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Nuclear power plants and the rights of neighbouring States

A case study on the management of the dispute between the Republic of Austria and the Czech Republic concerning the nuclear power plant in Temelín

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List of Abbreviations

BGBl.	Austrian Official Gazette
COP	Conference of the Parties
ECHR	European Court of Human Rights
ECR	European Court Reports
ECJ	Court of Justice of the European Communities
EIA	Environmental Impact Assessment
EU	European Union
EURATOM	European Atomic Community
IAEA	International Atomic Energy Agency
ICJ	International Court of Justice
IHT	International Herald Tribune
ILC	International Law Commission
ITLOS	International Tribunal for the Law of the Sea
L	Legislation (Part of the Official Journal of the European Communities)
MOX	mixed oxide fuel
NPT	Non-Proliferation Treaty
para.	paragraph
OJ	Official Journal of the European Communities
OSPAR	Oslo-Paris-Convention
PCIJ	Permanent Court of International Justice
UN	United Nations
UNCLOS	United Nations Convention of the Law of the Sea
UNTS	United Nations Treaty Series

I. Introduction

Whereas the details of a follow-up to the Kyoto protocol are still uncertain und subject to heated debates,[1] coordinated efforts in the fight against climate change have already yielded tangible results in Europe: In March 2007, the European Council, being the supreme policy maker in the European Union, agreed on an ambitious reduction goal, which mandates a reduction of Co_2 emissions in the European Union by 20 % of the reference value by 2020.[2] The precise implications of this goal still being subject to intricate negotiations, some Member States alongside interested observers have already invoked the potential of nuclear energy, which, as an emission-free source of energy, could make a key contribution to transform the reduction goal into reality.[3]

This potential renaissance of nuclear power plants goes hand in hand with traditional national energy policies in certain Member States of the European Union, which to a great extent have relied on energy supplied from nuclear power plants. A case in point is Lithuania, which, according to some estimates, depends to up to 75% on energy produced in the nuclear power plant located in Ignalina.[4] Conversely, other Member States, as a matter of long-standing policy and primarily due to safety-concerns, have opted for a clear "no" to nuclear power plants, some of which relying on the results of referenda so as to underscore the vitality of this policy goal. Thus, Austria, for instance, agreed, by referendum, to close its by then completed nuclear power plant in Zwentendorf back in 1978.[5] Since then, a reversal of this fundamental policy decision has never really been on the agenda. On the contrary, Austrian energy policy looked elsewhere and primarily aimed at developing hydropower plants so as to decrease dependence on energy imports from its neighbouring States, which themselves often relied on nuclear power plants.[6]

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[1] This paper states the law as of 1 November 2008. For details on the follow-up to the Kyoto protocol, see the Bali Roadmap, adopted at the UN Climate Change Conference in Bali 2007, and in particular Decision 4/CMP.3 on the scope and content of the second review of the Kyoto Protocol pursuant to its Article 9. Online available at http://unfccc.int/documentation/decisions/items/3597.php?such=j&volltext=/CMP.3#beg (31 October 2008).

[2] Presidency Conclusions of the Brussels European Council on 8 and 9 March 2007, Council Doc. No. 7224/1/07 Rev 1, paras. 29-35. This goal was recently confirmed by the Presidency Conclusions of the Brussels European Council on 15 and 16 October 2008, Council Doc. No. 14368/08, para. 16.

[3] Regina S. Axelrod, Nuclear Power and European Union Enlargement: The Case of Temelin, in: Carmin/VanDeveer (eds.), EU Enlargement and the Environment: Institutional Change and Environmental Policy in Central and Eastern Europe, Routledge, London 2005, 49. See also IHT, "Eastern Europe looks to nuclear revival to meet its power needs", 29 October 2008, http://www.iht.com/articles/2008/10/29/business/renuk.php (31 October 2008).

[4] Protocol No. 4 (of the Act of Accession) on the Ignalina Nuclear Power Plant in Lithuania, OJ 2003 L 236, p. 944.

[5] Regina S. Axelrod, Nuclear Power and European Union Enlargement: The Case of Temelin, in: Carmin/VanDeveer (eds.), EU Enlargement and the Environment: Institutional Change and Environmental Policy in Central and Eastern Europe, Routledge, London 2005, 42; see also Manfred Rotter, "The Temelín Appeasement: a Microcosmic Case Study", in: Reinisch/Kriebaum (eds.), The Law of International Relations: liber amicorum Hanspeter Neuhold, Eleven International Publishing, Utrecht 2007, 312.

[6] Cf., the website of the former incumbent provider of electric energy in Austria: http://www.verbund.at/cps/rde/xchg/internet/hs.xsl/191_218.htm.

