

UNITED NATIONS CONVENTION ON LAW OF SEA AS A MIXED TREATY OF EU: A HEADACHE FOR TURKEY?

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Abstract

International agreements and treaties concluded by EU constitute parts of *acquis communautaire*. Therefore Member States are expected to take all the relevant measures to enable EU to fulfil its obligations arising out of the agreements and treaties it concluded. United Nations Convention on Law of Sea (UNCLOS) is a mixed treaty that had to be concluded by EU and all of its Member States jointly as a result of complicated nature of EU's competence. As a mixed treaty of EU, it constitutes a part of *acquis*. Before acceding to EU, candidate states are expected to acquire *acquis*. Turkey has been negotiating to accede to EU. However she is not only a non-party to UNCLOS, but also a persistent objector to its certain provisions due to Aegean Sea dispute with Greece. Turkish perspective to EU membership raises the question whether she is under a legal obligation to ratify UNCLOS to be considered to have acquired *acquis* in its full sense.

Keywords: Mixed Treaty, UNCLOS, EU, Competence, Aegean Sea.

Özet

Avrupa Birliği tarafından akdedilmiş uluslararası anlaşmalar ve andlaşmalar *acquis communautaire* yani AB müktesebatının bir parçasını teşkil etmektedir. AB'nin akdettiği bu anlaşma ve andlaşmalardan doğan yükümlülüklerini yerine getirebilmesi için, üye devletler gerekli tüm tedbirleri almak zorundadırlar. Birleşmiş Milletler Deniz Hukuku Sözleşmesi (BMDHS) gibi bazı uluslararası anlaşmalar, AB'nin yetkisinin karmaşık karakteri nedeniyle, hem AB hem de üye devletler tarafından birlikte akdedilmekte, bu nedenle karma andlaşmalar olarak nitelendirilmektedirler. Karma andlaşmalar da AB müktesebatının bir parçasını teşkil etmektedir. AB üyeliğinin gerçekleşebilmesi için, Türkiye gibi aday devletlerin müktesebatı kabul etmeleri gerekmektedir. Ege Denizi'nde, Yunanistan ile Türkiye arasında mevcudiyetini koruyan hukuki uyuşmazlıklar nedeniyle, Türkiye BMDHS'ne taraf olmamış, hatta bu sözleşmenin bazı hükümleri için ısrarlı redci konumuna gelmiştir. AB üyeliği perspektifi, Türkiye'nin müktesebatı tam

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anlamıyla kabul etmiş sayılması için, BMDHS'ne taraf olma zorunluluğunun olup olmadığı konusunu gündeme getirmektedir.

Anahtar Kelimeler: Karma Andlaşma, BMDHS, AB, Yetki, Ege Denizi.

Introduction

Turkey has established a special relation with European Union (EU) since 1960's, by concluding an association agreement with the (then) European Economic Community (EEC). The association agreement, also called Ankara Agreement, is still in force today and has mainly aimed to achieve economical integration of Turkey and the Community/Union. Ankara Agreement, inspired by the Treaty of Rome, includes not only the provisions regarding the establishment of a customs union between Turkey and the Community/Union, but also the principles governing the free movement of other factors of production (i.e. persons-capital-services). It also has provisions regarding the transportation, competition and agriculture. By enabling the harmonization of laws and the economical policies, the agreement provides Turkey with the opportunity to become a member of the Community/Union. Even though, the agreement does not provide an automatic accession to the Community/EU, it allows gradual integration to the Community/Union system¹. Due to the economic and political changes both in Europe and Turkey, Turkey decided to apply for the membership of three Communities² in accordance with the articles regulated in the treaties of each Community that allowed any European state to join. In other words, instead of waiting for the Ankara Agreement to lead Turkey to European Communities membership gradually, she initiated the relevant proceeding to become a member by applying directly for the membership in 1987³.

In 1999, years after the application of Turkey, European Council decided in Helsinki Summit that, Turkey was a candidate state to join the European Union on the basis of Copenhagen Criteria⁴. Upon the report of Commission confirming that

¹ Article 28 Ankara Agreement states "As soon as the operation of this Agreement has advanced far enough to justify envisaging full acceptance by Turkey of the obligations arising out of the Treaty establishing the Community, the Contracting Parties shall examine the possibility of the accession of Turkey to the Community."

² European Economic Community, European Coal And Steel Community and European Atomic Energy Community.

³ For detailed analysis of reasons regarding Turkish application for full membership to European Communities see S. Rıdvan Karluk, **Avrupa Birliği ve Türkiye**, Istanbul, Beta, 2005, p. 715-719.

⁴ Copenhagen Criteria were first established by the European Council in 1993 and became the preconditions for a European state to begin the membership negotiations with the European Union. Copenhagen Criteria requires the applicant states, to have stabilized institutions to ensure "democracy, the rule of law, human rights and protection of minorities", "a functioning market economy together with the capacity to cope with the competitive pressures and market forces within the Union" and finally "the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union."

Turkey met the Copenhagen Criteria sufficiently, European Council decided in 2004 that the negotiations with Turkey be opened on 3 October 2005⁵. During the negotiations, like any other European States, Turkey is expected to implement EU Law (*Acquis Communautaire*).

Turkey is not only expected to implement EU law but also to improve its relations with the neighbouring states. European Council, in June 2006, asked Turkey “to complete fulfilment of the Copenhagen criteria, including the commitment to good neighbourly relations”⁶. Aegean Sea Dispute is one of the most important obstacles before Turkey in establishing good neighbourhood relations. Aegean Sea Dispute arises from the conflicting claims of Turkey and Greece (a member of EU) over the maritime zones of Aegean Sea.

