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**REGULATING JURISDICTION COLLISIONS
IN INTERNATIONAL LAW:
THE CASE OF THE EUROPEAN COURT OF
JUSTICE'S EXCLUSIVE JURISDICTION IN LAW
OF THE SEA DISPUTES**

*Dario Maestro**

I. INTRODUCTION: THE PRACTICE OF JURISDICTION COLLISIONS

International dispute resolution has achieved an unparalleled level of global popularity, with a noticeable proliferation of new dispute resolution forums since World War II. And yet the jurisdictional boundaries between international courts have never been more conceptually footloose. Adjudication of international disputes by a range of courts and arbitral tribunals¹—combined with improved access by private parties and the ability to rely on domestic legal systems to enforce the tribunals' judgments—have together expanded the parties' freedom of choice in late modernity.

But, when jurisdiction coincides in two or more forums, to which one should the parties in dispute have recourse? What are the legal remedies that most effectively will repair their rights? And what forces must we employ to reconcile conflicting interpretations of the very same rule? Answers to these questions have divided academics across decades. At one end, advocates of a fragmented system defend the increasing number of independent international courts as empowering more parties to submit their disputes to international adjudication and, even more importantly, characterize fears of conflicting jurisprudence as overstated.² At the other end, detractors insist that fragmentation threatens the coherence of international law and diminishes parties' certainty of obtaining legal redress.³ Failure to settle on a single in-

* University of Michigan Law School, LL.M. This note represents an extended and revised version of a paper presented as part of Professor Daniel Halberstam's "European Union Law" course at Michigan Law. I appreciate comments from Professor Steven Ratner and the members of this *Journal*.

1. I will use the terms "court" and "tribunal" interchangeably in this piece.

2. See Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553 (2002); Joost Pauwelyn, *Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands*, 25 MICH. J. INT'L L. 903 (2004) (arguing that the evidence does not support that international law is yet fragmented, and that serious inconsistencies between individual tribunals have not materialized); Bruno Simma, *Fragmentation in a Positive Light*, 25 MICH. J. INT'L L. 845 (2004).

3. G. Hafner, *Risks Ensuing from the Fragmentation of International Law*, in International Law Commission, Report of the Working Group on Long-term Programme of Work, ILC (LII)/WG/LT/L.1/Add. 1 (25 July 2000), at 26 ("The disintegration of the legal order is

terpretation of a given issue could result in divergent case-law and quasi-systematic appeals to courts of different areas of law or different target regions. Naturally, this would imply higher litigation costs and also longer wait times for a final decision.

The success of international litigation rests on the willingness of litigants to submit to the jurisdiction of the myriad of international courts and tribunals established by treaties and *ad hoc* agreements. Currently, international law operates under a multi-tiered judicial system. There are courts of all-inclusive jurisdiction, such as the International Court of Justice (the “ICJ”)⁴ and the International Tribunal for the Law of the Sea (“ITLOS” or the “Law of the Sea Tribunal”).⁵ There are courts of geographically-delimited jurisdiction, such as the European Court of Justice (“ECJ” or “European Court”),⁶ the European Court of Human Rights (“ECtHR”),⁷ and the Inter-American Court of Human Rights (“ICtHR”).⁸ Finally, there are *ad*

conducive to jeopardizing the authority of international law. Doubts could be raised as to whether international law will be able to achieve one of its primary objectives, dispute avoidance and the stabilization of international relations and, thus, achieve its genuine function of law. The credibility, reliability and, consequently, authority of international law would be impaired.”); *see also* Judge Stephen M. Scwebel, President, Int’l Ct. Justice, Address to the Plenary Session of the General Assembly of the United Nations (Oct. 26, 1999) (arguing that the creation of new individual courts significantly increases the possibilities for conflicting interpretations of international law); Judge Gilbert Guillaume, President, Int’l Ct. of Justice, Address to the United Nations General Assembly (Oct. 26, 2000) (stating that the emerging prospect of new international tribunals “gives rise to a serious risk of conflicting jurisprudence[,] as the same rule of law might be given different interpretations in different cases”); John J. Mearsheimer, *The False Promise of International Institutions*, 19 INT’L SEC. 5 (1995) (suggesting that misplaced reliance on international adjudication is likely to lead to more conflict in the future).

4. *See* Statute of the International Court of Justice art. 36, June 26, 1945, 59 Stat. 1031 [hereinafter ICJ Statute].

5. *See* Statute of the International Tribunal for the Law of the Sea art. 20, Dec. 10, 1982, 1833 U.N.T.S. 561. The Tribunal has jurisdiction over all disputes concerning the interpretation or application of the United Nations Convention for the Law of the Sea (“UNCLOS”), subject to the provisions of article 297. The Tribunal’s jurisdiction also includes all matters specifically provided for in any other agreement which confers jurisdiction on the International Tribunal for the Law of the Sea (“ITLOS”), according to article 21 of the Tribunal’s Statute. A number of multilateral agreements conferring jurisdiction on the Tribunal have been concluded to date. Due to this broader *rationae personae* jurisdiction, I opt to classify ITLOS as an all-inclusive or general jurisdiction court here. For an account of the role of ITLOS in international law, see Michael Wood, *The International Tribunal for the Law of the Sea and General International Law*, 22 INT’L J. MARINE & COASTAL L. 351 (2007).

6. *See generally* Protocol on the Statute of the Court of Justice of the European Union, June 7, 2016, 2016 O.J. (C 202) 1. I very much believe that European courts are also international courts, and that European courts obviously have to apply not only Community law but also international law. The approach adopted in this note therefore presents the existing EU courts among the rest of the international courts.

7. *See* Convention for the Protection of Human Rights and Fundamental Freedoms art. 32, Nov. 4, 1950, E.T.S. No. 005.

8. *See* Organization of American States, Statute of the Inter-American Court of Human Rights art. 2, Oct. 31, 1979, AG/RES. 448 (IX-0/79).

hoc courts that apply a combination of international and domestic law on a situational basis. The International Criminal Tribunal for the former Yugoslavia (“ICTY”)⁹ and the International Criminal Tribunal for Rwanda (“ICTR”)¹⁰ fall in this latter category,¹⁰ commonly referred to as courts of issue-specific jurisdiction.¹¹

The ongoing proliferation of international courts has increased the frequency with which disputes fulfill the jurisdiction and admissibility requisites of two or more fora,¹² creating what this note calls a *jurisdiction collision*. Jurisdiction collisions lead to a couple of negative consequences: They provoke a dash to different court houses—sometimes even by the same litigant.¹³ They also lead to inconsistent lawmaking in scenarios in which the same doctrine is simultaneously developed in two different forums, leading to differing tests for the same issue.¹⁴ When that happens, and there are conflicting interpretations of international norms, where should a tribunal look for the standard that best reflects international consensus? In international law, no principles are available to reconcile differing judgments by interna-

9. See International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Updated Statute arts. 6, 8, 9 (Sept. 2009), https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

10. See S.C. Res. 955, annex arts. 5, 7, 8 (Nov. 8, 1994).

11. See RUTH MACKENZIE ET AL., *MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS* 253–54 (2d ed. 2010).

12. See Gerhard Hafner, *Pros and Cons Ensuing from Fragmentation of International Law*, 25 MICH. J. INT’L L. 849, 857 (2004).

13. For example, the State of Qatar launched multiple proceedings against the UAE (and others) based on distinct legal claims in 2018. These include three cases at the ICJ—based on the International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”), the Convention on International Civil Aviation, and the 1944 International Air Services Transit Agreement, respectively—and an inter-state complaint before the CERD’s Committee on the Elimination of Racial Discrimination. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.)*, Provisional Measures, 2018 I.C.J. 406 (July 23); *Appeal Relating to the Jurisdiction of the ICAO Council Under Article 84 of the Convention on International Civil Aviation (Bahr., Egypt, Saudi Arabia & U.A.E. v. Qatar)*, Order, 2018 I.C.J. 498 (July 25); *Appeal Relating to the Jurisdiction of the ICAO Council Under Article II, Section 2, of the 1944 International Air Services Transit Agreement (Bahr., Egypt, Saudi Arabia & U.A.E. v. Qatar)*, Order, 2018 I.C.J. 501 (July 25); Comm. on the Elimination of Racial Discrimination [CERD Committee], *Jurisdiction of the Inter-State Communication Submitted by Qatar Against the United Arab Emirates*, U.N. Doc. CERD/C/99/3 (Aug. 30, 2019).

14. In this sense, the ECJ and the ECtHR maintain different approaches in the treatment of third-country nationals concerning statutory social security. See Frans Pennings, *The Approaches of the EU Court of Justice and the European Court of Human Rights Vis-À-Vis Discrimination on the Ground of Nationality in Social Security*, in RESEARCH HANDBOOK ON EUROPEAN SOCIAL SECURITY LAW 121 (Pennings et al., eds., 2015). Clashes have also been frequent in respect of the European asylum system. See generally Lina Vosyliute, *The ECtHR and the ECJ Overlapping Jurisdictions on Common EU Asylum Policy Issues: What Matters* (3d European Public Policy Conference Budapest, Migration in Europe: Challenges and Opportunities, Apr. 18–19, 2011).

tional courts.¹⁵ Due to variations in procedure and substantive law, when the same legal dispute can be referred to more than one international court, the authoritative responses each provides—each according to its own remit and foundational title—will vary largely from one another. Moreover, the plethora of international courts is not organized, either horizontally or vertically, and so participants in the international legal system are without a hierarchy of precedent to resolve interpretative differences and define the law. Consequently, international law doctrines can vary more widely than doctrines in domestic and municipal systems.¹⁶

Yet for the parties to recognize legal certainty, predictability, and consistency in respect of international law, there must be a relatively coherent system of principles within which their legal claims are exercised and upon which adjudicative powers are exercised. How has it come to pass that the international courts are not, in any sense, ruling in common and creating a body of law that they can jointly rely on to adjudicate disputes—even in parts of the globe that have long traveled under the sign of international law? What mixture of modern phenomena has eviscerated the substance of jurisdictional collisions?

First, it is possible to identify a growing number of applications, that while relating to the same dispute, are submitted to more than one international tribunal—by the same claimant. “Forum shopping” by “rational claimants” is at least partly to blame.¹⁷ The practice consists of the accumulation of international proceedings with the same fact pattern and essentially the same parties to give one’s legal claims a greater chance of success.¹⁸ For example, claimants will sometimes pursue the same case through commercial arbitration and investment arbitration;¹⁹ or they will persevere through setbacks exhausting the same legal instruments.²⁰ But claimant rationality is

15. See MACKENZIE ET AL., *supra* note 11.

16. See generally Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT’L L.J. 271 (2003).

17. Marc L. Busch, *Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade*, 61 INT’L ORG. 735, 735–61 (2007) (“[T]he complaint’s choice of forum is not simply a function of which institution is likely to come the closest to its ideal ruling against the defendant, but where the resulting precedent will be more useful . . .”).

