsory jurisdiction under that convention (i.e. the ICJ and arbitration, which could be resorted to upon the parties' mutual consent only), but it did not exclude Part XV LOSC. Were the parties to expressly exclude the application of Part XV LOSC from Article 16 CCSBT, the Part XV LOSC jurisdiction would be lacking. But the parties did not do so. Moreover, there was no evidence that they ever wished to exclude the Part XV jurisdiction.

Besides, Article 282 LOSC can also be viewed as supporting the jurisdiction under the Convention. Article 16 CCSBT envisages procedures with binding decisions (the ICJ and the arbitration) only where all parties agree to resort to those procedures. But the parties did not so agree and Part XV LOSC could thus be applicable. In this context, the reliance of the arbitral tribunal on Article 281 LOSC in its attempt to resolve the jurisdictional conflict emanating from two treaties was unpersuasive. The CCSBT is a regional bilateral agreement provided for by Article 282 LOSC, rather than the agreement to seek settlement provided for by Article 281 LOSC. Further support of this argument can be found in *Barbados/Trinidad and Tobago*, where the arbitral tribunal fairly observed that Article 282 LOSC is meant for standing bilateral agreements between the parties, whereas Article 281 is intended primarily to cover the situation where the parties have come to an *ad hoc* agreement as to the means to be adopted to settle the particular dispute which has arisen.⁴³ In the *SBT* dispute parties did not reach any *ad hoc* agreement to resolve it. Instead, they had a standing bilateral agreement and they did not settle their dispute through procedures entailing binding decisions as envisaged in it (Article 16(2) CCSBT). Thus, the Part XV LOSC jurisdiction could come into play. Had the arbitral tribunal relied on Article 282 instead of Article 281 LOSC, the issue of 'exclusion of any further procedure' would have never come into consideration.

⁴² *SBT* (arbitration), paragraph 67.

⁴³ *Barbados/Trinidad and Tobago*, paragraph 200(ii). In *Reclamation* the applicant unsuccessfully attempted to equate negotiations with the 'agreement' under Article 281 LOSC, just like the *SBT* arbitrators did with the procedures under Article 16 CCSBT. However, ITLOS held that in the circumstances (the parties agreed that the applicant would retain its right to refer to Part XV LOSC despite the ongoing negotiations), Article 281 was inapplicable; paragraphs 53–57.

The *SBT* majority arbitrators' findings have been broadly criticized,⁴⁴ above all by Justice Keith who was the dissenting arbitrator in this case. In particular, he was not persuaded either that Article 16 CCSBT could be construed as an 'agreement' for the purposes of Article 281 LOSC, because none of the Article 16 provisions obliged the parties to apply any particular method or amounted to an agreed choice of one or more peaceful means of settlement.⁴⁵ He also disagreed with the other arbitrators that Article 16 excluded any further procedure. Having interpreted Article 16 in accordance with its ordinary meaning as required by Article 31 VCLT, he concluded that it did not say that the disputes concerning the CCSBT must be resolved *only* by the procedures under that treaty and *must not* be referred to any tribunal or other third party for settlement.⁴⁶ Consequently, Justice Keith inferred that the object and purpose of the LOSC in general and its binding dispute settlement provisions in particular, along with the plain wording of its Article 281(1) and of Article 16 CCSBT,