The reliance on energy produced by nuclear power plants, be it the result of a traditional choice of national energy policy, be it due to a paradigm-shift in energy policy, in turn begs the question as to the legal position of States which have opted for a non-use of nuclear technology vis-à-vis their neighbouring States relying on nuclear energy. This problem is exacerbated by the fact that, empirically, States often opt for constructing nuclear power plants close to their national borders so as to avoid, as far as possible, harm to its own populace and territory in case of a nuclear incident.

At the same time, recent years have seen the number of environmental disputes between States brought before judicial or quasi-judicial fora on the rise. Already a quick look at the docket of the ICJ alone is revealing in this respect: Apart from the *Gabčikovo-Nagymaros* case which, for its insensitivity to environmental interests and its strict reliance on classic treaty law-doctrine has often given rise to criticism[7] and which, in a second phase, is still pending before the Court, within less than two years, the Court has recently been confronted with two further cases involving international environmental law disputes, namely, in *Pulp Mill on the River Uruguay* (Argentina v. Uruguay) and in *Aerial Herbicide Spraying* (Ecuador v. Colombia). Another example of dispute settlement by (quasi-)judicial means is the recent MOX Plant arbitration between the United Kingdom and Ireland involving environmental obligations flowing from the UNCLOS and the OSPAR conventions, as well as European Community law. What is striking about all these disputes is that they involve neighbouring States.

This paper proposes to bring together both trends in international environmental law. At the heart of the thesis is a rigorous analysis of the legal relationship between neighbouring States one of which, in exercising its national sovereignty translating into a freedom of choice of energy sources, has chosen to construct and/or operate a nuclear power plant. The primary research question in this context will thus be to identify applicable rules and principles, both in conventional and customary international law, which are imperative as to the mutual rights and obligations of neighbouring States. This will first and foremost involve a study of participatory rights and/or duties of consultation, as they stem from treaty law (**Part II**). At the same time, this will also necessitate a look at the Rio principles, State sovereignty and non-interference, and their application to the problem of nuclear power plants. However, the present paper will not address the specific issue as to the (well-developed) international legal regime relating to accidents and ensuing damages stemming from nuclear power plants. In other words, this paper will only deal with the construction and normal operation of nuclear power plants but not with problems deriving from pathologies or accidents. Neither will it include the issue of radioactive wastes and their disposal. While this analysis, given its limitation in scope, cannot claim to be exhaustive, a particular emphasis will be placed on the works of the ILC with regard to the prevention of transboundary harm from hazardous activities. Having identified relevant obligations as the derive from international law, the thesis will take the dispute between the Czech Republic and the Republic of Austria with regard to the atomic power plant in Temelín (Czech Republic) as a case study and examine the management of this dispute concerning an atomic power plant in the immediate vicinity to the Austrian border (**Part III**). Against this background, the thesis will analyse the specific solutions adopted by the parties to this particular dispute. The substantive analysis will be complemented by a discussion of possible avenues of judicial dispute settlement, both before international and national courts (**Part IV**).

[7] Note that Brownlie goes so far as to state that international environmental law does essentially not go beyond classic doctrinal underpinnings of public international law. Ian Brownlie, Principles of Public International Law, 7th edition, OUP, Oxford, 2008, 276.

The methodology deployed in the course of this paper will involve both a dogmatic analysis of rules and principles in force as well as a more policy-oriented approach in line with the New Haven-school of international law. Apart from evaluating the rules applicable between the parties concerned, an aim will thus also be to make concrete policy proposals which could govern the successful management of future disputes of a comparable nature and scale (**Part V**).

II. Rules applicable to nuclear power plants in neighbouring States

1. Introductory remarks

In the words of a distinguished commentator, "the sovereignty and equality of states represent the basic constitutional doctrine of the law of nations".[8] Sovereignty translates first and foremost into the exclusive jurisdiction over a territory and its population but also a duty of non-intervention in the are of exclusive jurisdiction of other States.[9] Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration confirm that, in accordance with the UN Charter and the principles of international law, States have the sovereign right to exploit their own resources pursuant to their own environmental policies. Concomitantly, both principles require States to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States.

State sovereignty therefore includes a State's freedom of choice with regard to the energy sources it wants to use. This choice must, subject to the proviso of non-intervention, extend to nuclear power plants. States' rights to the peaceful use of nuclear technology is confirmed by Article IV(1) of the non-proliferation treaty[10] which provides as follows:

> "Nothing in this Treaty shall be interpreted as affecting the inalienable right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes without discrimination and in conformity with Articles I and II of this Treaty."

According to one commentator, the construction and operation of nuclear power plants is in conformity with general international law as long as the generally recognised radiation and safety standards are observed.[11] However, nowadays, in light of an ever-increasing corpus of international environmental law, such statement seems to be in need of further fine-tuning. Notably, the NPT cannot be interpreted as prevailing over the obligations of international environmental law. Quite to the contrary and in line with interpreting international law as a system of norms with meaningful relations between each other, the NPT must be construed in conformity with international environmental law which has subsequently developed.[12] It has thus correctly been pointed out that Article IV(1) NPT cannot be interpreted as an opt-out

[8] Ian Brownlie, Principles of Public International Law, 7th edition, OUP, Oxford, 2008, 290.