18. *Id.*

19. For example, in 2018, Spanish construction group Sacyr filed multiple investment treaty claims against the Republic of Panama in a dispute over the expansion of the Panama Canal that previously triggered a series of arbitrations pursuant to International Chamber of Commerce (“ICC”) Rules. See GLOBAL ARB. REV., *Panama Faces Treaty Claim Over Canal Works* (Sept. 10, 2018), <https://globalarbitrationreview.com/article/1173975/panama-faces-treaty-claim-over-canal-works>.

20. On the same facts, two new ICC proceedings were commenced by the same claimant, Sacyr, against the Panama Canal Authority, while three other previously filed claims were underway. GLOBAL ARB. REV., *Two More ICC Claims Over Panama Canal* (Jan. 12, 2017), <https://globalarbitrationreview.com/article/1080002/two-more-icc-claims-over-panama-canal>.

not the only force responsible for breeding jurisdictional collisions in international law.

Second, the regionalization agendas of regional courts (and their juridified regional unions) are also crucial to the trend of jurisdictional collisions. After several decades of operation, regional courts have become a guiding force in the integration of nation states into regional organizations. These courts—the ECJ, the ECtHR, the ICtHR, and others—displace the basic principles of unity and universality of international law with regional criteria that seek to bind the relationships and rights of proximate states more closely together.²¹ They render every judgment on the model of the treaty or charter which created them, not on the basis of the body of international law as a whole; hence while their member states benefit, the rest of the world does not.²² As a result, the justice system of international law is largely decentralized,²³ and the role of regional unions and their adjacent courts has moved from advisory to effectively usurping the classic adjudication of international law by entirely international courts.²⁴ For as long as this situation continues, the uniform adjudication of international law will remain a continuous aspirational project, perpetually unfinished as decisions come to dominate in each field and region, making a sharp break with each other.²⁵

As a solution to the disintegration of international legal regimes,²⁶ many commentators have considered whether identifying a single court with exclusive jurisdiction to decide on the meaning of an international norm could

21. See Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 NYU J. INT'L L. & POL. 709 (2000).

22. Eric A. Posner & John Yoo, *A Theory of International Adjudication* 48 (John M. Olin Program in Law and Economics Working Paper No. 206, 2004).

23. See GERHARD VON GLAHN & JAMES TAULBEE, *LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW* (11th ed. 2017); see also Myres McDougal & William Burke, *Crisis in the Law of the Sea: Community Perspectives Versus National Egoism*, 67 YALE L.J. 539, 568 (1958).

24. That is, non-regional international courts. See Yuval Shany, *THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS* (2003).

25. This lack of uniformity is reflected in the way some courts simultaneously can require each of their members to follow their precedent—but can *only* require their members to do so. For example, decisions from the ECJ and the ECtHR govern the doctrines of international law in Europe, though they don't reach sovereigns and private citizens outside the region; the findings of the ICtHR, the ICC, or even the ITLOS also apply only to their state parties. When international courts interpret and apply the same legal instruments with opposing views, they risk fragmented understandings of the same principles. For a similar conclusion on the structure of international law, see Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999, 1000–01 (2004).

26. In a time when scholarly theories on the multiplicity of international courts abound, many of them have in common a general worry of the fragmentation: That the variety of responses to interchangeable legal disputes could fracture the uniform application of international legal rules in different sectors and regions. Writings that recall these worries include: Hafner, *supra* note 12; Koskeniemi & Leino, *supra* note 1; and Pauwelyn, *supra* note 1.

be the most effective method to ensure its uniform interpretation.²⁷ This is the approach most explicitly followed by the ECJ, in the context of European law, to protect its jurisdiction against other courts.²⁸ Accordingly, EU Member States involved in any international dispute that potentially raises issues of Community law must bring the case before the ECJ and not another settlement body.²⁹ However, as will be discussed below, the exclusive jurisdiction of the ECJ is problematic as it limits parties' rights to use other dispute settlement systems.³⁰

Ultimately, to be meaningful, jurisdiction must reach further into the fabrics of each international law field and geographic region than it ever has.³¹ It must give freedom to the parties to consider all their options to settle a dispute while, at the same time, avoiding unjustified, duplicative actions. And it must fully safeguard the underlying diversity of regionalism, while preserving its "universality."³²

It is submitted here that, contrary to the conclusions of prior commentators, allowing courts to claim exclusive jurisdiction without requiring intra-court dialogue may jeopardize the future development of the international legal order and fail to keep the law up to date with social changes across regions. Given these risks, the determination of proper jurisdiction over legal disputes should be analyzed in light of a number of variables, including the importance and urgency of the rights at stake to the relevant community, the degree to which each court can provide meaningful remedies, and whether the legal claims either have been previously decided or are being simultaneously heard at another court. Under this approach, tribunals recognize each other's strengths. They neither transform nor curtail the interests of the parties but refer them to the forum best suited to redress their legal rights. At the same time, a tribunal that receives a dispute—relating to the same incident and substantive law—which has been resolved elsewhere would be justified to dismiss the case.

27. See Nikolaos Lavranos, *Protecting Its Exclusive Jurisdiction: The Mox Plant-Judgment of the ECJ*, 5 L. & PRAC. INT'L CTS. & TRIBUNALS 479 (2006); Nikolaos Lavranos, *Concurrence of Jurisdiction Between the ECJ and Other International Courts and Tribunals*, EUR. ENVTL. L. REV. 213 (2005).

28. See *infra* Part III.C.

29. See Lavranos, *Protecting Its Exclusive Jurisdiction: The Mox Plant-Judgment of the ECJ*, *supra* note 27.

30. Part III is dedicated to the precise analysis of this question.

31. Hafner, *supra* note 12, at 859 (recalling that fragmentation can also reflect a positive specialization of international regulations and lead to better representation of the needs of individual states).

32. G. Hafner, *Risks Ensuing from the Fragmentation of International Law*, Int'l L. Comm'n, Report of the Working Group on Long-Term Programme of Work, at 35, ILC (LII)/WG/LT/L.1/Add. 1 (July 25, 2000) (noting that "the tendency of regionalism even in respect of areas, such as human rights, where universal values would appear to be at stake, raises significant tensions for international law").

The following analysis is influenced by the large body of case law and legal literature on jurisdiction collisions in the law of the sea. It is now conventional wisdom that this field is particularly susceptible to the phenomenon.³³ This tendency can be ascribed to the growing number of law of the sea adjudicating bodies and litigants since the entry into force of the United Nations Convention for the Law of the Sea (“UNCLOS,” the “Convention,” or the “Law of the Sea Treaty”) thirty-eight years ago.³⁴ Collisions also arise out of the jurisdictional competition between the procedures of the Convention and regional international courts. As a result, in many instances, there are parallel proceedings in different fora between the same or closely related parties regarding largely identical issues, including in the European legal system. This note evaluates the effects of jurisdiction collisions in contrast with the dangers of exclusive jurisdiction. My approach aims to redress the imbalance between the two sides.

Part II provides an example of how jurisdiction collisions might occur in international law by surveying the various mechanisms for the peaceful settlement of disputes adopted in the field of law of the sea. Part III explores how the European Court of Justice has invoked exclusive jurisdiction over disputes between EU Member States, even when the states themselves have reserved other litigation options. Part IV then suggests how tribunals may better capture the positive benefits of jurisdiction collisions without sacrificing a coherent body of law. In short, tribunals should assess their jurisdiction based on urgent party needs, available remedies, and the existence of contemporaneous disputes elsewhere. I conclude with a few observations about the implications of this approach for the relationship between international courts.

II. LAW OF THE SEA AS A CASE STUDY: THE POTENTIAL FOR COMPETING, CONTEMPORANEOUS PROCEEDINGS

While a few maritime conflicts are regrettably still settled by armed conflict, states now resolve most maritime disputes through a wide range of peaceful dispute settlement mechanisms.³⁵ Since the introduction of UNCLOS, which is deeply influenced by customary principles of international law,³⁶ the sector has experienced a fundamental change of character.³⁷

33. It is appropriate to observe at the outset that the law of the sea is an essential part of international law and any dispute concerning the application and interpretation of that law should be seen as subject to settlement by international bodies. For an overview of the relationship between law of the sea and international law, see generally C. J. COLOMBOS & ALEXANDER PEARCE HIGGINS, *THE INTERNATIONAL LAW OF THE SEA* (6th ed. 1967).

34. I elaborate on these points in Part II below.

35. See Lakshman Guruswamy, *The Promise of the United Nations Convention on the Law of the Sea (UNCLOS): Justice in Trade and Environment Disputes*, 25 *ECOLOGY L.Q.* 189, 193 (1998).

36. For an overview of UNCLOS’s customary law inspiration, see JAMES SEBENIUS, *NEGOTIATING THE LAW OF THE SEA* 91 (1984); Martin Lee, *The Interrelation Between the*

The Convention provides a comprehensive code governing the sea: It features over 400 legal provisions and is the text of reference for international lawyers, government officials, and litigants seeking to understand legal issues related to the sea or maritime boundaries.³⁸ As such, it merits the title the “Constitution for the Oceans.”³⁹

At the Third United Nations Conference on the Law of the Sea,⁴⁰ held in New York in 1980, a proposal for a general system of law of the sea dispute settlement—to include a wide range of modalities from informal, non-binding procedures to formal procedures entailing binding decisions⁴¹—was introduced as the “Montreux Formula.”⁴² As codified in article 287(1) of the Law of the Sea Treaty, under the Montreux Formula states may choose to refer their legal disputes to: (i) the newly-instituted ITLOS;⁴³ (ii) the ICJ; (iii) an arbitral tribunal constituted in accordance with Annex VII; and (iv) an arbitral tribunal constituted in accordance with Annex VIII for disputes concerning special categories.⁴⁴ This multifaceted approach to the litigation of law of the sea disputes was probably the most important reason for the Convention’s successful adoption.⁴⁵ At the same time, UNCLOS’s multi-

Law of the Sea Convention and Customary International Law, 7 SAN DIEGO INT’L L.J. 405, 409 (2006).

37. See generally Guruswamy, *supra* note 36.

38. See Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

39. See Tommy Koh, President, Third United Nations Conference on the Law of the Sea, Address to the Third United Nations Conference on the Law of the Sea: A Constitution for the Oceans (Dec. 11, 1982).

40. On 1 November 1967, Ambassador Arvid Pardo of Malta addressed the General Assembly of the United Nations and called for “an effective international regime over the seabed and the ocean floor beyond a clearly defined national jurisdiction.” This led to the convening, in 1973, of the Third United Nations Conference on the Law of the Sea, which after nine years of negotiations successfully drafted the Convention. See I R. P. ANAND, LEGAL REGIME OF THE SEA-BED AND THE DEVELOPING COUNTRIES 182 (1977).

41. A. O. ADEDE, THE SYSTEM FOR SETTLEMENT OF DISPUTES UNDER THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A DRAFTING HISTORY AND A COMMENTARY 7 (1987).

42. See A. O. Adede, *The Basic Structure of the Disputes Settlement Part of the Law of the Sea Convention*, 11 OCEAN DEV. & INT’L L. 125, 131 (1982).

