KLUWER LAW INTERNATIONAL

European Energy and Environmental Law Review

Wolters Kluwer
Law & Business

AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

Published by Kluwer Law International
P.O. Box 316
2400 AH Alphen aan den Rijn
The Netherlands

Sold and distributed in North, Central and South America by Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America

Sold and distributed in all other countries by Turpin Distribution
Pegasus Drive
Stratton Business Park, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom

ISSN 0966-1646

This journal should be cited as:
(2009) 18 EEELR

The European Energy and Environmental Law Review is published 6 times per year.
Subscription prices for 2009 [Volume 18, Numbers 1 through 6] including postage and handling:
EUR642/USD856/GBP472 (print)

This journal is also available online at www.kluwerlawonline.com. Sample copies and other information are available at www.kluwerlaw.com. For further information at please contact our sales department at +31 (0) 172 641562 or at sales@kluwerlaw.com.

For advertisement rates please contact our marketing department at +31 (0) 172 641525 (Marina Dordic) or at marketing@kluwerlaw.com.

Printed on acid-free paper

EUROPEAN ENERGY AND ENVIRONMENTAL LAW REVIEW
The European Energy and Environmental Law Review invites the submission of unsolicited articles from scholars, practitioners and students of energy and environmental law. The Editors are willing to consider proposals for articles but is unable to make any commitment as to publication prior to submission of the final script. Book reviews are also welcome. Letters in response to articles can only be considered for publication if they do not exceed a maximum of 500 words.

AIMS AND SCOPE
European Energy and Environmental Law Review is a bimonthly journal which presents comprehensive coverage of the latest developments in energy and environmental law throughout Europe. In addition to this, European Energy and Environmental Law Review contains concise, accessible articles which explore and analyse significant issues and developments in energy and environmental law and practice throughout Europe.

European Energy and Environmental Law Review enables the reader to keep abreast of significant and topical aspects of energy and environmental law, including the legal issues relating to renewables, energy security, energy efficiency, energy competition law, energy liberalisation process, electricity and gas markets, climate change; sustainable energy, land, air, fresh water, oceans, noise, waste management, dangerous substances, and nature conservation. Its succinct, practical style makes it ideal for the busy professional, while the authority, scope,and topicality of its coverage make it an invaluable research tool.

The Epilogue in the MOX Plant Dispute

The Epilogue in the MOX Plant Dispute: An End Without Findings

*Nikolaos Lavranos**

I. Introduction

Recently, the UN Law of the Sea (UNCLOS) Arbitral Tribunal terminated the proceedings in the *MOX plant* dispute between Ireland and the United Kingdom (UK) concerning the possible radioactive emissions of the MOX plant situated in Sellafield, UK.[1] This decision, which did not adjudicate on the substantive issues of the case, marks the end of the dispute between both EC Member States that started in 2001. Accordingly, it is a good moment to evaluate the outcomes of this dispute. However, before doing so, it is appropriate to shortly summarize the various stages of the dispute.[2]

For many years Ireland has been concerned about the radioactive emissions of the MOX plant, which leak into the Irish Sea contaminating the Irish coast as well as causing an increase in cancer cases in the population living there. In order to properly assess the problem and deal with it accordingly, Ireland had been requesting for years from the UK all relevant data about the emissions and accidents of the MOX plant. Having been unsuccessful, Ireland initiated two proceedings against the UK. The first proceeding was initiated within the framework of the Convention for the Protection of the Marine Environment of the North-East Atlantic 1992 (OSPAR) by arguing that the UK is obliged to make available the data requested by Ireland; the second, within the framework of UNCLOS 1982, claiming that the UK violated UNCLOS provisions by polluting the Irish Sea. As a result, both parts of the dispute were brought before two different international ad hoc arbitral tribunals for adjudicating the claims of Ireland.

