

*EC Treaty Article 292—EURATOM Treaty Article 193—ECJ exclusive jurisdiction—failure of a member state to fulfill obligations—mixed agreement—EC competence—UN Convention on the Law of the Sea—protection and preservation of the marine environment—dispute settlement system—Article 282—Annex VII arbitration proceedings—MOX plant at Sellafield (UK).*

COMMISSION OF THE EUROPEAN COMMUNITIES V. IRELAND. Case C-459/03. Judgment. *At* <<http://eur-lex.europa.eu>>.

Court of Justice of the European Communities (Grand Chamber), May 30, 2006.

On May 30, 2006, the Court of Justice of the European Communities (ECJ) ruled on Case C-459/03, *Commission v. Ireland*,<sup>1</sup> brought by the European Commission (Commission) and alleging Ireland's failure to fulfill obligations under the Treaty Establishing the European Community<sup>2</sup> (EC Treaty). In 2001, Ireland had initiated proceedings against the United Kingdom before an ad hoc Arbitral Tribunal (Tribunal), pursuant to the Annex VII dispute settlement procedures of the 1982 UN Convention on the Law of the Sea<sup>3</sup> (LOS Convention). In the present case, the Commission alleged, first, that Ireland breached Article 292 of the EC Treaty and Article 193 of the EURATOM Treaty<sup>4</sup> (EA Treaty) because, by submitting the dispute to Annex VII arbitration, Ireland failed to respect the ECJ's exclusive jurisdiction on the interpretation and application of EC law. Second, the Commission claimed that Ireland had violated Article 10 of the EC Treaty and Article 192 of the EA Treaty because, by not consulting with the Commission before initiating arbitral proceedings, Ireland had hindered the achievement of the EC's tasks and jeopardized the attainment of the objectives of the EC Treaty. The Court upheld all complaints.

The case was the latest, though not the last,<sup>5</sup> stage of a complex legal dispute pitting Ireland against the United Kingdom over the construction and operation of a nuclear power plant (the so-called MOX plant)<sup>6</sup> at Sellafield, West Cumbria, which is in the northwest of England, on the Irish Sea coast. Concerned about the possible radioactive contamination of the Irish Sea, whether operational or accidental, Ireland had tried for several years to prevent the commissioning of the plant. In 2001, when operations at Sellafield were imminent, Ireland unleashed a barrage of cases before multiple international fora.

<sup>1</sup> Case C-459/03, *Commission v. Ireland* (Eur. Ct. Justice May 30, 2006). The judgment, along with other materials associated with it, is available at <<http://curia.europa.eu>>. Sweden intervened in support of Ireland. For a commentary on the judgment, see Constanze Semmelmann, *Forum Shopping Between UNCLOS Arbitration and EC Adjudication—and the Winner “Should Be” the ECJ!* 2006 EUR. L. REP. 234; Karen Kaiser, *Ausschließliche Zuständigkeit des EuGH bei Auslegung und Anwendung von zum Gemeinschaftsrecht gehörenden Bestimmungen*, 17 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 470 (2006).

<sup>2</sup> TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Mar. 25, 1957, 298 UNTS 11, as amended by TREATY OF AMSTERDAM, Oct. 2, 1997, 1997 O.J. (C 340) 1, as amended by TREATY OF NICE, Feb. 26, 2001, 2001 O.J. (C 80) 1, consolidated version reprinted in 2002 O.J. (C 325) 33 [hereinafter EC Treaty].

<sup>3</sup> UN Convention on the Law of the Sea, opened for signature Dec. 10, 1982, 1833 UNTS 397, reprinted in 21 ILM 1261 (1982) (entered into force Nov. 16, 1994) [hereinafter LOS Convention]. The Convention, along with the judgments and other decisions of the International Tribunal for the Law of the Sea (ITLOS), are available at <<http://www.un.org/Depts/los/>>.

<sup>4</sup> Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, Art. 193, 298 UNTS 167, as amended by Treaty of Nice (2001), 2001 O.J. (C 80) 1.

<sup>5</sup> At the time of this writing, the dispute over the MOX plant is still pending before the ad hoc Annex VII Arbitral Tribunal. See *infra* notes 36–38 and accompanying text.