⁴⁴ See Boyle, *The Southern Bluefin Tuna Arbitration*, 50 *ICLQ* 2001, pp. 447–452; D. Colson & P. Hoyle, *Satisfying the Procedural Prerequisites to the Compulsory Dispute Settlement Mechanisms of the 1982 Law of the Sea Convention: Did the Southern Bluefin Tuna Tribunal Get it Right?* 34 *ODIL* 2003, pp. 59–82; D.J. Devine, *Compulsory Dispute Settlement in UNCLOS Undermined?* 25 *SAYIL* 2000, pp. 97–112, at pp. 104–105; D. Horowitz, *The Catch of Poseidon's Trident: The Fate of High Seas Fisheries in the Southern Bluefin Tuna Case*, 25 *MULR* 2001, pp. 810–830; J. Peel, *A Paper Umbrella Which Dissolves in the Rain? The Future for Resolving Fisheries Disputes under UNCLOS in the Aftermath of the Southern Bluefin Tuna Arbitration*, 3 *MJIL* 2003, pp. 53–78; Romano, *The Southern Bluefin Tuna Dispute*, *supra* n. 27, throughout; T. Stephens, *The Limits of International Adjudication in International Environmental Law: Another Perspective on the Southern Bluefin Tuna Case*, 19(2) *IJMCL* 2004, pp. 117–197; L. Sturtz, *Southern Bluefin Tuna Case: Australia and New Zealand v. Japan*, 28 *ELQ* 2001–2002, pp. 455–486; N. Tanaka, *Some Observations on the Southern Bluefin Tuna Arbitration Award*, 44 *JAIL* 2001, pp. 9–34; and P. Vigni, *The Overlapping of Dispute Settlement Regimes: An Emerging Issue of International Law*, XI *IYIL* 2001, pp. 139–162, at pp. 149–154. But see *contra*: Kwiatkowska, *The Southern Bluefin Tuna Arbitral Tribunal*, *supra* n. 41, throughout; S. Schwebel, *The Southern Bluefin Tuna Case*, in: N. Ando *et al.* (eds.), *Liber Amicorum – Judge Shigeru Oda*. Vol. I. The Hague: Kluwer, 2002, pp. 743–748; and C. Yamada, *Priority Application of Successive Treaties Relating to the Same Subject-Matter: The Southern Bluefin Tuna Case*, *ibid.*, pp. 763–769 (the last two authors were the arbitrators in *SBT* (arbitration) who voted in favour of finding of the lack of jurisdiction).

⁴⁵ *SBT* (arbitration), Separate Opinion of Justice Sir Kenneth Keith; 39 *ILM* 2000, pp. 1395–1401, paragraphs 6–8 and 15. In this connection, Boyle reasonably asks why the Convention needs at all Article 281, if all regional agreements which do not make any reference to Part XV LOSC, are interpreted as excluding it. He concludes by saying that Article 281 LOSC was never intended to have a meaning attributed to it in *SBT* (arbitration); see Boyle, *The Southern Bluefin Tuna*, *supra* n. 44, at p. 449.

⁴⁶ *SBT* (arbitration), Separate Opinion of Justice Keith, paragraph 13.

suggested that the latter did not 'exclude' the arbitral tribunal's jurisdiction in respect of the LOSC disputes.⁴⁷

In the academic writings, it was submitted that the award undermines the compulsory jurisdiction under Part XV LOSC. For example, it was observed that the reasoning of the arbitral tribunal has opened up a "minefield of uncertainty and confusion which it is going probably to take an authoritative judicial decision to unravel".⁴⁸ It was also argued that, were the jurisdiction to be found, the *SBT* case would have been a "marking point in the evolution of the compulsory dispute settlement system under the Convention".⁴⁹ Indeed, as it follows from the *SBT* arbitral award, the Convention, which was originally meant to be a treaty with a universal and comprehensive regime capable of being protected by its Part XV binding dispute settlement, is not so protected according to the *SBT* arbitral tribunal, since its award makes Part XV LOSC subordinate to the regional implementation agreements and removes from the LOSC dispute settlement reach any dispute raising issues both under the LOSC and under another agreement. What is even more disturbing is that the question of the relationship between the concurrent dispute settlement regimes created by the umbrella treaty (LOSC) and the regional agreement (CCSBT) was decided by an *ad hoc* tribunal, convened to settle only a given dispute, rather than by a permanent court, such as ITLOS. In this context, one cannot help wondering why the Tribunal, created as a permanent judicial organ which is *prima facie* more likely to have coherent jurisprudence, was not chosen by the LOSC architects as a default forum under Article 287(3) and (5) LOSC. In any event, there is no conviction that future LOSC tribunals will follow the *SBT* arbitral tribunal's reasoning regarding the issue under discussion. As shown, the perception of the role of Article 281 LOSC by the *Barbados/Trinidad and Tobago* arbitral tribunal was quite different from that of the *SBT* arbitral tribunal.