The OSPAR Arbitral Tribunal decided that the UK had not violated its obligations under OSPAR and thus was not required to make available to Ireland the requested data.[3] Since this dispute was between two EC Member States and potentially involved EC legislation, thereby triggering the exclusive jurisdiction of the ECJ, the OSPAR Arbitral Tribunal could have considered taking EC law into account or even abstaining from exercizing its jurisdiction. However, the OSPAR Arbitral Tribunal neither considered itself competent to take other sources than OSPAR provisions into account, nor found it necessary to abstain from exercizing its jurisdiction for the benefit of the ECJ.[4]

The UNCLOS Arbitral Tribunal, before proceeding to the substance of the case, was faced with an objection raised by the UK arguing that the UNCLOS Arbitral Tribunal does not have jurisdiction to decide this dispute. Instead, the UK argued that since this dispute also touches on EC environmental legislation, the ECJ has exclusive jurisdiction according to Article 292 EC[5] and therefore should decide this dispute. The UNCLOS Arbitral Tribunal found this objection – *prima facie* – valid and thus suspended the proceedings of the case and ordered the parties to first find out whether the ECJ indeed has jurisdiction in this case.[6] At more or less the same time, the European Commission initiated an infringement procedure (Article 226 EC) against Ireland before the ECJ arguing that Ireland had violated Article 292 EC by bringing the case before the UNCLOS Arbitral Tribunal, since the ECJ has exclusive jurisdiction to rule on EC law. In view of this development, the UNCLOS Arbitral Tribunal suspended the proceedings and ordered the parties to regularly report to it about the developments regarding the dispute before the ECJ.

In 2006, the ECJ, following the Opinion[7] of Advocate General Maduro, indeed found that Ireland had violated Article 292 EC by bringing the case before the UNCLOS Arbitral Tribunal. The ECJ, in particular, emphasized that only the ECJ is competent to rule on EC law, including UNCLOS provisions that have become integral part of the Community legal order, and thereby is able to protect the autonomy and consistency of EC law.[8]

However, it should be noted in this context that the ECJ did not adjudicate on the substantive issues of the

* Dr. jur., LL.M., Max Weber Fellow, EUI. All websites last visited on 30 January 2009. The author can be contacted at: nlavranos@yahoo.com.

[1] UNCLOS Arbitral Tribunal (MOX plant) Order No. 6, 6 June 2008, available at: http://www.pca-cpa.org/upload/files/MOX%20Plant%20Order%20No.%206.pdf.

[2] See for an analysis: N. Lavranos, The MOX plant-judgment of the ECJ: How exclusive is the jurisdiction of the ECJ?, *European Environmental Law Review* 2006, pp. 291–296.

[3] OPSAR Arbitral Tribunal (MOX plant) Final Award, 2 July 2003, available at: http://www.pca-cpa.org/upload/files/OSPAR%20Award.pdf.

[4] *Ibid.*

[5] Article 292 EC reads as follows:

> Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein.

[6] UNCLOS Arbitral Tribunal, Order No. 3, Suspension of Proceedings on Jurisdiction and Merits, 24 June 2003, available at: http://www.pca-cpa.org/upload/files/MOX%20Order%20no3.pdf.

[7] Opinion in case C-459/03 (MOX plant) [2006] ECR I-4635.

[8] ECJ case C-459/03 (MOX plant) [2006] ECR I-4635.

The Epilogue in the MOX Plant Dispute

dispute, i.e. on the possible violation by the UK of EC environmental legislation or UNCLOS provisions. The dispute before the ECJ solely focused on the question whether or not the exclusive jurisdiction of the ECJ had been violated by the fact that the dispute had been brought before another international arbitral tribunal.

After the judgment of the ECJ, the parties turned again to the UNCLOS Arbitral Tribunal to consider the next steps. In a first step, the parties suggested to the UNCLOS Arbitral Tribunal that their obligation of periodic reporting was not appropriate anymore and therefore should be suspended. The UNCLOS Arbitral Tribunal accepted this request by issuing Order No. 5.[9]

In a second step, Ireland withdrew the claim against the UK, which the UNCLOS Arbitral Tribunal accepted by formally terminating the case by Order No. 6 of June 2008.[10]

Thus, as a result of the ECJ's exercize of its exclusive jurisdiction, the UNCLOS Arbitral Tribunal refrained from exercising its own jurisdiction in this dispute. Consequently and similar to the proceedings before the ECJ, the UNCLOS Arbitral Tribunal did not reach the stage of discussing the substantive aspects of the dispute.

