I. Introduction

In the past decade the topic of proliferation or multiplication of international courts and tribunals, competing jurisdiction between these courts and possible fragmentation of international law has increasingly received the attention of a vast array of scholars and practitioners.[1]

This article explores, first, the issue whether signs of fragmentation of international law as a result of the multiplication of international courts and tribunals could be detected, and second, whether there is a need for further general rules to regulate overlapping jurisdiction among those courts. More specifically, the question will be discussed whether in this context comity would be an appropriate general approach to handle competing jurisdiction.

The structure of the analysis below follows the order of these questions.

Accordingly, in the first part several case-studies will be presented that illustrate the various effects caused by overlapping jurisdictions.

The second part will discuss possible solutions to avoid the negative effects associated with divergent or conflicting rulings by the different courts and tribunals on the same legal issue. The focus will be on comity, but more specifically, on the more forceful variation of it, namely, the so-called *Solange* method (*Solange* means "as long as" in German) developed by the German Federal Constitutional Court.

The analysis will be wrapped up by some concluding remarks.

II. Case-Studies on the Effects of the Multiplication of International Courts and Tribunals

In this part several case-studies will be presented that illustrate what effects the multiplication of international courts and tribunals can have if those courts and tribunals come to divergent or conflicting rulings or simply negate the existing jurisdiction of another court or tribunal. To be sure, the multiplication of international courts and tribunals as such is not a problem. On the contrary, it should be considered as a sign that states are prepared to use courts and tribunals more often for settling their disputes rather than using armed forces. In other words, the multiplication of international courts and tribunals should be seen as a sign of a movement towards a rule of law based dispute settlement culture between states.[2] However, the multiplication of international courts and tribunals does raise problems if those courts arrive at divergent or even conflicting rulings – as has actually

[1] See i.e., Y. Shany, Regulating Jurisdictional Relations between National and International Courts, (2007); idem, The Competing Jurisdiction of International Courts and Tribunals, (2003); N. Lavranos, The MOX Plant and IJzeren Rijn Disputes: Which Court is the Supreme Arbiter?, 19 Leiden Journal of International Law 223, 223-246 (2006).

[2] See i.e., E.-U. Petersmann, Multilevel Judicial Governance of International Trade Requires a Common Conception of Rule of Law and Justice, 10(3) Journal of International Economic Law 529, 529-552 (2007).

been the case on several occasions. The main reason for these problems is the fact that there is no hierarchical legally binding relationship between all these courts and tribunals. In other words, there is no hierarchy between the various courts and tribunals, so they are not bound by each other's jurisprudence. Hence, they can act – formally and legally speaking – in "clinical isolation".[3]

The case-studies discussed below cover a wide range of areas of international law, ranging from environmental law, trade law, and human rights law to general international law issues such as individual and state responsibility. Moreover, jurisdictional overlap also takes place between different legal orders, for instance EC law, MERCOSUR law, NAFTA law *vis-à-vis* international trade law as well as EC law *vis-à-vis* European Convention on Human Rights ("ECHR") law.

This underlines the fact that the problem of competing jurisdictions is not confined to a certain area of international law but rather is of general importance which requires a generally applicable solution. The case-studies are each introduced by a short summary of the facts, followed by a synopsis of the relevant points of the decision of the court or tribunal as far as they concern the jurisdictional aspects and are concluded by a short analysis.

The first case concerns the *Mox Plant* dispute which entailed three separate dispute settlement proceedings: (i) the OSPAR arbitral tribunal's decision[4], (ii) the UNCLOS arbitral tribunal's decision[5] and (iii) the European Court of Justice's ("ECJ") judgment.[6] The relevant aspect of these proceedings for our purposes is the question whether or not the ECJ has exclusive jurisdiction instead of the arbitral tribunals.

That question was also the focus in the second case regarding the *IJzeren Rijn (*or *Iron Rhine)* dispute and the *IJzeren Rijn* arbitral tribunal's award.[7]

The third case deals with the *Mexico Soft Drinks*[8] case brought before the WTO and its relationship with the NAFTA dispute settlement system.

The fourth case examines the *Brazilian Tyres*[9] case brought before the WTO and its relationship with the dispute settlement system of the MERCOSUR.