43. The International Tribunal for the Law of the Sea is an independent judicial body established by UNCLOS to adjudicate disputes arising out of the interpretation and application of the Convention. Additionally, pursuant to article 21 of the Tribunal’s Statute, the ITLOS is also open to disputes arising out of any other agreements which confer jurisdiction on it other than UNCLOS. The Tribunal is composed of twenty-one elected judges, distributed among several chambers.

44. See UNCLOS, *supra* note 38, art. 287(1).

45. On the importance of making the dispute settlement system an integral part of UNCLOS, see Louis Sohn, *Settlement of Law of the Sea Disputes*, 10 INT’L J. MARINE & COASTAL L. 205 (1995). To this date, UNCLOS has been ratified by 168 parties, including 167 States and the European Union. See UNITED NATIONS, Status of Treaties: United Nations Convention on the Law of the Sea, <https://treaties.un.org/pages/ViewDetailsIII.aspx?src=>

forum approach contributes to the proliferation of international tribunals and adds to the potential for fragmentation—both of substantive law and of the procedures available for settling disputes.⁴⁶

Indeed, Professor Alan Boyle argued that the multiplicity of forums for the settlement of disputes under UNCLOS would result in both actual fragmentation, because there is no single forum covering all disputes arising under the Convention, and potential fragmentation, because there is no mechanism for ensuring uniformity in the outcome of similar or identical cases before different tribunals.⁴⁷

Yet, strikingly, the jurisprudence on the law of the sea following the adoption of UNCLOS is characterized by continuity rather than discord.⁴⁸ As mentioned in the introduction, a more recent cause for concern about fragmentation in the development of the law of the sea is not related to the structure of the UNCLOS dispute settlement system at all: Rather, as regions are becoming poles for the development of international law, they are interfering in the exercise of jurisdiction by other international courts and tribunals.⁴⁹ Given its already fragmented system, this is profoundly concerning in the field of law of the sea.

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46. Alan Boyle, *Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction*, 46 INT'L & COMP. L.Q. 37 (1997).

47. *Id.* at 40.

48. Jonathan Charney, *The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea*, 90 AM. J. INT'L L. 69 (1996). For an overview of the consistency maintained between the ICJ and the ITLOS over the merits of cases dealing principally with the law of the sea, see ICJ caselaw: *North Sea Continental Shelf (Ger. v. Den. & Ger. v. Neth.)*, Judgment, 1969 I.C.J. 3 (Feb. 20); *Fisheries Jurisdiction (Ger. v. Ice.)*, Judgment, 1974 I.C.J. Rep. 175 (July 25); *Continental Shelf Case (Tunis. v. Libya)*, Judgment, 1982 I.C.J. 18 (Feb. 24); *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.)*, Judgment, 1984 I.C.J. 246 (Oct. 12); *Continental Shelf (Libya v. Malta)*, Judgment, 1985 I.C.J. 13 (June 3); *Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.)*, Judgment, 1992 I.C.J. 35 (Sept. 11); *Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.)*, Judgment, 1993 I.C.J. 38 (June 14). See also ITLOS caselaw: *Beagle Channel Arbitration (Arg. v. Chile)*, 52 I.L.R. 93 (Feb. 18, 1977); *Anglo-French Continental Shelf Arbitration*, 54 I.L.R. 11 (Mar. 14, 1978); *Sharjah/Dubai Boundary Arbitration*, 91 I.L.R. 543 (Oct. 19, 1981); *Guinea/Guinea-Bissau Maritime Boundary Arbitration* 25 I.L.M. 252 (Feb. 14, 1985); *Franco-Canadian Fisheries Arbitration* XIX R.I.A.A. 225 (July 17, 1986); *Guinea-Bissau/Senegal Maritime Delimitation* 83 I.L.R. 1 (Nov. 12, 1991); *St Pierre and Miquelon Arbitration (Can. v. Fr.)* 95 I.L.R. 645 (June 10, 1992).

49. As will be discussed in Part III, some regional international courts, such as the European Court of Justice, have consistently defined the scope of their jurisdiction vis-à-vis other international courts. In this sense, since the early 2000s, the ECJ has restricted the sovereign right of the Member States to select the dispute settlement system of their choice and prevents certain disputes from being brought before external courts. See *Mox Plant Case (Ir. v. U.K.)*, Case No. 10, Order of Nov. 13, 2001, ITLOS Rep. 2001, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/published/C10-O-13_nov_01.pdf. The official date of the commencement of these proceedings was October 5th, 2001.

A. Multiplicity of Fora for Law of the Sea Disputes

UNCLOS is uniquely suited to be a case study for the benefits and shortcomings of jurisdiction collisions because of its range of possible forums for compulsory settlement. UNCLOS establishes four methods by which parties can settle their disputes,⁵⁰ and it permits parties to invoke more than one method at a time.

First, the Convention provides extensive support for maintaining the ICJ's prevalent position as an adjudicator of law of the sea cases involving state actors.⁵¹ Indeed, at the time of drafting the Convention, the only international court with sufficient experience on law of the sea to assist the Contracting Parties was the ICJ.⁵² However, because non-state disputants may not submit their controversies to the ICJ, it was an unsuitable forum for heterogeneous maritime disputes and the variety of actors they involve.⁵³ Given that the Convention was intended to cover non-state actors,⁵⁴ there was a need to establish a forum with broader jurisdiction to adjudicate disputes between those actors or between those actors and states. As a result, a new international tribunal, the ITLOS, was born.⁵⁵ What a single court used to do, two began to do instead.

50. UNCLOS article 287, entitled "Choice of procedure," provides:

1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:
 - (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI;
 - (b) the International Court of Justice;
 - (c) an arbitral tribunal constituted in accordance with Annex VII;
 - (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.

Additionally, as discussed below, parties may designate another judicial system under UNCLOS article 282.

51. For example, UNCLOS article 74 upholds the importance of the ICJ's role in the delimitation of exclusive economic zones between States. UNCLOS, *supra* note 38, art. 74 ("The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."); *see also* Charney, *supra* note 48.

52. *See* Helmut Tuerk, *UNCLOS and the Contributions of ITLOS, in UN CONVENTION ON THE LAW OF THE SEA AND THE SOUTH CHINA SEA* 15 (Shicun Wu et al. eds., 2015).

53. ICJ Statute, *supra* note 4, art. 34(1) ("Only states may be parties in cases before the Court."); *see also* Fergus Green, *Fragmentation in Two Dimensions: The ICJ's Flawed Approach to Non-State Actors and International Legal Personality*, 9 MELB. J. INT'L L. 47, 54 (2008); Yael Ronen, *Participation of Non-State Actors in ICJ Proceedings*, 11 L. & PRAC. INT'L CTS. & TRIBUNALS 77 (2012).

54. *See* Boyle, *supra* note 46, at 37–38.

55. UNCLOS, *supra* note 38, annex VI, art. 1 ("The International Tribunal for the Law of the Sea is constituted and shall function in accordance with the provisions of this Conven-

UNCLOS empowered more than the ICJ and the ITLOS to settle law of the sea disputes. Arbitral tribunals were also designated as potential adjudicators.⁵⁶ Under Annexes VII and VIII, parties can trigger the constitution of a special arbitral tribunal to resolve their dispute,⁵⁷ and arbitration is the default style of dispute resolution for parties who have not agreed to another dispute resolution option.⁵⁸

UNCLOS arbitral tribunals exist only temporarily and outside the jurisdiction of any state's judiciary or any other international court.⁵⁹ The tribunals independently apply the relevant law to the subject-matter of the dispute, even without consulting states whose laws might be implicated.

Additionally, through article 282 of the Convention, states may designate *another* dispute settlement mechanism of their choice—not included in the Convention—as the default system to resolve legal disputes in which they are involved.⁶⁰ Thus, parties are able to designate a regional international court as the preferred forum to resolve all of their law of the sea cases, even prevailing over the Convention's designated mechanisms. One state has even done so: Greece made a special declaration expressing in detail those Convention issues for which it wished to transfer jurisdiction to the ECJ.⁶¹

tion and this Statute.”); *see also* Helmut Tuerk, *UNCLOS and the Contributions of ITLOS, in UN CONVENTION ON THE LAW OF THE SEA AND THE SOUTH CHINA SEA* 31–46 (2016).

56. UNCLOS, *supra* note 38, art. 287(1)(c); *see also* Louis Sohn, *The Role of Arbitration in Recent International Multilateral Treaties*, 23 VA. J. INT'L L. 171, 185 (1982).

57. *See* UNCLOS, *supra* note 38, art. 287(5), annex VII, VIII.

58. UNCLOS, *supra* note 38, art. 287(1)(4) (“If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree.”).

59. *Id.* annex VII, arts. 5, 10 (“[T]he arbitral tribunal shall determine its own procedure The award of the arbitral tribunal shall be confined to the subject-matter of the dispute and state the reasons on which it is based.”). Broadly speaking, another salient feature of arbitral tribunals—including UNCLOS arbitral tribunals—is that they are not permanent institutions but have to be constituted for every case. In this respect, arbitral tribunals then disband when the specific dispute is resolved and their given legal status expires. LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 224 (2003) (noting that, unlike state courts, arbitral tribunals are not permanent, and their mission is to hear a single case).

60. UNCLOS, *supra* note 31, art. 282 (“If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.”).

61. In ratifying the UNCLOS, Greece conferred the European Court of Justice with jurisdiction over certain issues relating to the Convention, rather than accepting any of the procedures provided for in article 287(1). This is a legally binding declaration which Greece made pursuant to article 282 of UNCLOS. Consequently, Greece could effectively direct disputes arising out of the Convention to the ECJ as long as its counter-party has also made a declaration to that effect. By doing so, Greece and the other party would have successfully brought their dispute before an adjudicative body other than those established by UNCLOS.

The Convention permits litigants to use either arbitral tribunals or the aforementioned judicial systems to solve their disputes, alternatively or even simultaneously.⁶² Thus, counsel to law of the sea disputes must decide whether file a suit with the ICJ, the ITLOS, or an arbitral tribunal, or some combination of those, or all of them. The prevailing wisdom is that filing in multiple fora increases one's chances of success, as some dispute settlement procedures may be more favorable to one of the litigants.⁶³ It is worth reiter-

See UNITED NATIONS, Status of Treaties: United Nations Convention on the Law of the Sea—Declarations and Reservations, Greece—Upon Ratification, ¶ 4, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en (last visited Apr. 17, 2020) (“Greece, as a State member of the European Union, has given the latter jurisdiction with respect to certain issues relating to the Convention. Following the deposit by the European Union of its instrument of formal confirmation, Greece will make a special declaration specifying in detail the issues dealt with in the Convention for which it has transferred jurisdiction to the European Union.”).

