The Principle of Compétence de la Compétence in International Adjudication and its Role in an Era of Multiplication of Courts and Tribunals

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Chapter 50

The Principle of *Compétence de la Compétence* in International Adjudication and Its Role in an Era of Multiplication of Courts and Tribunals

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In his course at the Hague Academy of International Law dedicated to *The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication*, Michael Reisman painted a panoramic view of what he then called the "inherent limitations on competence."[1] In a characteristic turn of phrase, he states the following:

> When the International Court [of Justice] contemplates the performance of pre- or post-arbitral supervisory roles, it must still consider whether the tasks presented to it are within its competence. The Court, like any arbitration tribunal, is an entity of restricted powers. This means that certain actions that, in a particular case, might be useful to the parties, authorized by the parties, useful to a particular arbitration or useful to the system of arbitration, may nonetheless, lie beyond its own normative boundaries.[2]

This vision of the competence of international courts and tribunals implicitly raises a fundamental principle of law governing the activity of international courts and tribunals, that is, the principle of *compétence de la compétence*. This principle to which Michael Reisman dedicated attention has not attracted much consideration in recent times, despite its importance at a time of ever greater proliferation of courts and tribunals.

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1 W. Michael Reisman, *The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication*, 258 RECUEIL DES COURS 9, 57 (1996).

2 *Id.* (emphasis added).

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The present contribution will first try to sketch the contours of the principle of *compétence de la compétence*. It will then proceed to an assessment of its effects before contextualizing the said principle as an "ordering principle" in the context of the proliferation of international courts and tribunals.

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I. The Contours of the Principle of Compétence de la Compétence

Outlining the principle of *compétence de la compétence* requires grasping its meaning, its applicability, as well as its scope.

A. Grasping Its Meaning

The consensual nature (or basis) of international adjudication[3] has often overshadowed the autonomy of the international judicial function. However, even if consent of the parties lays at the basis of the jurisdiction of international courts and tribunals, it is in fact consent "*as found and determined by*"[4] international courts and tribunals that really matters. This implies a fundamental prerequisite of the autonomy of the international judicial function: *la compétence de la compétence.*

The principle of *compétence de la compétence* refers to the power of an international court or tribunal to define the limits of its own jurisdiction. *Compétence de la compétence* is the process through which an international court or tribunal "regards its jurisdiction as established"[5] or not established. It relates to the competence of an

3 *See, e.g.*, South West Africa (Eth. v. S. Afr.), Preliminary Objections, 1962 I.C.J. 319, 467 (Dec. 21) (joint dissenting opinion of Judges Spender & Fitzmaurice) ("The principle of consent [is an] essential condition for founding international jurisdiction."); *see also* Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda), Jurisdiction of the Court and Admissibility of the Application, 2006 I.C.J. 6, 18 (Feb. 3); Monetary Gold Removed from Rome in 1943 (Italy v. Fr.), Preliminary Question, 1954 I.C.J. 19, 32 (June 15).

As regards international arbitration, see the report of Baron Descamps to the First Hague Peace Conference on Convention No. I of 1899 on the Pacific Settlement of International disputes. The report reads as follows:

> A voluntary system of jurisprudence in origin as well as in jurisdiction, it agrees with the just demands of sovereignty, of which it is only an enlightened exercise. For, if there is no power superior to the States which can force a judge upon them, there is nothing to oppose their selection of an arbitrator by common agreement to settle their disputes, thus preferring a less imperfect means of securing justice to a method more problematical and more burdensome.

2 SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920-2005, at 550 (4th ed. 2006) (quoting the report of Baron Descamps).

4 IBRAHIM F. I. SHIHATA, THE POWER OF THE INTERNATIONAL COURT TO DETERMINE ITS OWN JURISDICTION: COMPÉTENCE DE LA COMPÉTENCE 5 (1965) (emphasis in original).

5 Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.), 1991 I.C.J. 53, 62 (Nov. 12).

international court or tribunal to "act at all"[6] and to "do justice."[7] It also relates to the "power to decide whether it may proceed with the judicial settlement of the particular case."[8] As ingeniously explained by Shihata, *compétence de la compétence*

> deals with a phase of the judicial action which comes even prior to that preliminary phase (substantive jurisdiction); *that is, the power, or the jurisdiction, to decide whether that substantive jurisdiction exists.* This power is obviously incidental and pre-preliminary. It comes next only to the seisin of the Court and is exercised, necessarily, even in the absence of any substantive jurisdiction.[9]

The principle of *compétence de la compétence* is intrinsically linked to the international adjudication phenomenon. It arose in the field of international arbitration in relation to the first commissions established under Articles VI and VII of the treaty between the United States and Great Britain signed on November 19, 1794 (Jay Treaty). The first case in which the principle was proclaimed is the *Betsey Case*. There, the two American commissioners filed separate opinions defending the right of the commissioners to determine their own jurisdiction.[10] It was held that the commissioners "must necessarily decide upon cases being within or without their competency."[11] The principle of *compétence de la compétence* was reaffirmed in the *Sally Case*, but through an arrangement between the commissioners and not through a judiciary pronouncement.[12] Some other cases like the *Isaac Harrington Case* before the United States and Costa Rican Commission emphasized the importance of this principle.[13] However, as pointed out by Shihata, "[u]p to that time there was not one judicial decision that enunciated clearly the principle that arbitral tribunals have the power to determine their jurisdiction."[14] In this context, the *Alabama Arbitration* constitutes a turning point. The arbitrators made a declaration according to which the indirect claims

> do not constitute upon the principles of international law applicable to such cases good foundation for an award of compensation or computation of damages between nations, and

6 Northern Cameroons (Cameroon v. U.K.), 1963 I.C.J. 15, 102 (Dec. 2) (separate opinion of Judge Fitzmaurice).

7 Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, 1954 I.C.J. 47, 57 (July 13).

8 Chittharanjan F. Amerasinghe, Jurisdiction of Specific International Tribunals 22 (2009).

9 Shihata, *supra* note 4, at 7-8 (emphasis added).

10 3 John Bassett Moore, History and Digest of the International Arbitrations to Which the United States Has Been a Party 2278-91, 2291-303 (1898).

11 John Bassett Moore, The Principles of American Diplomacy 312 (1918) (quoting Lord Chancellor Loughborough).

12 3 Moore, *supra* note, at 2305-06, 2306-12.

13 2 *id.* at 1564-65.

14 Shihata, *supra* note 4, at 16.

> should upon such principles be wholly excluded from the consideration of the tribunal in making its award, *even if there were no disagreement between the two governments as to the competency of the tribunal to decide thereon.*[15]

For this reason, the *Alabama Arbitration* is considered by many as having paved the way for the power of arbitrators to determine their own jurisdiction.[16] Here again, Shihata has been rather critical of the importance given to the *Alabama Arbitration* as a precedent in this area, stressing the need for more moderation with regard to its value:

> The *Alabama Arbitration* did not, therefore, create a clear-cut rule as to the *compétence de la compétence*. It emphasized, however, an important fact—the *compétence de la compétence* is a useful device which insures that adjudication will continue even when the parties disagree in the course of the proceedings. ... The assent of the parties was needed to allow the tribunal the power to determine the issue and was necessary to give its declaration a binding character.[17]

The principle of *compétence de la compétence* was then codified in multilateral treaties, and in particular in Article 48 of the Hague Convention No. I of 1899 on the Pacific Settlement of International Disputes and Article 73 the Hague Convention No. II of 1907 on the Pacific Settlement of International Disputes.[18] *Compétence de la compétence* also benefited from a crystallization process in many arbitral proceedings subsequent to the *Alabama* case. Noteworthy are the *Flutie Cases* in which it was stated:

> This Commission has no jurisdiction over any claims other than those owned by citizens of the United States of America. The American citizenship of a claimant must be satisfactorily established as primary requisite to the examination and decision of his claim. Hence the

15 1 MOORE, *supra* note 10, at 646 (emphasis added).

16 *See, e.g.*, Georges Berlia, *Jurisprudence des tribunaux internationaux en ce qui concerne leur compétence*, 88 RECUEIL DES COURS 105, 109 (1955).

17 SHIHATA, *supra* note 4, at 18-19.

18 On these treaties, see THE HAGUE PEACE CONFERENCES OF 1899 AND 1907 AND INTERNATIONAL ARBITRATION (Shabtai Rosenne ed., 2001) [hereinafter PEACE CONFERENCES]. Before the Hague Convention of 1899, the *Institut de droit international* adopted a Draft of rules of procedure of arbitral tribunals in 1875. Article 14 of the Draft reads as follows: "If the doubt concerning the jurisdiction depends on the interpretation of a clause in the *compromis*, the parties are presumed to have given the arbitrators power to settle the question, unless otherwise stipulated." *Projet de règlement pour la procédure arbitrale internationale*, 1 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 126, 130 (1877) (translated by the author).

> Commission, *as the sole judge of its jurisdiction*, must in each case determine for itself the question of such citizenship upon the evidence submitted in that behalf.[19]

The award of the arbitrator in the *Walfish Bay Boundary* case is also noteworthy:

> [I]t is a constant doctrine of public international law that the arbitrator has *powers to settle questions as to his own competence* by interpreting the range of the agreement, submitting to his decision the question in dispute.[20]

The award marks the fact that following the uncertainties which surrounded the principle of *compétence de la compétence* since its early conceptualization at the end of the eighteenth century and during the major part of the nineteenth century, practice in the course of the twentieth century acknowledged the said principle as a "constant doctrine of public international law."[21] There is strong recognition of its importance in the *Rio Grande Irrigation and Land Company* case of 1923.[22]

Perceived as a "constant doctrine of public international law,"[23] *compétence de la compétence* was progressively understood as an inherent power of each international tribunal. The principle of *compétence de la compétence* was thus conferred a specific and explicit status in international arbitration. As such, international arbitration sowed the seeds for a development and recognition of the principle in the entire system of international adjudication. The attitude of the Permanent Court of International Justice (PCIJ), one of the first ever permanent international jurisdictions, towards *compétence de la compétence* is a good illustration of that point. It is noteworthy that the PCIJ Statute expressly provided that "[i]n the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."[24]

Dealing with the competence of a mixed commission in the *Interpretation of the Greco-Turkish Agreement of December 1st, 1926* case, the PCIJ did not hesitate to vest

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19 Flutie Cases (U.S.-Venez.), 9 R. Int'l Arb. Awards 148, 151 (Mixed Cl. Comm'n 1903) (emphasis added).

20 Walfish Bay Boundary (Germany v. Gr. Brit.), 11 R. Int'l Arb. Awards 263, 307 (1911) (emphasis added).

21 *Id.*

22 Rio Grande Irrigation & Land Co., Ltd. (Gr. Brit. v. U.S.), 6 R. Int'l Arb. Awards 131, 135-36 (1923) ("Whatever be the proper construction of the instruments controlling the Tribunal or of the rules of procedure, there is inherent in this and every legal Tribunal a power, and indeed a duty, to entertain, and, in proper cases, to raise for themselves, preliminary points going to their jurisdiction to entertain the claim. Such a power is inseparable from and indispensable to the proper conduct of business. This principle has been laid down and approved as applicable to international arbitral tribunals." (internal citation omitted)).