---

[3] The term "clinical isolation" is used in analogy and by reference to G. Marceau, A Call for Coherence in International Law – Praises for the Prohibition Against "Clinical Isolation" in WTO Dispute Settlement, 33(5) Journal of World Trade Law 115, 87-153 (1999).

[4] Available at <http://www.pca-cpa.org/showpage.asp?pag_id=1158>.

[5] Available at <http://www.pca-cpa.org/showpage.asp?pag_id=1148>.

[6] ECJ case C-459/03, *Commission v Ireland*, ECR I-4635 (2006).

[7] See <http://www.pca-cpa.org/showpage.asp?pag_id=1056>.

[8] WTO Mexico-Tax Measures on Soft Drinks and Other Beverages, Dispute DS308, Panel report circulated on 7 October 2005, Appellate Body report circulated on 6 March 2006. On 24 March 2006, the DSB adopted the Appellate Body report and the Panel report, as modified by the Appellate Body report. Reports available at <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds308_e.htm>.

[9] WTO Brazil-Measures Affecting Imports of Retreated Tyres, Dispute DS332, Panel Report circulated on 12 June 2007, Appellate Body Report circulated on 3 December 2007. On 17 December, the DSB adopted the Appellate Body report and the Panel report, as modified by the Appellate Body report. Reports available at <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm>.

The fifth case concerns the International Court of Justice's ("ICJ") recent *Genocide Convention*[10] ruling in which the ICJ discussed the jurisdiction of the International Criminal Tribunal for the former Yugoslavia ("ICTY") regarding the application of a broader *Nicaragua* test by the ICTY.

Finally, the last case turns to the European Court of Human Rights' (ECrtHR) *Bosphorus* judgment[11] in which the ECrtHR clarified its jurisdiction *vis-à-vis* the ECJ concerning the level of fundamental rights protection in Europe.

A. The *MOX Plant* Dispute

The Facts

For many years Ireland has been concerned about the radioactive discharges of the Mox Plant situated in Sellafield, U.K., that are being released into the Irish Sea.[12] After having unsuccessfully tried to obtain information from the U.K. about the discharges of the Mox Plant, Ireland instituted proceedings against the U.K. by raising two different claims.[13]

First, Ireland wanted to obtain from the U.K. all available information regarding the radioactive discharges of the Mox Plant by relying on Article 9 of the Convention for the Protection of the Marine Environment of the North-East Atlantic ("OSPAR"). Article 9(2) OSPAR requires the contracting parties to make available information "on the state of the maritime area, on activities or measures adversely affecting or likely to affect it".

Second, Ireland believed that the discharges of the Mox Plant contaminated its waters and therefore constituted a violation of the UN Law of the Sea Convention ("UNCLOS"). Accordingly, Ireland sought an award for the disclosure of information regarding the Mox Plant from the U.K. on the basis of the OSPAR convention as well as a declaration that the U.K. violated its obligations under UNCLOS. After lengthy negotiations, Ireland and the U.K. agreed to establish arbitral tribunals under both the OSPAR and UNCLOS conventions in order to resolve the dispute.

---

[10] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia Herzegovina v Serbia and Montenegro*) ICJ judgment of 26 February 2007. Available at <http://www.icj-cij.org/docket/files/91/13685.pdf>.

[11] ECrtHR *Bosphorous Hava v Ireland*, App. No. 45036/98, judgment of 30 June 2005. Available at <http://cmiskp.echr.coe.int////tkp197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=10594&sessionId=5426811&skin=hudoc-en&attachment=true>.

[12] See for an overview <http://www.ecolo.org/documents/documents_in_english/Ireland-PETER-BRAZEL.doc>.

[13] See for the materials of the dispute Permanent Court of Arbitration, available at <www.pca-cpa.org>. See further: Y. Shany, The First MOX Plant Award: The Need to Harmonize Competing Environmental Regimes and Dispute Settlement Procedures, 17 Leiden Journal of International Law 815, 815-828 (2004).

However, it should be noted that this dispute between two EC member states also touches on EC law (EC environmental law legislation and the EURATOM treaty). This in turn potentially triggers Article 292 EC Treaty (hereinafter "EC"), which prescribes that all disputes between EC member states involving EC law should be brought exclusively before the ECJ.[14] In other words, this dispute raised the potential overlap of jurisdiction between the two arbitral tribunals and the ECJ.[15] Eventually, as will be discussed below, the *Mox Plant* dispute came before the ECJ – at least as far as the UNCLOS dispute is concerned.

