

Treaties — EC Treaty — Euratom Treaty — Application and interpretation — Court of Justice of the European Communities — Jurisdiction — Scope — Member States of European Community — Obligations on Member States under EC and Euratom Treaties — Member State instituting dispute-settlement proceedings against another Member State under United Nations Convention on the Law of the Sea, 1982 — Whether dispute concerning Community law — Whether Ireland failing to respect exclusive jurisdiction vested in Court — Whether dispute requiring interpretation and application of Community law measures — Whether Ireland failing to comply with duty of cooperation — Whether Ireland failing to fulfil its obligations under Articles 10 and 292 of EC Treaty and Articles 192 and 193 of Euratom Treaty

International tribunals — Arbitral Tribunal established under Annex VII of United Nations Convention on the Law of the Sea, 1982 — Jurisdiction — EC Member State submitting dispute with other EC Member State to Arbitral Tribunal — Whether dispute concerning Community law — Whether EC Member State thereby failing to fulfil its obligations under EC and Euratom Treaties — Whether system for resolution of disputes in EC Treaty or Part XV of UNCLOS having precedence

Treaties — United Nations Convention on the Law of the Sea, 1982 — UNCLOS concluded by European Community and all its Member States — Mixed agreement — Status of UNCLOS in Community legal order — EC Member State relying on UNCLOS provisions in submitting dispute to Arbitral Tribunal — Whether UNCLOS provisions in issue within scope of Community competence — Whether forming integral part of Community legal order — Whether dispute concerning interpretation or application of EC or Euratom Treaties — Effect of UNCLOS on allocation of responsibilities in Treaties — Effect of UNCLOS on autonomy of Community legal system

Relationship of international and municipal law — Treaties — United Nations Convention on the Law of the Sea, 1982 — Arbitral Tribunal established under Annex VII of UNCLOS — European Community — EC and Euratom Treaties — Obligations of Member States of European Community under EC and Euratom Treaties — Exclusive jurisdiction of Court of Justice of the European Communities — Autonomy of Community legal order — Whether

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EC Member States having conflicting legal obligations under public international law — Whether UNCLOS part of Community legal order — Court's jurisdiction over mixed agreements such as UNCLOS — Scope — Whether UNCLOS provisions in issue within Community competence — Whether part of Community law — Whether subject to Court's jurisdiction — Whether system for resolution of disputes in EC Treaty or Part XV of UNCLOS having precedence

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Sea — Environmental protection — United Nations Convention on the Law of the Sea, 1982 — Protection of marine environment — UNCLOS provisions invoked in dispute relating to protection of marine environment — Whether within scope of European Community competence — Whether subject to jurisdiction of Court of Justice of the European Communities — The law of the European Communities

COMMISSION OF THE EUROPEAN COMMUNITIES *v.* IRELAND¹

(Case C-459/03)

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

¹ The Commission was represented by P. J. Kuijper and M. B. Martenczuk, acting as Agents. The Commission was supported by the United Kingdom of Great Britain and Northern Ireland, intervening, represented by C. Jackson and C. Gibbs, acting as Agents, and by R. Plender QC. Ireland was represented by R. Brady and D. O'Hagan, acting as Agents, and by P. Sreenan and E. Fitzsimons SC, P. Sands QC and N. Hyland BL. Ireland was supported by the Kingdom of Sweden, represented by K. Wistrand, acting as Agent. The language of the case was English.

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(Skouris, *President*; Jann, Timmermans (*Rapporteur*) and Malenovský, *Presidents of Chambers*; Puissochet, Schintgen, Colneric, von Bahr, Cunha Rodrigues, Ilešič, Klučka, Lohmus and Levits, *Judges*; Poiares Maduro, *Advocate General*)

SUMMARY:² *The facts:*—On 30 October 2003, the Commission of the European Communities (“the Commission”) brought an action against Ireland for failure to fulfil its obligations under Articles 10 and 292 of the Treaty establishing the European Community, 1957 (“EC Treaty”) and Articles 192 and 193 of the Treaty establishing the European Atomic Energy Community, 1957 (“Euratom Treaty”).³ Ireland had instituted dispute-settlement proceedings against the United Kingdom under the United Nations Convention on the Law of the Sea, 1982 (“UNCLOS”)⁴ in relation to the United Kingdom’s authorization of the operation of the MOX plant, a reprocessing plant for mixed oxide fuel (“MOX”) in north-west England on the coast of the Irish Sea.⁵ For the background to this case, see the introductory note in 126 ILR 257 and the related proceedings in 126 ILR 259, 126 ILR 310 and 126 ILR 334.