23 *Id.*

24 Statute of the Permanent Court of International Justice art. 36, Dec.16, 1920, 6 L.N.T.S. 379, 390.

the said commission with the power to determine its own jurisdiction. In the words of the PCIJ:

> It should, in particular, be noted that the article contains no express provision designed to settle the question by whom or when the questions with which the instrument deals may be referred to the President of the Greco-Turkish Mixed Arbitral Tribunal. But from the very silence of the article on this point, *it is possible and natural to deduce that the power to refer a matter to the arbitrator rests with the Mixed Commission when that body finds itself confronted with questions of the nature indicated.* ... [T]hat being so, it is clear—having regard amongst other things to the principle that, *as a general rule, any body possessing jurisdictional powers has the right in the first place itself to determine the extent of its jurisdiction*—that questions affecting the extent of the jurisdiction of the Mixed Commission *must be settled by the Commission itself without action by any other body being necessary.* ... [T]he right of reference can, however, only belong to the Mixed Commission; for *it is a matter of determining the extent of its own competence.*[25]

Albeit prompt in affirming *expressis verbis* the principle of *compétence de la compétence* with respect to other international jurisdictions, the PCIJ was less bold with respect to its own jurisdiction.[26] As an illustration, one can mention the *Peter Pázmány University* case in which the PCIJ examined its *compétence de la compétence* without affirming with a clear wording that it was engaging *de jure* in such a process. The relevant passage of the judgment of the PCIJ reads as follows:

> The Court will examine in the first place *whether it has jurisdiction to entertain the present suit.*[27] ... The answer to the question under consideration depends upon the interpretation of Article X of Agreement II of Paris in relation to the Statute of the Court. ... *There can be no doubt that this Article confers jurisdiction upon the Court.*[28] ... Article X, paragraph I, of the Agreement No. II of Paris confers on the Court jurisdiction as a court of appeal. In the

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25 Interpretation of the Greco-Turkish Agreement of Dec. 1st, 1926 (Final Protocol, Article IV), Advisory Opinion, 1928 P.C.I.J. (ser. B) No. 16, at 20-21 (Aug. 28) (emphasis added).

26 For example, in *Rights of Minorities in Upper Silesia (Minority Schools)* (Germany v. Pol.), 1928 P.C.I.J. (ser. A) No. 15, at 23 (Apr. 26), the Court concluded:

> The Court's position, in regard to jurisdiction, cannot be compared to the position of municipal courts, amongst which jurisdiction is apportioned by the State, either *ratione materiae* or in accordance with a hierarchical system. This division of jurisdiction is, generally speaking, binding upon the Parties and implies an obligation on the part of the Courts *ex officio* to ensure its observance.

Id. This dictum implies that the Court considered itself as not being bound by such a doctrine.

27 Here, the PCIJ is dealing more with the "derived" facet of *compétence de la compétence* (jurisdiction to entertain) than with its "primary" facet which is the power of the Court to determine if it is competent to act at all. This last aspect should be examined in the first place and not the "jurisdiction to entertain the suit" as the PCIJ did. On these points, see *infra*.

28 This is a right formulation and expression of *compétence de la compétence*.

present case, the Court *considers it unnecessary to go into the various problems connected with the question of the nature of the jurisdiction thus conferred upon it.*[29]

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Several judgments of the PCIJ give the impression that the establishment of the jurisdiction of the PCIJ was more governed by a sort of "presumption of incompetence"[30] than by *compétence de la compétence.*[31] For instance, in the *Free Zones of Upper Savoy and the District of Gex* case, the PCIJ stated that it "does not dispute the rule invoked by the French Government, that every Special Agreement, like *every clause conferring jurisdiction upon the Court, must be interpreted strictly.*"[32]

As clearly stated by the jurisprudence of the International Court of Justice (ICJ) and scholars, *compétence de la compétence* is not subject to any "presumption of

29 Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány Univ. v. The State of Czechoslovakia) (Czechoslovakia v. Hung.), 1933 P.C.I.J. (ser. A/B) No. 61, at 220-21 (Dec. 15) (emphasis added).

30 See, for example, the report prepared by Basdevant, Jèze and Politis on behalf of the Republic of Czechoslovakia: "La vérification préalable de la compétence s'impose tout particulièrement aux tribunaux internationaux. La compétence des tribunaux internationaux est beaucoup plus étroite que celle des tribunaux nationaux. Non seulement elle est toujours exceptionnelle, mais encore elle déroge à une règle fondamentale du droit commun international: les litiges internationaux ne sont pas réglés par des tribunaux. ... Aucun tribunal international n'est un tribunal de droit commun. En droit public international, tous les tribunaux internationaux sont exceptionnels. ... Le tribunal international est toujours un tribunal doublement exceptionnel: 1° Il ne peut juger que les affaires mises dans sa compétence; 2° il ne peut juger ces affaires qu'en appliquant les règles de droit qui lui ont été prescrites par le traité ou la convention." Jules Basdevant, Gaston Jèze & Nicolas Politis, *Les principes juridiques sur la compétence des juridictions internationales et, en particulier, des Tribunaux Arbitraux Mixtes organisés par les Traités de paix de Versailles, de Saint-Germain, de Trianon*, 44 REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE EN FRANCE ET À L'ÉTRANGER 45, 46-47 (1927).

31 See on this debate MOHIEDDINE MABROUK, LES EXCEPTIONS DE PROCÉDURE DEVANT LES JURIDICTIONS INTERNATIONALES 295-302 (1966). The author makes a distinction between "*interprétation restrictive de la compétence ou «théorie du doute destructif»*," *id.* at 295, and "*interprétation extensive de la compétence*," *id.* at 299. In the same vein, see the award in *Amco Asia Corp. v. Indonesia*, Decision on Jurisdiction, 23 I.L.M. 351, 359 (Int'l Ctr. Settlement Inv. Disputes 1983) ("[A] convention to arbitrate is not to be construed *restrictively*, nor, as a matter of fact, *broadly* or *liberally*. It is to be construed in a way which leads to find out and to respect the common will of the parties ... Moreover ... any convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences of the commitments the parties may be considered as having reasonably and legitimately envisaged."). *See also* Československa Obchodní Banka, A.S. v. Slovak Republic, Decision of the Tribunal on Objections to Jurisdiction, No. ARB/97/4, ¶ 34 (Int'l Ctr. Settlement Inv. Disputes May 24, 1999).

32 Free Zones of Upper Savoy and the District of Gex (Fr. v. Switz.), 1932 P.C.I.J. No. 46, at 138-39 (June 7) (emphasis added).

incompetence."[33] Rather, *compétence de la competence* is an autonomous principle free of any technical threshold[34] except those thresholds deriving from the inherent[35] or express[36] limitations to the exercise of the judicial function. Such an approach was pursued by Judge Spiropoulos in his Individual Opinion attached to the judgment rendered by the ICJ in the *Ambatielos* case[37] and then by the ICJ in the *Monetary Gold* case, in which the Court categorically and definitively swept away any controversy surrounding the existence of thresholds when dealing with its *compétence de la compétence.*[38]

When dealing with the *compétence de la compétence* of the Council of the International Civil Aviation Organization (ICAO), the ICJ made the following statement:

> The fact that a defence on the merits is cast in a particular form, cannot affect the competence of the tribunal or other organ concerned,—otherwise parties would be in a position themselves to control that competence, which would be inadmissible. As has already been seen in the case of the competence of the Court, so with that of the Council, its competence must depend on the character of the dispute submitted to it and on the issues thus raised—not on those defences on the merits, or other considerations, which would become relevant only after the jurisdictional issues had been settled.[39]

In light of the use of such elements common to the ICJ as well as international arbitration, it can easily be asserted that the principle of *compétence de la compétence* is a principle of law which belongs to the "general principles of procedural law"[40] govern-

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33 Such a vision has been firmly criticized by some scholars. *See, e.g.*, GEORGES SCELLE, LE LITIGE ROUMANO-HONGROIS DEVANT LE CONSEIL DE LA SOCIÉTÉ DES NATIONS (1927).

34 *But see* Rights of Minorities in Upper Silesia (Minority Schools) (Germany v. Pol.), 1928 P.C.I.J. No. 15, at 53-54 (Apr. 26) (dissenting opinion of Judge Huber). Judge Huber considered that *compétence de la compétence* is subject to the raising of preliminary objections by the parties to a dispute. This approach is in contrast with Judge Moore's dissenting opinion in the *Mavrommatis Palestine Concessions* case. Judge Moore quoted from the *Recueil Dalloz* the following passage: "jurisdiction is essentially a question of public order ... even though the Parties be silent, the tribunal, if it finds that competence is lacking, *is bound of its own motion to dismiss the case.*" Mavrommatis Palestine Concessions (Greece v. Gr. Brit.), 1924 P.C.I.J. (ser. A) No. 2, at 58 (Aug. 30) (dissenting opinion of Judge Moore) (emphasis added).

35 *See infra.*

36 *See infra.*

37 Ambatielos Case (Greece v. U.K.), Preliminary Objection, 1952 I.C.J. 28, 55 (July 1) (individual opinion of Judge Spiropoulos).

38 Monetary Gold Removed from Rome in 1943 (Italy v. Fr.), Preliminary Question, 1954 I.C.J. 19, 28 (June 15)

39 Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pak.), 1972 I.C.J. 46, 61 (Aug. 18) (emphasis added).

40 That expression was used for the first time by a Chamber of the ICJ in *Land, Island and Maritime Frontier Dispute* (El Sal. v. Hond.), Application by Nicar. for Permission to Intervene, 1990 I.C.J. 92, 136 (Sept. 13).

ing international courts and tribunals.[41] It is part of the "accepted canons governing matters pertaining to jurisdiction."[42] Nonetheless, one can ask whether the scope of the principle of *compétence de la compétence* is subject to the judicial, the arbitral or the quasi-judicial nature of an international court or tribunal.

B. Grasping Its Applicability

In its judgment in the *Nottebohm Case*, the Court, referring to the principle of *compétence de la compétence* pointed out that

> [t]his principle, which is accepted by general international law in the matter of arbitration, assumes *particular force* when the international tribunal is no longer an arbitral tribunal constituted by virtue of a special agreement between the parties for the purpose of adjudicating on a particular dispute, but is an institution which has been pre-established by an international instrument defining its jurisdiction and regulating its operation, and is, in the present case, the principal judicial organ of the United Nations.[43]

The reasoning of the Court draws a delineation between international permanent jurisdictions like the ICJ and arbitral tribunals when appraising *compétence de la compétence*. According to the Court, *compétence de la compétence* "assumes particular force"[44] in the case of an institution which has been "pre-established by an international instrument defining its jurisdiction and regulating its operation."[45] How and why such a delineation between permanent jurisdictions and arbitral tribunals was ascertained by the ICJ, remains enigmatic and abstract. First of all, the Court itself does not really derive its *compétence de la compétence* from its Statute, but rather from a principle of general international law which has its foundations in international arbitration. This is not open to question. The Court has recognized in the *Nottebohm Case* that its *compétence de la compétence* transcends the ordinary meaning of Article 36, paragraph 6 of the Statute of the ICJ:

> Article 36, paragraph 6, suffices to invest the Court with power to adjudicate on its jurisdiction in the present case. But even if this were not the case, the Court, "whose function is to decide in accordance with international law such disputes as are submitted to it" (Article 38, paragraph 1, of the Statute), should follow in this connection what is laid down by *general international law. The judicial character of the Court and the rule of general international*

41 *See, e.g.*, Salem Case (Egypt v. U.S.), 2 R. Int'l Arb. Awards 1161, 1181 (1932) ("That an arbitral tribunal is authorized to interpret the arbitration agreement (compromise) whereunder it is constituted has been contested in certain cases, *but the prevailing opinion in international practice acknowledges their right to do so.*" (emphasis added)).

42 *ICAO Council*, 1972 I.C.J. at 164 (dissenting opinion of Judge Singh).

43 Nottebohm Case (Liech. v. Guat.), 1953 I.C.J. 111, 119 (Nov. 18) (emphasis added).

44 *Id.*

45 *Id.*

law referred to above are sufficient to establish that the Court is competent to adjudicate on its own jurisdiction in the present case.[46]

Neither the Statute of the ICJ nor the Rules of Court give a "particular force"[47] to *compétence de la compétence*. *Compétence de la compétence* as a principle "which is accepted by general international law"[48] is enshrined in international adjudication practice. Its applicability is not linked to the adjudicatory or the arbitral nature of the international body in charge of dispute settlement. The Court seems to have admitted this reality in the *Legality of the Use of Force* case whereby it endorsed the arguments of the parties according to which *compétence de la compétence* is "reflected"[49] in Article 36, paragraph 6, of the Statute rather than being "based on" or "conferred by"[50] that provision.