The OSPAR Arbitral Tribunal Award

In its decision of 2 July 2003 the OSPAR arbitral tribunal asserted its jurisdiction and rendered a final award.[16] As regards the possible implications of EC law and in particular the possible jurisdiction of the ECJ, the OSPAR arbitral tribunal refused to take into account any other sources of international law or European law that might potentially be applicable in the dispute. Whereas Article 32(5)(a) of OSPAR states that the arbitral tribunal shall decide according to the "rules of international law, and, in particular those of the [OSPAR] Convention", the OSPAR arbitral tribunal argued that the OSPAR Convention had to be considered to be a "self-contained" dispute settlement regime, such that the tribunal could base its decision only on the OSPAR Convention.[17]

Despite the fact that other relevant sources of international law or European law (in particular EC Directive 90/313[18], now replaced by EC Directive 2003/4[19], relevant ECJ jurisprudence[20] or the Convention on access to information, public participation in decision making, and access to justice regarding environmental matter ("the Aarhus Convention") of 1998, which has been ratified by all EC member states and recently also by the EC itself)[21], were applicable in this case, the OSPAR arbitral tribunal did not consider itself competent to take these into account.

---

[14] P. Craig/G. de Burca, EU Law, 4th ed., 203 (2008).

[15] See for a detailed analysis Lavranos, *supra* note 1.

[16] OSPAR arbitral tribunal, Mox Plant, final award, *supra* note 5, available at <http://www.pca-cpa.org>. See further: T. McDorman/D. Caron, Access to Information under Article 9 OSPAR Convention, 98 Am. J. Int'l L. 331, 331-341 (2004).

[17] OSPAR arbitral tribunal, *supra* note 5, para. 143.

[18] Council Directive 90/313/EEC of 7 June 1990 on the Freedom of Access to Information on the Environment, O.J. L 158/56 (1990).

[19] Directive 2003/4 of the EP and of the Council of 28 January 2003 on Public Access to Environmental Information and Repealing Council Directive 90/313/EEC, O.J. L 41/26 (2003).

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

[21] Council Decision 2005/370/EC of 17 February 2005 on the Conclusion, on Behalf of the EC, of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, O.J. L 124/1 (2005).

In substance, the OSPAR arbitral tribunal ruled that the U.K. did not violate the OSPAR Convention by not disclosing the information sought by Ireland.

More specifically, the OSPAR arbitral tribunal chose to interpret the relevant provision of the OSPAR Convention much more restrictively compared to the ECJ's interpretation of the comparable Community law provisions. While the OSPAR arbitral tribunal was obviously legally not bound to follow the ECJ's jurisprudence, the fact that the dispute was between two EC member states and the similar context of the relevant OSPAR and EC law provisions, would have been sufficient reasons for the OSPAR arbitral tribunal to be more in line with the ECJ. Consequently, by failing to do so the OSPAR arbitral tribunal caused fragmentation regarding the standard of access to information on environmental issues provided for by EC law and by the OSPAR Convention.

The UNCLOS Arbitral Award

In contrast to the straight-forward OSPAR proceeding discussed above (first case), the UNCLOS proceeding appeared to be more complicated because of the various dispute settlement options offered by UNCLOS.

More specifically, Articles 287 and 288 UNCLOS provide that various forums can be selected by the contracting parties to settle their disputes. Parties can use the International Tribunal for the Law of the Sea (ITLOS), the ICJ or ad hoc arbitral tribunals. Moreover, Article 282 UNCLOS explicitly recognizes the possibility of bringing a dispute before dispute settlement bodies established by regional or bilateral agreements. As the parties had not commonly designated a certain dispute settlement forum, the dispute had to be submitted to an arbitration procedure in accordance with Annex VII Article 287(5) UNCLOS. However, pending the establishment of this ad hoc arbitral tribunal, Ireland requested from ITLOS interim measures under Article 290(5) UNCLOS. Ireland asked that the U.K. be ordered to suspend the authorisation of the Mox Plant or at least take all measures to stop the operation of the Mox Plant instantly.