[9] Ian Brownlie, Principles of Public International Law, 7th edition, OUP, Oxford, 2008, 290. The duty of non-intervention is rendered applicable to the relationship between the UN and their members by means of Article 2(7) of the UN Charter.

[10] Treaty on the Non-Proliferation of Nuclear Weapons, 729 UNTS 161. According to Article X(2) of the NPT-Treaty, a conference should be convened to decide whether the Treaty shall continue in force indefinitely. On 11 May 1995 the review conference thus convened concluded a final document which, inter alia, provided that the NPT-Treaty "shall continue in force indefinitely". Cf. W. Michael Reisman, Manoush H. Arsanjani, Siegfried Wiessner and Gayl S. Westerman, International Law in Contemporary Perspective, 2nd edition, Foundation Press, American Casebook Series, 74.

[11] Luzius Wildhaber, Generalbericht zum transatlantischen Kolloquium über nachbarschaftliche Beziehungen: Europäische und nordamerikanische Perspektiven, Zürich 1987, 213.

[12] Cf. ILC, Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, 2006, A/61/10, para. 1 et seq.

from international environmental law, as far as nuclear power plants are concerned.[13] This view is corroborated by the *Nuclear Weapons* Advisory opinion, which underscores the relevance in principle of international environmental law for the legality of the use of nuclear weapons.[14] This must *a fortiori* apply to the question as to the peaceful use of nuclear energy. As regards nuclear power plants in neighbouring States, there is no international agreement and no custom extant which would prohibit the construction and operation of power plants close to national borders.[15] However, limitations may flow from both conventional as well as general international law.

In the following, relevant obligations of international environmental law which provide for procedural or substantive rules applicable to nuclear power plants, starting with treaty law, will therefore be discussed.

2. Applicable treaty law

2.1 The requirement to conduct an international environmental impact analysis (EIA)

Article 2(1) of the 1991 Espoo Convention obliges contracting parties to take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities. Thus, pursuant to Article 2(3), the party of origin shall ensure that an EIA is undertaken prior to a decision to authorise or undertake a proposed activity listed in Annex I to the Convention. Point 2(b) of Annex I lists nuclear power stations and other nuclear reactors except for certain research installations. As a consequence, the party of origin is obliged to ensure that an EIA is undertaken with regard to planned nuclear power plants, in so far they are likely to cause a significant adverse transboundary impact (Article 2(4)). Given the wide notion of "impact", which covers any effect caused by a proposed activity on the environment including, inter alia, human health and safety (Article 1(vii)), the significance of impacts resulting from nuclear power plants and their transboundary nature, it stands to reason to assume that, as a rule, projected nuclear power plants will trigger the requirement to undertake an EIA.

Pursuant to Article 3, the party of origin has to notify potentially affected parties of the proposed activity. Such notification shall inter alia contain information on the proposed activity (Article 3(2)). Article 3 equally gives parties potentially affected a right to respond to the proposed activity and in turn obliges them to inform the public of those areas likely to be affected about the proposed activity.

According to Article 2(6), the party of origin shall provide to the public in the areas likely to be affected the opportunity to participate in the relevant EIA procedures; there shall be no discrimination between the public of the party of origin and that of the affected party. In addition, Article 3(8) requires that the public of the affected party in the areas likely to be affected shall be informed of the proposed activity. It shall also be provided the possibility to

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[13] Michael Geistlinger, "Völkerrechtliche Möglichkeiten zur Verhinderung des Kernkraftwerkes Temelín", in: Geistlinger (ed.), Umweltrecht in Mittel- und Osteuropa im internationalen und europäischen Kontext: Festgabe für Henn-Jüri Uibopuu zum 75. Geburtstag, BWV, Berlin 2004, 24.

[14] ICJ, Advisory opinion on the Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996, p. 226, paras. 27-30.

[15] Stefan Kirchner, "Nuclear Power Plants Close to International Borders and Neighbour Protection Under International Environmental Law - The Temelín Dispute Enters into a New Round (Grenznahe Atomkraftwerke und umweltvölkerrechtlicher Nachbarschutz – Der Temelín-Streit geht in eine neue Runde)", available at SSRN: http://ssrn.com/abstract=1004888 (31 October 2008), 3-4.

make comments and objections on the proposed activity to the party of origin. Similarly, according to Article 4(2), the EIA documentation shall be disseminated by the concerned parties – apart from the authorities of the party affected – to the public of the affected party in the areas likely to be affected which shall also be given the possibility to submit comments to the competent authority of the party of origin.