If one were to follow the arbitral tribunal's reasoning, one would find that any agreement under Article 281(1) LOSC, which makes no provision for the application of Part XV LOSC, excludes the reference to it on the mere assumption that that is what the parties intended. This being the case, quite a large number of implementation agreements would automatically exclude Part XV LOSC even if they do not do so in express terms. Many of these agreements have been less than effective and the dispute settlement mechanisms provided by their majority boil down to negotiations. Accordingly, no effective settlement of disputes under these agreements, including the reference to Part XV

⁴⁷ *Ibid.*, paragraph 30.

⁴⁸ Boyle, *The Southern Bluefin Tuna*, *supra* n. 44, at p. 449.

⁴⁹ C.E. Foster, *The Real Dispute in the Southern Bluefin Tuna Case: A Scientific Dispute?* 16(4) *IJMCL* 2001, pp. 571-601, at p. 574.

LOSC, would be possible. The only solution which may be suggested in light of the *SBT* case is as follows.

When drafting the dispute settlement provisions in the LOSC-implementation agreements, States should expressly exclude or include reference to Part XV LOSC, or find another way of subordination of the dispute settlement provisions under those agreements and the Convention. In this regard, the words of the ITLOS Judge Wolfrum, who considers that an intention to entrust the settlement of disputes concerning the interpretation and application of the Convention to other institutions should be “expressed explicitly in respective agreements”⁵⁰ are very pertinent. A clear example of such an agreement is Article 31(2) of the Fish Stocks Agreement and some other agreements which establish the correlation between the dispute settlement provisions they enshrine and Part XV LOSC.⁵¹ It thus follows that the only reliable and effective means to avoid possible collisions of competing jurisdictions under the LOSC and its implementing agreements lies in the hands of States. The more precise they will draft the LOSC implementation agreements, the fewer problems concerning the resolution of the concurrent jurisdictions issues international courts will face.

Summarizing the foregoing reflections, one can observe that the *SBT* case is a bright example of ‘external’ competing jurisdictions which arise from treaty parallelism, where one single dispute falls within the scope of two conventions dealing with the same subject-matter. The ITLOS and the arbitral tribunal resolved the jurisdictional conflict by using two different approaches: the Tribunal sought support in Article 282 LOSC in finding the jurisdiction under the Convention, whereas the arbitral tribunal relied on Article 281 LOSC in denying it. Thus, even though both articles are destined to resolve such type of conflicts, their interpretation by different tribunals may lead to mutually

⁵⁰ *MOX* (provisional measures), Separate Opinion of Judge Wolfrum, paragraph 5. See also *SBT* (arbitration), Separate Opinion of Justice Sir Keith, who also stressed the need for “clear wording to exclude the obligations to submit to the UNCLOS binding procedures” (paragraph 19); D. Bialek, *Australia and New Zealand v. Japan: Southern Bluefin Tuna Case*, 1 *MJIL* 2000, pp. 153–161, at p. 160; Horowitz, *The Catch of Poseidon’s Trident*, *supra* n. 44, pp. 825 and 826; Öllers-Frahm, *Multiplication of International Courts and Tribunals*, *supra* n. 14, pp. 88–90; Pauwelyn & Salles, *Forum Shopping*, *supra* n. 10, at p. 83; P. Sands, *ITLOS: An International Lawyer’s Perspective*, in: Nordquist & Moore (eds.), *Current Marine Environmental Issues and the International Tribunal for the Law of the Sea*. The Hague: Martinus Nijhoff, 2001, pp. 141–158, at p. 151; and Vigni, *The Overlapping*, *supra* n. 44, p. 150. *Virginia Commentary* also suggests that the wording of Article 281(1) LOSC empowers the parties to specify that the procedure they agreed upon shall be an exclusive one and that no other procedures (including those under Part XV LOSC) may be resorted to even if the chosen procedure does not lead to a settlement; see V *Virginia Commentary* 1989, pp. 23 and 24.

⁵¹ See these agreements at http://www.itlos.org/fileadmin/itlos/documents/basic_texts/Relevant_provisions.12.12.07.E.pdf.

exclusive results. However, there is neither fragmentation of law nor conflicting jurisprudence⁵² in this case. There is no substantive fragmentation because theoretically there is no normative conflict between Articles 281 and 282 LOSC. Quite the contrary, both are designed to combat the concurrent jurisdictions, while there is no guarantee that one of these provisions is not given the meaning which it never intended to have. There is no inconsistent jurisprudence, because two different tribunals acted on different jurisdictional levels: ITLOS acted on the *prima facie* basis under Article 290(5), whereas the arbitral tribunal acted on *in merito* basis under Article 287 LOSC, which suggests that different conclusions as to the jurisdiction are not excluded.