Hence, the question arises: what are the consequences of this outcome without substantive findings? Is it an efficient and effective way of dispute resolution, when two courts are called upon to decide the case and both avoid rendering judgments on the substantive issues? In other words, has justice been served well?

These issues will be discussed under two headings. First, what are the implications regarding the overlapping jurisdictions between the ECJ and the other international (arbitral) tribunals? Second, what are the consequences for the substantive aspects of the case? Finally, an outlook will wrap up this contribution.

II. Jurisdictional implications

The jurisdictional implications of this dispute can be discussed from the point of view of the ECJ as well as from the point of view of international (ad hoc) arbitral tribunals.

The ECJ's point of view

From the point of view of the ECJ, the case raised the fundamental issue of the scope of its exclusive competence, which in the past was raised only once. In its Advisory Opinion concerning the question whether or not the proposed establishment of the EFTA court would be compatible with the EC Treaty, the ECJ opined that the jurisdiction of the EFTA court as envisaged by the EEA would endanger the autonomy of the Community legal order and affect the exclusive jurisdiction of the ECJ.[11] Hence, the ECJ did not accept the scope of jurisdiction as envisaged by the first EEA treaty.

In the same vein and even more strongly, the ECJ made crystal clear in its *MOX plant*-judgment[12] that its exclusive jurisdiction is to be understood very broadly and that EC Member States may not bring a dispute between them before another international court or tribunal if Community law is potentially at issue. Only after the ECJ satisfied itself that EC law and its jurisdiction is not at stake, may EC Member States bring a dispute before another court or tribunal.

In short, the ECJ reacted to the continuing proliferation of international courts and tribunals combined with the expansion of EC law into international law issues by asserting to the maximum its exclusive jurisdiction.[13] In this way the ECJ apparently hopes to prevent that international courts and tribunals start interpreting and applying EC law – potentially in a way that is inconsistent with ECJ jurisprudence. Moreover, the ECJ signaled to the EC Member States that they are not allowed to circumvent the ECJ when resolving their disputes that may involve Community law. In this way, the ECJ hopes to protect the uniformity, consistency and autonomy of the Community legal order.

Hence, the *MOX plant* dispute enabled the ECJ to explicitly define and assert for the first time its jurisdiction vis-à-vis other international courts and tribunals.

The International courts and tribunals' point of view

Obviously, the international courts and tribunals must feel the expanding scope of exclusive jurisdiction of the ECJ as a limitation of the exercise of their jurisdiction. Although, the *MOX plant* dispute also illustrates that their attitude towards the ECJ varies.

The OSPAR Arbitral Tribunal did not care at all about the fact that relevant EC legislation and thus exclusive jurisdiction of the ECJ may have been applicable. Consequently, the OSPAR Arbitral Tribunal did not consider the possibility of either refusing to exercise its jurisdiction for the benefit of the ECJ or to interpret the OSPAR provisions in the light of relevant EC law and ECJ jurisprudence, so as to ensure maximum consistency between the international law and Community law obligations of the Member States.[14]

[9] UNCLOS Arbitral Tribunal, Suspension of periodic reports by the Parties, Order No. 5, 22 January 2007, available at: http://www.pca-cpa.org/upload/files/MOX%20Order%20No5.pdf.

[10] UNCLOS Arbitral Tribunal, Order No. 6, *supra* note 1.

[11] ECJ Opinion 1/91 (EEA), [1991] ECR I-6079.

[12] ECJ (MOX plant), *supra* note 8.

[13] Regarding the proliferation of international courts and tribunals, see further: Y. Shany, *The competing jurisdiction of International Courts and Tribunals*, Oxford 2003.