<sup>6</sup> Short for “mixed oxide,” a uranium–plutonium oxide mixture that is derived from spent nuclear fuel and is now itself being (re)used as a fuel in nuclear reactors.

The first salvo was Ireland's unilateral triggering of the arbitration procedure under the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention).<sup>7</sup> Ireland claimed violation of the OSPAR Convention's provision (Article 9) providing for access to information "on the state of the maritime area, on activities or measures adversely affecting or likely to affect it and on activities or measures introduced in accordance with the Convention." In July 2003, the ad hoc arbitral tribunal found in favor of the United Kingdom.<sup>8</sup>

The second broadside was Ireland's unilateral triggering of the Annex VII dispute settlement procedure under the LOS Convention, alleging that the United Kingdom had violated basic Convention obligations with regard to the protection of the marine environment, including the obligation to carry out an assessment of environmental impact.<sup>9</sup> On November 15, 2001—pending the constitution of an arbitral tribunal, and a month before the scheduled commissioning of the MOX plant—Ireland requested provisional measures from the International Tribunal for the Law of the Sea (ITLOS),<sup>10</sup> which determined that the Annex VII arbitral tribunal had *prima facie* jurisdiction, with the consequence that provisional measures were prescribed.

In the meantime, the European Commission had been tracking the affair as it escalated into a major dispute attracting considerable public attention, especially on the two sides of the Irish Sea. Of course, in addition to being parties to the LOS and OSPAR Conventions, the United Kingdom and Ireland are members of the European Community. As such, they are both party to the EC and EA Treaties and are subject to the jurisdiction of the ECJ in actions brought by the European Commission for the infringement of those treaties.

Article 292 of the EC Treaty and Article 193 of the EA Treaty obligate EC member states not to submit a dispute concerning the interpretation or application of EC treaties "to any method of settlement other than those provided for therein"—namely, the ECJ. Article 10 of the EC Treaty, as well as Article 192 of the EA Treaty, also provides:

Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

Believing Ireland had violated both provisions in 2003 by unilaterally triggering, without consulting with the EC Commission, arbitral proceedings under the LOS Convention, the Commission initiated proceedings before the ECJ for failure to comply with EC obligations.

<sup>7</sup> Convention for the Protection of the Marine Environment of the North-East Atlantic, 3 Y.B. INT'L ENVTL. L. 703 (1992), 31 ILM 1312 (1993).

<sup>8</sup> Access to Information Under Article 9 of the OSPAR Convention (Ir. v. UK), Final Award (Arb. Trib. July 2, 2003), 42 ILM 1118 (2003), available at <<http://www.pca-cpa.org>>. On this part of the MOX dispute, see the case report by Ted L. McDorman at 98 AJIL 330 (2004); Yuval Shany, *The First MOX Plant Award: the Need to Harmonize Competing Environmental Regimes and Dispute Settlement Procedures*, 17 LEIDEN J. INT'L L. 815 (2004); Robin Churchill & Joanne Scott, *The MOX Plant Litigation: The First Half-Life*, 53 INT'L & COMP. L.Q. 643 (2004).

<sup>9</sup> MOX Plant (Ir. v. U.K.), Order No. 3, Suspension of Proceedings on Jurisdiction and Merits (LOS Convention Annex VII Arb. Trib. June 24, 2003), 42 ILM 1187 (2003) [hereinafter Order No. 3], available at <<http://www.pca-cpa.org>>.

<sup>10</sup> MOX Plant (Ir. v. U.K.), ITLOS Case No. 10, Interim Measures (Dec. 3, 2001), 41 ILM 405 (2002).