Even international dispute settlement bodies like World Trade Organization (WTO) panels and the WTO Appellate Body which cannot be qualified as being arbitral tribunals or purely international permanent jurisdictions like the ICJ or the International Tribunal for the Law of the Sea (ITLOS), had recourse to *compétence de la compétence* within the WTO dispute settlement system as a "widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it."[51] Taking advantage of the silence of the DSU with regard to the nature of the panel function, the Appellate Body has gone even further and declared that "WTO panels have certain powers that are inherent in their *adjudicative function*. Notably, panels have the right to determine whether they have jurisdiction in a given case, as well as to determine the scope of their jurisdiction."[52]

One peculiar example is the application of the principle of *compétence de la compétence* in the framework of Article 25 of the WTO Dispute Settlement Understanding (DSU). This provision provides for arbitration as "an alternative means of dispute settlement [to] facilitate the solution of certain disputes that concern issues that are clearly defined by *both parties*."[53] Article 25 also specifies that "resort to arbitration

46 *Id.* at 120.

47 *Id.* at 119.

48 *Id.*

49 Legality of Use of Force (Serb. & Mont. v. Belg.), 2004 I.C.J. 279, 294 (Dec. 15).

50 For a discussion on the distinction between "reflected" and "conferred," see CHESTER BROWN, A COMMON LAW OF INTERNATIONAL ADJUDICATION 62 (2007).

51 Appellate Body Report, *United States—Anti-Dumping Act of 1916*, ¶ 54 n.30, WT/DS136/AB/R (Aug. 28, 2000).

52 Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, ¶ 45, WT/DS308/AB/R (Mar. 6, 2006) (emphasis added).

53 Understanding on Rules and Procedures Governing the Settlement of Disputes art. 25.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) (emphasis added) [hereinafter DSU]. On arbitration at the WTO, see Laurence Boisson de Chazournes, *Arbitration at the WTO: A* Terra Incognita *to Be Further Explored, in* LAW

shall be subject to *mutual agreement of the parties which shall agree on the procedures to be followed* and that "the parties to the proceeding shall agree to abide by the arbitration award."[54] Most of the main ingredients of arbitration are thus referred to in Article 25 of the DSU. In the first and only case submitted to arbitration under Article 25, *United States—Section 110(5) of the Copyright Act*, and in spite of the agreement of the parties on the issues to be dealt with by the Arbitral Tribunal, the latter decided to raise *ex officio* the issue of the *compétence de la compétence*. It was an unequivocal sign of the will of the tribunal to fully exercise inherent judicial powers:

> The Arbitrators note that this is the first time since the establishment of the WTO that Members have had recourse to arbitration pursuant to Article 25 of the DSU. Whereas the DSB establishes panels or refers matters to other arbitration bodies, Article 25 provides for a different procedure. The parties to this dispute only had to *notify* the DSB of their recourse to arbitration. No decision is required from the DSB for a matter to be referred to arbitration under Article 25. In the absence of a multilateral control over recourse to that provision, it is incumbent on the Arbitrators themselves to ensure that it is applied in accordance with the rules and principles governing the WTO system. As recalled by the Appellate Body in *United States—Anti-Dumping Act of 1916*, it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative. *The Arbitrators believe that this principle applies also to arbitration bodies. In case there be any question as to the jurisdiction of the Arbitrators to deal with this dispute, we provide brief reasons for our conclusion that we do have the necessary jurisd*iction.[55]

Even in instances where the agreement of the parties is reached *ex post facto* with regard to the jurisdiction of an arbitral tribunal, the latter can still decide to determine its *compétence de la compétence*. The award in *Funnekotter v. Zimbabwe* demonstrates such a high degree of due diligence exercised by some arbitral tribunals with regard to their *compétence de la compétence*. In that case, Zimbabwe first objected to the jurisdiction of the tribunal but then withdrew its objection. Nevertheless, for the arbitral tribunal presided over by a former president of the ICJ (Judge Gilbert Guillaume), *compétence de la compétence* had still to be assessed:

> In light of the importance of jurisdiction as a foundation for arbitral decisions and the special competence granted to arbitral tribunals to determine their jurisdiction, the Tribunal considers it important to address, albeit briefly, the question of jurisdiction despite the current agreement between the parties. It is the Tribunal's judgment that jurisdiction under

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IN THE SERVICE OF HUMAN DIGNITY: ESSAYS IN HONOUR OF FLORENTINO FELICIANO 181 (Steve Charnovitz, Debra P. Steger & Peter van den Bossche eds., 2005).

54 DSU, *supra* note 53, art. 25.3 (emphasis added).

55 Award of the Arbitrators, *United States—Section 110(5) of the US Copyright Act*, ¶ 2.1, WT/DS160/ARB25/1 (Nov. 9, 2001) (final emphasis added).

the BIT and ICSID Convention has been established: all three requisites for jurisdiction have been met.[56]

All these elements prove that *compétence de la compétence* finds application in judicial proceedings be they before permanent international judicial or quasi-judicial bodies. In all such fora, the exercise of *compétence de la compétence* is a prerequisite and a condition *sine qua non* to the exercise of any judicial or arbitral function. As suggested by Michael Reisman in its above-mentioned course at The Hague Academy of International Law, "competence" goes with "vocation."[57] Every single international court or tribunal has what may be called a "jurisdictional" vocation, that is, the vocation to exercise its powers within the limits of its competence. In this sense, *compétence de la compétence* is the root of that jurisdictional vocation. Permanent international jurisdictions and international arbitral tribunals are both governed by a similar rationale when it comes to preserving their jurisdictional vocation. Nevertheless, in spite of being a major component of the "common law of international adjudication,"[58] *compétence de la compétence* is not governed by a unique conception when it comes to its scope.

C. Grasping Its Scope

The scope of application of *compétence de la compétence* can be subject to different interpretations. Two of them may be highlighted for the purposes of the present contribution, the one argued by Ibrahim Shihata and the other one by Sir Gerald Fitzmaurice. These analyses reveal the diverse facets of *compétence de la compétence.*

Shihata considers that there are two stages in the exercise of the *compétence de la compétence*: the "power to determine the nature of the controversy"[59] and the "power to determine, through the interpretation of the jurisdictional instruments, whether jurisdiction was accepted by the parties."[60] If these two stages can be seen as being major elements of the process through which an international court or tribunal exercises its *compétence de la compétence,* they do not give a clear picture of the function *per se* of the principle of *compétence de la compétence.* Moreover, such a distinction may lead to confusion.

Shihata asserted that the first stage is "reserved to the parties; only they could decide whether the nature of the controversy is such as could be adjudicated."[61] Then, he proceeded to say "[i]n the second stage, which would come to existence only if

56 Funnekotter v. Zimbabwe, No. ARB/05/6, ¶ 94 (Int'l Ctr. Settlement Inv. Disputes Apr. 22, 2009) (emphasis added), *available at* http://ita.law.uvic.ca/documents/ZimbabweAward.pdf.

57 Reisman, *supra* note 1, at 57.

58 *See* Brown, *supra* note 50, at 62-63.

59 Shihata, *supra* note 4, at 27.

60 *Id.*; *see also id.* at 27-30.

61 *Id.* at 28.

this primary question is answered in the affirmative, the tribunal becomes the judge of its own competence."[62] The chronological approach suggested by Shihata with regard to the exercise of *compétence de la compétence* does not reflect the practice of many international courts and tribunals. First of all, taking into account the practice of the ICJ, it is now well-established that the "power to determine the nature of the controversy"[63] (and even the existence as such of the controversy) lies within the *compétence de la compétence* of the ICJ and is not a matter to be controlled *ab initio* by the parties to the dispute.[64] Then, conceiving a sort of chronological hierarchy between the two-mentioned stages may induce a "chicken or egg dilemma." An international court or tribunal in exercising its *compétence de la compétence* may also decide to look first at the title of jurisdiction, that is, may exercise first what Shihata called its power "to determine, through the interpretation of the jurisdictional instruments, whether jurisdiction was accepted by the parties."[65] Shihata himself recognized that such a hierarchy could be moot when he pointed out that an international court or tribunal exercising its *compétence de la compétence* "will do so primarily *by interpreting the jurisdictional instrument to reach a conclusion on whether the parties have consented to adjudicate before it the dispute at hand.*"[66]

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The "Fitzmaurice interpretation" of the interplay of *compétence de la compétence* gives another perspective. In his Separate Opinion in the *Northern Cameroons* case, Judge Fitzmaurice explained that:

62 *Id.*

63 *Id.* at 27.

64 *See, e.g.*, Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457, 463 (Dec. 20) ("However, while examining these questions of a preliminary character, the Court is entitled, and in some circumstances may be required, to go into other questions which may not be strictly capable of classification as matters of jurisdiction or admissibility but are of such a nature as to require examination in priority to those matters. In this connection, it should be emphasized that the Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated ... Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded. With these considerations in mind, the Court has therefore first to examine a question which it finds to be essentially preliminary, namely the existence of a dispute, for, whether or not the Court has jurisdiction in the present case, the resolution of that question could exert a decisive influence on the continuation of the proceedings.").

65 SHIHATA, *supra* note 4, at 27; *see, e.g.*, Certain Questions of Mutual Assistance in Criminal Matters (Djib. v. Fr.) (Judgment of June 4, 2008), *available at* http://www.icj-cij.org/docket/files/136/14550.pdf.

66 SHIHATA, *supra* note 4, at 28 (emphasis added).

> No doubt there is a duty in principle for an international tribunal to hear and determine the cases it is both seised of, and competent to go into; *and therefore, equally to consider the question of its competence.* But there must be limits to this duty.[67]

> The fact that *jurisdiction is assumed,* does not of course mean that the tribunal concerned necessarily proceeds to hear and determine the *merits,* for it may reject the claim *in limine* on some ground of inadmissibility (non-exhaustion of local remedies, undue delay, operation of a time-limit, etc.). Such a rejection however, on grounds of this kind, *is itself an exercise of jurisdiction.*[68]
>
> The line between questions of jurisdiction (which basically relate to the competence of the Court to act at all) and questions of admissibility, receivability or examinability (which relate to the nature of the claim, or to particular circumstances connected with it) is apt in certain cases to get blurred. ... [T]here have certainly been cases in which a claim has been pronounced to be inadmissible, even though the objections on the score of jurisdiction had not been fully disposed of, so that strictly the court might not be competent to act at all. *Per contra,* there have been cases in which a court has found itself to be competent, yet has refused to proceed any further, on what were essentially grounds of propriety.[69]

What can be deduced from this quotation is that the principle of *compétence de la compétence* operates in two ways. *Primo, compétence de la compétence* consists in the power of an international court or tribunal to decide on its "competence to act at all" (we refer to it as "jurisdiction over jurisdiction"). *Secundo, compétence de la compétence* allows an international court or tribunal to decide on the "admissibility" of a claim (we refer to it as "jurisdiction over admissibility"). Those two facets of the function of the principle of *compétence de la compétence* constitute the core of the power of international courts and tribunals to determine the limits of their own jurisdiction. Refusing to engage in a debate "whether 'competence' and 'jurisdiction,' *incompétence* and *fin de non-recevoir* should invariably and in every connection be regarded as synonymous expressions,"[70] the PCIJ in the *Mavrommatis Palestine Concessions* case stated that

> the preliminary question to be decided is not merely whether the nature and subject of the dispute laid before the Court are such that the Court derives from them jurisdiction to entertain it, but also whether the conditions upon which the exercise of this jurisdiction is dependent [conditions of admissibility] are all fulfilled in the present case.[71]

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67 Northern Cameroons (Cameroon v. U.K.), Preliminary Objections, 1963 I.C.J. 15, 102 (Dec. 2) (separate opinion of Judge Fitzmaurice) (emphasis added).

68 *Id.* at 101 n.2 (first and last emphases added).

69 *Id.* at 102.

70 Mavrommatis Palestine Concessions (Greece v. Gr. Brit.) 1924 P.C.I.J. (ser. A) No. 2, at 10 (Aug. 30).

71 *Id.* (emphasis added).

The two elements of "jurisdiction over jurisdiction" and "jurisdiction over admissibility" are here well defined. They are even better reflected in the following passage of the *Northern Cameroons* case: "It is the act of the Applicant which seises the Court but even if the Court, when seised, *finds that it has jurisdiction, the Court is not compelled in every case to exercise that jurisdiction*."[72] This being said, it is important to stress that from a chronological point of view, "jurisdiction over jurisdiction" is by principle the first step in the exercise of *compétence de la compétence*;[73] then follows "jurisdiction over admissibility." This dynamic has been confirmed by the case-law of the ICJ.[74]

The scope of application of *compétence de la compétence* is not limited to the aspects described above. A third element is also foreseen in the case-law of some international courts and tribunals: "jurisdiction to entertain the merits of a case." In other words, the principle of *compétence de la compétence* vests international courts and tribunals with the power to determine not only if they have competence to act, but also competence to entertain the merits of a case. That facet of *compétence de la compétence* has been highlighted in the *Appeal Relating to the Jurisdiction of the*

72 *Northern Cameroons*, 1963 I.C.J. at 29 (judgment).