The Commission sought a declaration that, by instituting dispute-settlement proceedings against the United Kingdom under UNCLOS (invoking the provisions of UNCLOS relating to the protection of the marine environment), Ireland had failed to fulfil its obligations under the EC and Euratom Treaties. First, the Commission claimed that Ireland had failed to respect the exclusive jurisdiction vested in the Court of Justice of the European Communities (“the Court”) by Article 292 of the EC Treaty to rule on any dispute concerning the interpretation and application of Community law. Second, it argued that Ireland had breached Article 292 of the EC Treaty and Article 193 of the Euratom Treaty by referring to the Arbitral Tribunal a dispute which required for its resolution the interpretation and application of measures of Community law.⁶ Third, the Commission maintained that Ireland had failed to comply with its duty of cooperation under Article 10 of the EC Treaty by exercising a competence which belonged to the Community and that it had failed in that duty under Article 10 of the EC Treaty and Article 192 of

² Prepared by Ms Karen Lee, Co-Editor.

³ Article 292 of the EC Treaty and Article 193 of the Euratom Treaty provided that: “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.”

⁴ UNCLOS was signed on 10 December 1982 and came into force on 16 November 1994. It was approved on behalf of the European Community by Council Decision 98/392/EC and had been ratified by all Member States of the European Union.

⁵ The MOX Plant, which was sited in Sellafield, used plutonium and uranium oxides to make mixed oxide fuel, an energy source for nuclear power plants.

⁶ In addition to the Convention for the Protection of the Marine Environment of the North-East Atlantic (“OSPAR”), Ireland invoked Directives 85/337 and 90/313 in regard to the EC Treaty and Directives 80/836, 92/3 and 96/29 in regard to the Euratom Treaty pursuant to UNCLOS Article 293(1), which provided that a tribunal such as the Arbitral Tribunal was to “apply this Convention and other rules of international law not incompatible with this Convention”.

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the Euratom Treaty by failing first to inform or consult with the competent Community institutions. Ireland maintained that none of the issues in dispute fell within the Court's jurisdiction.

Opinion of the Advocate General

Held:—(1) The Court's exclusive jurisdiction in disputes between Member States concerning Community law was a means of preserving the autonomy of the Community legal order. It sought to ensure that Member States incurred no conflicting legal obligations under public international law (paras. 8-10).

(2) The essential question was whether the dispute concerned Community law. If at least part of the subject matter of the dispute was governed by Community law, there was a breach of Article 292 of the EC Treaty or Article 193 of the Euratom Treaty. Whenever Community law was concerned, Member States had to settle their differences within the Community (paras. 11-15).

(3) The Court should declare that, by instituting dispute-settlement proceedings against the United Kingdom concerning the MOX plant, Ireland had failed to fulfil its obligations under Article 292 of the EC Treaty and Article 193 of the Euratom Treaty.

(a) By submitting the dispute to an Arbitral Tribunal established under Annex VII of UNCLOS, Ireland had failed to fulfil its obligations under Article 292 of the EC Treaty. The Court had jurisdiction in respect of mixed agreements such as UNCLOS, to which both the Community and Member States were party, in so far as the provisions fell within the scope of Community competence. With respect to the UNCLOS provisions relating to the protection of the marine environment, the Community exercised both its exclusive and non-exclusive external competence in the area of environmental protection when it acceded to UNCLOS. The UNCLOS provisions invoked by Ireland had thus become part of Community law and so were subject to the Court's jurisdiction. No transfer of jurisdiction to UNCLOS had been effected by its conclusion (paras. 17-43 and 61).