Even before the negotiations between Turkey and EU began, European Council in Helsinki had emphasized “the principle of peaceful settlement of disputes in accordance with the United Nations Charter” and asked the candidate states “to resolve any outstanding border disputes and other related issues”. According to European Council, the candidate states failing to resolve the border issues should bring the dispute before the International Court of Justice within a reasonable time⁷. Until today, a solution has not been reached between Turkey and Greece. Therefore, Aegean Sea Dispute which is the border dispute between Turkey and Greece is expected to be solved before International Tribunals.

If the issue is brought before an International Tribunal, principles of Law of Sea will be applied. However, the principles of Law of Sea consist mainly of customary law. Even though United Nations Convention on Law of Sea (UNCLOS) signed in 1982, which attempted to codify these principles, not every state is a party to this convention⁸. However some of its provisions that constitute customary

Koen Lenaerts and Piet Van Nuffel, **European Union Law**, London, Sweet & Maxwell, 2011, p. 93.

⁵ BRUSSELS EUROPEAN COUNCIL - 16/17 DECEMBER 2004 - PRESIDENCY CONCLUSIONS, <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/83201.pdf> (last visited 18 July 2012).

⁶ BRUSSELS EUROPEAN COUNCIL - 17 JULY 2006 - PRESIDENCY CONCLUSIONS at 54, <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/90111.pdf> (last visited 18 July 2012).

⁷ HELSINKI EUROPEAN COUNCIL - 10/11 DECEMBER 1999 - PRESIDENCY CONCLUSIONS, at 4. <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/acfa4c.htm> (last visited 18 July 2012).

⁸ Peter Malanczuk, **Akehurst's Modern Introduction to International Law**, New York, Routledge, 1997, p. 173-175. First attempt to codify customary rules on law of sea was United Nations Conference on Law of Sea, which led four Geneva Conventions, namely 1958 Convention on Territorial Sea and Contiguous Zone, 516 UNTS 205; 1958 Convention on High Seas, 450 UNTS 11; 1958 Convention on Fishing and Conservation of the Living Resources of High Seas, 559 UNTS 285; 1958 Convention on Continental Shelf, 499 UNTS

international law are applicable to non-party states unless those states are persistent objector that is to say unless those states have expressly and continuously rejected the rule since the beginning of its evolution⁹.

Greece is a party to UNCLOS. Not only Greece, but also the European Union is a party to UNCLOS. However, due to the Aegean Sea dispute, Turkey refuses to sign and ratify the said convention. She is also a persistent objector to the rules of UNCLOS regarding the delimitation of maritime zones and the islands having maritime zones etc. As EU is also a signatory to UNCLOS, this treaty became an integral part of EU Law. Therefore it is vital to analyze the status of UNCLOS in EU Law in order to determine whether Turkey has to ratify UNCLOS to achieve the full implementation of the *Acquis*.

In this article, reasons behind the Aegean Sea Dispute and the Turkish position regarding the UNCLOS provisions are explained in the first place. As UNCLOS has to be ratified by both EU and Member States as a consequence of extraordinary nature of EU competence, the article also attempts to explain the principles governing EU competence in concluding international agreements. The agreements have to be concluded by EU and Member States jointly, namely the mixed agreements are also focused in the article. Finally the mixed treaty character and the status of UNCLOS will be discussed to determine whether Turkey, as a candidate state, is under an obligation to ratify it in order to achieve the full implementation of *Acquis*.

Aegean Sea Dispute

Aegean Sea is a semi-enclosed sea¹⁰ between mainland Turkey and mainland Greece where many small islands and islets are found. These islands and islets are the main reasons of the dispute between Turkey and Greece. There are many islands over which Greece claims sovereignty even though these islands are natural prolongation of Anatolia and are surrounding western coast of Turkey. Some of those islands were ceded by Greece with international agreements, but Turkey claims sovereignty on some other islands like Kardak/Imia. The sovereignty claims are not the only reason of Aegean Sea Dispute. The islands surrounding Western Anatolia, on which Turkey does not claim sovereignty, constitutes a “wall that

311. However there were some issues which could not be agreed in this conference and new customary rules emerged in time requiring a new convention. The second conference was also unable to meet the expectations. In 1982, the third conference was able to draw a comprehensive convention on law of sea, namely United Nations Convention on Law of Sea, 21 ILM 1261 (1982) which entered into force in 1994. In order to secure the ratification of States like USA, a supplementary agreement was adopted modifying the rules of Convention on deep sea mining.

⁹ *ibid*, 48.

¹⁰ Article 122 UNCLOS defines enclosed or semi-enclosed sea as “a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States”.

closes Anatolia to the Aegean”¹¹. The existence of these Greek islands causes different claims regarding the maritime zones in the eastern Aegean Sea.

Greece has taken the view that the only unresolved issue is the delimitation of continental shelves while Turkey contends that the width of the territorial waters is also an issue. Even though territorial waters of both countries regarding the adjacent coasts have been delimited, there is not such an agreement regarding the delimitation between the opposite coasts of Turkey and Greek islands¹². Breadth of the territorial waters is considered to be the most important issue by Turkey as it is related with navigational freedoms. Greece has declared 6 nautical miles around her islands in Aegean Sea. However she reserved the right to increase the width of the territorial waters up to 12 nautical miles in accordance with the UNCLOS. UNCLOS allows the state parties to declare territorial waters up to 12 nautical miles from the baselines. Turkey objected insistently to such an expansion of the territorial waters around Greek islands, as it would allow the Greek territorial waters to replace high seas in the Southern Aegean Sea limiting the right of navigation of Turkish and other nations’ vessels to the innocent passage¹³.