62. In the absence of an express prohibition in the Convention and given the desire for flexibility in its interpretation, I infer that parties can initiate an unlimited number of proceedings in respect of the same dispute, pursuant to article 287. Indeed, the parties are free to have recourse to any forum and any number of procedures they choose, judicial or arbitral; notwithstanding that the respective tribunals could decide to stay or consolidate the proceedings from different venues. This issue is best illustrated in Part III through the *Mox Plant* cases, in which Ireland commenced three parallel proceedings against the United Kingdom over a sole dispute. The essential point is that no restrictions are in place on instituting legal proceedings at more than one forum at the same time. *See* Marianne P. Gartner, *The Dispute Settlement Provisions of the Law of the Sea: Critiques and Alternatives of the Law of the Sea (1981–1982)*, 19 SAN DIEGO L. REV. 577, 582–83; *see also infra* note 65. Neither an implied nor an express limitation in this sense was included in the text of the Convention. Article 288 of the Convention, entitled “Jurisdiction,” reads in full:

1. A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.
2. A court or tribunal referred to in article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement.
3. The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea established in accordance with Annex VI, and any other chamber or arbitral tribunal referred to in Part XI, section 5, shall have jurisdiction in any matter which is submitted to it in accordance therewith.
4. In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal.

UNCLOS, *supra* note 31, art. 288.

63. Whatever the specific reason, the goal of selecting one particular court or jurisdiction over another is always the same: To gain a perceived or actual advantage in litigation through reduced costs, improved remedies, or more favorable laws or procedural rules. The forum most favorable to the party's case, however, is not always the forum that is most connected to the dispute. For this reason, a party may choose to file with all the courts with potential jurisdiction over the litigation with the hope that its suit will survive objections from the counter-party in at least one of the forums. *See also* Joost Pauwelyn & Luiz Salles, *Forum*

ating that nothing in the Convention prevents any of the judicial systems from issuing decisions that oppose each other (in outcome or in basic interpretation of the underlying law), even when they are hearing a case simultaneously.

B. *Multiplicity of Participants in Law of the Sea Disputes*

A multiplicity of forums is not the only factor that produces complexity in law of the sea cases. An observer cannot fail to note the large number of actors typically involved. As mentioned earlier, the UNCLOS's drafters broadened the range of parties who may be involved in international litigation arising from the Convention. Perhaps this could be seen as a promotion of inclusiveness, seeking to ensure that all the relevant parties to a dispute have recourse to legal adjudication under one of the procedures of article 287(1).⁶⁴ Yet this expansion of potential parties also expands the number of potential simultaneous claimants, and because the Convention does not limit the parties' ability to file claims to a single forum,⁶⁵ recurrent collisions among proceedings instituted by one party or another at different court houses or tribunals seem likely.

As Sir Robert Jennings rightly stated, the ICJ's narrow *rationae personae* jurisdiction reflects a conception of participation in the international legal system conceived after World War II and out of step with contemporary international society.⁶⁶ Other international tribunals, including those tasked

Shopping Before International Tribunals: (Real) Concerns, (Im)Possible Solutions, 42 CORNELL INT'L L.J. 77 (2009).

64. See Charney, *supra* note 48 at 73–74 (“We should celebrate the increased number of forums for third-party dispute settlement found in the [UNCLOS] . . . it means that international third-party settlement procedures, especially adjudication and arbitration, are becoming more acceptable. This development will promote the evolution of public international law and its broader acceptance by the public as a true system of law”).

65. It should be clarified that various scholars have interpreted article 287(4) of UNCLOS as an *electa una via* clause that prohibits recourse to any other settlement forum when the parties have already referred their dispute to one. In situations like under UNCLOS where parties may have recourse to more than one dispute settlement forum, this type of clause prohibits parties who have elected a particular forum from choosing another. Ishaya Paul Amaza, *Multiplicity of International Dispute Settlement Forums: Avoiding the Risk of Parallel Proceedings*, 6 DISP. RESOL. INT'L 149, 158 (2012). This provision, however, does not prevent parties from filing multiple claims with different UNCLOS settlement bodies, but rather serves as a basis for international tribunals to stay or consolidate the proceedings from different venues. The issue then remains that, with frequent litigants, a viable option to expand their chances of success is to bring the dispute to all plausible forums. Thus, the risk of jurisdiction collisions will remain a feature of the UNCLOS dispute settlement system. Gartner, *supra* note 68, at 582–83.

66. See Robert Jennings, *The International Court of Justice After Fifty Years*, 89 AM. J. INT'L L. 493, 504 (1995).

with the interpretation and application of human rights,⁶⁷ commercial and investment law,⁶⁸ or even European Union law,⁶⁹ have adopted broader rules on participation by private parties and international organizations.⁷⁰ Likewise, the ITLOS needed to be open to a wide range of parties, including international organizations, non-governmental organizations, and other entities which are not states or whose international status is not recognized by other states, such as Taiwan or Palestine.⁷¹

The procedures provided for by the Law of the Sea Treaty in its Part XV are generally open only to “States Parties,” as provided in article 291,⁷² but it should be noted that the term “States Parties,” as used throughout the Convention, is extended by article 2(1)(2):⁷³ In addition to states, the Convention is consequently open to self-governing associations of states and territories entitled to participate in the Convention under article 305⁷⁴ and to

67. European Convention on Human Rights and Freedoms art. 25, Apr. 11, 1950, E.T.S. No. 5; American Convention on Human Rights art. 44, Nov. 22, 1969, 1144 U.N.T.S. 123.

68. See WAYNE MAPP, *THE IRAN-US CLAIMS TRIBUNAL: THE FIRST TEN YEARS, 1981–1991* 29–32 (1993); Boyle, *supra* note 46, at 51–52; David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT’L L. 104 (1990); John Crook, *The UN Claims Commission—A New Structure to Enforce State Responsibility*, 87 AM. J. INT’L L. 144 (1993).

69. See Damien Gerard, *Non-State Actors in European Law: Enhanced Participation of Non-State Actors in EU Law-Making and Law-Enforcement Process—A Quest for Legitimacy*, in PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM 407–11 (Jean d’Aspremont ed., 2011).

70. See generally KIEL WALTHER-SCHICKING-INSTITUTE OF INTERNATIONAL LAW, *NON-STATE ACTORS AS NEW SUBJECTS OF INTERNATIONAL LAW* (Rainer Hofmann & Nils Geissler eds., 1999) (providing an overview of the expansion of *ratione personae* jurisdiction of international tribunals).

71. See Francisco Orrego Vicuna, *Individuals and Non-State Entities Before International Courts and Tribunals*, 5 MAX PLANCK Y.B. U.N. L. 58 (J.A. Frowein & R. Wolfrum eds., 2001) (arguing that the expansion of jurisdiction to non-state actors through ITLOS has had a positive effect on the interpretation of the Convention, as it has been advanced by disputes brought by private parties and contractors and international organizations).

72. UNCLOS, *supra* note 38, art. 291 (“1. All the dispute settlement procedures specified in this Part shall be open to States Parties; 2. The dispute settlement procedures specified in this Part shall be open to entities other than States Parties only as specifically provided for in this Convention.”).

73. *Id.* art. 2(1) (“(1) ‘States Parties’ means States which have consented to be bound by this Convention and for which this Convention is in force. (2) This Convention applies *mutatis mutandis* to the entities referred to in article 305, paragraph 1(b), (c), (d), (e) and (f), which become Parties to this Convention in accordance with the conditions relevant to each, and to that extent ‘States Parties’ refers to those entities.”).

74. Article 305 reads, in part:

This Convention shall be open for signature by: . . .

- (c) all self-governing associated States which have chosen that status in an act of self-determination supervised and approved by the United Nations in accordance with General Assembly resolution 1514 (XV) and which

certain international organizations under Annex IX—principally the European Union.⁷⁵ All of these entities are entitled to be parties to proceedings before the ITLOS, or to arbitration in accordance to the aforementioned article 287(1) of the Convention. For the EU this is a particularly significant characteristic, since Member States can also participate in disputes where their conduct is complained-of, within the terms of the Convention. Though unlikely, this results in the possibility that EU institutions and EU Member States could litigate against each other at UNCLOS dispute settlement bodies.

Moreover, article 20(2) of Annex VI, establishing ITLOS, provides that:

The Tribunal shall be open to entities other than States Parties in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case.⁷⁶

Unlike article 291, this provision does not limit access only to State Parties.⁷⁷ Nor, when used in article 20 of the Annex, is the term “entity” defined only by reference to state actors listed in article 187 of Part XI,⁷⁸ as it is

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- have competence over the matters governed by this Convention, including the competence to enter into treaties in respect of those matters;
- (d) all self-governing associated States which, in accordance with their respective instruments of association, have competence over the matters governed by this Convention, including the competence to enter into treaties in respect of those matters; all territories which enjoy full internal self-government, recognized as such by the United Nations, but have not attained full independence in accordance with General Assembly resolution 1514 (XV) and which have competence over the matters governed by this Convention, including the competence to enter into treaties in respect of those matters

UNCLOS, *supra* note 38, art. 305.

75. UNCLOS, *supra* note 38, art. 305(f) (listing as possible Convention signatories “international organizations, in accordance with Annex IX”); *id.*, annex IX, art. 1 (“For the purposes of article 305 and of this Annex, ‘international organization’ means an intergovernmental organization constituted by States to which its member States have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of those matters.”); *id.*, annex IX, art. 2 (“An international organization may sign this Convention if a majority of its member States are signatories of this Convention.”); *id.*, annex IX, art. 4 (discussing the extent of participation by and obligations for international organizations). The European Union is the only international organization that is a Convention party to UNCLOS to date. DEPOSITARY, UNITED NATIONS TREATY COLLECTION, *United Nations Convention on the Law of the Sea*, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtmsg_no=XXI-6&chapter=21&Temp=mtmsg3&clang=_en (list of signatories with their declarations and reservations) (last visited May 19, 2020).

76. *Id.*, annex VI, art. 20(2).

77. Boyle, *supra* note 46, at 53.

78. UNCLOS, *supra* note 38, art. 187; Boyle, *supra* note 46, at 53.

when used in article 37 of the Annex.⁷⁹ Article 20(2) uses the word “agreement” without further qualification, suggesting not only that the agreement in question need not be a treaty, but also that the parties to it do not need to have the independent capacity to conclude treaties, allowing jurisdiction over non-states.⁸⁰

This provision enables actors to resolve their disputes before an international tribunal without having to resolve the question of their legal status,⁸¹ as do the arbitration provisions in Annexes VII and VIII.⁸² However, by expanding the pool of potential claimants in a law of the sea dispute, these provisions also make jurisdiction collisions more likely, since the same legal dispute can be initiated by any of the various entities who could serve as claimants. And, since article 287(1) of UNCLOS does not preclude parties from instituting a multiplicity of proceedings, litigants can do so strategically in order to increase their chances of surviving objections to jurisdiction.

III. THE EUROPEAN COURT OF JUSTICE AS A CASE STUDY: HOW THE EUROPEAN UNION FRAMEWORK PREVENTS BENEFICIAL JURISDICTION COMPETITION

International law progresses, in great part, through the legal argumentation that occurs in deliberation rooms. In the context of the divisive dynamics of contemporary global affairs, it now also progresses through regional organizations trying to customize international rules for their own benefit. Regional conventions are increasingly taking the lead in enforcing norms originally rooted in international conventions,⁸³ giving rise to a system of scattered norms lacking a definite hierarchy.