The Court began by noting (para. 83) that the LOS Convention is, in EC jargon, a “mixed agreement,” a treaty concluded both by the EC and, in this case, all its member states<sup>11</sup> and therefore falling partly within the competence of the EC and partly within the competence of the states. According to ECJ case law, the provisions of the LOS Convention that come within the scope of EC competence are an integral part of the EC legal order (para. 82).<sup>12</sup> Pursuant to Annex IX of the Convention, it is for the EC, not its member states, to exercise rights and obligations under the Convention in respect of matters for which competence has been transferred to the EC by its member states.<sup>13</sup>

Upon ratifying the LOS Convention, the EC deposited a formal declaration to this effect. The key part reads:

*Matters for Which the Community Shares Competence with Its Member States:* . . . . With regard to the provisions on . . . the prevention of maritime pollution contained inter alia in Parts II, III, V, VII and XII of the Convention, the Community has exclusive competence only to the extent that such provisions of the Convention or legal instruments adopted in implementation thereof affect common rules established by the Community. When Community rules exist but are not affected, . . . the Member States have competence, without prejudice to the competence of the Community to act in this field. Otherwise, competence rests with the Member States.<sup>14</sup>

The ECJ noted that Ireland’s statement of claim before the Arbitral Tribunal mostly relied on provisions covered by the EC declaration.<sup>15</sup> The only article claimed to be breached by the United Kingdom not falling under Part XII of the LOS Convention, and thus the declaration, was Article 123, the “Cooperation of States Bordering Enclosed or Semi-enclosed Seas.”

The Court then considered whether and to what extent the EC, by becoming a party to the Convention, intended to exercise its external competence in matters of marine environmental protection. The Court so found since the matters covered by the Convention provisions relied on by Ireland before the Arbitral Tribunal are “very largely regulated by Community measures, several of which are mentioned expressly in the appendix to the [Community] declaration” (para. 110).<sup>16</sup> Thus, the LOS Convention provisions relied on by Ireland in the arbitral proceedings “are rules which form part of the Community legal order” (para. 121).

Tackling next whether the Court has *exclusive* jurisdiction over disputes relating to the interpretation and application of EC laws—as far as disputes between EC member states are concerned—the Court noted that an international agreement, such as the LOS Convention, cannot affect the allocation of responsibilities to and between EC bodies as defined in the EC

<sup>11</sup> The LOS Convention was signed by the EC and approved by Council Decision 98/392/EC of 23 March 1998 (1998 O.J. (L 179) 1).

<sup>12</sup> Citing Case C-344/04, *Int’l Air Transp. Assoc. v. Dep’t of Transp.*, para. 36 (Eur. Ct. Justice Jan. 10, 2006).

<sup>13</sup> LOS Convention, *supra* note 3, Annex IX, Arts. 4, 5.

<sup>14</sup> Declaration Made Pursuant to Article 5(1) of Annex IX to the [LOS Convention] and to Article 4(4) of the [Agreement Relating to the Implementation of Part XI of the LOS Convention] (Apr. 1, 1998) (emphasis added), at <[http://www.un.org/Depts/los/convention\\_agreements/convention\\_declarations.htm](http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm)>; see *Commission v. Ireland*, para. 8.

<sup>15</sup> Ireland contended breach of various articles of the Convention, including Articles 123, 192, 193, 194, 197, 206, 207, 211, and 213.

<sup>16</sup> For example, Council Directives 85/337/EEC, 1985 O.J. (L 175) 40; 93/75/EEC, 1993 O.J. (L 247) 19; and 90/313/EEC, 1990 O.J. (L 158) 56. See *Commission v. Ireland*, paras. 110–120, 147; see also *id.*, para. 135 (“a significant part of the dispute in this case between Ireland and the United Kingdom relates to the interpretation or application of Community law” (emphasis added)).

treaties (paras. 123, 132, 151–53). The EC legal system is “autonomous,” and the Court has a “jurisdictional monopoly” over it, which is confirmed by Article 292 of the EC Treaty, whereby “Member States undertake not to submit a dispute concerning the interpretation or application of the EC Treaty to any method of settlement other than those provided for therein” (paras. 123, 124, 132, 154).<sup>17</sup> Indeed, the Court remarked that the LOS Convention “precisely makes it possible to avoid such a breach of the Court’s exclusive jurisdiction in such a way as to preserve the autonomy of the Community legal system” (para. 124). Article 282 of the LOS Convention, entitled “Obligations Under General, Regional or Bilateral Agreements,” provides:

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

According to the Court, since the above article “provides for procedures resulting in binding decisions in respect of the resolution of disputes between Member States, the system for the resolution of disputes set out in the EC Treaty must in principle take precedence over that contained in . . . the [LOS] Convention” (para. 125).