Issue of continental shelf in Aegean Sea was taken to International Court of Justice in 1976 after both Turkey and Greece attempted to grant permission for oil extraction on the Aegean continental shelf. Greece applied to International Court of Justice unilaterally and asked the court to determine the rules to be applied to the delimitation of continental shelf between Turkish coast and the Greek islands in eastern Aegean Sea. In other words, the issue raised by Greece before the Court, was not related with delimiting the whole of the continental shelf. Instead, Greece argued that delimitation was required for only the part of continental shelf that lied between Turkish coast and Eastern islands as she considered the rest of the continental shelf was under Greek sovereignty¹⁴. Considering the objections raised by Turkey regarding its jurisdiction, International Court of Justice rejected the case stating that it did not have any jurisdiction on the case¹⁵.

As the case was rejected by the Court, the dispute remained unresolved. Based on article 121 of UNCLOS, Greece claims that the islands can have continental shelf as long as they sustain human habitation or economic life. According to Greece, the islands under the Greek sovereignty constitute parts of the

¹¹ Ali Kurumahmut, “opening speech”, *2nd National Symposium On the Aegean Islands*, 2-3 July 2004, Gökçeada-Çanakkale, 1 <<http://www.tudav.org/new/pdfs/2.EgeAdalari.pdf>> (last visited 18 July 2012).

¹² For delimitation of territorial waters in Aegean Sea, see Aydoğan Özman, **Deniz Hukuku I**, Ankara, Turhan Kitabevi, 2006, p. 346-348.

¹³ Jon M. Van Dyke, “An Analysis of the Aegean Dispute Under International Law”, **Ocean Development And International Law**, Volume 36, No I, 2005, p. 83.

¹⁴ Hüseyin Pazarıcı, **Uluslararası Hukuk Dersleri II. Kitap** Ankara, Turhan Kitap Evi, 1999, p. 402-405.

¹⁵ For the detailed analysis on the development of the dispute before the International Court of Justice see Aurelia A. Georgopoulos, “Delimitation of the Continental Shelf in the Aegean Sea”, **Fordham International Law Journal**, Volume 12, No I, 1988, p. 91-97.

Greek territory. Therefore, in order to safeguard the integrity of Greek territory, the continental shelf lying between mainland Greece and Eastern Aegean islands belongs to Greece. In other words, Greece argues that the elongation of Turkish continental shelf towards the west of Eastern Aegean islands means the division of Greek territory with the Turkish territory. Therefore, the continental shelf that is subject to delimitation should be the region between Eastern Aegean islands and Turkish coast. Greece also states that the delimitation of the mentioned region must be done in accordance with the principle of equidistance¹⁶.

On the other hand, Turkey argues that all the conventions and international customary law requires the continental shelf to be delimited with an agreement. In case an agreement cannot be achieved, the delimitation must be done in accordance with the principle of equity considering the special circumstances. According to Turkish view, Aegean Sea is a semi-closed sea with many islands on it, can be considered as a special circumstance. Besides she argues that, continental shelf is a concept based on geographical features. The Eastern Aegean islands are located on the natural prolongation of Turkish territory. Therefore they should not separate continental-shelf.¹⁷

Turkey avoided signing and ratifying UNCLOS, as the convention did not allow any reservations. Even though, some UNCLOS provisions could be interpreted in parallel with the Turkish arguments, it is not clear whether an international Tribunal will do so¹⁸.

In order to determine whether there is a legal obligation for the candidate states to ratify UNCLOS before acquiring the EU membership, the status and the place of international agreements within the EU legal system must be contemplated.

Competence of EU to Conclude International Agreements

As a subject of international law, EU has the legal capacity to conclude international agreements. However, under international law only states have unlimited international personality and therefore unlimited capacity to enter into international obligations. International organizations are generally supposed to have limited capacity under international law as they can act within the limits of their competences granted to them by the member States. Therefore their conclusion of

¹⁶ Gökhan Yaşar Duran and Çağdaş Evrim Ergün, **Uluslararası Hukukta Adalar**, Kocaeli, Çakmak Yayınevi, 2011, p. 250-254.

¹⁷ Hüseyin Pazarıcı, **Uluslararası Hukuk Dersleri II. Kitap**, p. 407.

¹⁸ For Turkish interpretation of UNCLOS and position of Turkey see Aydoğan Özman, **Deniz Hukuku I**, p. 42-50. Turkey claims that the application of UNCLOS provision regarding the width of territorial waters, in the semi-enclosed seas like Aegean Sea, would be contrary to the principle enshrined in article 300 that prohibits the abuse of rights. Turkey also contends that principle of equity foreseen in the articles of UNCLOS regarding the delimitation of continental shelf and exclusive economic zone is applicable also in the delimitation of territorial waters between the adjacent and opposite coasts. Turkey claims that, principle of equity may prevent the application of the UNCLOS provision allowing the islands to have maritime zones.

international agreements beyond their competences is considered to constitute *ultra vires* act¹⁹. EU law reflects this approach. The agreements concluded by EU are acts of the institutions. Those agreements form parts of EU law, therefore the interpretation of their provisions falls within the jurisdiction of Court of Justice of the European Union (CJEU)²⁰. Also, validity of the act by which an institution concluded the international agreement can be challenged before CJEU either by an action for annulment in accordance with article 263 Treaty on Functioning of European Union (TFEU) (ex 230 EC)²¹ or by the preliminary ruling procedure in accordance with article 267 TFEU (ex 234 EC)²². In case the institution acts contrary to the Treaty rules on the competence, CJEU can annul the act by which the international agreement was concluded. In other words, EU can conclude an international agreement, only if it is empowered to do so by the Treaties. Therefore before concluding an international agreement, EU must determine whether it has external competence (competence to conclude international agreements and treaties) on the subject matter of the international agreement.