79. UNCLOS, *supra* note 38, art. 37 (“The Chamber shall be open to the States Parties, the Authority and the other entities . . .”); Boyle, *supra* note 46, at 53 (supporting that the Convention does not uphold a limited reading of “entities”).

80. UNCLOS, *supra* note 31, art. 20(2) (“The Tribunal shall be open to entities other than States Parties in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case.”).

81. Going back to examples like Palestine or Taiwan, this characteristic is desirable so that an international suit can proceed even when the other party has not previously recognized a party’s international legal status. *See generally* THOMAS GRANT, *THE RECOGNITION OF STATES: LAW AND PRACTICE IN DEBATE AND EVOLUTION* 55–56 (1999).

82. Even NGOs can be parties to international arbitration against states. For an example from outside of the law of the sea context, see *Rainbow Warrior Affair* (N.Z. v. Fr.), *France-New Zealand Arb. Trib.*, 20 R.I.A.A. 217, 82 I.L.R. 500 (1990). *See also* Christine Gray & Benedict Kingsbury, *Developments in Dispute Settlement: Inter-State Arbitration Since 1945*, 63 BRIT. Y.B. INT’L L. 97, 104 n.39 (1993).

83. Regional conventions that reflect the rules embodied in international conventions are the principal basis of enforcement by regional international courts. As an illustration, the European Court of Human Rights will cite the European Convention of Human Rights instead of the International Covenant on Civil and Political Rights (“ICCPR”) or the 1951 Refugee Convention to secure the same rights. *See* C-411/10 and C- 493/10, *N.S. v. Secretary of State*

Some regional organizations have gone as far as to wrest jurisdiction away from other potential international courts and tribunals. This is the case for the European Court of Justice, which, as analyzed below, announced to EU Member States that it is the only and final dispute settlement body to adjudicate all aspects of Community law, including aspects that are integral part of the Community legal order.⁸⁴

While regional international courts like the ECJ do not seek to delegitimize international law or international tribunals, one should ask whether there are consequences when they are given the opportunity to monopolize the future development of international norms. Though the exclusive jurisdiction of regional courts may help maintain the unity of regional laws, if every international and regional court adopted a similar strategy, it could in fact undermine the unity of the extensive frameworks of international law, which goes back more than 350 years.⁸⁵

In this context, this note argues that the ECJ's efforts to protect its exclusive jurisdiction in the face of the ongoing proliferation of international courts and tribunals deprives Member States of the benefits of arbitration⁸⁶ under Annexes VII and VIII of UNCLOS and has the potential to give rise to serious breaches of the international obligations acquired by the EU Member States and to further deepen the separation of international law into regional loci. It could ultimately affect the autonomy of the EU legal order.⁸⁷

A. *The European Union and International Courts: Understanding the ECJ's "Exclusive Jurisdiction"*

Before describing how the EU and ECJ interact with UNCLOS, it may be helpful to provide some predicate on the EU's capacity to sue and be

for the Home Department (U.K.) and M.E. and Others v. Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform (Ir.), 2011 E.C.R. 00000, ¶¶ 62, 80, and 111 (although the European Court notes that regulations on the treatment of asylum seekers comply with the 1951 Refugee Convention, the judgment relies on the fundamental rights set forth on the ECHR to decide the case; article 3 ECHR in specific). I leave aside whether this reality is a consequence of the lack of enforcement mechanisms attached to the primary international conventions. *See generally* Gabriel M. Wilner, *Reflections on Regional Human Rights Law*, 25 GA. J. INT'L & COMP. L. 407, 408 (1995).

84. *See* Comm'n v Ireland, Judgment, Case C-459/03, Comm'n of the European Communities (May 5, 2006); BRUNO DE WITTE, DIRECT EFFECT, SUPREMACY AND NATURE OF THE LEGAL ORDER (Grainne de Burca & Paul P. Craig eds., 1999).

85. In 1648, the Peace of Westphalia was concluded. It is believed to be the seminal event in international law. For an account of the relevance of this event towards the establishment of modern international law, see Benjamin Straumann, *The Peace of Westphalia 1–2* (Inst. Int'l L. & Just., Working Paper No. 7, 2007).

86. Advantages such as the determination of the rules, language, and place of the procedure; the appointment of the final members of the tribunal; and, most importantly, confidentiality. *See generally* STEPHEN E. BLYTHE, 47 THE INTERNATIONAL LAWYER 273–90 (2013).

87. *See infra* Part III.C.

sued in a variety of fora. To start, it is important to understand that the EU itself is created by treaties, and it can also produce new treaties.⁸⁸ After the European Union was founded, the Governments of Europe consented to transfer sufficient powers to the Union to enable it to manage matters related to international law.⁸⁹ Under classic international law, only states enjoy unlimited legal personality and the capacity to sign, ratify, and voluntarily adhere to international treaties.⁹⁰ Consequently, in order for the EU to inherit those powers, its Member States had to grant them to the EU. To this end, through article 216 of the Treaty of the Functioning of the European Union (“TFEU”) establishes the specific powers of the Union to join international agreements: The EU may join international agreements when the EU receives either an explicit treaty competence from its Member States, or, in the absence of an explicit treaty competence, it cites to binding EU law which nevertheless authorizes it to join.⁹¹ In addition, the TFEU permits the Union to participate in international agreements when “necessary in order to achieve one of the objectives referred to in the Treaties . . . or [when such objective] is likely to affect the common rules or alter their scope.”⁹² Any other international lawmaking by the EU is deemed *ultra vires*.⁹³

Thus, the Union does not have unlimited ability to act in the international order; it needs to be specifically empowered by the EU Member States to have a voice wherever the states desire it to. The scope of an empowerment may vary. For example, the Union’s authority in matters concerning the law of the sea is significantly more generous than its supporting competence on the protection of human health.⁹⁴

The Union is not only able to participate in international lawmaking but in international litigation. The EU can be party to international lawsuits in two ways. First, European States have managed to create and maintain two regional international courts—the ECJ and the ECtHR—with extensive case

88. See also Marco Bronckers, *The Effect of the WTO in European Court Litigation*, 40 TEX. INT’L L.J. 443, 446 (2005).

89. See INTERNATIONAL LAW ASPECTS OF THE EUROPEAN UNION (Martti Koskeniemi ed., 1998) (aggregating a list of the European Union’s competencies in international law).

90. See P. K. MENON, THE LAW OF TREATIES BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS 95–96 (1992).

91. Consolidated Version of the Treaty on the Functioning of the European Union art. 216, 2010 O.J.E.U. C 83 [hereinafter TFEU].

92. *Id.* The provision is, in reality, a codification of the ECJ’s decision in the ERTA case. See Case C-22/70, Comm’n v. Council, 1971 E.C.R. 263.

93. If the case arises, articles 263 and 267 of the TFEU establish the bases for initiating annulment proceedings. Ulas Gündüzler, *United Nations Convention on Law of Sea as a Mixed Treaty of EU: A Headache for Turkey?*, 12 ANKARA REV. EUR. STUD. 61, 66–67 (2013).

94. See TFEU, *supra* note 91, article 168(1); see also Wieke Willemijn Huizing Edinger, *Food Health Law: A Legal Perspective on EU Competence to Regulate the ‘Healthiness’ of Food*, 9 EUR. FOOD & FEED L. REV. 11 (2014).

law and highly complied-with judgments.⁹⁵ Agreements concluded by EU institutions become part of EU law, and the interpretation of their provisions necessarily falls within the jurisdiction of the ECJ;⁹⁶ and, with the upcoming accession of the EU to the European Convention of Human Rights (“ECHR”), the EU institutions have agreed to the ECtHR’s supervision, too.⁹⁷ Moreover, the validity of an act executed by EU institutions in the international sphere can be challenged at the ECJ in accordance with the TFEU.

The exclusive jurisdiction of the European Court of Justice is provided by article 344 of the TFEU, which states that:

Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than [the European Court of Justice].⁹⁸

95. See Tobias Lock, *The ECJ and the ECtHR: The Future Relationship Between the Two European Courts*, 8 L. & PRAC. INT’L. CTS. & TRIBUNALS 375 (2009).

96. TFEU, *supra* note 86, art. 216. Article 216 reads:

1. The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.
2. Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.

The ECJ has authority over “mixed agreements” like UNCLOS, too. A mixed agreement refers to a treaty or agreement between the EU and a third party which touches both on competencies exclusive to the EU institutions and on competencies reserved to the EU member states, such that the obligations arising from the agreement are divided between EU and the Member States. As explained by Professor Koutrakos, mixed agreements are to be treated similarly to treaties concluded by the EU alone, which means that the Court’s jurisdiction extends *prima facie* to all parts of a mixed agreement except those that fall clearly within the exclusive competence of the Member States. See Panos Koutrakos, *The Interpretation of Mixed Agreements Under the Preliminary Procedure*, 7 EUR. FOREIGN AFF. REV. 25, 36 (2002). I elaborate on the nature of UNCLOS as a mixed agreement within the EU legal order in the next section.

97. On January 15, 2020, the EU and the Council of Europe approved the continuation of the *ad hoc* terms of reference to finalize the accession of the EU as a party to the ECHR, including its participation in the ECtHR. This negotiation process began in 2001, and forthcoming meetings had to be rescheduled due to the COVID-19 crisis. Eur. Comm. Ministers, Ministers’ Deputies, *Decision on Steering Committee for Human Rights*, 1364th Mtg., Doc. No. CM/Del/Dec(2020)1364/4.3 (Jan. 15, 2020), https://search.coe.int/cm/pages/result_details.aspx?objectid=09000016809979be. For additional background on the negotiation process, see also Johan Callewaert, *The Accession of the European Union to the European Convention on Human Rights*, COUNCIL OF EUROPE (2014).

98. TFEU, *supra* note 91, art. 344. Upon the creation of the European Court of Justice, only the six founding members of the ECC (Belgium, France, Italy, Luxembourg, the Netherlands, and West Germany) were subject to the jurisdiction of the Court. After the Treaty of

With the aim of ensuring the uniform interpretation and application of Community law, the ECJ hears cases involving Community law year-round, and it has the power to invalidate laws of the EU Member States that are found inconsistent with Community norms.⁹⁹ Thus, the ECJ serves as the final arbiter of the European Union's legal order.

Second, though the ECJ has barred the EU Member States from entering international agreements to create new regional international courts that could overlap with its own jurisdiction and damage the homogeneity of EU law,¹⁰⁰ as a signatory of international agreements, the EU itself may be sued in external courts.¹⁰¹ For instance, the European Union is a party to the Energy Charter Treaty and numerous bilateral and multilateral investment treaties that include investor-state dispute settlement ("ISDS") provisions.¹⁰² These provisions create the possibility of arbitral proceedings directed against the EU.