4.3.2. Competing Jurisdictions Belonging to Treaties Dealing with Different Subject-Matters: The Convention and the Trade Agreements

The second category of external competing jurisdictions is the interaction between the dispute settlement regimes appertaining to two treaties dealing with different subject-matters, both potentially applicable to the multifaceted but otherwise single dispute between the same parties (the ILC third pattern of conflicts). As a result, each tribunal within its constitutive treaty should adjudicate only over those aspects of the dispute, which are governed by the respective treaty. In essence, there is no question of jurisdictional conflict, i.e. there is no question as to which of the two tribunals will be chosen. But even though the tribunals should consider only 'their own' aspects of a dispute, not trespassing into each other's competence, there still exists a danger that they will do so or will arrive at incompatible decisions having stumbled on the pre-existing normative clash between the law of the sea and the trade law. Neither Articles 281 and 282 LOSC nor *lis pendens* will be applicable in this category of competing jurisdictions.

The *Swordfish case*⁵³ (*Chile v. EU* in ITLOS and *EU v. Chile* in the WTO DSB), the first international adjudication between a State and an international organization, can serve as a spectacular example of possible tension between

⁵² But see Higgins, The ICJ, the ECJ, *supra* n. 14, at p. 19.

⁵³ For general comments on the case, see: P. Gautier, The International Tribunal for the Law of the Sea: Activities in 2002, 2 *CJIL* 2003, pp. 341–364, at pp. 352 and 353; M.A. Orellana, The EU and Chile Suspend the *Swordfish* Case Proceedings at the WTO and the International Tribunal of the Law of the Sea, *ASILI*, February 2001; The *Swordfish* Dispute between the EU and Chile at the ITLOS and the WTO, 71 *NJIL* 2002, pp. 55–81; R. Salama, Fragmentation of International Law: Procedural Issues Arising in Law of the Sea Disputes, 19 *MLANZJ* 2005, pp. 25–55, at pp. 28–32; P.-T. Stoll & S. Vöneky, The *Swordfish* Case: Law of the Sea *v.* Trade, 62(1)-(2) *ZAÖRV* 2002, pp. 21–36; and G. Zekos, Arbitration as a Dispute Settlement Mechanism Under UNCLOS, the Hamburg Rules, and WTO, 19 *JIA* 2002, pp. 497–504.

the law of the sea and the trade law. Having spent about ten years on negotiations, the parties simultaneously submitted their dispute to the ITLOS Special Chamber under Part XV LOSC⁵⁴ and to the WTO DSB⁵⁵ under the 1994 General Agreement on Trade and Development (GATT).⁵⁶ Both of these fora had compulsory jurisdictions to consider certain aspects of the otherwise single dispute between the parties.

The dispute at issue concerned the prohibition by Chile, pursuant to Article 165 of its Law on Fisheries and Aquaculture, of unloading and transit from foreign and Chilean vessels in its ports of the swordfish catches taken both from the Chilean EEZ and from the high seas bordering that EEZ. The aim of this measure was explained as the conservation and reduction of over-fishing of swordfish, a highly migratory species which under Articles 64–67 LOSC requires protection, both in the EEZ and on the high seas. Colombia, Ecuador and Peru pursued a similar policy. Besides, for the implementation of the above LOSC provisions, some South American States, including Chile, signed the regional Galapagos Agreement⁵⁷ seeking to ensure the conservation of marine living resources of the Southeast Pacific high seas. The Spanish-owned vessels traditionally fishing for swordfish in the high seas adjacent to the Chilean EEZ and unloading it in the Chilean ports for further transportation to Spain and the United States were opposed to the aforementioned Chilean law. As a result, the Spanish Association of Owners of Deep Sea Longliners lodged a complaint with the European Commission (Commission) pursuant to the EC Trade Barriers Regulations. The latter conducted an investigation and concluded that Chile had been in violation of the freedom of transit and of quantitative restriction provisions under the GATT.