On the basis of the EIA documentation submitted to the party of origin (Article 4), both the party of origin and the party potentially affected shall enter into consultations without undue delay (Article 5). Consultations may relate to possible alternative activities, mutual assistance in reducing any significant transboundary impact as well as any other appropriate matters relating to the proposed activity. Article 6 obliges the parties to take due account of the EIA in the final decision on the proposed activity, which, together with the reasons and considerations on which it is based, shall be provided to the party potentially affected. Article 7 finally foresees the possibility of a post-project analysis, which, at the request of any affected party, aims at a surveillance of the activity and the determination of any adverse transboundary impact.

The Espoo Convention entered into force on 10 September 1997.[16]

2.2 Participatory rights pursuant to the Aarhus Convention

Pursuant to Principle 10 of the Rio Declaration, environmental matters are best handled with the participation of all concerned citizens. Moreover, effective access to judicial and administrative proceedings, including regress and remedy, shall be provided. Fleshing out this principle, the Aarhus Convention is concerned with access to information, public participation in decision-making and access to justice in environmental matters. Compared to the Espoo Convention, the Aarhus Convention still enlarges public participation, both in terms of its scope and the involvement of interested circles.

Defining the public as one or more natural or legal persons as well as their associations, organizations or groups (Article 2(4)), it provides for far-reaching rights of access to environmental information, participation in decision-making and access to justice, without discrimination as to citizenship, nationality or domicile (Article 3(9)). Without an interest having to be stated, requested environmental information has to be made available to the public within the framework of national law (Article 4(1)). “Environmental information” having been defined broadly in Article 2(3), including the state of elements of the environment, such as air and other elements as well as “factors, such as […] noise, affecting or likely to affect the elements of the environment”, also the information collected in the course of the EIA in the State of origin falls in principle under the right of access of the Convention and thus underlines the obligations already present under the Espoo Convention. Although Article 4(3)(4) enumerates numerous exceptions, none of them appears pertinent, especially when bearing in mind the duty to interpret them in a restrictive way (Article 4(5)). Apart from providing information upon request, the Aarhus Convention requires a pro-active attitude of the contracting parties to establish environmental information systems.

More specifically with regard to public participation in decisions on specific activities, "nuclear power stations and other nuclear reactors" except for research installations are included in the list of activities (annex 1), to which the following considerations apply: In accordance with Article 6(2), the public concerned shall be informed, either by public notice or individually, inter alia of the proposed activity, the nature of possible decisions, the public authority responsible for making the decision, the envisaged procedure, as well as of the fact

[16] See http://www.unece.org/env/eia/eia.htm (13 October 2008).

that the activity is subject to a national or transboundary EIA procedure. The discerned requirement to conduct a transboundary EIA in the case at hand therefore triggers the participatory rights as enshrined in the Aarhus Convention.[17] Emphasis is put on the effective participation of the public by allowing for reasonable time-frames and thus for sufficient preparation (Article 6(3)). Equally, public participation shall commence at an early stage when all options are still open (Article 6(4)). The competent public authorities must be empowered to give the public concerned access for examination to all information relevant to the decision-making (Article 6(6)). The public shall be allowed to submit any comments, information, analyses and opinions that it considers relevant to the proposed activity (Article 6(8)). In the decision on the activity "due account" must be taken of the outcome of the public participation. The decision itself must promptly be communicated to the public, and its text along with the reasons and considerations must be made accessible to the public (Article 6(9)).

According to Article 9(2), the contracting parties are under an obligation to ensure access to review procedures before a court of law or another impartial body established by law, to challenge the substantive or procedural legality of a decision, act or omission subject to the provisions of Article 6. Such review shall be open to members of the public concerned[18] either having a sufficient interest or maintaining an impairment of a right. Both of the latter concepts need to be determined in accordance with national law, taking account, however, of the Convention's objective of giving the public concerned wide access to justice within its scope. If a requirement of prior exhaustion of administrative remedies exists in national law, such requirement shall remain unaffected by the Convention.

The Aarhus Convention has been in force since 30 October 2001.[19]

3. The works of the ILC

In 2001, the ILC adopted and submitted to the UN General Assembly draft articles on the "Prevention of Transboundary Harm from Hazardous Activities". The General Assembly commended the draft articles to the attention of Governments, annexed their text to a resolution adopted by it and decided to include, in the provisional agenda of its sixty-fifth session, an item entitled "Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm".[20] This far-reaching and modern codification of relevant obligations on States rests on the basic assumption that prevention should be the preferred policy because compensation in case of harm often cannot restore the situation prevailing prior to an accident.[21] Prevention deals with the phase prior to a situation where significant harm or damage might actually occur.[22]

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[17] It is true that an EIA is not the only decision-making procedure envisaged by Article 6 Aarhus Convention and indeed the convention itself does not create a requirement to conduct an EIA. At the same time, the EIA is the most familiar process within decision-making covered by Article 6. See UN-ECE, The Aarhus Convention – An Implementation Guide, United Nations, New York and Geneva, 2000, 91.