Maastricht entered into force in 1993, the European Union was formed and today counts 27 Member States; all of them are covered by the jurisdiction of the European Court. It is the responsibility of the ECJ to ensure that the law of the Community is applied equally in all of them. See MARTIN DEDMAN, *THE ORIGINS AND DEVELOPMENT OF THE EUROPEAN UNION 1945–1995: A HISTORY OF EUROPEAN INTEGRATION* (2006).

99. TFEU, *supra* note 91, art. 258.

100. In *Opinion 1/09 on the Legality of a Unified Patent Litigation System*, the ECJ rejected such a proposal because it would overlap with tasks already attributed to the national courts of EU Member States and the ECJ, thus risking the preservation of EU law. See *Opinion 1/09*, 2011 E.C.R. I-01137 (Mar. 8). Additionally, in *Opinion 1/91*, the Court studied the establishment of a court for the European Economic Area ("EEA"). *Opinion 1/91*, 1991 E.C.R. I-06079 (Dec. 14). Although from its start the EEA Court would have been bound by ECJ case law, the Court raised objections to the creation of such judicial body because the EEA Court's decisions might usurp the ECJ in ruling on essentially the same issues, perhaps even in different ways. As a result, the EEA agreement never came into force. The ECJ did, however, rule in favor of a successor concept of the EEA Court, the European Free Trade Association ("EFTA") Court which provided two important changes; the first being that such a court would only have jurisdiction within the framework of EFTA, and the other that the ECJ's judgments would be compulsory on the EFTA Court. See *Opinion 1/92*, 1992 E.C.R. I-02821, ¶¶ 13–14 (Apr. 10).

101. See SAMUEL B. CRANDALL, *TREATIES, THEIR MAKING AND ENFORCEMENT* 357–58 (2009). When the EU is sued or sues, article 335 of the TFEU mandates the Union to be "represented by the [European] Commission." TFEU, *supra* note 91, art. 335; Case C-73/14, *Council v. Comm'n*, Judgment, 2015/C, 2015 O.J. (398) 5, ¶ 58 (Oct. 6) ("It is clear from the case-law of the Court that article 335 TFEU, although restricted to Member States on its wording, is the expression of a general principle that the European Union has legal capacity and is to be represented, to that end, by the Commission."). The Commission, in turn, is to be "represented by each of the institutions, by virtue of their administrative autonomy, in matters relating to their respective operation." *Id.*

102. For a complete list of treaties with ISDS provisions to which the European Union is a party, see UNCTAD's *Work Programme on International Investment Agreements (IIAs), European Union* (last visited June 8, 2020), <https://investmentpolicy.unctad.org/international-investment-agreements/groupings/28/eu-european-union->.

On this issue, the ECJ has found that the EU's submission of a dispute to an external judicial body does not automatically posit a conflict with Community law. The Judges noted:

Where an international agreement provides for its own system of courts, including a court with jurisdiction to settle disputes between the Contracting Parties to the agreement and, as a result, to interpret its provisions, the decisions of that Court will be binding on the Community institutions, including the European Court of Justice. Those decisions will also be binding in the event that the Court . . . is called upon to rule, by way of preliminary ruling or in a direct action, on the interpretation of the international agreement, insofar as that agreement is an integral part of the Community legal order. An international agreement providing for such a system of courts is in principle compatible with Community law.¹⁰³

Thus, the ECJ recognizes the capacity of European institutions to self-defend against claims brought by other international actors or private parties. Consequently, the European Union debuted in its first international suit in 2000, at the ITLOS.¹⁰⁴

B. *The European Union, the EU Member States, and UNCLOS: Joint Liability Under the "Mixed Agreement" Theory*

Historically, the greatest world powers have been those with access to the sea. Today, the majority of all rights and responsibilities of nations using the world's oceans are officially regulated by UNCLOS. In the European context, the Union became a signatory of the Law of the Sea Treaty upon its completion in 1982—first as the European Economic Community, and then, when the Treaty of Maastricht entered into force, as the European Union.¹⁰⁵ As a Convention party, the Union regularly participates in UNCLOS-wide conferences along with its fellow EU Member States to decide on the im-

103. Opinion 1/91, 1991 E.C.R. I-06079, ¶¶ 39–40 (Dec. 14).

104. Chile brought a case against the EU before an *ad hoc* Special Chamber of the Tribunal for the Law of the Sea in relation to the exploitation of swordfish stocks in the South-Eastern Pacific Ocean. First, Chile requested a declaratory judgment on whether the EU had fulfilled its obligations under UNCLOS to ensure the conservation of highly migratory species and the living resources of the high seas. In counter, the EU claimed that the Chilean denial of port access to European ships violated substantive provisions of a trade agreement signed between the Parties. During January 2001, the EU and Chile finally reached an agreement that effectively suspended proceedings at the ITLOS. *See* Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v. Eur. Community), Case No. 7, Order of Dec. 20, 2000, ITLOS Rep. 148–51; *see also* Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v. Eur. Community), Case No. 7, Order of Mar. 15, 2001, ITLOS Rep. 4, 5.

105. Council Directive 98/392 1998 O.J. (L 179) 1 (EC).

plementation of the Convention's provisions.¹⁰⁶ Furthermore, the European Union has implemented specific provisions and regional cooperation plans (including enclosed and semi-enclosed seas and fisheries management) inspired by the text of the Convention.¹⁰⁷

As UNCLOS was originally being negotiated, the European Economic Community participated not as a prospective signatory, but as an observer.¹⁰⁸ Other states feared that having both the EU Member States and the European Union as parties would disturb the equilibrium of the Convention and amount to double representation for European states.¹⁰⁹ Despite these initial concerns, UNCLOS article 305(1)(f) ultimately allowed for the introduction of international organizations as parties to the Convention.¹¹⁰ The European Union is today a full party to the Convention.

For the purposes of understanding litigation surrounding UNCLOS, it is notable that the European institutions and the EU Member States concluded the Convention as a "mixed agreement."¹¹¹ One of the most significant features of mixed treaties is the division of implementation responsibility between the EU and its Member States, even as mixed agreements retain the same status in the Community legal order as agreements concluded by the EU alone.¹¹² As Professor Leal-Arcas explains, however, the exact allocation of responsibility within the Union requires a careful analysis of several factors, including whether subject-matters regulated by an agreement fall within the scope of the EU's exclusive or shared competences and whether an obligation has been directly acquired by the EU institutions or the EU Member States.¹¹³

As a consequence thereof, in respect of the EU Member States' responsibility, a violation of an international agreement such as UNCLOS will amount not only to a breach of the agreement's text, but also of their obligations under Community law.¹¹⁴ Equally important, if EU institutions are found liable for breaching a mixed international agreement every EU Mem-

106. For an academic analysis of the EU's participation in these conferences, see PUBLICATIONS ON OCEAN DEVELOPMENT, THE LAW OF THE SEA: THE EUROPEAN UNION AND ITS MEMBER STATES (Tullio Treves & Laura Pineschi eds., 1997).

107. See, e.g., Commission Regulation 2019/1241, 2019 O.J. (L 198) 105 (EU).

108. Esa Paasivirta, *The European Union and the United Nations Convention on the Law of the Sea*, 38 FORDHAM INT'L L.J. 1045, 1047 (2015).

109. See Tullio Treves, *The EEC and the Law of the Sea: How Close to One Voice?*, 12 OCEAN DEV. & INT'L L. 173, 184 (1983).

110. UNCLOS, *supra* note 38, art. 305(1)(f) ("This Convention shall be open for signature by: . . . international organizations, in accordance with annex IX."). As discussed above, "international organizations" was further defined in Annex IX, article 1.

111. See Council Directive 98/392 1998 O.J. (L 179) 1 (EC).

112. Lavranos, *Protecting Its Exclusive Jurisdiction: The Mox Plant-Judgment of the ECJ*, *supra* note 27, at 486.

113. See Rafael Leal-Arcas, *The European Community and Mixed Agreements*, 6 EUR. FOREIGN AFF. REV. 483, 488-97 (2001).

114. *Supra* note 93.

ber State will also be found liable. But if the EU institutions breach an international agreement for which the institutions are exclusively competent, that breach will be interpreted as made directly by the Union without implicating the states.¹¹⁵

C. *The ECJ's Exclusive Jurisdiction in Action: Restricting Jurisdiction Collisions in Disputes over the Law of the Sea and Beyond*

Ultimately, despite the ECJ's apparent openness to some external dispute resolution by the EU as a whole and despite the mixed nature of the EU's involvement in UNCLOS, which would appear to permit EU states, as independent signatories, to take advantage of the multitude of fora available for resolving law of the sea disputes, the ECJ has claimed hegemony over the resolution of law of the sea disputes arising between EU member states.

In *Case C-459/03 Mox Plant, Commission v. Ireland* (hereinafter, "*MOX Plant*"), the ECJ, invoking article 292 TFEU, explicitly determined the scope of its exclusive jurisdiction.¹¹⁶ As part of a law of the sea dispute between Ireland and the United Kingdom, a total of four parallel judicial and arbitral processes were instituted. Ireland was concerned about the release of radioactive discharges at the Mox Plant (situated in Sellafield, United Kingdom) into the Irish Sea.¹¹⁷ After its petitions to obtain information directly from the UK about the discharges were ignored, Ireland initiated arbitral proceedings against the UK at the Permanent Court of Arbitration under the OSPAR Convention.¹¹⁸ Four months later, Ireland initiated another proceeding before an *ad hoc* UNCLOS arbitral tribunal, also administered by the PCA.¹¹⁹ Two weeks after that, Ireland initiated a third proceeding before the ITLOS requesting provisional measures.¹²⁰ Finally, on October 15, 2003, Ireland became a respondent when the European Commission initiated a proceeding against the state at the ECJ.¹²¹

The European Commission, supported by the UK, commenced an article 258 TFEU (formerly article 226 TEC)¹²² infringement procedure against Ireland for violating article 344 of the TFEU by submitting a dispute con-

115. *Id.* at 71.

116. *See* Case C-459/03, *Comm'n v. Ireland*, Judgment, 2006 E.C.R. 345.

117. *Id.* ¶¶ 20–29.

118. *See* Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention (*Ir. v. U.K.*) 23 R. Int'l Arb. Awards 59 (Perm. Ct. Arb. 2003). The official date of commencement of these proceedings was June 15, 2001.

119. *See* Mox Plant Case, Order.

120. *See* Mox Plant Case (*Ir. v. U.K.*), Case No. 10, Request for Provisional Measures (ITLOS, Nov. 9, 2001), https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/request_ireland_e.pdf.

121. *See* Case C-459/03, *Comm'n v. Ireland*, *supra* note 116.

122. TFEU, *supra* note 91, art. 258 ("If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.").

cerning EU law to tribunals outside the EU legal order.¹²³ The ECJ ruled that by filing matters of EU law before external bodies, Ireland had violated the exclusive jurisdiction of the Court.¹²⁴ In particular, the ECJ held that the EU Member States involved in a dispute that potentially raises issues of Community law are not allowed to bring the case before a dispute settlement body other than the ECJ.¹²⁵ Otherwise, in the ECJ's view, the autonomy of the Community's legal order might be adversely affected by rulings of other international courts or tribunals in disputes that also touch on EU law.¹²⁶ Coincidentally, this decision arrived at the same time as the oral hearings in the UNCLOS *ad hoc* arbitration.¹²⁷ When the ECJ found Ireland in violation of European law, Ireland withdrew from the dispute before the arbitral tribunals.¹²⁸ The case then came before the ECJ in full, even though both disputants originally intended to resolve their dispute in arbitration or before the ITLOS.