(b) By relying on Community law before a non-Community tribunal, Ireland had failed to fulfil its obligations under Article 292 of the EC Treaty and Article 193 of the Euratom Treaty. Ireland had claimed that the United Kingdom had violated Community law obligations. In any event, Ireland had invited the Arbitral Tribunal to interpret United Kingdom obligations under EC and Euratom law (paras. 44-52 and 61).

(4) The Court should declare that, by instituting proceedings without previously consulting the Commission, Ireland had failed to fulfil its obligations under Article 10 of the EC Treaty and Article 192 of the Euratom Treaty. The duty of cooperation was particularly important in the area of external relations. Ireland was obliged to consult with the Commission to avoid the risk of infringing Community rules or obstructing Community policies (paras. 53-9 and 61).

Judgment of the Court of Justice

Held:—Ireland had failed to fulfil its obligations under Articles 10 and 292 of the EC Treaty and under Articles 192 and 193 of the Euratom Treaty.

(1) Ireland had failed to respect the exclusive jurisdiction vested in the Court by Article 292 of the EC Treaty to rule on any dispute concerning the interpretation and application of Community law. Articles 220 and 292 of the EC Treaty precluded Ireland from initiating proceedings before the Arbitral Tribunal with a view to resolving the MOX plant dispute.

(a) According to settled case law, the provisions of UNCLOS formed an integral part of the Community legal order. UNCLOS had been signed by the Community and subsequently approved by Decision 98/392 (paras. 80-2).

(b) Although a mixed agreement, concluded by the Community and all of its Member States on the basis of shared competence, UNCLOS had the same status in the Community legal order as a purely Community agreement. The UNCLOS provisions on the prevention of marine pollution relied on by Ireland, which covered a significant part of the dispute relating to the MOX plant, came within the scope of Community competence which the Community had elected to exercise by acceding to UNCLOS (paras. 83-121).

(c) The Court's jurisdiction was exclusive. An international agreement could not affect the allocation of responsibilities defined in the Treaties and, consequently, the autonomy of the Community legal system, compliance with which the Court ensured under Article 220 of the EC Treaty. Exclusive jurisdiction was confirmed by Article 292 of the EC Treaty. It followed from Article 282 of UNCLOS that the system for the resolution of disputes set out in the EC Treaty had in principle to take precedence over that contained in Part XV of UNCLOS. Such exclusivity precluded such a dispute being brought by a Member State before an Arbitral Tribunal established pursuant to Annex VII of UNCLOS (paras. 122-5).

(d) Since the UNCLOS provisions in issue came within the scope of Community competence, they formed an integral part of the Community legal order. As such this dispute concerned the interpretation or application of the EC Treaty within the terms of its Article 292 (paras. 126-7).

(e) This dispute was clearly covered by the dispute-settlement procedure set out in Article 227 of the EC Treaty. The proceedings brought by Ireland before the Arbitral Tribunal constituted a method of settlement of dispute within the terms of Article 292 of the EC Treaty inasmuch as the Arbitral Tribunal's decisions were final and binding on the parties; it was not a method provided for in the EC Treaty (paras. 128-39).

(2) Ireland had breached Article 292 of the EC Treaty and Article 193 of the Euratom Treaty by referring to the Arbitral Tribunal a dispute which required for its resolution the interpretation and application of measures of Community law.

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(a) By arguing that the 1993 environmental statement did not meet the requirements of Directive 85/337 and that the United Kingdom's refusal to disclose the operating plan for the MOX plant prevented the evaluation of the justification for that plant as required under Directive 96/29 as well as breaching Article 6 of both Directive 80/836 and Directive 96/29, Ireland had submitted Community law instruments to the Arbitral Tribunal for the purposes of their interpretation and application in the context of proceedings seeking a declaration that the United Kingdom had breached the provisions of those instruments (paras. 146-51).