The external competence of EU is regulated mainly in TFEU. TFEU sometimes expressly grants external competence to the EU on an issue. Union can exercise its explicit external competence even where there are no rules enacted by EU on that issue²⁴. However, EU can conclude an international agreement on an issue even if there is no specific TFEU provision granting the relevant competence

¹⁹ Eva Steinberger, "The WTO Treaty as A Mixed Agreement: Problems with the EC's and the EC Member States' Membership of the WTO", **European Journal of International Law** Volume 17, No 4, 2006, p.840-843. Considering the rights of other parties of the agreement, Steinberger objects to such an approach. She cites articles 27 and 46 of 1986 draft Vienna Convention of the Law of Treaties between States and International Organization or between International Organizations (1986 Vienna Convention). She argues that even though mentioned convention has never entered into force, its articles 27 and 46 are worded same as the articles of the 1969 Vienna Convention of the Law of Treaties between States, 8 ILM 679 (1969) therefore are the mere reflection of international customary law. Article 46 prevents the parties of a treaty to avoid fulfilling its obligations based on the violation of its internal rules regarding competence to conclude the Treaty as long as such violation is not manifest and fundamental.

²⁰ See Case 181/73, *R. & V. Haegeman v Belgian State*, ECR 00449, para 4-6.

²¹ Art. 263 TFEU grants CJEU with the jurisdiction to "review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects *vis-à-vis* third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects *vis-à-vis* third parties."

²² Art. 267 TFEU grants CJEU with the jurisdiction to "give preliminary rulings concerning the interpretation of the Treaties; the validity and interpretation of acts of institutions, bodies, offices or agencies of the Union" upon the request of a tribunal or a court of a Member State, where such interpretation or the assessment of validity of the mentioned acts is necessary for the tribunal or the court of the Member State to give a judgement in the case pending before it.

²³ Koen Lenaerts and Piet Van Nuffel, **European Union Law**, p. 872-873.

²⁴ Koen Lenaerts and Piet Van Nuffel, **European Union Law**, p. 1015.

to it explicitly. EU can conclude such an agreement in accordance with article 216/1 TFEU which codifies the implied competence doctrine. Article 216 does not grant EU open ended competence to conclude international agreements. Instead it sets the limits of the implied competence of EU.

In the absence of an explicit external competence, EU can conclude an international agreement if a legally binding Union act provides the relevant competence or concluding the agreement “is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties (...) or is likely to affect the common rules or alter their scope”. This provision of TFEU is a codification of the Court of Justice of European Union (CJEU) precedent. Therefore, to determine the extent of EU’s implied external competence, the case law of CJEU must be considered.

When the verdict of CJEU is considered in *ERTA*²⁵ case, it can be concluded that, once European Union enacts in a certain area exercising its internal competence, Member States may lose their competence to conclude an agreement in this area. CJEU clarified that, for EU to conclude an international agreement, the relevant competence is not necessarily derived from the Treaty provisions regulating the external competence of EU. According to CJEU, the external competence may also be derived from the measures adopted by EU that exercised its internal competence²⁶. The CJEU verdict in this case is also the source of TFEU provision which says that “concluding the agreement ... is likely to affect common rules or alter their scope”. The case was about whether EU or the Member States should conclude the international agreement on working conditions in international road transport. Before the conclusion of the agreement, EU harmonized the Member States’ legislation on the issue. If Member States had been allowed to conclude the mentioned agreement, the harmonizing rules enacted by EU would have been affected or their scope would have changed. Consequently, Member States would be able to avoid their obligations arising out of secondary Union law by concluding international agreements with the third states²⁷.

Where EU is found to have external competence on a matter, it must be determined whether this external competence is exclusive or shared. When the external competence of EU on a matter is exclusive, Member States are not allowed to enter into any international agreement on that matter. Therefore, EU can conclude the international agreements on its own on that matter. On the other hand, where EU shares an external competence in a field with Member States, both the Member States and EU can conclude an international agreement on that field. In such a case, the conclusion of the agreement may require the joint action of EU and member states.

²⁵ Case C-22/70, *Commission of the European Communities v Council of the European Communities – European Agreement on Road transport*, [1971] ECR 263.

²⁶ *Ibid*, para 16.

²⁷ Koen Lenaerts and Piet Van Nuffel, **European Union Law**, p. 1017.

Article 3/1 TFEU grants the Union exclusive internal competence in a number of areas. These areas are customs union, monetary policy for the Member States whose currency is the euro, common commercial policy, the conservation of marine biological resources under the common fisheries policy and the establishment of the competition rules for the functioning of internal market. However, exclusive external competence has been explicitly provided only in the areas of common commercial policy and monetary policy. In addition to these areas, article 3/2 TFEU grants exclusive competence to EU “in concluding an international agreement when its conclusion is provided for in a legislative act of Union or it is necessary for the Union to exercise its internal competence or insofar as its conclusion may affect common rules or alter their scope”. Considering the wording of article 216 TFEU and article 3 TFEU together with the CJEU case law, it can be concluded that, EU has exclusive external competences only in the areas of common commercial policy, monetary policy and in the areas where it has implied external competences. Consequently, all the explicit external competences, stated in the Treaties other than the ones for common commercial policy and monetary policy, are shared competences of the Union²⁸.

Mixed Agreements of EU

As stated earlier, before concluding an international agreement, EU must be granted external competence on the subject matter of the agreement. Where the subject matter of the agreement falls within the competence of EU exclusively, the agreement can be concluded by EU on its own. However, there are also some agreements that must be concluded by both EU and the Member States jointly. The agreements, which require the joint action of EU and Member States to be concluded, are called mixed agreements. Obligations arising under mixed agreements are divided between EU and the Member States²⁹.