[14] N. Lavranos, The MOX plant and IJzeren Rijn disputes: Which court is the supreme arbiter?, *Leiden Journal of International Law* 2006, pp. 223–246.

The Epilogue in the MOX Plant Dispute

In contrast, the UNCLOS Arbitral Tribunal recognized that in the present case an overlap between its jurisdiction and the ECJ's jurisdiction is very likely and therefore was prepared to resolve this issue first before proceeding with the substance of case. In other words, the UNCLOS Arbitral Tribunal showed judicial comity towards the ECJ.[15] Indeed, by giving the ECJ the opportunity to define its jurisdiction in this case, the UNCLOS Arbitral Tribunal avoided a jurisdictional conflict and ensured that the uniformity and consistency of Community law could be preserved by the ECJ. The question, however, arises whether the UNCLOS Arbitral Tribunal can really be happy about the manner in which the ECJ defined its jurisdiction. The ECJ essentially precluded future UNCLOS Arbitral Tribunals as well as the ITLOS and the ICJ to decide disputes between two EC Member States, which may potentially involve EC law issues next to UNCLOS issues.

Clearly, the ECJ was deeply alarmed by the situation created by the OSPAR Arbitral Tribunal, which rendered its award as if relevant EC legislation and ECJ jurisprudence did not exist. That would in itself not have been terribly bad, had the OSPAR Arbitral Tribunal interpreted the OSPAR provision in question in line with the relevant EC legislation, thereby creating an equivalency between the OSPAR and EC law obligations. Instead the OSPAR Arbitral Tribunal defined the obligations of the UK to make environmental law-related information available much more narrowly than the relevant ECJ jurisprudence suggests.[16] In other words, whereas the UK most likely would be required under EC law to make all information regarding the emissions of the MOX plant available to Ireland, the OSPAR Arbitral Tribunal decided that under OSPAR the UK is not required to do so.

In short, the different attitude of the various international arbitral tribunals towards the expanding exclusive jurisdiction of the ECJ illustrates the limits of the ECJ's ability to control other international courts and tribunals. Indeed, the *IJzeren Rijn* dispute between Belgium and the Netherlands concerning the reactivation of an old cargo railway track and its impact on a protected natural habitat, which took place around the same time when the *MOX plant* case started, proved that the ECJ's strategy could not prevent the circumvention of its exclusive jurisdiction.[17] So, it remains to be seen whether this strategy will be more successful in the future.

III. Substantive implications

The UNCLOS part

While the *MOX plant* dispute at least partly clarified the jurisdictional issues between the ECJ and other international courts and tribunals, this cannot be said for the substantive aspects.

As regards UNCLOS, neither the ECJ nor the UNCLOS Arbitral Tribunal reached the stage of discussing the crucial question of this dispute, namely, whether or not the UK violated its UNCLOS obligations by continuing to release radioactive emissions from the MOX plant into the Irish Sea.

This is an unsatisfactory result, in particular because both – the ECJ as well as the UNCLOS Arbitral Tribunal – could – and in my view should – have discussed the substantive issues of this case.

As far as the ECJ is concerned, after it had asserted its exclusive jurisdiction, there were no reasons not to deal with the substantive aspects of the case – despite the fact that the Commission based its claim mainly on a violation of Article 292 EC, i.e. an infringement of the exclusive jurisdiction of the ECJ when it brought the case against Ireland before the ECJ. However, after having established such a violation, as the ECJ in fact did, it could – and indeed should – have examined further whether or not 'communitarized' UNCLOS provisions were infringed by the UK.

The adjudication on the substance of the *MOX plant* dispute by the ECJ was particularly necessary because the claim of exclusive jurisdiction by the ECJ implied that the UNCLOS Arbitral Tribunal was not competent to deal with this dispute any longer. Of course, the ECJ could rely on judicial economy by arguing that since it found a violation of Community law on the procedural side, there was no need anymore for looking into the substantive issues. But one could counter this efficiency argument with Ireland's right to justice. After all Ireland started the proceedings against the UK because it believed that the UK has been violating its UNCLOS obligations and because it wanted to obtain a judicial decision on this crucial point.