(b) Ireland's submission of these Community law instruments to the Arbitral Tribunal was at variance with the obligation imposed on Member States by Article 292 of the EC Treaty and Article 193 of the Euratom Treaty to respect the exclusive nature of the Court's jurisdiction to resolve disputes concerning the interpretation and application of provisions of Community law, in particular by recourse to procedures in Article 227 of the EC Treaty and Article 142 of the Euratom Treaty for a declaration that another Member State had breached those provisions (para. 152).

(c) Since some measures fell within the scope of the EC Treaty and some within the Euratom Treaty, both Article 292 of the EC Treaty and Article 193 of the Euratom Treaty had been breached (para. 153).

(d) Proceedings before the Arbitral Tribunal involved a manifest risk that the jurisdictional order laid down in the Treaties and, consequently, the autonomy of the Community legal system might be adversely affected irrespective of whether the Arbitral Tribunal was called upon to appraise whether the United Kingdom had breached any Community law rule or the application technique (paras. 154-7).

(3) Ireland had failed to comply with its duty of cooperation under Article 10 of the EC Treaty and Article 192 of the Euratom Treaty by bringing dispute-settlement proceedings under UNCLOS without having first informed and consulted the competent Community institutions.

(a) The submission of a dispute of this nature, in which Community and Member State competences were liable to be closely interrelated, to the Arbitral Tribunal risked a judicial forum other than the Court ruling on the scope of obligations imposed on the Member States pursuant to Community law. Moreover, the Commission's services had already contended that the dispute was a matter falling within the exclusive jurisdiction of the Court (paras. 168-78).

(b) The obligation of close cooperation within the framework of a mixed agreement involved a duty to inform and consult the competent Community institutions prior to instituting such proceedings under the EC and Euratom Treaties (paras. 179-83).

The text of the judgment of the Court commences at p. 23. The text of the Opinion of Advocate General Poirares Maduro commences on the opposite page.

**OPINION OF ADVOCATE GENERAL
POIARES MADURO¹**

[4640] 1. These infringement proceedings require the Court to consider for the first time an alleged breach by a Member State of Article 292 EC and Article 193 EA. The Commission believes that Ireland has infringed these provisions, as well as Article 10 EC and Article 192 EA, by submitting a dispute with another Member State (the United Kingdom) to an arbitral tribunal established under the United Nations Convention on the Law of the Sea (hereinafter “UNCLOS”).

2. According to Article 292 EC and its identically worded counterpart, Article 193 EA, “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.” In order to establish whether these provisions were infringed, the Court must determine if the matters brought before the Arbitral Tribunal by Ireland fall within the scope of Community law.

**I THE FACTS AND THE PRE-CONTENTIOUS
PROCEDURE**

3. The present proceedings originate in a dispute between Ireland and the United Kingdom over the operation of a MOX plant in Sellafield, in the north-west of England, on the coast of the Irish Sea. The plant is designed to recycle plutonium from spent nuclear fuel, by mixing plutonium dioxide with depleted uranium dioxide and converting it into mixed oxide fuel (MOX), which can be used as an energy source in nuclear power plants.

4. The United Kingdom approved the construction of the MOX plant by British Nuclear Fuel plc (hereafter “BNFL”) following an environmental impact study published by BNFL in 1993. The plant was completed in 1996. On 3 October 2001, after conducting five public enquiries into the economic justifications of the MOX plant, the United Kingdom granted authorisation to BNFL to operate the plant and manufacture MOX.

[4641] 5. On 25 October 2001 Ireland, alleging various breaches by the United Kingdom of the provisions of UNCLOS, instituted proceedings concerning the MOX plant against the United Kingdom before an arbitral tribunal established under Annex VII of UNCLOS.²

¹ Original language: Portuguese.