Leal-Arcas mainly underlines three different cases where the conclusion of an international agreement requires the participation of both EU and Member States. The first case is the one where, some of the matters regulated by the international agreement falls within the exclusive competence of EU, while the others fall within competence of Member States. Such an international agreement can theoretically be divided into two separate agreements for one of which EU is responsible while Member States are responsible for the other one. In other words, the obligations arising out of such an agreement can easily be divided between EU and Member States. In the second case, an agreement is concluded as a mixed agreement, if its enforcement, implementation or financing requires the participation of the Member States. In the final case, the matters regulated by the international agreement fall within the shared competence of EU. It may not be possible to divide such an

²⁸ For detailed analysis of Union’s external competences Damian Chalmers et al, **European Union Law**, New York, Cambridge University Press, 2010, p. 637-648.

²⁹ Case law analysis by Paul James Cardwell and Duncan French, “Who Decides? The ECJ’s Judgment on Jurisdiction in Mox Plant Dispute”, **Journal of Environmental Law**, Volume 19, No 1, 2007, p.123.

agreement into two different agreements. Such an agreement may cause uncertainty for the third parties in determining whether EU or Member States should be kept liable for the violations³⁰.

In line with the principle regarding the protection of the other parties' rights, CJEU, in its precedent, emphasized the obligations of Member States to ensure the unity in international representation of EU, where the subject matter of the international agreement to be concluded falls partly in EU competence and partly in Member States competence. In order to ensure the unity in representation of EU, Member States are expected to cooperate with EU in both the conclusion of the agreement and fulfilment of the obligations arising out of it³¹. The same co-operation obligation also exists in the conclusion of an international agreement subject matter of which falls within the shared competence of EU³².

However, CJEU distinguished the co-operation obligation from the question of competence in its opinion regarding the conclusion of Agreement establishing the World Trade Organization (WTO)³³, its annexes General Agreement on Trade in Services (GATS)³⁴ and Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs)³⁵. Commission sought the opinion of CJEU on the ability of EU to conclude those agreements on its own. Commission argued that, recognizing the shared competence of EU in concluding those agreements could undermine the EU's unity of action in the international sphere. After finding that EU shares competence with member states in concluding those agreements, CJEU responded to the Commission's concern, stressing that the problems regarding implementation of an international agreement entered into by EU and Member States jointly and the need to unity of action could not affect the division of competence³⁶. In short, where EU does not have exclusive external competence on a field, the conclusion of an international agreement on that field requires the consents of member states in addition to EU consent.

A subject of international law assumes rights and obligations from provisions of international agreements, if it consented to them. Through the glasses of EU law, where an international agreement is concluded by Member States and EU jointly, EU is considered to have consented to those provisions which fall within its competence. However, through the glasses of international law, a party to an international agreement is considered to have consented to all of its provisions unless it formulates a reservation or the other parties agree to the partial consent³⁷.

³⁰ Rafael Leal-Arcas, "The European Community and Mixed Agreements", **European Foreign Affairs Review**, Volume 6, No 4, 2001, p. 489-92.

³¹ Case C-246/07, *European Commission v Sweden*, [2010] ECR-I 03317, para 73 and 75.

³² Opinion 1/08 [2009] ECR I-11129, para 136.

³³ Agreement Establishing World Trade Organization, 15 April 1994, 33 ILM 1144 (1994).

³⁴ General Agreement on Trade in Services, 15 April 1994, 33 ILM 1167 (1994).

³⁵ Agreement on Trade-related Aspects of Intellectual Property Rights Agreement, 15 April 1994, 33 ILM 1197 (1994).

³⁶ Opinion 1/94 [1994] ECR I-05267, para. 106-107.

³⁷ Eva Steinberger, "The WTO Treaty as A Mixed Agreement: Problems with the EC's and the EC Member States' Membership of the WTO", p. 843.

There are some treaties which allow intergovernmental organizations to consent to only some of their provisions. However, such treaties require the ratification by most of the Member States as a pre-condition for the intergovernmental organization like EU to sign and become a party to them. Some writers define such a situation as “partial mixity” which requires stricter clarifications regarding the division of competence and arrangements for representation³⁸. Some other writers define such an agreement as incomplete mixed agreements. No matter what the definition of such an agreement is, it becomes the integral part of EU law, therefore binding upon all the Member States as they are under an obligation to co-operate with EU to implement EU’s international obligations³⁹. In such a situation, the question arises whether EU law allows some Member States to avoid signing this kind of treaty. As explained, UNCLOS is a mixed treaty concluded by both EU and the Member States. It required most of the Member States to become parties to it, before EU ratification. Can a candidate state like Turkey avoid ratifying UNCLOS before her accession to EU and comply only with the UNCLOS provisions that fall within EU competence?

Unclos as a Mixed Treaty for EU

During the negotiations carried out for UNCLOS, EU (then European Economic Community) had only an observer status. In late 1970’s, granting the status of equal contracting party to EU was objected by many states, as the competence of EU was not clarified sufficiently in its Treaty. Principles regarding the division of powers between Member States and EU were evolving by triggering the fears of dual representation of Member States on some issues and raising the questions about who would be liable for violations of UNCLOS. These concerns and fears were overcome by adding Annex IX to the convention. Annex IX allowed organizations like EU, to which Member States transferred powers regarding the matters regulated by the Convention, to become a party to UNCLOS. An organization like EU could only become a party to the convention if most of its Member States ratified it. Such an organization is also expected to make a declaration specifying the competences transferred to it by its Member States regarding the matters governed by UNCLOS. In its declaration, the organization must specify not only the competences transferred, but also the nature and the extent of those competences⁴⁰.

EU (then European Community) concluded UNCLOS and the Agreement Relating to the Implementation of Part XI by enacting Council Decision 98/392/EC and depositing its instrument of formal confirmation. EU also deposited an

³⁸ Piet Eeckhout, **External Relations of the European Union**, (New York, Oxford University Press 2004), p. 223.