73 *But see* South West Africa (Eth. v. S. Afr.), Preliminary Objections, 1962 I.C.J. 319, 574 (Dec. 21) (dissenting opinion of Judge Morelli). "Admissibility can relate only to conditions lack of fulfillment of which prevents a decision on the merits. Within these limits, however, it is quite possible to give the term a very wide meaning so as to refer to all the conditions having that character, *including jurisdiction." Id.* (emphasis added). Here, "jurisdiction over jurisdiction" is seen as a potential component of "jurisdiction over admissibility."

74 See, for example, and by analogy the implications of the distinction between "objections to jurisdiction" and "objections to admissibility." *Oil Platforms* (Iran v. U.S.), 2003 I.C.J. 161, 177 (Nov. 6) ("Objections to admissibility normally take the form of an assertion that, *even if the Court has jurisdiction* and the facts stated by the applicant State are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an examination of the merits." (emphasis added)). Nonetheless, in some specific situations, "*compétence de la compétence* over jurisdiction" may be determined simultaneously with "*compétence de la compétence*." See, for instance, the judgment in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*:

> In the view of the Court, the questions of jurisdiction and admissibility raised by Serbia's preliminary objection *ratione temporis constitute two inseparable issues in the present case.* The first issue is that of the Court's jurisdiction to determine whether breaches of the Genocide Convention were committed in the light of the facts that occurred prior to the date on which the FRY came into existence as a separate State, capable of being a party in its own right to the Convention; this may be regarded as a question of the applicability of the obligations under the Genocide Convention to the FRY before 27 April 1992. The second issue, that of admissibility of the claim in relation to those facts, and involving questions of attribution, concerns the consequences to be drawn with regard to the responsibility of the FRY for those same facts under the general rules of State responsibility.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), ¶ 129 (Judgment of Nov. 18, 2008), *available at* http://www.icj-cij.org/docket/files/118/14891.pdf (emphasis added).

ICAO Council. Under a section of its judgment titled "Jurisdiction of the Council of the ICAO to Entertain the Merits of the Case," the Court argued

> [t]he question is whether the Council is *competent to go into and give a final decision on the merits* of the dispute in respect of which, at the instance of Pakistan, and subject to the present appeal, *it has assumed jurisdiction*.[75]

This pronouncement is of great importance for two main reasons. First, it shows that the determination of the jurisdiction to entertain the merits may be linked to the exercise of the *compétence de la compétence*. But, most of all it underlines that *compétence de la compétence ad definitionem* has as a consequence the determination by an international court or tribunal of its "competence to act" or to quote from the judgment of the Court the ability of an international court or tribunal to "assume[] jurisdiction."[76] This is the primary function of the principle of *compétence de la compétence*. "Jurisdiction over admissibility" and "jurisdiction to entertain the merits" are only components of the derived function of the principle of *compétence de la compétence*.[77] The derived function is what Shihata refers to as the subject matter of the power or the "process of the Court's determination of its substantive jurisdiction."[78]

The dynamic primary/derived function of *compétence de la compétence* is palpable in the award rendered by an arbitral tribunal in the *Case Concerning the Re-evaluation of the German Mark*. The arbitral tribunal depicted the said dynamic in the following terms:

> Though the parties have raised no jurisdictional issue it still remains the responsibility of the Tribunal to determine, *ex officio*, its *competence to act*. Not even an explicit agreement

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75 Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pak.), 1972 I.C.J. 46, 61 (Aug. 18) (emphasis added).

76 *Id.* The primary function of *compétence de la compétence* is what Shihata calls the power in itself to determine jurisdiction. *See* SHIHATA, *supra* note 4, at 12.

77 This is where one could disagree with Sir Gerald Fitzmaurice who seemed to place "jurisdiction over jurisdiction" and "jurisdiction over admissibility" on the same level, that is, both are components of the primary function of *compétence de la compétence*. Indeed, Fitzmaurice said that "jurisdiction over admissibility" "*is itself an exercise of jurisdiction.*" *Northern Cameroons*, 1963 I.C.J. at 101 n.2 (separate opinion of Judge Fitzmaurice) (emphasis added).

78 SHIHATA, *supra* note 4, at 83. Shihata went further by explaining that

> [p]ut in its simplest form the subject matter of the Court's power to determine its jurisdiction, is this jurisdiction itself. To differentiate it from the power (which is a jurisdiction of a more preliminary character), this subject matter will always be referred to as the Court's "substantive jurisdiction." ... On so doing the Court has not always been a mere executor of the will of the parties. It considered, however, such will as the major foundation of its substantive jurisdiction, and, relying on it and on its constituent instrument, built for this jurisdiction a complicated structure that was made possible and became more refined by the continued exercise of the very *compétence de la compétence*.

Id. at 83.

> by the parties could confer on the Tribunal a jurisdiction that is not contemplated by the LDA [London Agreement on German External Debts]. In accordance with the provisions of Article 28(7) of the LDA the *Tribunal itself has the power to decide questions as to its jurisdiction.* In these proceedings the Tribunal is satisfied that all the conditions giving rise to *its authority to act* have been met. ... The Tribunal concludes that *it is seised of jurisdiction.*[79]

The last sentence of the above quoted excerpt says it all. To be or not to be "seised of jurisdiction,"[80] there lies the primary facet of *compétence de la compétence.* The exercise by the arbitral tribunal of its "power to decide questions as to its jurisdiction" or the determination of "its authority to act" is *mutatis mutandis* an exercise of its *compétence de la compétence.* The subsequent determination of the "jurisdiction over admissibility" or/and the jurisdiction to entertain the merits is a step which is generally subject to the prior determination of the "competence to act at all." The award in the *Case Concerning the Reevaluation of the German Mark* is unambiguous on that point:

> The Arbitral Tribunal, in its considered judgment, concludes that it not only has jurisdiction in the dispute before it *but that it can and,* in the circumstances of this case, *must exercise that jurisdiction and deal with the representations made by the Applicants on their merits.* ... We conclude that the *exercise of its jurisdiction* in the matter before the Tribunal and the *adjudication on the merits* on the Applicants' representations are not inconsistent with the *Tribunal's judicial functions.*[81]

The scope of application of the principle of *compétence de la compétence* has revealed its various facets. It is now interesting to look at its *modus operandi* in the context of the multiplication of international courts and tribunals. Indeed, the latter has fostered substantial differentiation in the *modus operandi* of *compétence de la compétence.*

II. Assessing the Effects of Compétence de la Compétence

The assessment of the effects of *compétence de la compétence* has been, and is still, the subject of much discussion.[82] Such controversies are a logical consequence of the

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79 Whether the Reevaluation of the German Mark in 1961 and 1969 Constitutes a Case for Application of the Clause in Article 2(e) of Annex I A of the 1953 Agreement on German External Debts Between Belgium, France, Switzerland, the United Kingdom of Great Britain and Northern Ireland and the United States of America on the One Hand and the Federal Republic of Germany on the Other (Belg. v. F.R.G.), 19 R. Int'l Arb. Awards 67, 87 (Agreement on German External Debts Art. 28 Arbitral Tribunal 1980) (emphasis added).

80 *Id.*

81 *Id.* at 88-90 (emphasis added).

82 On the ICJ, see, for example, AMERASINGHE, *supra* note 8, at 24-33.

various and rather inconsistent pronouncements of international courts and tribunals when dealing with their *compétence de la compétence*. While some international courts like the PCIJ (and to a considerably lesser extent the ICJ)[83] have sometimes been reluctant to decisively affirm their *compétence de la compétence*, others have opted for a broad appreciation of the effect of their *compétence de la compétence*. It suffices here to think about the rather proactive exercise by the Arbitrator of his *compétence de la compétence* in the *Ottoman Public Debt* arbitration.[84] Hence, reviewing the arbitral practice, some authors considered that "[i]t is questionable ... whether the International Court of Justice has power to raise, of its own accord, a question concerning its jurisdiction, where it is not disputed by the parties."[85]

It is not within the purposes of the present contribution to discuss in detail the controversies surrounding the effects of the principle of *compétence de la compétence*. Since the *Alabama Arbitration*, it is undisputable that *compétence de la compétence* has developed and has acquired some specific characteristics depending on the activity and the nature of the various international courts and tribunals. Nowadays, it is permissible to make a distinction between three types of effects that may derive from the exercise of *compétence de la compétence* by international courts and tribunals. Only the practice of a few international courts and tribunals will be analyzed hereinafter. First, attention should be drawn to what may be called the "extensive" effect of *compétence de la compétence*. The main development of such an effect has occurred in the practice of the ICJ. Then, focus will be put on what may be labeled the "restrictive" effect of *compétence de la compétence*. That effect emerged mainly in the context of awards rendered in the framework of the 1966 International Convention for the Settlement of Investment Disputes (ICSID Convention). Finally, the "*sui generis*" effect of *compétence de la compétence* will be highlighted through the experience of the World Trade Organization (WTO)'s Dispute Settlement Body (DSB).

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83 See, for example, *Certain Norwegian Loans* (Fr. v. Nor.), 1957 I.C.J. 9, 27 (July 6), in which the Court refused to examine the validity of the "automatic reservation." For a discussion of this case, see *infra*.

84 Ottoman Public Debt (Belg. Iraq, Palestine, Transjordan, Greece, Italy & Turk.), 1 R. Int'l Arb. Awards 529, 565 (Anglo-Ger. Mixed Arb. Trib. 1925) ("Au cours des débats et avant que soit abordé le fond de la contestation, l'Arbitre, *proprio motu*, a signalé aux Parties le doute et l'hésitation que ... de sa propre compétence quant au point ici en litige, en raison du fait que l'article 47, dont il tient sa mission, ne mentionne pas la Partie B du Tableau, où figurent les avances de la Société des Phares. Des déclarations faites alors par les parties, il résulte que, bien que le point n'ait pas échappé à leur attention. Elles acceptent la compétence de l'Arbitre, laquelle, dans l'esprit du Traité, doit embrasser la Partie B aussi bien que la Partie A du Tableau. L'Arbitre se range à cet avis. Il serait incompréhensible que, voulant réserver aux Etats en cause la garantie du recours à un arbitre contre les décisions du Conseil de la Dette, le Traité l'ait néanmoins exclue à l'égard de la Partie B du Tableau.").

85 John Liddle Simpson & Hazel Fox, International Arbitration 69 n.16 (1959).

A. Measuring Its "Extensive" Effect: The ICJ Model

The "extensive" effect of *compétence de la compétence* is foreseen in the framework of international courts and tribunals the jurisdiction of which is not subject to "explicit limitations." In such fora, *compétence de la compétence* is usually seen as an inherent "right ... and ... power"[86] of any international tribunal or an "inherent requirement[]"[87] to the exercise of the judicial function. Once consent has been given to the jurisdiction of an international court or tribunal, the "extensive" effect of *compétence de la compétence* presupposes that the said court or tribunal has a quasi-unlimited power to determine the limits of its own jurisdiction.[88] No specific or absolute express limitation on the exercise of *compétence de la compétence* is normally provided for in the statutes regulating the activity of these international courts and tribunals. Only the "inherent limitations"[89] of the judicial function may operate to limit the exercise of *compétence de la compétence*.[90]

The main expression of the "extensive" effect of *compétence de la compétence* is the one found in Article 36, paragraph 6 of the Statute of the ICJ, which reads as follows: "In the event of a dispute as to whether the Court has jurisdiction, *the matter shall be settled by the decision of the Court.*"[91] The ICJ has long developed a practice consisting of attributing a positive effect to its *compétence de la compétence* both in contentious

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86 Nottebohm Case (Liech. v. Guat.), Preliminary Objection, 1953 I.C.J. 111, 119 (Nov. 18) ("Since the *Alabama* case, it has been generally recognized, following the earlier precedents, that, in the absence of any agreement to the contrary, an international tribunal has the *right* to decide as to its own jurisdiction and has the *power* to interpret for this purpose the instruments which govern that jurisdiction." (emphasis added)).