[18] Note that "the public concerned" is a narrower concept than "the public", since the former notion only relates to the public affected or likely to be affected by, or having an interest in, the environmental decision-making (Article 2(5) Aarhus Convention).

[19] See http://www.unece.org/env/pp/ctreaty.htm (10 November 2006).

[20] GA, Resolution 62/68 of 6 December 2007, A/RES/62/68.

[21] Prevention of Transboundary Harm from Hazardous Activities, General commentary, Reports of the ILC on the work of its fifty-third session, 148.

[22] See Principle 2 of the Rio Principles.

The scope of application of the draft articles covers (i) activities not prohibited by international law which (ii) involve a risk of causing significant transboundary harm through their physical consequences (Article 1). Regarding the first criterion, it has already been seen that the construction and operation of nuclear power plants is not prohibited by international law. With regard to the second criterion, the ILC`s commentary explains that any activity which involves the risk of causing significant transboundary harm through the physical consequences is within the scope of application, without there being a need to specify a list of activities.[23] Against this broad scope of application, it is safe to assume that the draft articles apply to nuclear power plants. It has been pointed out that nuclear power plants are not in themselves hazardous as long as they are properly maintained and operated in accordance with national law.[24] At the same time it must not be overlooked that, although the draft articles, in their title, refer to "hazardous activities", their actual text speaks of activities which involve the risk of causing significant transboundary harm. Against this apparently lower threshold, the draft articles must be presumed to be applicable to nuclear power plants. This understanding is confirmed by the ILC's commentary on Article 16 of the draft articles, which explicitly refers to prevention in connection with nuclear reactor accidents.[25]

After listing general obligations incumbent on States in Article 3 (States shall take all appropriate measures to prevent significant transboundary harm), Article 4 (duty to cooperate in good faith) and Article 5 (States shall take appropriate implementing measures including suitable monitoring mechanisms), which all qualify as *obligations de moyens*, the draft articles translate these general obligations into specific duties. Article 6 obliges States[26] to require prior authorisation for activities coming within the scope of application as well as major changes to such activities. Most importantly, the requirement of a prior authorisation shall also be made applicable in respect of all pre-existing activities (Article 6(2)). Put differently, the draft articles equip the authorisation requirement with retroactive force. In case of failure to conform to the terms of the authorisation, States shall provide for appropriate actions, which include, where necessary, the termination of the authorisation (Article 6(3)). Decisions on authorisations must be based on a risk assessment, including an environmental impact assessment (Article 7). If the risk assessment indicates a risk of causing significant transboundary harm, the State of origin shall notify the State likely to be affected in good time of the risk and its assessment and shall transmit all relevant information on which the risk assessment is based (Article 8(1)). No decision on authorisation shall be taken pending, within a period of a maximum of 6 months, the response from the State likely to be affected (Article 8(2)). At the request of any of the States concerned, they shall enter into consultations on preventive measures so as to seek solutions based on an equitable balance of interests (Article 9). Factors to be taken into account in the balance of interests are detailed in Article 10 and include the degree of risk, the importance of the activity, the availability of means preventing harm, the economic viability of the activity in relation to the costs of prevention and the standards of prevention applicable in the State likely to be affected. In case consultations fail, the State of origin shall nevertheless take into account the interests of the State likely to be affected.

[23] ILC Commentary on Article 1.

[24] Albrecht Randelzhofer and Bruno Simma, Das Kernkraftwerk an der Grenze, in: Blumenwitz/Randelzhofer (eds.), Festschrift für Friedrich Berber zum 75. Geburtstag, C.H. Beck, München, 1973, 389.

[25] ILC Commentary on Article 16.

[26] More precisely, this obligation refers to states of origin. Pursuant to Article 2(d) "state of origin" means the State in the territory or otherwise under the jurisdiction or control of which the activities are planned or carried out.

Once the activity is operative, States concerned shall exchange in a timely manner all available information concerning the activity and relevant to preventing significant transboundary harm or risk minimisation (Article 12). They shall equally inform the public likely to be affected by appropriate means (Article 13).

The State of origin shall moreover develop contingency plans for emergency response which may involve cooperation with the State likely to be affected and competent international organisations (Article 16). Emergencies shall, without delay and by most expeditious means, be notified to the State likely to be affected by the State of origin (Article 17).