Ireland asserted that in its statement of claims and pleadings before the Arbitral Tribunal, it referred to EC law merely as “non-binding elements of fact solely with a view to facilitating the interpretation of a number of terms of the [LOS] Convention by indicating how those terms are understood in the practice of courts and tribunals of legal systems other than that governing the Arbitral Tribunal” (para. 144)—as merely “*renvoi*,” a frequently used juridical technique designed to guarantee the harmonious coexistence of rules deriving from different legal orders” (para. 145).

The Court rejected Ireland’s defense, noting that Article 293(1) of the LOS Convention provides that an adjudicating body, such as the Arbitral Tribunal, is “to apply this Convention and other rules of international law not incompatible with this Convention.” By looking at the pleadings lodged by Ireland before the Arbitral Tribunal, the Court concluded that EC law had been raised not as a mere *renvoi*, but rather for the purpose of interpretation and application by the Arbitral Tribunal, seeking a declaration that the United Kingdom had breached EC law—a declaration that would violate the ECJ’s exclusive jurisdiction (paras. 149–51). Although Ireland had given the ECJ formal assurance that it did not intend to call on the Arbitral Tribunal to examine or appraise whether the UK had breached any EC laws, the Court found that it was sufficient that there was even simply a “manifest risk” to the autonomy of the EC legal system (paras. 154–56).

Finally, upholding the third head of complaint—namely, that Ireland had infringed duties of information and consultation with the EC Commission—the ECJ noted that all contacts between the Commission and Ireland on the matter had occurred after Ireland had initiated

<sup>17</sup> See Opinion of the Advocate General Poireres Maduro (Jan. 18, 2006), para. 9, *Commission v. Ireland*, citing Nicolas Mackel, *Article 292 (Ex-article 219)*, in COMMENTAIRE ARTICLE PAR ARTICLE DES TRAITÉS UE ET CE 1874 (Philippe Léger ed., 2000).

dispute settlement proceedings (paras. 168–83). The Court held that initiating such proceedings with another member state outside the EC framework is an “act . . . liable to create confusion in non-member countries which are parties to the Convention with regard to the external representation and internal cohesion of the Community as a contracting party, and is highly damaging to the effectiveness and coherence of the Community’s external action” (para. 160).

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*Commission v. Ireland* is of interest to EC law scholars and European decision makers, both in Brussels and state capitals. However, it also has significance and ramifications well beyond the circumscribed European context. While the dispute is not the only one in which EC members have brought a dispute before an international adjudicative body other than the ECJ,<sup>18</sup> it is the first time the ECJ had a chance to decide whether doing so is contrary to EC laws.<sup>19</sup>

The European Community/European Union is an international entity sui generis. It is more than a classic international organization, but not quite a federation of states. Its members have transferred to it more competences than has ever been done in the case of any other international organization, but the states nevertheless retain international legal personality.

The ECJ, the principal judicial organ of this entity, itself has a hybrid nature, combining features of both domestic and international courts. Granted, as long as member states retain international legal personality, it will not enjoy anything like the absolute monopoly on disputes between member states that domestic supreme courts have within their own state territory.<sup>20</sup> With its judgment in *Commission v. Ireland*, however, the ECJ it moved a little closer to the domestic supreme court paradigm and a little further from the international court ideal.

In the instant case, the Court had to decide whether the LOS Convention provisions invoked by Ireland fall within the scope of the EC’s competence and are thus part of the EC legal order. The Court decided this question in the affirmative, but its reasoning was not entirely convincing, or at least not as convincing as warranted by the momentous nature of the case—in particular, because it glossed over the exact nature of EC competences in the given area.

While the environment and, in particular, the marine environment<sup>21</sup> fall within the EC’s competence, the Court recognized that competences in this field are “not exclusive but rather,

<sup>18</sup> See *Iron Rhine (“Ijzeren Rijn”) Railway* (Belg./Neth.), Award, paras. 120, 137, 141 (Arb. Trib. May 24, 2005), at <<http://www.pca-cpa.org>>. On the award and its significance for the MOX dispute, see Nikolaos Lavranos, *The MOX Plant and Ijzeren Rijn Disputes: Which Court Is the Supreme Arbiter?* 19 LEIDEN J. INT’L L. 249 (2006).