³⁹ Rafael Leal-Arcas, “The European Community and Mixed Agreements”, p. 496.

⁴⁰ Sonja Boelaert-Suominen, “The European Community, the European Court of Justice and the Law of Sea”, **The International Journal of Marine and Coastal Law**, Volume 23, No 4, 2008, p. 663-67.

instrument of declaration in accordance with the provisions of Annex IX specifying its competence for the matters regulated in those agreements⁴¹.

In its declaration regarding its competence, EU clarified that UNCLOS and the Agreement relating to the implementation would apply to the territories in which EU law applied, only on matters for which competences transferred to it by Member States. However, EU emphasized that continuous development in the scope of the competence transferred to it, might require amendments or completion of the declaration. Even though Lisbon Treaty defined the exclusive competence of EU more specifically, it still grants EU shared competence on some areas. As stated earlier, once EU exercises its shared internal competence and regulates a field, Member States' competence to conclude international agreements on that field may be pre-empted, resulting with the exclusive external competence for EU. In other words, as long as the category of shared competence exists within EU law, the scope of EU competences is subject to continuous development.

According to its declaration, Union had exclusive competence on conservation and management of sea fishing resources. Union stated that this competence applied not only to waters under national fisheries jurisdiction but also to high seas. Even though, EU law provided some administrative sanctions, enforcement of administrative and penal sanctions laid within the competence of Member States. The competence regarding flagging and registration of vessels also belonged to Member States. However Member States could exercise those competences respecting Union Law⁴². EC in its declaration listed its competence on parts of convention related with international trade as its exclusive competence by virtue of its commercial and customs policy. Article 3 TFEU kept these areas within the category of exclusive competence.

Declaration of acceptance also specified the matters regulated in the convention which fell within the shared competence of EU. EU has shared competence in the area of fisheries where the matter is not related with the conservation and management of sea fishing sources. EU exemplified research and technological development and development cooperation in this category. EU noted that it had enacted some rules regarding maritime transport, safety of shipping and the prevention of marine pollution, thereby had shared competence as long as the

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See http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#EuropeanCommunityUponsignature (last visited 4 March 2013.)

⁴² In Case C- 221/89, *The Queen v Secretary of State for Transport, ex parte Factortame Ltd and Others*, [1991] ECR-I 3905 UK attempted to prevent Spanish fishermen to have their fishing vessels registered in UK and benefit from British fishing quotas. UK law required the fishing vessels to have British owners to be registered as British vessels and benefit from British quotas. CJEU found that, by requiring the vessels to be owned by British citizens, UK violated EU law on freedom of establishment. This case was a clear indication that, even if an area falls within the exclusive competence of Member States, its exercise may still violate EU law.

provisions of the convention on those matters do not affect the common rules. Once the provision of the convention or the instruments enacted to implement the convention affect the EU rules, the EU is considered to have exclusive competence.

Considering the declaration made by EU regarding its competence, it can be concluded that UNCLOS has characteristics of all three types of mixity mentioned earlier⁴³. UNCLOS regulates areas some of which fall within exclusive competence of EU while some others do not at all. In certain areas regulated by UNCLOS, EU shares competence with Member States. Also there are provisions of UNCLOS implementation of which requires the Member States to exercise their competence, even if those provisions fall within the exclusive competence of EU. For instance, the rules regarding the conservation and management of living marine resources falls within the competence of EU. However, enforcement measures against the vessels violating the rules in this respect can only be taken by Member States⁴⁴. Therefore in order to determine whether EU law requires the candidate states to become a party to UNCLOS, case law of CJEU has to be considered.

CJEU has considered the status of UNCLOS in certain cases. One of those cases was *Intertanko*⁴⁵, where British International Association of Independent Tanker Owners sought to challenge the validity of an EU directive in the light of International Convention for the Prevention of Pollution from Ships (MARPOL)⁴⁶ and UNCLOS. *Intertanko*, applied to High Court of Justice of England and Wales for the judicial review in relation to the implementation of the directive. Court stayed the proceedings and referred questions to CJEU regarding the validity of the directive.

MARPOL was signed and ratified by all the Member States. The validity of EU directive was challenged in the sense that its provisions required Member States to apply the test of serious negligence in determining the liability arisen from the discharging of polluting substances, while MARPOL required stricter conditions. It was also claimed that directive limited the exceptions provided in MARPOL. Besides, directive was deemed to contravene the UNCLOS in the sense that requiring the application of serious negligence test to the discharges of polluting substances in the territorial waters, would violate the right of innocent passage.

CJEU stated that, even if all the Member States were parties to MARPOL, Union could not be bound by this agreement as long as the relevant powers

⁴³ See page 12.

⁴⁴ Rafael Leal-Arcas, "The European Community and Mixed Agreements", p.492.

⁴⁵ Case C- 308/06, *International association of Independent Tank Owners (Intertanko) and others v Secretary of State for Transport*, [2008] ECR-I 04057.

⁴⁶ International Convention for the Prevention of Pollution from Ships, 2 November 1973, 12 ILM 1319 (1973). The Convention did not enter into force until Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 17 February 1978, 17 ILM 546 (1978) adopted. The Protocol absorbed the Convention. The term *MARPOL 73/78* is used to refer both the Convention and the Protocol. See <http://www.eisil.org/index.php?t=link_details&id=1997&cat=424> (last visited 6 March 2013).

previously exercised by Member States were not transferred to Union⁴⁷. CJEU stated that while exercising its competence, Union had to observe the international law including the international agreements that codified customary international law even if she is not a party to it. However, CJEU found that relevant provisions of MARPOL were not the rules codifying customary international law⁴⁸. Therefore, the validity of the directive could not be assessed in the light of MARPOL.