87 The Rapporteur of the Convention of 1899 had emphasized the necessity of the principle of *compétence de la compétence*, presented by him as being "of the very essence of the arbitral function and one of the inherent *requirements* for the exercise of this function." PEACE CONFERENCES, *supra* note 18, at 71 (emphasis added).

88 See the famous dictum in the *Nottebohm Case*, 1953 I.C.J. at 122 ("[T]he seising of the Court is one thing, the administration of justice is another."). See also the rather broad perspective of Sir Gerald Fitzmaurice in the *Northern Cameroons* case. Northern Cameroons (Cameroon v. U.K.), Preliminary Objections, 1963 I.C.J. 15, 106 (Dec. 2) (separate opinion of Judge Fitzmaurice).

89 *Northern Cameroons*, 1963 I.C.J. at 29 (judgment).

90 *See id.*

> There are *inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore.* There may thus be an incompatibility between the desires of an applicant, or, indeed, of both parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. *The Court itself, and not the parties, must be the guardian of the Court's judicial integrity.*

Id. (emphasis added).

91 Statute of the International Court of Justice art. 36, ¶ 6, June 26, 1945, 33 U.N.T.S. 993 [hereinafter ICJ Statute] (emphasis added). On this point, see in particular, GEORGES ABI-SAAB, LES EXCEPTIONS PRÉLIMINAIRES DANS LA PROCÉDURE DE LA COUR INTERNATIONALE 38 (1967). *See also* Christian Tomuschat, *Article 36*, *in* THE STATUTE OF THE

and in advisory proceedings. It suffices to recall the passage of the *Admission of a State to the United Nations* case:

> Nowhere is any provision to be found forbidding the Court, "the principal judicial organ of the United Nations", to exercise in regard to Article 4 of the Charter, a multilateral treaty, an interpretative function which falls within the normal exercise of its judicial powers. Accordingly, the Court holds that it is competent ... and considers that there are no reasons why it should decline to answer the question put to it.[92]

One can also think about the *Appeal Relating to the Jurisdiction of the ICAO Council* case in which the Court recognized its power to determine *proprio motu* its own jurisdiction,[93] that is, even if no objection to its jurisdiction is raised by the parties to a dispute and even if such a power does not derive from the text of Article 36, paragraph 6 of the Statute.[94]

INTERNATIONAL COURT OF JUSTICE 589, 643 (Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm eds., 2006).

92 Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948 I.C.J. 57, 61-62 (May 28).

93 Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pak.), 1972 I.C.J. 46, 52 (Aug. 18). The Court concluded:

> It is certainly to be desired that objections to the jurisdiction of the Court should be put forward as preliminary objections for separate decision in advance of the proceedings on the merits. *The Court must however always be satisfied that it has jurisdiction, and must if necessary go into that matter* proprio motu. The real issue raised by the present case was whether, in the event of a party's failure to put forward a jurisdictional objection as a preliminary one, that party might not thereby be held to have acquiesced in the jurisdiction of the Court. However, since the Court considers its jurisdiction to be established irrespective of any consent of Pakistan's on that basis, it will now proceed to consider Pakistan's objections.

Id. (emphasis added). See also, for situations of non-appearance before the ICJ, the following statement of the Court in the *Fisheries Jurisdiction* case:

> It is to be regretted that the Government of Iceland has failed to appear in order to plead the objections to the Court's jurisdiction which it is understood to entertain. *Nevertheless the Court, in accordance with its Statute and its settled jurisprudence, must examine* proprio motu *the question of its own jurisdiction to consider* the Application of the United Kingdom. Furthermore, in the present case the duty of the Court to make this examination *on its own initiative* is reinforced by the terms of Article 53 of the Statute of the Court. According to this provision whenever one of the parties does not appear before the Court, or fails to defend its case, the Court, before finding upon the merits, *must satisfy itself that it has jurisdiction.* ... [T]he Court, in examining its own jurisdiction, will consider those objections which might, in its view, be raised against its jurisdiction.

Fisheries Jurisdiction (U.K. v. Ice.), Jurisdiction of the Court, 1973 I.C.J. 3, 7-8 (Feb. 2) (emphasis added).

94 Statute of the International Court of Justice, *supra* note 91, art. 36(6) ("*In the event of a dispute as to whether the Court has jurisdiction*, the matter shall be settled by the decision of the Court." (emphasis added)).

These approaches of the "extensive" effect of *compétence de la compétence* are in contradiction with the position sustained by some scholars.[95] Moreover, the ICJ itself has in few cases departed from that approach consisting in the conferral of an "extensive" effect to the principle of *compétence de la compétence*. The example which comes directly to mind is the one relating to the *Norwegian Loans* case in which the Court refused to examine the validity of the "automatic reservation" (domestic jurisdiction reservation) contained in the French declaration accepting the compulsory jurisdiction of the Court on the basis of the following reasoning:

> [T]he Court has before it a provision which both parties to the dispute regard as constituting an expression of their common will relating to the competence of the Court. *The Court does not therefore consider that it is called upon to enter into an examination of the reservation in the light of considerations which are not presented by the issues in the proceedings.* The Court, without prejudging the question, gives effect to the reservation as it stands and as the parties recognize it.[96]

That attitude was severely and lengthily criticized by Judge Lauterpacht in his Separate Opinion joined to the judgment in that case. He asserted:

> [I]t is my view that it was not open to the Court to act on that particular reservation. This is so for the reason that I consider it legally impossible for the Court to act in disregard of its Statute which imposes upon it the duty and confers upon it the right to determine its jurisdiction. That right cannot be exercised by a party to the dispute. The Court cannot, in any circumstances, treat as admissible the claim that the parties have accepted its jurisdiction subject to the condition that they, and not the Court, will decide on its jurisdiction. To do so is in my view contrary to Article 36(6) of the Statute which, without any qualification,[97] confers upon the Court the right and imposes upon it the duty to determine its jurisdiction.[98]

More recently, the *Prevention and Punishment of the Crime of Genocide* case has vividly illustrated the "extensive" effect of the *compétence de la compétence* of the ICJ, excluding any possibility for the parties to a dispute to challenge a determination by

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95 *See, e.g.*, Hugh Thirlway, *The Law and Procedure of the International Court of Justice 1960-89* (pt. 9), 69 BRIT. Y.B. INT'L L. 1, 6 (1999) ("When jurisdiction is referred to, it must always be asked, 'jurisdiction to do what?'. Jurisdiction or competence is not, in the sense in which those terms are used in relation to a dispute, a general property vested in the court or tribunal contemplated: it is the power, conferred by the consent of the parties, to make a determination on specified disputed issues which will be binding on the parties because that is what they have consented to.").

96 Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J. 9, 27 (July 6) (emphasis added).

97 The use of the expression "without qualification" by Lauterpacht is another way of describing what we refer to as the "positive" effect of *compétence de la compétence*.

98 *Norwegian Loans*, 1957 I.C.J. at 43 (separate opinion of Judge Lauterpacht) (emphasis added).

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the Court of the extent of its jurisdiction—except through an application for revision. Thus, the ICJ established a bridge between the exercise of its *compétence de la compétence* and the principle of *res judicata:*

> That principle [*res judicata*] signifies that once the Court has made a determination, whether on a matter of the merits of a dispute brought before it, or *on a question of its own jurisdiction, that determination is definitive both for the parties to the case,* in respect of the case (Article 59 of the Statute), and for the Court itself in the context of that case. However fundamental the question of the capacity of States to be parties in cases before the Court may be, *it remains a question to be determined by the Court, in accordance with Article 36, paragraph 6, of the Statute, and once a finding in favour of jurisdiction has been pronounced with the force of* res judicata, it is not open to question or re-examination, except by way of revision under Article 61 of the Statute. There is thus, *as a matter of law,* no possibility that the Court might render "its final decision with respect to a party over which it cannot exercise its judicial function", because the question whether a State is or is not a party subject to the jurisdiction of the Court *is one which is reserved for the sole and authoritative decision of the Court.*[99]

The ICJ went even further in defending its *compétence de la compétence* following the contention of the respondent party according to which reliance on the *res judicata* principle "would justify the Court's *ultra vires* exercise of its judicial functions contrary to the mandatory requirements of the Statute."[100] The Court replied sharply by stating:

> However, the operation of the "mandatory requirements of the Statute" falls to be determined by the Court in each case before it; and once the Court has determined, with the force of *res judicata,* that it has jurisdiction, then for the purposes of that case no question of *ultra vires* action can arise, *the Court having sole competence to determine such matters under the Statute.*[101]

The counterpart for such "extensive" effect of *compétence de la compétence* is the recognition by the ICJ of the principle according to which the Court has to assess its *compétence de la compétence* even if the parties have not raised the issue. This progressive development demonstrates that the "extensive" effect of *compétence de la compétence* also implies that international courts and tribunals may be bound to exercise their power to determine their own jurisdiction irrespective of any consent

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99 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.) (Judgment of Feb. 26, 2007), ¶ 138 (first, second, and last emphases added), *available at* http://www.icj-cij.org/docket/files/91/13685.pdf; *see also* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, 1986 I.C.J. 14, 23 (June 27).

100 *Prevention and Punishment of the Crime of Genocide,* ¶ 139 (internal quotations omitted).

101 *Id.* (emphasis added).

to the parties to a dispute. The following statement of the ICJ in the *Legality of the Use of Force* cases is a clear indication of such trend:

> [I]t is the view of the Court that a distinction has to be made between a question of jurisdiction that relates to the consent of a party and the question of the right of a party to appear before the Court under the requirements of the Statute, which is not a matter of consent. The question is whether *as a matter of law* Serbia and Montenegro was entitled to seise the Court as a party to the Statute at the time when it instituted proceedings in these cases. Since that question is independent of the views or wishes of the Parties, even if they were now to have arrived at a shared view on the point, the Court would not have to accept that view as necessarily the correct one. *The function of the Court to enquire into the matter and reach its own conclusion is thus mandatory upon the Court irrespective of the consent of the parties and is in no way incompatible with the principle that the jurisdiction of the Court depends on consent.*[102]

The same rationale was already endorsed in part by the Iran-U.S. Claims Tribunal in the *Marks v. Iran* case in which the Tribunal stated:

> In this connection, Claimants' argument that Respondent has waived its jurisdictional objections by not raising them is unavailing. Article 21(3) of the Tribunal Rules does not purport to preclude the Tribunal from raising jurisdictional issues *on its own motion*. Moreover, the Claims Settlement Declaration alone delimits the Tribunal's jurisdiction. These jurisdictional boundaries, established by the Governments of the United States of America and the Islamic Republic of Iran in adhering to the Claims Settlement Declaration, are absolute and cannot be waived or modified unilaterally by an arbitrating party or parties. The Tribunal's power to adjudicate claims derives from the Claims Settlement Declaration, *not from the consent of individual parties to cases.*[103]

However, the *Tadić* case is maybe the best illustration of what the "extensive" effect of *compétence de la compétence* entails for an international court or tribunal. The Appeal Chamber of the International Criminal Tribunal for the Former Yugoslavia in a decisive passage declared:

> This power, known as the principle of "*Kompetenz-Kompetenz*" in German or "*la compétence de la compétence*" in French, is part, and indeed a major part, of the incidental or inherent jurisdiction of any judicial or arbitral tribunal, consisting of its "jurisdiction to determine its own jurisdiction". It is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents of those tribunals, although this is often done. ... This is not merely a power in the hands of the tribunal. In international law, where there is no integrated judicial system and where every

102 Legality of Use of Force (Serb. & Mont. v. Belg.), Preliminary Objections, 2004 I.C.J. 279, 295 (Dec. 15) (final emphasis added).