<sup>19</sup> The *Iron Rhine* case was brought before the arbitral tribunal jointly by the two countries; hence, neither was going to bring the matter before the ECJ. The Commission probably decided that because that arbitration had taken place consensually (as opposed to the *MOX* case, where proceedings were started unilaterally), the Commission would not bring the dispute before the ECJ either. It is worth noting that Article 292 of the EC Treaty was tangentially raised recently in the *Reynolds Tobacco v. Commission* case, Case C-131/03 P, paras. 97–103 (Eur. Ct. Justice Sept. 12, 2006), but the courts in question in that case were U.S. courts, not international ones.

<sup>20</sup> For example, the U.S. Supreme Court has original and exclusive jurisdiction over disputes between states, U.S. CONST. Art. III, §2; in Brazil, the Supreme Federal Tribunal has original jurisdiction over disputes between the Union and states, the Union and the Federal District, or between on another, C. F., Art. 102; and in the Federated States of Micronesia, the Supreme Court has original and exclusive jurisdiction in disputes between states, CONST. Art. XI.6.a.

<sup>21</sup> EC Treaty, *supra* note 2, Arts. 174–76 (Title XIX). [is this what you meant



in principle, shared between the Community and the Member States” (para. 92).<sup>22</sup> According to the Court, however, “the question as to whether a provision of a mixed agreement comes within the competence of the Community is one which relates to the attribution and, thus, the very existence of that competence, and not to its exclusive or shared nature” (para. 93). In other words, it seems that, according to the Court, as soon as the EC starts acting on the subject matter of a “mixed agreement”—regardless of what the EC has done in the concrete (for example, whether EC law in the area sets only minimal standards, is incomplete, or comprises directives or regulations)—everything provided for in the agreement becomes ipso facto “an integral part of the Community legal order” (paras. 82, 126) and is subject to the exclusive jurisdiction of the ECJ.

As far as dispute settlement is concerned, the implication is that in the case of mixed agreements—regardless of what kind of actions the EC has undertaken to implement them—member states are prevented from resorting to the dispute settlement procedures provided for in those agreements.<sup>23</sup> Although it is immediately obvious that EC states thereby lose alternative fora in which to settle disputes, what do member states have to gain, if anything, from being limited to litigating their disputes only before the ECJ?

By including mixed agreements in the notion of the EC legal order regardless of whether and how the EC has actually exercised competences, and regardless of whether those competences are shared or exclusive, the Court has significantly enlarged its statutory judicial monopoly. Moreover, as the number and import of mixed agreements keep growing, the scope of the Court’s exclusive jurisdiction *ratione materiae* will likewise expand.<sup>24</sup>

From the point of view of EC history and its trajectory, the judgment in *Commission v. Ireland* was expected. The process of transferring competence from national capitals to Brussels has long been unidirectional and irreversible.<sup>25</sup> It is well known that the ECJ has been taking a proactive role in transforming the EC and, through its legal interpretations of EC law, in promoting European integration;<sup>26</sup> this teleological approach to EC law replaced a straightforward textual approach long ago.<sup>27</sup> From its inception, the ECJ’s goal has been to further

<sup>22</sup> See also Case No. 2/00, Cartagena Protocol, [2001] ECR I-9713, para. 47.

<sup>23</sup> This result does not, of course, prejudice disputes that member states might have with states that are not EC members.

<sup>24</sup> Between 1958 and 2000, the EC and all or some of its member states concluded 154 mixed agreements with other subjects of public international law. JONI HELISKOSKI, MIXED AGREEMENTS AS A TECHNIQUE FOR ORGANIZING THE INTERNATIONAL RELATIONS OF THE EUROPEAN COMMUNITY AND ITS MEMBER STATES (2001). These agreements included several major multilateral environmental treaties/regimes, such as the International Convention for the Prevention of Pollution from Ships, Convention for the Protection of the Mediterranean Sea Against Pollution, Convention for the Protection of the Antarctic Marine Living Resources, Convention on Long-Range Transboundary Air Pollution, Vienna Convention for the Protection of the Ozone Layer and Montreal Protocol, and UN Framework Convention on Climate Change.