Regarding the issue of jurisdiction, the ITLOS determined that *prima facie* the conditions of Article 290(5) UNCLOS were met so that under Annex VII the arbitral tribunal had jurisdiction to decide on the merits of the case.[22] Concerning the substance, the ITLOS ordered both parties to co-operate and enter into consultations regarding the operation of the Mox Plant and its emissions into the Irish Sea, pending the decision on the merits of the arbitral award.[23]

[22] ITLOS, Mox Plant, Request for Provisional Measures, Order of 3.12.2001, available at <http://www.itlos.org>.

[23] Ibid.

After the matter had come before the UNCLOS arbitral tribunal, the arbitral tribunal confirmed the finding of ITLOS that it had *prima facie* jurisdiction.[24] However, in a second step, the arbitral tribunal considered it necessary to determine whether it indeed had definite jurisdiction to solve the dispute, in view of the U.K.'s objection that the ECJ had jurisdiction in this case on the basis of Article 292 EC because Community law was also at issue. The arbitral tribunal accepted the U.K.'s objection and consequently stayed the proceedings. Accordingly, the arbitral tribunal requested the parties of the dispute to first find out whether or not the ECJ had jurisdiction before it would proceed with rendering a decision on the merits.[25]

But the parties did not have to take any action as – at about the same time – the European Commission (supported by the U.K.) started an Article 226 EC infringement procedure against Ireland for violating Article 292 EC and the identical provision in the Euratom Treaty. The Commission argued that Ireland had instituted the proceedings against the U.K. without taking due account of the fact that the EC was a party to UNCLOS. In particular, the Commission claimed that by submitting the dispute to a tribunal outside the Community legal order, Ireland had violated the exclusive jurisdiction of the ECJ as enshrined in Article 292 EC and the similarly worded Article 193 Euratom. Furthermore, according to the Commission, Ireland had also violated the duty of loyal co-operation incumbent on it under Article 10 EC and the similarly worded Article 192 Euratom.

So in this way the *Mox Plant* case, at least as far as it concerned the UNCLOS proceedings, ultimately came before the ECJ – against the initial intentions of the member states involved in the dispute.

The MOX Plant Judgment of the ECJ

The starting point of the Court's analysis was the question whether or not this dispute falls within the acting competence of the EC, because only if that were the case would the exclusive jurisdiction of the ECJ based on Article 292 EC be triggered.[26] The EC and its member states have concluded the Law of the Sea Convention as a mixed agreement.[27] In this context the ECJ reaffirmed that mixed agree-

[24] UNCLOS arbitral tribunal, Mox Plant, Suspension of Proceedings on Jurisdiction and Merits and Request for further Provisional Measures, Order No. 3 of 24.6.2003, available at <http://www.pca-cpa.org>.

[25] Ibid.

[26] ECJ case C-459/03, *Commission v Ireland*, ECR I-4635 (2006); see for a detailed analysis C. Romano, Commission of the European Communities v. Ireland, 101 Am. J. Int'l L. 171, 171-179 (2007); N. Lavranos, The Scope of the Exclusive Jurisdiction of the Court of Justice, 32 European Law Review 83, 83-94 (2007); S. Maljean-Dubois/J.-C. Martin, L'affaire de l'Usine Mox devant les tribunaux internationaux, 134 Journal du Droit International 437, 437-471 (2007).

[27] Council Decision 98/392/EEC of 23.3.1998 concerning the Conclusion by the EC of the UN Convention of 10.12.1982 on the Law of the Sea and the Agreement of 28.7.1994 Relating to the Implementation of Part XI Thereof O.J. L 179/1 (1998).

ments have the same status in the Community legal order as agreements concluded by the EC alone.[28] Consequently, when the EC ratified UNCLOS, it became an integral part of the Community legal order. Based on that, the ECJ examined whether the EC had exercised its competence in the policy area (maritime pollution) that is at the centre of the dispute between Ireland and U.K. The ECJ concluded that the matters covered by the provisions of UNCLOS relied upon by Ireland before the arbitral tribunal are "very largely" regulated by Community law.[29] Ireland therefore was relying before the UNCLOS arbitral tribunal on provisions that have become part of the Community legal order. This triggered the jurisdiction of the ECJ based on Article 292 EC. The next issue was to determine whether that jurisdiction is indeed exclusive in view of the fact that UNCLOS provides for its own sophisticated dispute settlement system. Referring to its position in Opinion 1/91,[30] the ECJ held that