Unlike MARPOL, CJEU concluded that UNCLOS formed the integral part of the Union legal order as it was signed and ratified by the Union⁴⁹. However, CJEU decided that where the invalidity of a secondary legislation of EU is pleaded before a national court, based on an international treaty, it could review the validity of that legislation if two conditions were met. First, Union must be bound by those rules of international treaty. Secondly, the content of the provisions must be sufficiently precise and clear⁵⁰. What is meant by the second condition is that the provisions of the treaty must provide rights and freedoms to individuals clearly and without any condition. In other words, the treaty must provide rules intended to apply directly and immediately to individuals. As UNCLOS did not provide the individuals with the independent rights and freedoms, CJEU rejected to assess the validity of EU directive in the light of UNCLOS as well⁵¹.

Article 216/2 TFEU states that “agreements concluded by the Union are binding upon the institutions of the Union and on its Member States”. Therefore, in case institutions that adopt secondary legislation contrary to the international agreements concluded by EU would be violating article 216/2. In *Intertanko*, CJEU rejected to assess the validity of the directive based on an international treaty which was declared to constitute a part of EU law. The reasoning behind the verdict of CJEU was that there were no precise and unconditional rights provided in UNCLOS individuals could invoke. However, CJEU found that UNCLOS aimed mainly to set up a balance between the interests of coastal states and flag states rather than to give rights and protect the interests of the individuals⁵². Therefore, CJEU would not reject such an assessment if the case was brought directly before it under article 263 TFEU (ex 230 EC) instead of through a reference from a national court dealing with the claims of individuals. However, even if the case was brought before the court under article 263, it would be doubtful whether court would find the relevant provision of UNCLOS as binding on Union.

As stated earlier, UNCLOS is a mixed agreement, ratified by both EU and Member States. However, while becoming a party to UNCLOS, EU made a declaration clarifying the areas that fall within its competence. Considering the

⁴⁷ Case C- 308/06, *International association of Independent Tank Owners (Intertanko) and others v Secretary of State for Transport*, para 49.

⁴⁸ *ibid*, para 51.

⁴⁹ *ibid*, para 53.

⁵⁰ *ibid*, para 43-46.

⁵¹ *ibid*, para 53-64.

⁵² *Ibid*, para 58.

provisions of UNCLOS regarding the ratification of intergovernmental organizations, and the declaration of EU, it can be concluded that, EU would only be liable for the violations of UNCLOS provisions which fall in its competence. For the other provisions, Member States would fulfil the obligations and be liable for their violation. In other words, UNCLOS is similar to a document bringing together different agreements to be concluded by different actors. Its provisions regarding the delimitation of territorial waters can be considered as a separate agreement with different parties from those regarding the protection of marine resources. Third parties would keep EU liable for the violations of UNCLOS provisions on protection of marine resources while they would claim the liability of Member States for the violations of provisions on the width of territorial waters. This reasoning may be supported by the statement of CJEU where it concluded that MARPOL was not a part of Union legal order even though it was ratified by all Member States until all relevant competence was transferred to EU. Therefore, the provisions of UNCLOS regarding the delimitation of territorial waters would not be a part of EU law as EU has no competence on this field. This argument is also valid for the rules on delimitation on continental shelves.

Such an interpretation of *Intertanko* is supported by the CJEU decision in *Mox Plant*⁵³ case. The case was brought by Commission against Ireland for failing to fulfil her obligations under Treaties. Mox Plant was designed by a British company BNFL, to recycle plutonium. BNFL submitted an environmental statement for the Mox Plant. Based on the information submitted in the environmental statement, United Kingdom authorized its construction and Commission delivered an opinion that disposal of radioactive wastes by Mox Plant did not cause radioactive contamination in the waters or aerospace or soil of another Member States. However, doubting about the viability of environmental statement provided by BNFL, Ireland objected to the activities of Mox Plant and decided to initiate arbitral proceedings against UK in accordance with the provisions of UNCLOS. Ireland asked the Arbitral Tribunal to declare that UK breached her obligations under UNCLOS regarding the protection of marine environment in Irish Sea. Commission asked Ireland to withdraw her application to arbitration on the ground that the dispute fell in the jurisdiction of CJEU exclusively. Finally Commission initiated proceedings against Ireland before CJEU, claiming that Ireland breached Union law by not respecting the exclusive jurisdiction of CJEU. Commission argued that the dispute required the interpretation of Union law, therefore submitting the dispute to an arbitral tribunal would breach Union law.

In its decision, CJEU clarified its position regarding mixed agreements. After repeating that mixed agreements had the same status of purely Union's agreements within Union legal system, CJEU made a distinction between the provisions of such agreements that fell within EU competence and those that did not. It examined whether the provisions of UNCLOS relied on by Ireland before arbitral tribunal fell within the competence of EU⁵⁴. Considering Council Decision 98/392 by which EU

⁵³ Case C-459/03, *Commission of the European Communities v. Ireland*, [2006] ECR-I 04635.

⁵⁴⁵⁴ *ibid*, para 84-86.

approved UNCLOS, CJEU emphasized that EU could acquire obligations from provisions of UNCLOS that fell within its competence, as the said decision enabled EU to become a party within the limits of its competence⁵⁵. Therefore, it can be concluded that where EU does not have competence on a provision of UNCLOS, it cannot be considered as a party and that provision cannot become an integral part of Union legal order.