<sup>25</sup> “The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights . . . against which a subsequent act incompatible with the concept of the Community cannot prevail.” Case 6/64, *Flaminio Costa v. E.N.E.L.*, 1964 ECR 585.

<sup>26</sup> For an account of the ECJ’s role in the building and transformation of the European polity, see KAREN ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW (2001).

<sup>27</sup> For example, in *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case 26/62, 1963 ECR 1, the Court held that rights conferred on individuals by EC legislation should be enforceable by those individuals in national courts, but that position is nowhere to be found in the EC treaties.

European integration and to increase the effectiveness of the European legal system, even if that meant creative interpretation of the treaties.<sup>28</sup>

The ECJ has consistently treated the EC legal order as a type of supranational law more akin to constitutional law than to classic international law, and treated itself more as a supreme court of a federal polity than as a classic international court.<sup>29</sup> Thus, individual member states and their courts—or courts or other fora that they select outside the EC legal order, such as the Annex VII Arbitral Tribunal in *Commission v. Ireland*—cannot control the EC legal order. It is the ECJ, qua supreme court of this “autonomous legal order,” that necessarily has the last word on its interpretation. Arguing otherwise would undermine the unity of the European legal construct as built by the ECJ over the last four decades.

Not everyone on the Continent appreciates the ECJ’s efforts to advance European integration, and not everyone supports the march toward an “ever closer union.”<sup>30</sup> For them, the Court’s decision in *Commission v. Ireland* is surely unwelcome and provides yet another reason to denounce the Court’s “activism”—even if the decision itself does not come as a surprise. But if one steps outside of the European integrationist logic, and if one examines the decision from the perspective of the LOS Convention’s legal regime, the ruling might still be perplexing.

The overarching goal of the LOS Convention dispute settlement provisions is, exactly so, to settle disputes. Mindful of this simple truth, it seems that those who negotiated the Convention considered it unnecessary to insist in having parties resort only to the Convention’s specific dispute settlement procedures. Arguably, the overall approach of the LOS Convention is that as long as the dispute is settled, the goal is achieved. The negotiating history of Article 282 suggests that it is designed to tie up jurisdictional loose ends and to provide parties with different, mutually exclusive options for having disputes “concerning the interpretation and application of [the LOS Convention]”<sup>31</sup> considered by a dispute settlement body.<sup>32</sup>

The ECJ claimed that Article 282 purports to protect the autonomy of the EC legal order (para. 124). That might be the practical result—when Article 282 of the LOS Convention is coupled with Article 292 of the EC Treaty—but that is surely not the intended goal of Article 282. Indeed, to what extent is the dispute litigated before the ECJ the same dispute still pending before the Annex VII Arbitral Tribunal? If it is not the same, and there are many reasons to believe it is not,<sup>33</sup> the Arbitral Tribunal, which applies the LOS Convention and not EC law,

<sup>28</sup> ALTER, *supra* note 26, at 20–21.

<sup>29</sup> See generally REN BARENTS, *THE AUTONOMY OF COMMUNITY LAW* (2004). In *Van Gend en Loos*, at 12, the ECJ stated that the EC Treaty had created “a new legal order of international law.” The ECJ later dropped the label “of international law” to speak of a “new legal order” *tout court*. ALTER, *supra* note 26, at 2 n.2.

<sup>30</sup> EC Treaty, *supra* note 2, pmb1.

<sup>31</sup> LOS Convention, *supra* note 3, Art. 282.

<sup>32</sup> On the negotiating history of, and for a commentary of, the LOS Convention dispute settlement system, see ANDRONICO ADEDE, *THE SYSTEM FOR SETTLEMENT OF DISPUTES UNDER THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A DRAFTING HISTORY AND A COMMENTARY* (1987); MYRON NORDQUIST, *5 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY* (1989); ROBIN CHURCHILL & VAUGHAN LOWE, *THE LAW OF THE SEA* (2d ed. 1999); NATALIE KLEIN, *DISPUTE SETTLEMENT IN THE UN CONVENTION ON THE LAW OF THE SEA* (2005); Bernard H. Oxman, *The Third UN Conference on the Law of the Sea: The Tenth Session* (1981), 76 AJIL 1 (1982); and Shabtai Rosenne, *UNCLOS III—The Montreux (Riphagen) Compromise*, in *REALISM IN LAW-MAKING* 169 (Adriaan Bos & Hugo Siblesz eds., 1986).