It is submitted that if the ECJ claims exclusive jurisdiction but at the same time fails to address the real issues of this dispute, Ireland's right to justice is clearly violated.

Besides, since the ECJ did not look into the substantive issues of the case, the UNCLOS Arbitral Tribunal was not prevented from examining the substantive issues, despite the fact that the ECJ exercized its jurisdiction. In other words, the UNCLOS Arbitral Tribunal rather than simply

[15] Y. Shany, The First *MOX Plant* Award: The need to harmonize competing environmental regimes and dispute settlement procedures, *Leiden Journal of International Law* 2004, pp. 815–827.

[16] See eg: ECJ case C-186/04 (Housieaux), [2005] ECR I-3299; case C-233/00 (Commission v. France) [2003] ECR I-6625; case C-316/01 (Glawischnig) [2003] ECR I-5995; case C-217/97 (Commission v. Germany) [1999] ECR I-5087; case C-321/96 (WilhelmMecklenburg v. Kreis Pinneberg – Der Landrat) [1998] ECR I-3809.

[17] See on the IJzeren Rijn case: N. Lavranos, *supra* note 14.

The Epilogue in the MOX Plant Dispute

terminating the proceedings could have exercized its jurisdiction and adjudicated on the substantive UNCLOS aspects. Since the ECJ did not discuss these aspects, there would have been no risk of divergent or conflicting judgments regarding the UNCLOS provisions. In this way, Ireland's right to justice and quest for an answer to its question whether or not the UK has violated its UNCLOS obligations would have been served well. For this reason, it seems very odd that it was Ireland that requested the termination of the UNCLOS proceedings. One can only guess the reasons for Ireland's decision, but probably Ireland considers the use of diplomatic means to be more apt for finding an amicable solution. Be that as it may, the fact remains that after several years of proceedings before the UNCLOS Arbitral Tribunal and the ECJ, it still remains unclear whether, and if so, to what extent the MOX plant is contaminating the Irish Sea.

The OSPAR part

In contrast to the UNCLOS issues, the OSPAR Arbitral Tribunal clarified that under the OSPAR the UK was not obliged to hand over to Ireland any data or information regarding the emissions of the MOX plant. As such, the OSPAR Arbitral Tribunal must be praised for not circumventing the substantive aspects of the dispute. However and at the same time, it is a pity that the OSPAR Arbitral Tribunal did not take into account the stricter obligations for making the relevant data or information accessible, which are imposed on the EC Member States by virtue of EC legislation, ECJ jurisprudence and other international treaties such as the Aarhus Convention that has been ratified by all EC Member States and the EC itself.

While the OSPAR Arbitral Tribunal is, obviously, not obliged to automatically apply or follow these 'foreign' sources, it could have taken them into account in its decision. Indeed, it is argued that for the sake of avoiding divergent or even conflicting jurisprudence regarding similar OSPAR and EC law obligations, the OSPAR Arbitral Tribunal should have issued its award in line with those other 'foreign' sources.

Thus, at the end of the day, as the OSPAR Arbitral Tribunal did not care much about the Community law implications, it has created divergent rights and obligations for the UK and Ireland compared to what EC law prescribes in the same situation. This is considered to be unfortunate because it does not serve the consistent interpretation and development of the relevant law, but instead adds to the fragmentation of international and European law.

IV. Outlook

The *MOX plant* dispute is an illustration of the negative effects associated with the proliferation of international courts and tribunals and the resulting overlapping jurisdictions among those dispute settlement bodies.[18] In particular, the *MOX plant* dispute underlines the urgent need to establish formal and informal ways of coordinating the judgments of the various courts and tribunals so as to achieve better consistency and harmony of law.[19] This in turn would be beneficial for better compliance by states and for enhancing the authority of all dispute settlements bodies. Obviously, the ECJ can play an important role towards achieving this aim. Unfortunately, the more recent jurisprudence of the ECJ, subsequent to its *MOX plant*-judgment, indicates that the ECJ is not very much inclined to adjudicate cases involving UNCLOS or other international marine/environmental protection agreements.