However, CJEU distinguished the provisions of UNCLOS that fell within the exclusive competence of EU from the ones which fell within its shared competence. CJEU stated that, where a matter fell within the shared competence of EU, it could conclude an international agreement even if there were no secondary Union rules on the issue. Therefore, in the case of a mixed agreement regulating an area that falls within the shared competence of EU, it must be examined whether EU exercised its external powers. In other words, it must be examined whether EU consented to acquire the obligations arising out of those provisions⁵⁶. CJEU examined the declaration made by EU, to find out whether it exercised its external competence with regard to the UNCLOS provisions on protection of environment. Declaration on Competence states that the transfer of a shared competence by Member States to EU depends on the existence of Union rules on the area. As a result, CJEU found that EU enacted in the areas of marine pollution extensively, therefore exercised its external powers in areas of marine pollution making the relevant provisions of UNCLOS part of EU law⁵⁷. Based on this reasoning, CJEU decided that the provisions of UNCLOS depended on by Ireland before Arbitral Tribunal, were parts of Union legal order, so their interpretation was within the exclusive jurisdiction of CJEU. CJEU also found that UNCLOS did not prevent the Member States to bring the issue before it. Considering all those, CJEU decided that Ireland violated EU law by applying to arbitral tribunal for the interpretation of UNCLOS provisions that constitute a part of EU law.

Conclusion

Negotiating Framework of 3 October 2005 requires Turkey to accept “the rights and obligations attached to the Union system and its institutional framework, known as the *acquis* of the Union”. Negotiating Framework clearly states that *acquis* includes international agreements concluded by EU, EU jointly with its Member States and the international agreements concluded by the Member States among themselves with regard to Union activities.

When the case law of CJEU is considered, it may be concluded that UNCLOS, as a mixed treaty, that is to say a treaty concluded by EU jointly with its Member States, is only partially a part of EU law (*acquis*). As stated above, Council decision to approve UNCLOS, proves that EU can become party to UNCLOS within its competence. CJEU confirmed that EU is party to the provisions of UNCLOS as long

⁵⁵ *ibid*, para 98.

⁵⁶ *ibid*, para 93-96.

⁵⁷ *ibid*, para 105-111.

as they regulate the area that falls within EU competence. According to Declaration on Competence, EU has exclusive competence on conservation and management of sea fishing resources with respect to common fisheries policy. EU also shares competence with Member States on certain matters that are not directly related with conservation and management of sea fishing sources. Where EU shares a competence with its Member States on a matter regulated in UNCLOS, it must be examined whether EU has exercised its external competence on that matter. EU is considered to exercise its external competence, where it has enacted rules relating to the areas regulated by the provisions of UNCLOS. In short, provisions of UNCLOS constitute a part of EU law, as long as they regulate an area that falls within the exclusive competence of EU or the area they regulate falls within the shared competence of EU and EU enacted on it.

Where a mixed agreement is signed by both EU and its Member States, there are two types of obligations for the Member States. The first obligation of the Member States arises out of EU law. Where EU becomes a party to an international agreement, Member States are under obligation in relation to EU, to take all the necessary measures to enable EU to fulfil its obligations arising out of the international agreement. In that case, Member States fail in taking relevant measures, results EU's breach of international agreement. In other words, it is EU whose liability arises towards the other parties of the agreement. In such a case, Member States liability arises from EU law.

With regard to UNCLOS, Member States also possess obligations on the areas that EU does not have competence or its competence is shared but has not been exercised. In that case, failure of Member States to fulfil their obligations does not result the violation by EU but rather, violation by Member States themselves. Consequently, the liability of Member States arises from international law towards the third parties. In other words, Member States cannot be kept liable in accordance with EU law.

Considering the objections of Turkey to the provisions of UNCLOS regarding to the width of territorial waters and the delimitation of sea zones, it must be considered whether these issues fall within the competence of EU. Exclusive competence of EU covers only the area of conservation and management of sea fishing resources both in waters under national jurisdiction and high seas. On some areas (maritime safety and prevention of marine pollution, protection of marine environment, marine environment research and scientific and technological cooperation) where it has shared competence, EU enacted rules making those provisions of UNCLOS a part of EU law. Therefore, Member States have to take necessary measures to enable EU to fulfil its obligations under UNCLOS. EU does not have any competence on the width of territorial waters and the delimitation of sea zones. In other words, EU law does not bring any obligation or restriction on Member States regarding to the extent of territorial waters and the delimitation of the continental-shelf and sea zones.

As stated earlier, even though concluded by EU jointly with its Member States, only some provisions of UNCLOS constitute part of EU law (*acquis*). In other words, only some provisions of UNCLOS create rights and obligations attached to the Union system. Therefore, EU law requires Turkey to implement only these provisions into her legal system. In other words, Turkey can avoid becoming a party to UNCLOS as she does not have to implement the provisions that are not part of EU law.

In case, as a result of evolvement of its competence, EU becomes party to the some other provisions of UNCLOS after the membership of Turkey to EU takes place, those provisions will be automatically binding on Turkey as well, in accordance with Article 216/2 TFEU which states that “agreements concluded by Union are binding on the Union institutions and on Member States”. Also, when EU enacts rules on an area regulated in UNCLOS provisions (and therefore becomes party to them), Turkey will be applying them or implementing them into her legal system. In short, Turkey does not have to ratify UNCLOS to take necessary measures to enable EU to fulfil its obligations that have arisen or will arise in the future from UNCLOS provisions.

Therefore, it seems that ratifying UNCLOS is not a legal obligation in accordance with either UNCLOS provisions or EU law. It is more like a political obligation for Turkey rather than a legal one. Greece, as a member of EU, would definitely insist on a solution that would allow her wider rights and sovereignty regarding maritime zones in Aegean Sea. Even though she would not be backed by EU law regarding Turkish accession to UNCLOS, she still retains power of veto on Turkish membership. Treaty for Accession of Turkey to EU must be ratified by all Member States including Greece. In short, UNCLOS and Aegean Sea dispute remains as a headache for Turkey.

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