> "[…] an international agreement cannot affect the allocation of responsibilities defined in the Treaties and, consequently, the autonomy of the Community legal system, compliance with which the Court ensures under Article 220 EC. That exclusive competence is confirmed by Article 292 EC […]."[31]

As a consequence thereof, an international agreement such as UNCLOS cannot affect the exclusive jurisdiction of the ECJ regarding the resolution of disputes between the member states concerning the interpretation and application of Community law.[32] Hence, Ireland was precluded on the basis of Articles 292 and 220 EC from bringing the dispute before the UNCLOS arbitral tribunal. Indeed, the Court of Justice went as far as stating that

> "[…] the institution and pursuit of proceedings before the arbitral tribunal […], *involve a manifest risk that the jurisdictional order* laid down in the Treaties, consequently, *the autonomy of the Community legal system may be adversely affected*."[33]

The ECJ did not leave it at claiming exclusive jurisdiction in this case, but found it necessary to make two important further remarks. First, that it is only for the ECJ itself to determine – should the need arise – whether, and if so to what extent, provisions of the international agreement in question fall outside its jurisdiction, and therefore may be adjudicated by another dispute settlement body.[34] Accordingly, if member states doubt whether a dispute involves Community law aspects, they are essentially obliged to obtain an answer from the ECJ before bringing the case to another dispute settlement body. Second, the ECJ found that Article 292 EC must be understood as a specific expression of the member states' more general

[28] *Supra* note 26, para. 84.
[29] Ibid. at para. 110.
[30] ECJ Opinion 1/91 (EEA) ECR I-6079 (1991).
[31] *Supra* note 26, para. 123.
[32] Ibid. at para. 132.
[33] Ibid. at para. 154 [emphasis added].
[34] Ibid. at para. 135.

duty of loyalty as enshrined in Article 10 EC.[35] Thus, member states have a duty to inform and consult with the competent Community institutions (i.e. the Commission and/or the ECJ) prior of bringing a case before a dispute settlement body other than the ECJ.[36] In this way, the Commission and eventually the ECJ are informed in time of a dispute settlement procedure that might interfere with Article 292 EC. This in turn puts the Commission in a position to start an Article 226 EC infringement procedure against a member state if it considers that Article 292 EC has been violated. However, it should be emphasized that this is entirely in the discretion of the Commission. In contrast to the Commission, the ECJ has no possibility to seize *ex officio* by itself a case in order to protect its exclusive jurisdiction.

Analysis

The *Mox Plant* dispute was the first case that highlighted the potential problems associated with the exclusive ECJ jurisdiction and the multiplication of international courts and tribunals. The ECJ clearly decided to defend its exclusive jurisdiction to the maximum as far as it concerns disputes between EC member states that potentially may involve EC law. The ECJ did so by substantially limiting the freedom of EC member states to select a dispute settlement body of their choice. Only if it has been established by the ECJ that no EC law issues are involved, are EC member states in a position to bring their dispute before another dispute settlement body. In this way the ECJ hopes to protect the uniform application of EC law in all EC member states. However, the different approaches by the OSPAR and UNCLOS arbitral tribunals illustrate that the ECJ cannot force them to take EC law or for that matter the ECJ's jurisdiction into account. The UNCLOS arbitral tribunal showed comity by staying the proceedings and requesting the parties to check first whether the jurisdiction of the ECJ is triggered in this case. In contrast, the OSPAR arbitral tribunal did not show any comity towards the ECJ.

The *Mox Plant* dispute also revealed that the ECJ is quite helpless when it comes to defending its exclusive jurisdiction, in particular it cannot prevent member states from going to another court. Only the Commission can take action against such a move if it considers it necessary and appropriate.

In sum, the *Mox Plant* dispute exhibits fragmenting effects as far as the OSPAR Convention *vis-à-vis* EC access on information law is concerned, while at the same time showing unifying effects by preserving the uniform application of EC environmental law as far as UNCLOS law is concerned.

[35] Ibid. at para. 169 "The obligation devolving on Member States, set out in Article 292 EC, to have recourse to the Community judicial system and to respect the Court's exclusive jurisdiction, which is a fundamental feature of that system, must be understood as a specific expression of Member States' more general duty of loyalty resulting from Article 10 EC."

[36] Ibid. at para. 179.