103 Marks v. Iran, 8 Iran-U.S. Cl. Trib. Rep. 290, 296-97 (1985) (emphasis added).

> judicial or arbitral organ needs a specific constitutive instrument defining its jurisdiction, the first obligation of ... any ... judicial body ... is to ascertain its own competence.[104]

The *Tadić* case is not only a good example of the "extensive" effect of *compétence de la compétence*. It also embodies what may be called the "restrictive" effect of *compétence de la compétence*. "Restrictive" effect implies that the *compétence de la compétence* of an international court or tribunal is governed by "explicit limitations" (constitutional limitations). Therefore, when dealing with its *compétence de la compétence*, an international tribunal is not only vested of the right or power to decide of its own jurisdiction, but also to assess the extent of such a right or power. This pattern of "restrictive" effect of *compétence de la compétence* has been recognized straightforwardly by the ICTY in the *Tadić* case:

> It is true that this power [*compétence de la compétence*] can be limited by an express provision in the arbitration agreement or in the constitutive instruments of standing tribunals, though the latter possibility is controversial, particularly where the limitation risks undermining the judicial character or the independence of the Tribunal. But it is absolutely clear that such a limitation, to the extent to which it is admissible, cannot be inferred without an express provision allowing the waiver or the shrinking of such a well-entrenched principle of general international law.[105]

The "restrictive" effect of *compétence de la compétence* is unraveled more specifically in the context of the ICSID system.

B. Assessing Its "Restrictive" Effect: The ICSID Convention Model

Article 41, paragraph 1 of the 1966 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the ICSID Convention) reads as follows: "The Tribunal shall be the judge of its own competence."[106] By contrast to Article 36, paragraph 6 of the Statute of the ICJ, Article 41 refers explicitly to the principle of *compétence de la compétence*. Moreover, Article 41 does not incorporate the expression "*[i]n the event of a dispute as to whether the Court has jurisdiction*"[107] which leaves no doubt as to the power of an ICSID arbitral tribunal to exercise *proprio motu* its *compétence de la compétence*.

What can be termed the "restrictive" effect of *compétence de la compétence* under Article 41 of the ICSID Convention, that is the subjection of such power to consti-

104 Prosecutor v. Tadić, Case No. IT-94-1-AR72, ¶ 18 (Oct. 2, 1995) (internal quotations and citations omitted).

105 *Id.* ¶ 19 (emphasis added).

106 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 41(1), Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

107 ICJ Statute, *supra* note 91 (emphasis added).

tutional requirements or explicit limitations, derives from the necessary reading of Article 41 in conjunction with Article 25 of the ICSID Convention.[108]

Under this provision, the determination by an ICSID tribunal of the extent of its own jurisdiction will be governed by some pre-established criteria like the existence of a legal dispute "arising directly out of an investment."[109] Henceforth, there is no conception of a "general unlimited jurisdiction to decide on its own jurisdiction"[110] when facing for instance clauses such as Article 25 of the ICSID Convention. This is what distinguishes the "extensive" effect of *compétence de la compétence* from its "restrictive" effect. As explained by Schreuer,

> it must be remembered that not all of the Convention's jurisdictional requirements are subject to the parties' disposition. The Convention also contains *objective requirements*. Thus, the existence of a legal dispute arising directly out of an investment is an objective fact which must be ascertained independently of the parties' consent. ... Therefore, the tribunal may rely on a party's failure to protest the non-existence of its consent. *But it cannot rely on the parties when it comes to the Convention's objective requirements.*[111]

The *ratio operandi* of Article 41 of the ICSID Convention has been further developed by an ICSID tribunal in the *Phoenix* case. According to the tribunal:

> Article 41 of the ICSID Convention makes plain that the Tribunal is the judge of the Centre's jurisdiction and its own competence. *In order to determine the existence of its jurisdiction in any given case, an ICSID tribunal has to analyze the fulfillment of the requirements of the Washington Convention, and the requirements of the contract, the national law, the BIT or the multilateral treaty providing for the submission of investment disputes to ICSID arbitration.*[112]

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108 Article 25, paragraph 1 of the ICSID Convention states:

> The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

ICSID Convention, *supra* note 106, art. 25(1).

109 *Id.*

110 AMERASINGHE, *supra* note 8, at 24.

111 CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 535-36 (2001) (emphasis added and internal citations omitted).

112 Phoenix Action, Ltd. v. Czech Republic, No. ARB/06/5, ¶ 52 (Int'l Ctr. Settlement Inv. Disputes Apr. 15, 2009) (emphasis added). The arbitral tribunal further elaborated its reasoning and declared:

> In other words, in order for the Centre to have jurisdiction over a dispute, three—well-known—conditions must be met, according to Article 25, to which one must add a condition resulting from a general principle of law, which is the principle of non retroactivity: first, a condition *ratione personae*: the dispute must oppose a Contracting State and a national of another Contracting State; second, a condition *ratione materiae*: the dispute must

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The "restrictive" effect of *compétence de la compétence* in the ICSID system is as such that if facts on which the jurisdiction of an ICSID tribunal rests are contested between the parties, the said tribunal has to decide on those facts. In other words, an ICSID tribunal cannot limit itself to accepting the facts as alleged by a claimant party. The tribunal must take into account the facts and their interpretation as alleged by the claimant, as well as the facts and their interpretation as alleged by the respondent, and take a decision on their existence and proper interpretation.[113]

The arbitral tribunal in the *Phoenix* case strengthened that assertion by concluding that

> the Tribunal considers that as a general approach, it is correct that factual matters should provisionally be accepted at face value, since the proper time to prove or disprove such facts is during the merits phase. *But when a particular circumstance constitutes a critical element for the establishment of the jurisdiction itself, such fact must be proven, and the Tribunal must take a decision thereon when ruling on its jurisdiction.* In our case, *this means that the Tribunal must ascertain that the prerequisites for its jurisdiction are fulfilled*, and that the facts on which its jurisdiction can be based are proven.[114]

This is properly where the "restrictive" effect of *compétence de la compétence* lies: an international court or tribunal "must ascertain that the *prerequisites for its jurisdiction* are fulfilled."[115] Those prerequisites usually take the form of "inherent limitations" in the context of the "extensive" effect of *compétence de la compétence*. They take the form of "explicit limitations" in the frame of the "restrictive" effect of *compétence de la compétence*.

However, it should also be acknowledged that there is no absolute line of demarcation between the extensive effect of *compétence de la compétence* and its restrictive effect. Even Article 41 depending on the circumstances of a dispute may integrate a sort of balance between those two effects of *compétence de la compétence*. The award rendered in the *Tokios* case allows us to reach such a conclusion:

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be a legal dispute arising directly out of an investment; third, a condition *ratione voluntatis*, *i.e.* the Contracting State and the investor must consent in writing that the dispute be settled through ICSID arbitration; fourth, a condition *ratione temporis*: the ICSID Convention must have been applicable at the relevant time.

Id. ¶ 54.

113 *See* Inceysa Vallisoletana, S.L. v. El Salvador, Decision on Jurisdiction, No. ARB/03/26, 2006 WL 4491473, ¶ 155 (Int'l Ctr. Settlement Inv. Disputes Aug. 2, 2006) ("If, in order to rule on its own competence, the Arbitral Tribunal is obligated to analyze facts and substantive normative provisions that constitute premises for the definition of the scope of the Tribunal's competence, then it has no alternative, but to deal with them."); *see also* Industria Nacional de Alimentos, S.A. v. Peru, Decision on Annulment, No. ARB/03/4, ¶ 17 (Int'l Ctr. Settlement Inv. Disputes Sept. 5 2007) (dissenting opinion of Sir Franklin Berman).

114 *Phoenix Action*, ¶ 64 (emphasis added).

115 *Id.* (emphasis added).

> [I]nvestment agreements confirm that state parties are capable of excluding from the scope of the agreement entities of the other party that are controlled by nationals of third countries or by nationals of the host country. The Ukraine-Lithuania BIT, by contrast, includes no such "denial of benefits" provision with respect to entities controlled by third-country nationals or by nationals of the denying party. We regard the absence of such a provision as a deliberate choice of the Contracting Parties. *In our view, it is not for tribunals to impose limits on the scope of BITs not found in the text, much less limits nowhere evident from the negotiating history. An international tribunal of defined jurisdiction should not reach out to exercise a jurisdiction beyond the borders of the definition* [restrictive effect of *compétence de la compétence*]. *But equally an international tribunal should exercise, and indeed is bound to exercise, the measure of jurisdiction with which it is endowed* [extensive effect of *compétence de la compétence*].[116]

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This being said, the "restrictive" effect of *compétence de la compétence* has a counterpart. It is a "presumption of exhaustion of *compétence de la compétence.*" In other words, once *compétence de la compétence* has been exercised by an international court or tribunal, the power to determine jurisdiction is considered as being exhausted by the said court or tribunal. This scheme of things is the driving factor in the ICSID system. As recognized by the very first ICSID Annulment Committee, a decision by which an ICSID arbitral tribunal determined that its own jurisdiction (*compétence de la compétence*) can be subject to annulment if and only if the tribunal "manifestly" exceeded its powers. To borrow the words of the Decision on Annulment in the *Klöckner v. Cameroon* case:

> *It is neither contestable nor contested that the arbitrators have "the power to determine their own jurisdiction" (la compétence de la compétence)*, subject only to the check of the ad hoc Committee in the case of annulment proceedings provided by the Washington Convention's system. They have exercised this power by interpreting the Protocol of Agreement in itself and with respect to the Management Contract. Even if it is assumed that they thereby exceeded their powers, which remains to be proven, it would, as required by Article 52(1)(b) of the Convention, be necessary that this be "manifest" for the Application to be accepted.[117]

It should also be added that the determination by an ICSID tribunal of its own jurisdiction cannot be reviewed by the International Court of Justice (ICJ). Article 64 of the ICSID Convention provides for a submission to the jurisdiction of the ICJ of disputes concerning the interpretation or application of the ICSID Convention between Contracting States if the dispute is not settled by negotiation. The Executive Director's Report on the ICSID Convention dealing with the jurisdiction of the ICJ under Article 64 states that "the provision does not confer jurisdiction on the Court

116 Tokios Tokelės v. Ukraine, Decision on Jurisdiction, No. ARB/02/18, ¶ 36 (Int'l Ctr. Settlement Inv. Disputes Apr. 29, 2004) (emphasis added).

117 Klöckner Industrie-Anlagen GmbH v. Cameroon, Decision on Annulment, 114 I.L.R. 243, 251-52 (Int'l Ctr. Settlement Inv. Disputes 1985) (emphasis added).

to review the decision of a Conciliation Commission or Arbitral Tribunal *as to its competence* with respect to any dispute before it."[118]

Finally, the other organ—the Secretary-General—dealing with issues of "jurisdiction" under the ICSID Convention does not benefit from the presumption of exhaustion of *compétence de la compétence*. The ICSID arbitral tribunals are the sole beneficiaries of such presumption. Therefore, when the ICSID Secretary-General has found that a dispute is not manifestly outside the ICSID's jurisdiction,[119] such a determination does not preclude an ICSID arbitral tribunal from exercising its *compétence de la compétence*.[120]

This interpretation was stressed in *American Manufacturing & Trading, Inc. v. Zaire* in which the Tribunal declared with regard to the registration of a request:

> The competence of the Tribunal is obviously derived from that of the Centre. ... Nevertheless, this fact does not prevent the Tribunal from examining the competence of ICSID, because, evidently Article 36(3) does not confer upon the Secretary-General of ICSID, responsible for the registration of Request, notably as concerns verification of the competence of the Centre, the task other than a mere obligation of an extremely light control which in the execution does not, in any sense, bind the Tribunal in any way in *the latter's appreciation of its own competence or lack thereof. The Tribunal will still have a number of questions to raise and also to find answers thereto.*[121]

In sum, a number of safeguards are attached to the "restrictive" effect of *compétence de la compétence* under the ICSID system. This is due in particular to the explicit limitations which govern the *compétence de la compétence* of ICSID arbitral tribunals. These tribunals are presumed to fully exercise their *compétence de la compétence* in light of the said explicit limitations and thus—in order to enhance the predictability of the system—it is necessary to guarantee that *compétence de la compétence* against *de novo* reviews or screenings by other arbitral tribunals (for example, ICSID annulment committees) or other international courts.