<sup>33</sup> For example, the parties to the dispute pending before the Arbitral Tribunal are Ireland and the United Kingdom, and the main issue concerned the violation of the LOS Convention; the parties to the case decided by the ECJ were the EC Commission and Ireland, and the issue concerned the violation of EC laws.

might decide to proceed on the merits, regardless of the decision reached by the ECJ.<sup>34</sup> To avoid a head-on clash with the ECJ, the Arbitral Tribunal will therefore have to find reasons other than Article 282 of the LOS Convention to decline jurisdiction and dismiss the case.<sup>35</sup>

When the United Kingdom raised the question of the ECJ's potential exclusive jurisdiction over the dispute, and the Commission publicly threatened legal action against Ireland before the ECJ, the LOS Convention Annex VII Arbitral Tribunal suspended proceedings,<sup>36</sup> "bearing in mind considerations of mutual respect and comity which should prevail between institutions both of which may be called upon to determine rights and obligations as between two States."<sup>37</sup> Should the Arbitral Tribunal decide to play the "comity and mutual respect" card, the decision would establish an intriguing precedent that might contribute to finding a solution to the intractable conundrum of competing international jurisdictions.<sup>38</sup>

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<sup>34</sup> In 2000, an Annex VII LOS Convention Arbitral Tribunal declined to exercise jurisdiction in the *Southern Bluefin Tuna* dispute because the 1993 Convention for the Conservation of the Southern Bluefin Tuna contains a dispute settlement clause that, according to the respondent, should have been resorted to in lieu of the dispute settlement procedure under the LOS Convention. The arbitral tribunal recognized that in that particular case, the very same dispute had arisen under two different conventions. *Southern Bluefin Tuna* (Austl. v. Japan; N.Z. v. Japan), Jurisdiction and Admissibility, para. 54, 39 ILM 1359 (2000) (LOS Convention Annex VII Arb. Trib. Aug. 4, 2000), see Barbara Kwiatkowska, Case Report: Southern Bluefin Tuna (Australia and New Zealand v. Japan), Jurisdiction and Admissibility, 95 AJIL 162 (2001).

<sup>35</sup> At the time this note was prepared (November 2006), the parties were holding consultations about how to proceed in the light of the ECJ ruling. No date for a final award has been fixed yet. In the order suspending proceedings, the LOS Convention Arbitral Tribunal observed that "a procedure that might result in two conflicting decisions on the same issue would not be helpful to the resolution of the dispute between the Parties." Order No. 3, *supra* note 9, para. 28. See also the June 13, 2003, Statement by the President, para. 11, at <<http://www.pca-cpa.org>>.

<sup>36</sup> In its Order No. 3, *supra* note 9, the Arbitral Tribunal suspended proceedings until December 1, 2003, and in its Order No. 4 of November 14, 2003, until the ECJ has issued its judgment.

<sup>37</sup> Order No. 3, *supra* note 9, para. 28.

<sup>38</sup> On the problems raised by competing jurisdictions, along with possible solutions, see generally YUVAL SHANY, *COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS* (2003); ANDREW BELL, *FORUM SHOPPING AND VENUE IN TRANSNATIONAL LITIGATION* (2003); Laurence R. Helfer, *Forum Shopping for Human Rights*, 148 U. PENN. L. REV. 285 (1999); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003); Jenny S. Martinez, *Toward an International Judicial System*, 56 STAN. L. REV. 429 (2003); William W. Burke-White, *A Community of Courts: Toward A System Of International Criminal Law Enforcement*, 24 MICH. J. INT'L L. 1 (2002); and Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487 (2005). For a summary and criticism of the various proposed solutions, see Cesare Romano, *The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent*, 39 NYU J. INT'L L. (forthcoming 2007).