There are two striking aspects of this judgment. First, just as the ECJ claims its jurisdiction is exclusive, it also claims exclusive license to decide whether there exists an actual collision between the jurisdiction of the European Court and another dispute settlement body in the first instance.¹²⁹ Member States are not allowed to decide this themselves and therefore must submit all disputes that could involve EU law to the ECJ. Second, the ECJ's approach to the primacy and exclusivity of its own jurisdiction is in direct contrast with the ITLOS's approach. Unlike the ECJ, the ITLOS did not rule that it was the only available option to resolve the parties' dispute. Rather, the ITLOS conceded that issues of Community law were involved in the case and therefore suspended the proceedings pending a final judgment from the European Court on those key issues covered by EU law.¹³⁰ Thus, while some tribunals like the ITLOS are embracing and cooperating with the multiplicity of other fora in the field, the *MOX Plant* case reveals that the ECJ is not among them.

123. See Case C-459/03, *Comm'n v. Ireland*, ¶¶ 124, 132, 154.

124. Case C-459/03, *Comm'n v. Ireland*, ¶ 154 (“[T]he institution and pursuit of proceedings before the arbitral tribunal . . . involve a manifest risk that the jurisdictional order laid down in the Treaties [and], consequently, the autonomy of the Community legal system may be adversely affected.”); see also *id.* ¶ 177 (“The act of submitting a dispute of this nature to a judicial forum such as the Arbitral Tribunal involves the risk that a judicial forum other than the Court will rule on the scope of obligations imposed on the Member States pursuant to Community law.”).

125. *Id.* ¶ 136.

126. *Id.* ¶ 154.

127. See *Mox Plant Case*, Order.

128. *Id.*

129. Lavranos, *Protecting Its Exclusive Jurisdiction: The Mox Plant-Judgment of the ECJ*, *supra* note 27, at 489.

130. Although ITLOS initially confirmed its *prima facie* jurisdiction, it found it necessary to consider a potential collision with the jurisdiction of the ECJ. See *Mox Plant Case*, Order.

MOX Plant is not the only case to demonstrate this point. In the 2018 case *Slovak Republic v. Achmea*, the Court addressed the Slovak Republic's objection to an arbitral tribunal's jurisdiction over a dispute between EU Member States (the Netherlands and the Slovak Republic) pursuant to the Netherlands-Slovakia BIT, which was signed before the Slovak Republic joined the EU.¹³¹ The bench noted that agreements between Member States containing arbitration clauses inappropriately

remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which [EU law] requires them to establish in the fields covered by EU law, disputes which may concern the application or interpretation of EU law.¹³²

Citing a line of cases arguing that the EU can solely comply with article 19 TFEU through the exclusive jurisdiction of the ECJ to interpret Community law in judicial dialogue with the national courts of the EU Member States as required by article 267 TFEU,¹³³ the ECJ held that, by denying the ECJ the opportunity to hear cases, the arbitration clause contained in the BIT risked the continuity of Community law, as protected by articles 344 and 267 TFEU.¹³⁴ *Achmea* thus requires that arbitral tribunals reconsider the limits of their jurisdiction under intra-EU bilateral agreements.¹³⁵

131. See Case C 284/16, *Slowakische Republik (Slovak Republic) v. Achmea BV*, Judgment, 2018 E.C.R. 158.

132. *Id.* ¶ 55.

133. *Id.* ¶¶ 35–37.

134. TFEU, *supra* note 91, art. 344 (“Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.”); *id.*, art. 267 (“The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union . . .”).

135. *Achmea* has already been interpreted and discussed by a number of arbitral tribunals. To render viable, enforceable awards in the EU, they apparently prefer to ignore the decision or exclude it from their interpretations, rather than attempting a reconciliation. Some arbitral awards that have effectively ruled that *Achmea* should not limit investment treaty agreements are: *Masdar Solar & Wind Cooperatief U.A. v. Spain*, ICSID Case No. ARB/14/1, Award (May 16, 2018) and *UP and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award (Oct. 9, 2018). In contrast, the ruling in *Vattenfall AB v. Germany*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue (Aug. 31, 2018) specifically rejected the application of *Achmea*, as the tribunal held that EU law is not part of general international law and therefore cannot constitute principles applicable between the parties that the tribunal would be called upon to interpret. In view of these decisions, one should expect *Achmea* to have very limited impact among the international community.

However, the ECJ also recently decided a further question on the compatibility of another EU investment agreements with EU law. See Opinion C-1/17, *EU-Canada CET Agreement*, 2019 E.C.R. 72 (concluding, with a view of preserving the autonomy of the EU legal order, that the Comprehensive Economic and Trade Agreement (“CETA”) Tribunal should be precluded from interpreting provisions of EU primary and secondary law).

The reasoning in *Mox Plant* and *Achmea* has implications for the settlement of law of the sea claims. Essentially, none of the wide variety of adjudicators permitted by the Convention could hear any UNCLOS dispute concerning issues of Community law, even when explicitly selected by the EU Member States. As mentioned earlier, article 282 of the Law of the Sea Treaty allows Convention parties to elect to submit disputes to any third-party dispute settlement forum or to ITLOS or the ICJ, under article 287(1).¹³⁶

If they desired to do so, all EU Member States could have appointed the ECJ to settle their intra-EU UNCLOS legal disputes under this provision. But only Greece has done so.¹³⁷ Instead, the ECJ has sought to surpass the Convention's dispute settlement processes altogether by forcing EU countries to submit their disputes directly to the European Court. As a result, the ECJ's jurisprudence unduly burdens the rights of EU Member States to refer legal disputes to alternative dispute settlement forums.

One could thus make the observation that dispute settlement processes relying on bodies external to the EU will only remain available to EU Member States for intra-EU disputes to the extent that: (i) international courts are willing to disregard the implications of their jurisdiction over disputes between EU countries, therefore denying to stay the proceedings, or (ii) arbitrations are seated, and resulting awards enforced, outside the EU. Framed differently, the exclusive jurisdiction of the European Court can only stand if other international tribunals and the national courts of the EU Member States do not resist its encroachment.

IV. RECONCILING JURISDICTION COLLISIONS

Though in my view jurisdiction collisions benefit international jurisprudence, the ECJ is correct that there is a need for clarity when a legal dispute can be brought before a multiplicity of forums. Currently, there is no binding legal obligation on an international court to yield jurisdiction in favor of another when there are at least two possible forums.¹³⁸ Below, I offer a proposal for how an international tribunal can determine whether it is best suited to review a matter when multiple tribunals have jurisdiction. Drawing on the approaches taken by tribunals, practitioners, and academics to date, I identify three possible factors for tribunals to consider sequentially:

136. See UNCLOS, *supra* note 38, art. 282.

137. Of course, this transfer is only effective when the party facing Greece has also conferred jurisdiction over the relevant issues to the ECJ. See Part II.A.

138. See Inga Daukšienė, *Recognition of Jurisdiction of the Court of Justice of the European Union in International Courts*, 19 JURISPRUDENCIJA 459 (2012).

A. *The Existence and Status of Proceedings Elsewhere*

First, when an international court receives an application instituting proceedings over a dispute that is already being decided in another court, it should suspend proceedings until the first has arrived at a final decision.¹³⁹ We have seen how a failure to suspend proceedings creates a problematic context in the *MOX Plant* cases: The ECJ did not wait until other forums arrived at a decision; instead, it sanctioned Ireland while the other proceedings were active. In contrast, tribunals not only focus on the unity of remedies—one process, one judgment—but also minimize the risk of parallel proceedings instituted for the mere purpose of increasing litigants’ chances to survive jurisdictional objections, which are manifestly abusive.

The domestic concept of estoppel should play a powerful role here; *lis pendens* and *res judicata* each bar a second litigation whenever the “parties” and the “matter in dispute” in the two proceedings are substantially identical.¹⁴⁰ According to the ILA’s Recommendations, where parallel proceedings have been commenced before one tribunal and are pending before another, the later tribunal should decline jurisdiction or stay the current proceedings, “in whole or in part, and on such conditions as it sees fit, for such duration as it sees fit.”¹⁴¹ As discussed below, there may be an exception when the relief available to the requesting parties in another tribunal would be inadequate. Contemporary jurisprudence¹⁴² and legal commen-

139. W. Michael Reisman, Professor of International Law, Shabati Rosenne Memorial Lecture: Parallel Proceedings in International Law (Dec. 5, 2019).

140. See, e.g., Polish Postal Service in Danzig, Advisory Opinion, 1925 P.C.I.J. (ser. B) No. 11, at 30 (May 16). (stating that “the doctrine of *res judicata* [applies when] not only the Parties but also the matter in dispute [are] the same”); China Navigation Co. Ltd. (U.K.) v. U.S. (The *Newchwang* Case), 6 R. Int’l Arb. Awards 64, 65 (1921) (“It is a well-established rule of law that the doctrine of *res judicata* applies only where there is identity of the parties and of the question at issue.”). The requirements for *lis pendens* and *res judicata* are largely the same. See, e.g., Pedro Martinez-Fraga & Harout Jack Samra, *The Role of Precedent in Defining Res Judicata in Investor-State Arbitration*, 32 NW. J. INT’L L. & BUS. 419, n.49 (2012) (“Though conceptually similar to *res judicata*, *lis pendens* applies when the [competing] proceedings are ongoing. *Res judicata*, in contrast, relates to the binding and preclusive effects of completed proceedings.”).

141. Filip De Ly & Audley Sheppard, *ILA Recommendations on Lis Pendens and Res Judicata and Arbitration*, 25 ARB. INT’L 83, Recommendation 5 (2009). In situations where a full decision has not been rendered on the merits (e.g., when the prior forum declined jurisdiction, and the case was never heard at a merits phase), I am not suggesting that litigants should be barred from pursuing further litigation of their claims. Only decisions on the merits may become *res judicata* in a majority of domestic jurisdictions. See K.R. HANDLEY & SPENCER BOWER, *RES JUDICATA* (2009).