² In addition, on 9 November 2001, pursuant to Article 290(5) UNCLOS, Ireland submitted a request to the International Tribunal for the Law of the Sea (ITLOS) for provisional measures,

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6. On 20 June 2002 a meeting was held between Ireland and the Commission services concerning the MOX plant disputes.³ On 15 May 2003 the Commission addressed a letter of formal notice to Ireland, expressing the view that by instituting proceedings against the United Kingdom under UNCLOS, Ireland had failed to fulfil its obligations under Articles 10 EC and 292 EC and Articles 192 EA and 193 EA.

7. By letter of 15 July 2003 Ireland explained that it disagreed with the views of the Commission. On 19 August 2003 the Commission addressed a reasoned opinion to Ireland on account of the institution of arbitral proceedings concerning the MOX plant against the United Kingdom under UNCLOS. On 16 September 2003 Ireland replied that it remained unconvinced of the Commission's point of view. The Commission brought the matter before the Court on 15 October 2003.

II THE ISSUES RAISED

8. The Court has only rarely been called to decide a dispute between two Member States.⁴ Yet, by virtue of Article 220 EC in conjunction with Article 227 EC, and Article 136 EA in conjunction with Article 142 EA, the Court has jurisdiction in such disputes where they concern the application and interpretation of the EC Treaty or the Euratom Treaty.⁵

[4642] 9. Article 292 EC and Article 193 EA provide that this jurisdiction is exclusive. Together, these provisions establish what has

namely suspension of the authorisation of the MOX plant and a stop to international movements of radioactive materials associated with the MOX plant. ITLOS prescribed certain provisional measures different from those requested by Ireland: ITLOS, Order of 3 December 2001 in Case No 10, *The MOX Plant Case (Ireland v. United Kingdom)*, Provisional Measures, Reports of Judgments, Advisory Opinions and Orders 5 (2001), Part II, pp. 51-4.

³ Ireland had instituted related dispute-settlement proceedings against the United Kingdom under the Convention for the Protection of the Marine Environment of the North-East Atlantic ("OSPAR"). Ireland contended that the United Kingdom had breached Article 9 of the OSPAR Convention. The OSPAR Tribunal rejected the claims by Ireland: Final Award of 2 July 2003 in the *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention (Ireland v. United Kingdom)*. The present infringement proceedings against Ireland concern only the institution of dispute-settlement proceedings under UNCLOS.

⁴ Thus far, five such disputes have been brought before the Court. In two instances the proceedings led to a judgment: Case 141/78 *France v. United Kingdom* [1979] ECR 2923; and Case C-388/95 *Belgium v. Spain* [2000] ECR I-3123. Two cases were withdrawn and removed from the register (order of 15 February 1977 in Case 58/77 *Ireland v. France*, not reported; and order of 27 November 1992 in Case C-349/92 *Spain v. United Kingdom*, not reported). One case is currently pending: Case C-145/04 *Spain v. United Kingdom*.

⁵ Other provisions in the EC Treaty and the Euratom Treaty under which disputes between Member States can be brought before the Court of Justice are Articles 88(2) EC, 95(9) EC, 239 EC, 298 EC and 154 EA.

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been called a “jurisdictional monopoly” for the Court of Justice regarding disputes between Member States concerning the application and interpretation of Community law.⁶

10. The Court’s exclusive jurisdiction in disputes between Member States concerning Community law is a means of preserving the autonomy of the Community legal order.⁷ It serves to ensure that Member States do not incur legal obligations under public international law which may conflict with their obligations under Community law. Fundamentally, Article 292 EC and Article 193 EA express the duty of loyalty to the judicial system created by the Community Treaties. Member States have agreed to settle their differences through the ways provided in the Treaties; they must abstain from submitting disputes relating to those Treaties to other methods of settlement.⁸

11. The Commission contends that Ireland has infringed this rule by submitting its dispute with the United Kingdom regarding the MOX plant to arbitration by a tribunal established under UNCLOS. The essential question to be decided by this Court is whether that dispute concerns Community law. The Court must examine and compare, on the one hand, the scope of its jurisdiction and, on the other hand, the subject-matter of the dispute brought before the Arbitral Tribunal.