4. General international law

It has already been noted that, as a corollary to the concept of State sovereignty, the principle of non-intervention obliges States not to interfere in the exclusive jurisdiction of other States. According to Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration, States must ensure that activities within their jurisdiction or control do not cause damage to the environment of other States. According to one author, the normal operation of a nuclear power plant has to be considered as an ultra-hazardous activity. Although in principle not illegal, it could amount to an interference with the territorial jurisdiction of another State and a violation of the principle of good neighbourliness, if a nuclear power plant is operated in immediate vicinity to a neighbouring State so that in case of an accident, the consequences would be of the same extent in both the State of origin and the State affected.[27] Apart from the fact that it appears to be less than universally accepted that the operation of nuclear power plants amounts to an ultra-hazardous activity,[28] such purported rule would be difficult to apply since it would require an ex ante-assessment of the potential consequences of an accident and, in addition, leaves the question open when a nuclear power plant is considered to be "close enough" to another State so as to trigger a violation of international law. According to another view, which appears to be more in line with State practice, an affected State is required to take precautionary measures in the face of the operation of a nuclear power plant in a neighbouring State.[29] It follows that the affected State has a right to be consulted before the construction of a potentially dangerous plant close to the national border which appears to be borne out by State practice.[30] This view is further corroborated by the Friendly Relations-Declaration[31] and Principle 19 of the Rio Declaration. On the other hand, it is doubtful if, apart from procedural rights provided for in treaty law discussed above, affected States have in fact the power to co-decide with the State of origin, which has

[27] Stefan Kirchner, "Nuclear Power Plants Close to International Borders and Neighbour Protection Under International Environmental Law - The Temelín Dispute Enters into a New Round (Grenznahe Atomkraftwerke und umweltvölkerrechtlicher Nachbarschutz – Der Temelín-Streit geht in eine neue Runde)", available at SSRN: http://ssrn.com/abstract=1004888 (31 October 2008), 4.

[28] See Albrecht Randelzhofer and Bruno Simma, Das Kernkraftwerk an der Grenze, in: Blumenwitz/Randelzhofer (eds.), Festschrift für Friedrich Berber zum 75. Geburtstag, C.H. Beck, München, 1973, 389.

[29] Günther Handl, Grenzüberschreitendes nukleares Risiko und völkerrechtlicher Schutzanspruch, Duncker & Humblot, Berlin, 1992, 25

[30] Günther Handl, Grenzüberschreitendes nukleares Risiko und völkerrechtlicher Schutzanspruch, Duncker & Humblot, Berlin, 1992, 81 et seq.; Stefan Kirchner, "Nuclear Power Plants Close to International Borders and Neighbour Protection Under International Environmental Law - The Temelín Dispute Enters into a New Round (Grenznahe Atomkraftwerke und umweltvölkerrechtlicher Nachbarschutz – Der Temelín-Streit geht in eine neue Runde)", available at SSRN: http://ssrn.com/abstract=1004888 (31 October 2008), 5.

[31] UN GA Res. 2625(XXV).

occasionally been assumed in legal literature.[32] Although co-decision between the State of origin and the affected States appears to be desirable as a matter of legal policy, there are few indications in State practice that a requirement of co-decision in fact exists. It is conspicuous that also in the case of Temelín discussed below such right has never been claimed by Austria.

5. Conclusion

The above section identified a number of rules and principles which are applicable in relation to nuclear power plants. Apart from general international law from which a duty of consultation can be derived, relevant treaty law, notably the Espoo and Aarhus Conventions, flesh out consultative obligations between the States concerned and, at the same time, afford the public of the States likely to be affected a say in the decision-making process. It can thus be concluded that international law provides for a bundle of obligations which impose certain limitations on States constructing nuclear power plants. At the same time, given that both the Espoo and the Aarhus Conventions entered into force fairly recently, the problem remains that old nuclear power plants are beyond their scope *ratione temporis*. Arguably, this problem is exacerbated by the fact that it is exactly these power plants whose operation involves the greatest risks. It is true that the ILC draft articles provide that the requirement of a prior authorisation shall also be made applicable in respect of pre-existing activities. At the same time, it is doubtful that this innovation of international law which is absent from both the Espoo and the Aarhus conventions can be considered a part and parcel of international law applicable to old nuclear reactors until such time as it has been promoted to the ranks of an international agreement.

The problem of the lacking retroactivity of relevant rules of international law is exemplified by the case of Temelín the construction of which started in 1986 and thus at a time, when principles of general international law had arguably not yet hardened into custom and conventional rules had not yet entered into force. Against the background of a multilateral framework of international law, States are therefore required to seek mutually acceptable bilateral solutions which may or may not contain a dispute. In the following, the example of the arrangement with regard to the nuclear power plant in Temelín will be analysed.

[32] Stefan Kirchner, "Nuclear Power Plants Close to International Borders and Neighbour Protection Under International Environmental Law - The Temelín Dispute Enters into a New Round (Grenznahe Atomkraftwerke und umweltvölkerrechtlicher Nachbarschutz – Der Temelín-Streit geht in eine neue Runde)", available at SSRN: http://ssrn.com/abstract=1004888 (31 October 2008), 5.