In the context of other dispute settlement mechanisms, *compétence de la compétence* is characterized by a "*sui generis*" effect. "*Sui generis*" effect combines both inherent limitations and explicit limitations. It entails that an international court or

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118 Int'l Bank for Reconstruction & Development, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, ¶ 45 (Mar. 18, 1965) [hereinafter *Report of the Executive Directors*], *reprinted in* Int'l Ctr. for the Settlement of Inv. Disputes [ICSID], *ICSID Convention, Regulations and Rules*, at 35, 48, ICSID Doc. No. ICSID/15 (Apr. 2006), *available at* http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

119 *See* ICSID Convention, *supra* note 106, art. 36(3) ("The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre.").

120 *See Report of the Executive Directors*, *supra* note 118.

121 Am. Mfg. & Trading, Inc. v. Zaire, 36 I.L.M. 1534, 1542 (Int'l Ctr. Settlement Inv. Disputes 1997) (emphasis added).

tribunal should—or must in some circumstances—refrain from going "beyond its normative boundaries"[122] in exercising its *compétence de la compétence*. The *sui generis* effect of *compétence de la compétence*, although not referred to by statutes and rules governing the functioning of international courts and tribunals, finds a strong reflection in the World Trade Organization's dispute settlement system. 1055

C. A "Sui Generis" *Effect: The WTO's Dispute Settlement Body Model*

Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) reads as follows:

> The dispute settlement system of the WTO is a central element in providing *security and predictability* to the multilateral trading system. The Members recognize that it serves *to preserve the rights and obligations of Members under the covered agreements*, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB *cannot add to or diminish* the rights and obligations provided in the covered agreements.[123]

The wording of the DSU does not refer to "normative boundaries"[124] but to "security and predictability"[125] in the exercise by the panels and/or the Appellate Body of their *compétence de la compétence* in a given dispute. The principle of "not adding to or not diminishing rights and obligations" is another way of expressing such "normative boundaries."[126] Therefore, in the WTO Dispute Settlement System *compétence de la compétence* must be assessed by also keeping in mind the necessity of preserving the balance of rights and obligations negotiated by WTO member states and by the principle of not adding to or diminishing rights and obligations. The *sui generis* effect of *compétence de la compétence* in the DSU is well illustrated in the general statement

122 On that expression, see Reisman, *supra* note 1, at 57.

123 DSU, *supra* note 53, art. 3.2 (emphasis added).

124 Reisman, *supra* note 1, at 57.

125 DSU, *supra* note 53, art. 3.2.

126 In *US—Certain EC Products*, the Appellate Body ruled that the purpose of dispute settlement is only to preserve the rights and obligations of Members:

> [W]e observe that it is certainly not the task of either panels or the Appellate Body to amend the DSU or to adopt interpretations within the meaning of Article IX:2 of the *WTO Agreement*. Only WTO Members have the authority to amend the DSU or to adopt such interpretations. Pursuant to Article 3.2 of the DSU, the task of panels and the Appellate Body in the dispute settlement system of the WTO is "to preserve the rights and obligations of Members under the covered agreements, and to *clarify the existing provisions* of those agreements in accordance with customary rules of interpretation of public international law." ... Determining what the rules and procedures of the DSU ought to be is not our responsibility nor the responsibility of panels; it is clearly the responsibility solely of the Members of the WTO.

Appellate Body Report, *United States—Import Measures on Certain Products from the European Communities*, ¶ 92, WT/DS165/AB/R (Dec. 11, 2000) (emphasis in original).

about WTO rules and the concept of "security and predictability" made by the Appellate Body in *Japan—Alcoholic Beverages II*:

> WTO rules are reliable, comprehensible and enforceable. WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgments in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind. In that way, *we will achieve the "security and predictability" sought for the multilateral trading system by the Members of the WTO through the establishment of the dispute settlement system.*[127]

The *sui generis* effect of *compétence de la compétence* has been even more emphasized in the context of Arbitration under Article 25 of the DSU. In the course of the above-mentioned *United States—Section 110(5) of the Copyright Act* case, the Arbitrators considered that *compétence de la compétence* at the WTO should be exercised with a view to ensuring that the object and purpose of the WTO dispute settlement system is preserved. The following excerpt from their award is illustrative:

> Having regard to the *object of the arbitration* requested by the parties and *the fact that the rights of other Members under the DSU are not affected* by the decision of the European Communities and the United States to seek arbitration under Article 25, the Arbitrators are of the view that, pending further interpretation by the Members, they should declare that they have jurisdiction under Article 25 to determine the level of EC benefits which are being nullified or impaired in this case.[128]

Playing the card of prudence and being conscious of the *sui generis* effect of their *compétence de la compétence*, the Arbitrators inserted a footnote with the purpose of clarifying what they said in the above quoted passage and of pointing out the effect of their *compétence de la compétence*:

> The Arbitrators' recognition of their jurisdiction in this case is *not a unilateral extension of WTO jurisdiction*, since it is dependent on the agreement of the parties to a dispute to have

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127 Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, at 31, WT/DS10/AB/R (Oct. 4, 1996) (emphasis added). See also the position of the Panel in *US—Section 301 Trade Act*:

> Providing security and predictability to the multilateral trading system is another central object and purpose of the system which could be instrumental to achieving the broad objectives of the Preamble. Of all WTO disciplines, the DSU is one of the most important instruments to protect the security and predictability of the multilateral trading system and through it that of the market-place and its different operators. DSU provisions must, thus, be interpreted in the light of this object and purpose and in a manner which would most effectively enhance it. In this respect we are referring not only to preambular language but also to positive law provisions in the DSU itself.

Panel Report, *United States—Sections 301-310 of the Trade Act of 1974*, ¶ 7.75, WT/DS152/R (Dec. 22, 1999).

128 *United States—Section 110(5)*, *supra* note 55, ¶ 2.4 (emphasis added).

> recourse to Article 25 of the DSU. *This decision is without prejudice to the DSU compatibility of the decision of the parties to accept this award as the level of nullification or impairment for the purpose of any further proceedings under Article 22 of the DSU in relation to this case. It is also without prejudice to any interpretation of the provisions of Articles 22 and 25 of the DSU by the Ministerial Conference or the General Council.*[129]

Therefore, by contrast to the "extensive" and the "restrictive" effects of *compétence de la compétence* whereby international courts and tribunals either have a rather extensive interpretation (through the mechanism of inherent limitations) or a more restrictive interpretation (through the mechanism of explicit limitations) of their jurisdiction, the "*sui generis*" effect of *compétence de la compétence* purports to preserve the normative foundations and pillars of a dispute settlement system. Such a situation may lead to extreme "judicial caution"[130] on the part of international courts and tribunals when dealing with their jurisdiction. The *United States—Zeroing* case gives some illustration of the tendency toward judicial caution in the exercise of *compétence de la compétence*. Article 8.7 of the DSU establishes that, whenever there is no agreement between the parties, the ultimate power to determine the composition of the panel rests with the Director-General. In *United States—Zeroing*, the Panel underscored that there is no provision of the DSU that would give it the authority to make a finding or ruling on the provisions of the DSU regarding panel composition contained in Article 8.7. The Panel refrained from ruling on the substance of the claim of the European Communities with respect to its composition. On appeal, the European Communities alleged that the Panel acted inconsistently with the "basic requirements of due process and the full exercise of the judicial function by failing to address properly its claim that the Panel was composed in a manner inconsistent with Articles 8.3 and 21.5 of the DSU."[131] The European Communities submitted that, because panels, and ultimately the Appellate Body, have the authority and the obligation to rule on the correct interpretation of the DSU, defects that could arise during panel composition are subject to judicial review by them. The United States responded that the European Communities' claim on the Panel's composition did not fall within the Panel's jurisdiction and asserted that "an improperly composed panel would not have the authority to make findings on the merits of the European Communities' claims, including on claims related to its own composition."[132]

In a rather prudent manner, the WTO Appellate Body declared:

> On the substance of the European Communities' appeal, we note that, on 28 November 2007, the Director-General was requested to determine the composition of the compliance panel under Article 8.7 of the DSU. In our view, Article 8.7 confers on the Director-General

129 *Id.* ¶ 2.7 n.30.

130 On this term, see HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 75 (1958).

131 Appellate Body Report, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, ¶ 169, WT/DS294/AB/RW (May 14, 2009).

132 *Id.* ¶ 170.

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> the discretion to compose panels, which was properly exercised in this case. We therefore *find* that the Panel did not err *in refraining*, in paragraphs 8.17 and 9.1(a) of the Panel Report, *from making a finding on whether it was improperly composed*. In the light of this conclusion, we do not consider it necessary to address the other arguments made by the parties on this matter.[133]

The WTO dispute settlement system has allowed the development of new trends with regard to *compétence de la compétence*. Since the *Alabama* case, *compétence de la compétence* seemed to be rooted in a sort of "natural law" governing international courts and tribunals. By admitting that *compétence de la compétence* may be subject to new legal dimensions or new legal expressions, many dispute settlement mechanisms—which do not appear *prima facie* as traditional international courts and tribunals[134]—might be able to give new contours to the principle of *compétence de la compétence* in disputes brought under their statutes and their rules of procedure.[135] The contours and effects of the principle of *compétence de la compétence* thus benefit from the multiplication of international courts and tribunals. Then, remains the question of knowing whether *compétence de la compétence* and the phenomenon of proliferation of dispute settlement procedures are tied by a sort of "reciprocal" relationship. The principle of *compétence de la compétence* has clearly evolved and will continue to evolve in this era of multiplication of courts and tribunals. However, the effect as well as the action of *compétence de la compétence* in the rationalization of such a phenomenon—that is, the action of *compétence de la compétence* as an "ordering principle"—still need to be evaluated.

III. Contextualizing *Compétence de la Compétence* in an Era of Proliferation of Courts and Tribunals: An Ordering Principle?

In dealing with principles and rules capable of avoiding jurisdictional overlaps or conflicts between various international courts and tribunals, the principle of *compétence de la compétence* has not garnered much attention. Yuval Shany has, however, in his

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133 *Id.* ¶ 172 (second and third emphases added).

134 *See, e.g.*, Abyei Area (Sudan v. Sudan People's Liberation Movement/Army), Final Award, ¶ 502 (Perm. Ct. Arb. July 22, 2009), *available at* http://www.pca-cpa.org/upload/files/Abyei%20Final%20Award.pdf. The Arbitral tribunal (on which Michael Reisman sat as an arbitrator) considered that

> the fact that the ABC was not an adjudicatory body *strictu sensu* does not mean that it lacked *Kompetenz-Kompetenz*. Moreover, a number of features of the ABC proceedings suggest that the ABC was intentionally endowed with the authority to interpret the provisions of its constitutive instruments, which define the scope of its own competence.

Id.

135 For a discussion of the application of the principle of *compétence de la compétence* in the framework of non-compliance procedures, see Laurence Boisson de Chazournes & Makane Moïse Mbengue, *À propos du caractère juridictionnel de la procédure de non-respect du Protocole de Kyoto*, *in* CHANGEMENTS CLIMATIQUES: LES ENJEUX DU CONTRÔLE INTERNATIONAL 73, 77-85 (Sandrine Maljean-Dubois ed., 2007).

seminal work on *The Competing Jurisdictions of International Courts and Tribunals* focused on one of the aspects of *compétence de la compétence* which is the so-called "principle of comity,"[136] but did not go so far as to refer directly to the principle of *compétence de la compétence* as a competition-regulating principle in international adjudication. Addressing the principle of comity, Shany explains that

> a court or tribunal exercising discretionary jurisdiction ... might be justified in deciding to defer jurisdiction in favour of another judicial body, which is better situated to address the particular dispute at hand and to take into consideration the various rights and interests of the parties before it.[137]

Such an interpretation of comity shows that it may play in some circumstances the same function as the principle of the *compétence de la compétence*. In that sense, it appears better to refer to *compétence de la compétence* as a means of avoiding jurisdictional conflicts since it is enshrined in the *lex lata*, while comity, for the time being, is soft, to say the least, in its legal facets. Shany himself admits that "while a rule of comity is certainly desirable it is far from clear whether such rule can be regarded as part of existing international law."[138]

Furthermore, comity is not *per se* a norm regulating jurisdictional overlaps between international courts and tribunals. It is a "consideration" that may be taken into account in the exercise by an international court or tribunal of its *compétence de la compétence* and not the legal causation through which a court or a tribunal will determine its "competence to act at all." This perception of comity is palpable in the Order of the Arbitral Tribunal constituted under Annex VII of the Convention on the Law of the Sea in the *Mox Plant* case. Here, the Tribunal dealing with its *compétence de la compétence* judged:

> In the circumstances, and bearing in mind *considerations of mutual respect and comity* which should prevail between judicial institutions both of which may be called upon to determine rights and obligations as between two States, the Tribunal considers that it would be inappropriate for it to proceed further with hearing the Parties on the merits of the dispute in the absence of a resolution of the problems referred to.[139]

This being said, considering the principle of *compétence de la compétence* as an ordering principle in a context of multiplication of international courts and tribunals might raise a number of legal problems. In particular, the "stakes are high" when

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136 *See* YUVAL SHANY, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS 260 (2003).