As a consequence, the Commission lodged a claim with the WTO DSB against Chile (as both are WTO members). In support of its claim, the

⁵⁴ See ITLOS Order of 20 December 2002 in the Case (No. 7) *Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Swordfish)* (Chile/European Community), available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_7/Ord.2000.3.E.pdf.

⁵⁵ Case DS193: *Chile: Measures Affecting the Transit and Importation of Swordfish*. The WTO DSB jurisdiction was established through the procedure. On 19 April 2000, the EU requested formal consultations at the WTO, which took place on 14 June 2000 and did not make a progress (Chile-Measures Affecting the Transit and Importation of Swordfish, Request for Consultations by the European Communities, WT/DS193/1). On 6 November 2000 the EU requested the establishment of a panel to hear the dispute (WT/DS193/2). All DSB documents related to this case are available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds193_e.htm.

⁵⁶ Marrakesh Agreement Establishing the World Trade Organization. Annex 1A, General Agreement on Tariffs and Trade 1994, 15 December 1993, 33 *ILM* 1994, pp. 29–43.

⁵⁷ Framework Agreement for the Conservation of Living Marine Resources on the High Seas of the Southeast Pacific of 14 August 2000; 45 *LOS* 2001, pp. 70–78 (Galapagos Agreement).

Commission maintained that by its own law and by not allowing the unloading of the swordfish in its ports, Chile had violated Article V GATT. Pursuant to that provision, "there shall be freedom of transit for goods through the territory of each contracting party... for traffic in transit to or from the territory of other contracting parties". Furthermore, pursuant to Article XI GATT, no prohibitions or restrictions other than the duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, can be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.⁵⁸ In its defence, Chile relied on Article XX(b) and (g) GATT, according to which restrictive and prohibitive measures can be justified in order to protect human, animal or plant life or health if these measures relate to the conservation of exhaustible natural resources.

The earlier decisions of the WTO Appellate Body demonstrate that a national non-discriminating environmental legislation, even if enacted in good faith, cannot be an obstacle to free trade in contravention of the GATT.⁵⁹ Those decisions are quite justified, as the applicable law at the WTO is the international trade agreements, and not the environmental law or the law of the sea.⁶⁰ Indeed,

⁵⁸ The latter provision could be less supportive of the Commission's claim. As was fairly observed, it speaks about "any product of the territory of any other contracting party", whereas the Spanish-registered vessels fishing for swordfish on the high seas cannot be assimilated to the territory of any other contracting party; see A. Serdy, *See You in Port: Australia and New Zealand as Third Parties in the Dispute between Chile and the European Community over Chile's Denial of Port Access to Spanish Vessels Fishing for Swordfish on the High Seas*, 3 *MJIL* 2002, pp. 79–119, at p. 91.

⁵⁹ See *United States-Restrictions on Imports of Tuna (Tuna/Dolphin)*, Panel Report of 3 September 1991, available at http://www.wto.org/gatt_docs/english/sulpdf/91530924.pdf; *United States – Restrictions on Imports of Tuna*, Panel Report of 20 May 1994, 33 *ILM* 1994, pp. 842–903; *United States – Standards for Reformulated and Conventional Gasoline*, Report of the WTO Appellate Body of 22 April 1996, 35 *ILM* 1996, pp. 605–634; and *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Shrimp/Turtle)*, Report of the WTO Appellate Body of 12 October 1998, 38 *ILM* 1999, pp. 121–175. In this connection, Charnovitz points out that the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (WTO DSU, 33 *ILM* 1994, pp. 114–135) is an especially unsuitable forum for bringing the marine conservation related disputes. For example, in *Tuna/Dolphin*, where Mexico brought the complaint against the United States for embargoing Mexican tuna, the United States could have been told to admit Mexican tuna, but Mexico could not have been forced to improve its dolphin conservation measures; see S. Charnovitz, *Dolphins and Tuna: An Analysis of the Second GATT Panel Report*, 24 *ELR* 1994, p. 10567.

⁶⁰ But see Pauwelyn, who considers that the WTO DSB can apply international law in its decisions, if both parties to the dispute "are bound by non-WTO international law rule and that rule prevails over the WTO rule pursuant to conflict rules of international law" (Pauwelyn, *Bringing Fragmentation and Unity*, *supra* n. 9, pp. 915–917; and *The Role of Public Inter-*