III. The management of the Temelín dispute

1. Introductory remarks[33]

Temelín is situated in the southern part of the Czech Republic, about 80 kilometres from the Austrian border. Construction of a nuclear power plant in Temelín started in 1986. The Chernobyl catastrophe led to a re-evaluation of the benefits and risks of nuclear power plants on a global scale and also triggered a re-assessment of the Temelín plant. Thus, construction works were brought to a halt and the project design was reviewed. In 1992, a new Government came into power which favoured the completion of the Temelín nuclear power plant. The publicised intention to complete the plant roughly coincided with the IAEA pointing to serious safety concerns. According to the IAEA, it was in particular design flaws, the use of Russian fuel and the Russian designed fuel cycle, which gave rise to these concerns. The Czech Government responded to these concerns and, in a debated move, in 1993 awarded a contract to the American Westinghouse company, which should implant Western technology in the reactor and thereby alleviate safety concerns.

The steps undertaken by the Czech Government did not do away with concerns and fears about the safety of the plant in neighbouring States, notably in Austria. There the issue of the nuclear power plant in Temelín ranked high on the political agenda in the nineties and, on various occasions, the threat to veto Czech accession to the European Union was presented as a "joker" so as to make the Czech side reconsider its insistence on finishing and putting into operation the Temelín plant. According to others, Temelín should be closed pending an EIA. The then Austrian Chancellor Schüssel delimited the position of the Austrian Government by demanding that the Temelín power plant should comply with safety standards applicable to nuclear power plants in the European Union. This position was not without its own problems, given that there are no common safety standards with regard to reactor safety in the European Union, given the absence of a Community competence in the field of nuclear energy.

In 2000, the first reactor block was put into operation in Temelín which led to a further escalation of the conflict and increasingly overshadowed the traditionally good-neighbourly relations between the Czech Republic and Austria. In order to increase public attention, citizens` action groups organised border blockades, often with the implicit or even explicit backing by regional and federal politicians. The official Austrian position had evolved into blocking closure of the energy chapter of accession negotiations with the Czech Republic in light of the unresolved Temelín-issue.

Against the background of this politically highly charged situation, in December 2000, diplomatic efforts unfolded and a bilateral initiative known as the "Melk Process" was launched, with a view to specifically examine nuclear safety issues. Further goals of the Melk Process were the facilitation and the exchange of information. Given the hardened positions on both sides and the fact that the issue of Temelín had become an actual part of the accession negotiations with the Czech Republic, the European Commission, notably Commissioner Verheugen, acted as a mediator.

[33] The following overview is based on Axelrod (see Fn. 3 above).

2. The Melk Protocol

The first concrete result of the Melk Process was the Melk Protocol[34] adopted in December 2000. Most importantly, it foresaw a (retroactive) EIA with EU participation, which was to be guided by existing Community law[35]. The report on the EIA was released by the Czech authorities in July 2001. According to the report, the environmental impacts of the nuclear power plant in Temelín were to be considered to be insignificant and acceptable.[36] Other parts of the Melk Protocol related to the establishment of an info hotline, an early warning system, an energy partnership, safety issues, the free movement of persons and enlargement.

Given its vague contents which bear all the hallmarks of a political declaration of intent, there is agreement in the legal literature that the Melk Protocol is a political instrument which lacks binding legal force. One commentator has referred to it as an extra-legal international agreement meant to be socially but not legally binding.[37]

[34] Protocol of the negotiations between the Czech and the Austrian Government led by Prime Minister Zeman and Federal Chancellor Schüssel with the participation of Commissioner Verheugen. Online available at www.umweltbundesamt.at (31 October 2008). The protocol has not been published in the Austrian Official Gazette which, apart from the other aspects mentioned below, might support the view that it is not legally binding.

[35] Directives 85/337/EEC and 97/11/EC.

[36] Regina S. Axelrod, Nuclear Power and European Union Enlargement: The Case of Temelin, in: Carmin/VanDeveer (eds.), EU Enlargement and the Environment: Institutional Change and Environmental Policy in Central and Eastern Europe, Routledge, London 2005, 44.

[37] Manfred Rotter, "The Temelín Appeasement: a Microcosmic Case Study", in: Reinisch/Kriebaum (eds.), The Law of International Relations: liber amicorum Hanspeter Neuhold, Eleven International Publishing, Utrecht 2007, 316; see also Michael Geistlinger, "Völkerrechtliche Möglichkeiten zur Verhinderung des Kernkraftwerkes Temelín", in: Geistlinger (ed.), Umweltrecht in Mittel- und Osteuropa im internationalen und europäischen Kontext: Festgabe für Henn-Jüri Uibopuu zum 75. Geburtstag, BWV, Berlin 2004, 5, who arrives at the same result, which, however, he exclusively bases on a constitutional law reasoning, which cannot be of relevance for the purposes of international law.