137 *Id.* at 261-62.

138 *Id.*

139 MOX Plant (Ir. v. U.K.), Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures, 42 I.L.M. 1187, ¶ 28 (Perm. Ct. Arb. 2003) (emphasis added), *available at* http://www.pca-cpa.org/upload/files/MOX%20Order%20no3.pdf.

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compétence de la compétence is used by an international court or tribunal to decline to exercise jurisdiction in favor of another court or tribunal in a specific dispute settlement system such as the WTO dispute settlement system. The *Mexico—Soft Drinks* case is illustrative of the difficulties which may arise of such implementation of the principle of *compétence de la compétence*. *In casu*, the question was to determine if a WTO panel could—in light of its *compétence de la compétence*—decline to exercise jurisdiction over a particular dispute in favor of a NAFTA Chapter 20 panel, without diminishing the rights of the complaining WTO Member under the DSU and other WTO agreements. The legitimacy of that question was exacerbated by the pronouncement of the Appellate Body in *Mexico—Corn Syrup*, where it stated that "panels are required to address issues that are put before them by the parties to a dispute."[140] From this quotation, one may doubt whether the power or the discretion of a WTO panel extends to freely deciding to refrain from exercising its jurisdiction even if a panel has an inherent power to establish whether it has jurisdiction and whether a particular matter is within its jurisdiction.[141]

The position of the Panel itself in *Mexico—Soft Drinks* was to consider that it had "no discretion to decide whether or not to exercise its jurisdiction in a case properly before it."[142] Referring to Article 11 of the DSU and to the ruling of the Appellate Body in *Australia—Salmon*,[143] the Panel observed that "the aim of the WTO dispute settlement system is to resolve the matter at issue in particular cases and to secure a positive solution to disputes"[144] and that a panel is required "to address the claims on which a finding is necessary to enable the DSB to make sufficiently precise recommendations or rulings to the parties."[145] From this, the Panel concluded that a WTO panel "would seem therefore not to be in a position to choose freely whether or not to exercise its jurisdiction."[146]

On appeal, Mexico contended that the Panel erred in rejecting Mexico's request that it decline to exercise jurisdiction. Mexico submitted that WTO panels "have certain implied jurisdictional powers that derive from their nature as adjudicative bodies."[147] According to Mexico,

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140 Appellate Body Report, *Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, ¶ 36, WT/DS132/AB/RW (Oct. 22, 2001).

141 For a general discussion of inherent powers at the WTO, see Isabelle Van Damme, *Inherent Powers of and for the WTO Appellate Body* (Ctr. for Trade and Econ. Integration, Working Paper No. 02-2008, 2008), *available at* http://www.graduateinstitute.ch/webdav/site/ctei/shared/CTEI/cteiworkpapers/WPCTEI-InherentPowersAB29Aug.pdf.

142 Panel Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, ¶ 7.18, WT/DS308/R (Oct. 7, 2005).

143 Appellate Body Report, *Australia—Measures Affecting Importation of Salmon*, ¶ 223, WT/DS18/AB/R (Oct. 20, 1998).

144 *Mexico—Soft Drinks*, *supra* note 142, ¶ 7.8.

145 *Id.*

146 *Id.*

147 *Mexico—Soft Drinks*, *supra* note 52, ¶ 42 (quoting Mexico's Appellant's Submission).

> [s]uch powers include the power to refrain from exercising substantive jurisdiction in circumstances where the underlying or predominant elements of a dispute derive from rules of international law under which claims cannot be judicially enforced in the WTO, such as the NAFTA provisions or when one of the disputing parties refuses to take the matter to the appropriate forum.[148]

The Appellate Body decided not to follow Mexico's assertions and rather declared:

> Notably, panels have the right to determine whether they have jurisdiction in a given case, as well as to determine the scope of their jurisdiction. In this regard, the Appellate Body has previously stated that it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it. ... *[I]t does not necessarily follow, however, from the existence of these inherent adjudicative powers that, once jurisdiction has been validly established, WTO panels would have the authority to decline to rule on the entirety of the claims that are before them in a dispute.*[149]

Although it upheld the finding of the Panel, the Appellate Body was careful to make a precision which is of importance for the exercise of *compétence de la compétence* by WTO panels, noting that it had expressed

> no view as to whether there may be other circumstances in which legal impediments could exist that would preclude a panel from ruling on the merits of the claims that are before it. In the present case, Mexico argues that the United States' claims under Article III of the GATT 1994 are inextricably linked to a broader dispute, and that only a NAFTA panel could resolve the dispute as a whole. Nevertheless, Mexico does not take issue with the Panel's finding that "neither the subject matter nor the respective positions of the parties are identical in the dispute under the NAFTA ... and the dispute before us." Mexico also stated that it could not identify a legal basis that would allow it to raise, in a WTO dispute settlement proceeding, the market access claims it is pursuing under the NAFTA. It is furthermore undisputed that no NAFTA panel as yet has decided the "broader dispute" to which Mexico has alluded. Finally, we note that Mexico has expressly stated that the so-called "exclusion clause" of Article 2005.6 of the NAFTA had not been "exercised". We do not express any view on whether a legal impediment to the exercise of a panel's jurisdiction would exist in the event that features such as those mentioned above were present. In any event, we see no legal impediments applicable in this case.[150]

The Appellate Body makes it clear here that in some circumstances, a panel may, in the exercise of its *compétence de la compétence*, decline to "act at all" if another dispute settlement mechanism is more suitable to entertain its jurisdiction. None-

148 *Id.* (internal quotations omitted).

149 *Id.* ¶¶ 45-46 (internal citations and quotations omitted).

150 *Id.* ¶ 54 (emphasis added) (ellipsis in original) (internal citations omitted).

theless, by contrast to the Arbitral Tribunal in the *Mox Plant* case, the Appellate Body is not referring to soft considerations of "comity" but to "legal impediments" ("*obstacles juridiques*" in French) as the core basis of the operation of the principle of *compétence de la compétence* as a competition-regulating principle in international adjudication.[151] For the time being, instances of practice showing acceptance of the principle of *compétence de la compétence* as an ordering principle remains scarce. Even before the reports of the Panel and the Appellate Body in the above-mentioned *Mexico—Soft Drinks* case, a NAFTA Chapter 20 panel in the *Mexico—Broom Corn Brooms* case had indicated how reticent international courts and tribunals can be with respect to the use of the principle of *compétence de la compétence* as a means for regulating jurisdictional conflicts or overlaps. The NAFTA Chapter 20 panel stated that

> [i]t will be recalled that the United States argued that the Panel did not have jurisdiction to adjudicate claims by Mexico based on the obligations of GATT Article XIX and the WTO Agreement on Safeguards—the GATT/WTO obligations that govern the type of global safeguard measure involved in this case. The panel determined that it was not necessary to resolve this preliminary objection, because it was possible to dispose of the issues in dispute under the NAFTA agreement alone. ... It was thus unnecessary for the Panel to make any determination with regard to the preliminary United States objection concerning the Panel's jurisdiction to consider the GATT/WTO provisions referred to in NAFTA Article 802.[152]

Conferring on the principle of *compétence de la compétence* the function of an ordering principle in the galaxy of international courts and tribunals so as to avoid overlaps and conflicts of jurisdiction does not mean in any sense that *compétence de la compétence* precludes a court or tribunal from exercising its supervisory powers over another court when it is given such mandate by its statute. This was clearly recognized by the ICJ in the *Appeal Relating to the Jurisdiction of the ICAO Council* case. One of the parties to the dispute pleaded that the principle of the *compétence de la compétence* made the ICAO Council's jurisdictional decisions conclusive and unappealable.[153] The ICJ replied to that contention in a strong passage, saying:

> Not only do issues of jurisdiction involve questions of law, but these questions may well be as important and complicated as any that arise on the merits,—sometimes more so. They

151 In this context, attention should also be paid to Article 2005.6 of NAFTA which reads as follows: "Once dispute settlement procedures have been initiated under Article 2007 or dispute settlement proceedings have been initiated under the GATT, the forum selected shall be used to the exclusion of the other." North American Free Trade Agreement, art. 2005.6, Dec. 17, 1992, 32 I.L.M. 289, 605.

152 *In re* U.S. Safeguard Action Taken on Broom Corn Brooms from Mex., ¶¶ 49-50 (NAFTA Chapter Twenty Arbitral Tribunal Jan. 30, 1998), *available at* http://www.worldtradelaw.net/nafta20/brooms.pdf.

153 Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pak.), 1972 I.C.J. 46, 53 (Aug. 18).

> may, in the context of such an entity as ICAO, create precedents affecting the position and interests of a large number of States, in a way which no ordinary procedural, interlocutory or other preliminary issue could do. It would indeed be hard to accept the view that even the most routine decisions of the Council on points of the interpretation or application of the Treaties should be automatically appealable, while decisions on jurisdiction, which must *ex hypothesi* involve important general considerations of principle, should not be, despite the drastic effects which ... they are capable of having.[154]

And the Court added:

> Clearly, not only do obvious reasons of convenience call for such exercise as early as possible—in the present case, here and now—but also substantial considerations of principle do so,—for it would be contrary to accepted standards of the good administration of justice to allow an international organ to examine and discuss the merits of a dispute when its competence to do so was not only undetermined but actively challenged. Yet this is precisely what the Court would be allowing if it now held itself not to have jurisdiction to deal with the matter because it could only hear appeals from final decisions of the Council on the merits.[155]

At a time of proliferation of international courts and tribunals, with risks of contradictory judgments as well as risks of forum shopping and of parallel litigation, it appears important to think of legal ways to overcome these risks. The range of practices in terms of forum selection provisions running from exclusivity to non-exclusivity, and the scarcity of jurisdiction-regulating norms addressing multiple proceedings, such as the *lis alibi pendens, electa una via* or res judicata provisions, do not lead one to conclude that there are clear and common jurisdictional-regulating rules.[156] As advocated by Yuval Shany:

> [I]n the future, given the need to strengthen the coherence of the international legal system, new methods ought to be explored in order to unify further the international judiciary and to alleviate procedural problems associated with jurisdictional overlaps, *inter alia*, by introducing additional jurisdiction-regulating rules capable of providing greater levels of coordination and harmonization to the relations between the various international courts and tribunals.[157]

The principle of *compétence de la compétence* should surely be taken into account in the range of new methods capable of alleviating jurisdictional overlaps. In the light of the practice analyzed throughout this contribution, it remains however uncertain

154 *Id.* at 56-57.

155 *Id.* at 57.

156 *See* Laurence Boisson de Chazournes, Book Review, 98 AM. J. INT'L L. 622 (2004).

157 SHANY, *supra* note 136, at 127.

how and when the principle of *compétence de la compétence* will be consecrated by international courts and tribunals as competition-regulating principle.

Nevertheless, one cannot ignore that if the principle of *compétence de la compétence* has not yet effectively rationalized the proliferation of courts and tribunals, the said proliferation has without any doubt influenced the development of the contours and effects of the principle of *compétence de la compétence* in the system of international adjudication. It is not only the law which benefits from different perceptions in the context of the multiplication of international court and tribunals; the fundamental principles governing the procedural law of international courts and tribunals such as *compétence de la compétence* are themselves being rethought through new lenses. Whether these developments are for better or for worse might in the future capture the attention of international lawyers.