For example, in the recent *Intertanko* case the ECJ concluded that the provisions of UNCLOS do not enjoy direct effect, that is, cannot be relied upon by individuals before a court.[20] Moreover, the ECJ also found that the EC could not be considered to be bound by the International Convention for the Prevention of Pollution from Ships of 1973 (MARPOL) in view of the fact that the EC is not a Contracting Party to MARPOL and in the absence of a full transfer of the powers previously exercized by the Member States in the policy areas covered by MARPOL.[21] Also, the ECJ argued that the fact that all EC Member States are parties to MARPOL does not bind the EC.[22] In this context, reference must be made to the opposite conclusions of AG Kokott who convincingly demonstrated in her opinion that neither is there a reason for denying in general terms any direct effect of UNCLOS provisions nor is it impossible to construct by meaningful interpretation a binding effect of MARPOL on the EC.[23]

Similarly, in the recent *Commune de Mesquer* case the ECJ noted, first, that because the EC had not acceded to the relevant international agreements (i.e. International Convention on Civil Liability for Oil Pollution Damage, International Oil Pollution Compensation Fund), and

[18] See eg: G. Hafner, Pros and Cons ensuing from Fragmentation, *Michigan Journal of International Law* 2004, pp. 849–863.

[19] See for a more detailed discussion: N. Lavranos, Regulating Competing Jurisdictions among International Courts and Tribunals, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 2008, pp. 575–621.

[20] ECJ case C-308/06 (Intertanko), paras. 64-65, judgment of 3 June 2008, available at: http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en. See further: R. Pereira, On the legality of the Ship-source Pollution 2005/35/EC Directive – The Intertanko case and selected others, *European Energy and Environmental Law Review* 2008, pp. 372–383.

[21] ECJ case C-308/06 (Intertanko), para. 48.

[22] *Ibid.*, para. 49.

[23] Opinion Advocate General Kokott, case C-308/06 (Intertanko) of 20 November 2007, available at: http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en.

The Epilogue in the MOX Plant Dispute

second, since not all EC Member States were party to these agreements, the EC could not be regarded as having replaced the Member States and thus be bound by these treaties.[24] In her Opinion Advocate General Kokott, even though having concluded that the Community is not bound by those agreements, at the same time pointed out that the ECJ may, nonetheless, examine the extent to which those treaties can preclude the application of the EC Directive in question.[25]

In other words, this recent jurisprudence of the ECJ illustrates that the ECJ is not particularly eager to strengthen the legal status and effect of these international marine/environmental protection agreements within the Community legal order by considering the EC to be bound by them and by enhancing their enforcement by granting them direct effect. This, it is argued, is a missed opportunity for the ECJ to actively develop and enhance – together with the other international courts and tribunals – the level of protection of international environmental law within Europe and beyond.[26]

In sum, it can only be concluded that the *MOX plant* dispute has been put to end without any substantive findings. Moreover, this dispute has been a huge waste of precious resources in terms of manpower and money. This unsatisfactory result clearly does not do justice to the inhabitants living around the Irish Sea who arguably have been suffering most from the radioactive emissions of the MOX plant.

[24] ECJ case C-188/07 (Commune de Mesquer) para. 85, judgment of 24 June 2008, available at: http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en.

[25] Opinion Advocate General Kokott, case C-188/07 (Commune de Mesquer), para. 84, of 13 March 2008, available at: http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en.

[26] See generally on the EC's environmental policy: P. Wenneras, Towards an ever greener Union? Competence in the field of the environment and beyond, *Common Market Law Review* 2008, pp. 1645-1685; D. Benson/A. Jordan, A grand bargain or an 'incomplete contract'? European Union Environmental Policy after the Lisbon Treaty, *European Energy and Environmental Law Review* 2008, pp. 280–290.