142. See *CME Czech Republic B.V. (Neth.) v. The Czech Republic*, Legal Opinion Prepared by Christoph Schreuer and August Reinisch, UNCITRAL Arb. Proceedings, ¶ 63 (June 20, 2002) (“It has been recognized that if too restrictive criteria of identity with regard to the “object,” the “ground,” and “facts” of different cases are used, the doctrine of *res judicata* would rarely apply. This has led international courts and tribunals to refrain from an overly formalistic approach vis-à-vis the question of the identity of issues.”).

tary¹⁴³ make clear that these requirements must be interpreted flexibly, so as not to thwart justice in an international legal framework increasingly characterized by overlapping jurisdictions. As Professor Reinisch notes:

[the] shared main purposes [of *lis pendens* and *res judicata*] of preventing costly parallel litigation, avoiding conflicting judgements and protecting parties from oppressive litigation tactics will be achieved in a world of expanded dispute settlement opportunities only if the two principles are applied in a fashion transcending strict formalism. Instead of rigid identity tests, an overall assessment of the parties involved, the legal grounds invoked, the objects pursued, and the underlying facts will be necessary in order to avoid a multiplication of proceedings with its inherent danger of conflicting outcomes.¹⁴⁴

Although respondents are often the most vocal opponents to duplicate litigation, in practice very few international suits are declared inadmissible on *lis pendens* and *res judicata* grounds. In connection with this proposal, an application must not merely aim to pursue a better outcome than a preceding international decision. Therefore, an application must not be substantially the same as for a matter which has already been examined by a prior international court or has already been submitted to another procedure of international settlement, unless it contains relevant new information, or more suitable remedies in the case of human rights violations. What is of importance is that new facts be put forward in the litigation, or that the requesting party submits that the remedy available at the forum it is addressing now is more adequate in light of the factual nature of the case than the one it sought previously.

B. *The Availability of Meaningful Remedies*

Second, effective legal remedies can serve as expressions of the efficacy of international law itself.¹⁴⁵ Remedies send a signal to parties and other actors that treaty and norm violations will not go unnoticed—that international agreements are not an empty promise, and international law is well equipped to deal with them. Enforceability should thus be a priority in tribunals' decisions on jurisdiction. The international court that receives a dis-

143. See, e.g., Martinez-Fraga & Samra, *supra* note 140, at 433, 450; see also Vaughan Lowe, *Overlapping Jurisdiction in International Tribunals*, 20 AUST. Y.B. INT'L L. 191, 202 (stating that "[t]he doctrine [of *lis pendens*] indicates that if a substantially identical case is already pending before a competent tribunal, the forum may decline to exercise its own jurisdiction.").

144. August Reinisch, *The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes*, 3 L. & PRAC. INT'L CTS. & TRIBUNALS 37 (2004).

145. See generally CHRISTINE GRAY, JUDICIAL REMEDIES IN INTERNATIONAL LAW (1990).

pute for which it can offer no adequate remedies to the parties should immediately identify other competing forums capable of providing them, and stay the proceedings. When possible, the court should point the parties towards the relevant forum in view of the remedies they need.

For example, when the enforceability of a tribunal's final award would not be protected by the New York Convention, it should not accept jurisdiction over the dispute if the same dispute could also be brought before another body that could render an enforceable award, such as the ECJ or the ITLOS.¹⁴⁶ Similarly, when parties seek reparations from other states before UN organs, the ECJ should not be allowed to deny EU Member States access to such forums—and most definitely not to the ICJ—when those forums are uniquely capable of providing enforceable decisions.¹⁴⁷ In cases in which multiple adjudicative bodies could provide effective remedies, it may be important to consider other factors before an international court declines or grants jurisdiction, including the particular international agreements which each party seeks to invoke; the type of outcome needed (*e.g.*, the need for an international judgment instead of an arbitral award); the interest of the parties in confidential proceedings; and the geographical location of the parties or the place where the alleged acts occurred. These issues should then be addressed by the requesting party in its application to institute the proceedings.

C. The Importance and Urgency of the Rights at Stake

Third, in urgent cases, any tribunal that can offer adequate remedies should be allowed to retain jurisdiction—even if this means simultaneous proceedings and even if it undermines the continuity of another court's jurisprudence. Accordingly, the international court that receives a dispute concerning the deprivation of essential treaty rights should proceed with the case, particularly when a request for provisional measures is attached. Requests for provisional measures are very common in law of the sea disputes.¹⁴⁸

146. If the states of which the parties are nationals have not ratified the New York Convention (whose parties promise mutual enforceability of arbitral awards), the enforcement opportunities of an arbitral award will decrease enormously. Therefore, the ECJ or the ITLOS would be in better condition to provide a weightier remedy in this example.

147. For example, the ICJ can issue recommendations to the Security Council so that it takes action in the dispute before the Court. See Heidi K. Hubbard, *Separation of Powers Within the United Nations: A Revised Role for the International Court of Justice*, 38 STAN. L. REV. 165 (1985). Additionally, it can order the parties' compliance with mechanisms established by the United Nations, such as fact-finding missions. See *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria)*, Order, 1996 I.C.J. 13 (Mar. 15) (ordering parties to lend every assistance to the fact-finding mission which the Secretary-General of the United Nations had proposed for the case).

148. See generally SHABTAI ROSENNE, *PROVISIONAL MEASURES IN INTERNATIONAL LAW: THE INTERNATIONAL COURT OF JUSTICE AND THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA* (2004).

But when the urgency of the dispute is not such that time prohibits the court from referring the dispute to a more fitting forum because of the risk of irreparable harm, the court should make such a referral. When evaluating the urgency of ongoing human rights violations, tribunals should weigh the reality of the gravity of the case and the adequacy of the remedy requested.

To offer a contemporary example, within days of The Gambia's application to institute ICJ proceedings against Myanmar,¹⁴⁹ the International Criminal Court launched an investigation into the prosecution of the Rohingya.¹⁵⁰ A separate case was filed in Argentinean courts to prosecute international crimes committed by Aung San Suu Kyi, the State Counsellor of Myanmar, under the theory of universal jurisdiction.¹⁵¹ This third element of jurisdiction determination would allow for all of these cases to proceed simultaneously, in as much as there is a pressing urgency that requires prompt action to protect the rights of the community. Yet in this example, in the absence of an ongoing human rights violation, the ICJ would have been deemed the best sole forum to which to direct this dispute, so that it could further develop its doctrine on genocide.

D. *Questions of Competence-Competence*

It might be questioned whether judges themselves should analyze the jurisprudence of other judicial venues in order to avoid contradiction of international norms. This note argues that they should; such considerations enhance the predictability of international law, especially when the litigants in international disputes lack a shared vision of the overall structure of the jurisdiction of various international courts.

In sum, this proposal serves as an alternative to the exclusive jurisdiction of courts like the ECJ. If tribunals believe that other tribunals will cooperate to refer each other appropriate cases, the fear that their own jurisprudence will be undermined by those tribunals should decrease. Moreover, the consistency of international law should increase when tribunals' decisions are no longer driven by the kinds of collateral issues that influence courts of exclusive jurisdiction.¹⁵² It is also possible that it could give tribu-

149. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Application Instituting Proceedings and Request for the Indication of Provisional Measures, (Nov. 11, 2019, I.C.J.), <https://www.icj-cij.org/files/case-related/178/178-20191111-APP-01-00-EN.pdf>.

150. Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19-27, Decision by Pre-Trial Chamber III (Nov. 14, 2019).

151. Agence France-Presse, *Myanmar's Aung San Suu Kyi Faces First Legal Action Over Rohingya Crisis*, GUARDIAN (Nov. 13, 2019).

152. In this regard, the ICJ has reiterated its approach not to depart from settled jurisprudence unless there are reasons to do so, for example in the *Cameroon v. Nigeria and Burkina Faso/Niger* cases. See *Cameroon v. Nigeria*, Preliminary Objections, Judgment, 1998 I.C.J. 292, ¶ 228 (June 11); *Frontier Dispute (Burk. Faso v. Niger)*, Judgment, 2013 I.C.J. 44 (Apr. 16).

nals more knowledge about the ways in which their jurisprudence affects each other, both favorably or unfavorably, and how it affects the parties.¹⁵³

Moreover, if international courts demand exclusive jurisdiction, parties will lose recourse to the legal remedies available at other forums. To this end, this proposal focuses on the role of the courts to assess and guide the litigants to the forum that will be able to most effectively address their claims and requests. It does not purport to shut the doors of different institutions by requiring parties to litigate in one region or place. Instead, it is aimed at getting the most meaningful remedies in the hands of the parties without the need to litigate at multiple courts. That a case is decided by the ECJ or the ITLOS should not matter as much as that the parties gain redress of their rights.

Will these new recommendations for international courts undercut jurisdiction collisions in view of a more predictable and coherent litigation framework? Compared to the current approach, the proposal seems like a significant improvement. Of course, tribunals adopting this approach will need to make adjustments, both to their jurisdictional rules and in determining when their jurisdiction does collide with that of another court. Tribunals should be capable of communicating with each other.¹⁵⁴ With regard to jurisdiction collisions, tribunals will be in new territory as they have not focused on defining their jurisdictional boundaries in view of other courts before. Yet some related tools, like stays of proceedings will already be familiar to them.

V. CONCLUSION

Forum shopping and consequent jurisdiction collisions are often considered to be a threat to the international legal system. Critics have argued that the ongoing proliferation of dispute settlement procedures could undermine the unity of international law. For instance, the “Montreux Formula” embodied in article 287 of UNCLOS provides a plurality of forums to which Parties can submit their disputes, including the ICJ, the ITLOS, and arbitral tribunals under Annexes VII and VIII. The potential for a collision—of jurisdiction and ultimately of jurisprudence—between these adjudicatory bodies and between these bodies and additional regional international courts, such as the ECJ, easily gives rise to claims that the homogeneity of the international order will be diminished one incompatible

153. I am assuming that a general commitment from tribunals to identify the jurisdiction and capabilities of other international courts will make them more knowledgeable about the ways in which different interpretations of a norm are more likely to be found incompatible with their own.

154. This communication can take different forms, from establishing a system of protected channels for courts and tribunals to communicate to reuniting jurists from different courts in new international organizations or circles aimed at facilitating dialogue among them. In the context of the present proposal, I will express a preference for courts to focus primarily on cross-references in their decisions.

judgment at a time. But there is no material evidence that suggests judicial decentralization has inhibited the coherence of any sector of international law.

Although we must proceed with caution, the growth in the number of international judicial institutions which can settle international disputes should be celebrated. It presents the opportunity to keep jurisprudence current and embrace inter-judicial debates among the world's greatest jurists on the various forms that a single norm can adopt. By contrast, if courts are allowed to build jurisdictional barriers to discourage litigation at other court-houses, we will surely miss out on the vast innovation that comes with the exchange of views on international law. For example, where the ECJ may decide to ignore the dispute settlement systems of UNCLOS, the law of the sea cases it decides will lose the benefit of the customs and jurisprudential doctrines ascribed to the text of the Convention. Competition among international tribunals will always encourage the peaceful settlement of legal disputes. Competition can help make better norms.

Once courts are aware of, and willing to acknowledge the deficiencies in their current stances surrounding jurisdiction collisions, how should they deal with the issue? A more comprehensive and predictable framework is clearly needed, one that informs states, individuals, corporations, non-profit organizations, and international lawyers about the limits of the different institutions' jurisdiction. The answer may lie in adopting the three-part proposal outlined in this note, which requires tribunals to wait before wading into matters currently being litigated elsewhere, but permits tribunals to determine whether to retain a case based on its nature and urgency and the tribunal's own ability to provide remedies.