12. Before the Arbitral Tribunal, Ireland argues that the United Kingdom has breached three sets of obligations. First, the obligation to carry out a proper assessment of the potential effects of the authorisation of the MOX plant on the marine environment of the Irish Sea. In this regard, Ireland refers to Article 206 UNCLOS. Second, the obligation to cooperate with Ireland, as co-riparian of the semi-enclosed Irish Sea, in taking the necessary steps to preserve the marine environment of that sea. In this regard, Ireland refers to Articles 123 and 197 UNCLOS. Third, the obligation to take all the steps necessary to protect and preserve the marine environment of the Irish Sea. In this connection, Ireland invokes Articles 192, 193, 194, 207, 211, 213 and 217 UNCLOS.

⁶ Mackel, N., “Article 292 (ex-Article 219)”, in: Léger, P. (ed.), *Commentaire article par article des traités UE et CE*, Dalloz/Bruylant, Paris/Brussels, 2000, p. 1874. In similar words: Lasok, K., and Lasok, D., *Law and Institutions of the European Union*, Reed Elsevier, 2001, p. 371. The ECSC Treaty contained a similar provision, Article 87 CS. On the difference in wording between this provision and Article 292 EC/193 EA, see Herzog, P., “Article 219”, in: Smit/Herzog, *The Law of the European Community: A Commentary on the EEC Treaty*, Bender, New York (1976), at 6-170.1-2.

⁷ Opinion 1/91 of 14 December 1991 [1991] ECR I-6079, paragraph 35.

⁸ Van Panhuys, H. F., “Conflicts between the Law of the European Communities and Other Rules of International Law”, 3 *Common Market Law Review* 420 (1966), p. 445.

13. The positions of Ireland and the Commission as regards the extent of the Court's jurisdiction over the MOX plant dispute are [4643] diametrically opposed. According to Ireland, none of the issues in dispute falls within the Court's jurisdiction. The Commission, on the other hand, argues that the entire dispute comes within the jurisdiction of the Court. For the purposes of the present proceedings, however, it is not necessary to establish whether the MOX plant dispute falls wholly within the jurisdiction of the Court. It suffices to verify whether at least part of the subject-matter of the dispute is governed by Community law. If that is so then, in my view, a breach of Article 292 EC—or Article 193 EA, as the case may be—is established.

14. This is not to say that the Court's jurisdiction extends to the entire dispute, merely because part of the dispute is covered by Community law. It may be that a dispute falls largely and perhaps predominantly outside the jurisdiction of the Court, and that only one or a few of the matters of contention come within its jurisdiction. However, in such circumstances Article 292 EC—or Article 193 EA—nevertheless precludes that the entire dispute, including the elements falling within the scope of Community law, is submitted to a method of settlement other than those provided for in the Community Treaties. After all, there is no threshold in the rules establishing the Court's jurisdictional monopoly. Whenever Community law is concerned, Member States must settle their differences within the Community.⁹

15. The Commission has presented three complaints. First, it maintains that the provisions of UNCLOS invoked by Ireland before the Arbitral Tribunal constitute part of Community law and accordingly fall within the Court's exclusive jurisdiction to settle a dispute between Member States. As a consequence, the institution of arbitral proceedings against another Member State concerning the UNCLOS provisions at issue amounts to a breach of Article 292 EC. Second, the Commission considers that Ireland has infringed Articles 292 EC and 193 EA by calling on the Arbitral Tribunal to apply the provisions of certain Community directives. Third, it contends that by instituting such proceedings Ireland has breached the duty of cooperation which can be derived from Article 10 EC and Article 192 EA.

16. I shall assess these three complaints in turn.

⁹ This does not necessarily mean that Member States should always carefully isolate the Community elements from a dispute between them in order to bring only those elements before the Court of Justice, while submitting the rest of the dispute to another method of settlement. In theory, such a solution would be in line with Articles 292 EC or 193 EA. Yet, in practice it may be preferable to bring "hybrid disputes" between Member States—concerning both matters falling within and matters falling outside the scope of the Court's jurisdiction—in their entirety before the Court under Article 239 EC or Article 154 EA.