3. The follow-up to the Melk Process

In 2001, as a next step in the Melk process, a document containing conclusions and a follow-up was signed by the Czech Republic, Austria and Commissioner Verheugen. This document, which is about 130 pages long, has often been referred to as Brussels Protocol, given its place of signature. For reasons of convenience, this designation will also be used in the following.

3.1. The legal nature of the Brussels Protocol

The official title of the Brussels Protocol is "Schlussfolgerungen des Melker Prozesses und Follow up" ["Conclusions of the Melk process and follow-up"], under which name it was published in the Austrian Official Gazette.[38] The Protocol was annexed to a report of the Austrian Minister for the Environment (annex 6), published on 22 May 2002[39]. The title, which refers to "conclusions" and a "follow-up" as well as the way of its initial publication appear ambiguous and could well suggest that the Protocol merely intends to record a joint assessment of the Melk process. This could suggest considering the Brussels Protocol as a non-binding instrument of a political nature or a mere statement recording political understanding. However, Article 2(2) of the Vienna Convention on the Law of Treaties defines a treaty as "[a]n international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation". Consequently, the designation of "conclusions" and "follow-up" is not such as to rule out the possibility to consider the Brussels Protocol as a treaty. What is essential, though, is whether the parties to a particular international instrument intended it to create legal obligations. This is to be inferred from both its actual terms and the particular circumstances, in which it was made.[40]

Taking a look at the terms of the treaty,[41] the Brussels Protocol contains a number of obligations on the part of the Czech Republic which first and foremost relate to compliance with certain safety standards. These obligations appear to be sufficiently precise and clear so as to suggest that the parties to the Protocol intended it to be legally binding. This reading is confirmed by Chapter VIII of the Protocol which explicitly refers to the "binding legal character" of the Protocol.

An intention to be bound is also apparent from the context of the Protocol.[42] Thus, on the occasion of the closing of the energy chapter of the negotiations with regard to the accession of the Czech Republic to the European Union, on 12 December 2001, the then Czech Foreign Minister Kavan made a unilateral declaration to the extent of the obligations contained in the Protocol. On the same occasion, the then Austrian Foreign Minister Ferrero-Waldner explicitly referred to "the internationally binding nature of the bilateral accord", a qualification, which was not challenged by the Czech side. Equally, the joint declaration[43] of

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[38] Published in BGBl. III Nr. 266/2001. Apparently, the Brussels protocol has not been published by the Czech Republic.

[39] Michael Geistlinger, "Völkerrechtliche Möglichkeiten zur Verhinderung des Kernkraftwerkes Temelín", in: Geistlinger (ed.), Umweltrecht in Mittel- und Osteuropa im internationalen und europäischen Kontext: Festgabe für Henn-Jüri Uibopuu zum 75. Geburtstag, BWV, Berlin 2004, 5.

[40] Malgosia Fitzmaurice, "The practical working of the law of treaties", in Evans (ed.), International Law, 2nd edition, OUP, Oxford, 2006, 188.

[41] See below.

[42] For information on the context of the Protocol see the expert opinion of the international law department of the Austrian Ministry of European and international affairs on the Brussels Protocol, 14 May 2007 (on file with the author). The following paragraphs rely on the information contained therein.

[43] On this document, see Chapter IV below.

the Czech Republic and the Republic of Austria on their bilateral agreement on the nuclear power plant in Temelín refers to "bilateral obligations" deriving from the Brussels Protocol. Against this background, the Brussels Protocol must be considered as an international agreement which, beyond a mere political understanding, contains enforceable legal obligations. It appears useful to add that the apparent lack of publication of the Brussels Protocol by the Czech Republic cannot put in doubt this qualification, since the publication of an international agreement is essentially a matter of domestic law which, as such, is not touched upon by the Vienna Convention on the Law of Treaties.

Even if one were to assume that the Brussels Protocol does not meet the threshold of a treaty, it is worth recalling that States may also enter into commitments vis-à-vis other States by means of unilateral declarations as long as they publicly and clearly express an intention to be bound. Thus, in the *Nuclear Tests* cases[44], the ICJ held that, by publicly announcing that its 1974 series of atmospheric nuclear tests would be the last, France undertook a commitment possessing legal effect to the effect of terminating nuclear tests. Similarly, the PCIJ recognised the potential law-making effect of unilateral declarations in the *Eastern Greenland* case.[45] In view of the above-mentioned unilateral declaration of the then Czech Foreign Minister Kavan which was made publicly and left no room to question the intention to be bound, there can thus be no doubt that the Czech Republic entered into binding legal commitments vis-à-vis Austria, even if one were not to consider the Brussels Protocol as an international treaty.

This view has been confirmed in legal literature. Thus, Rotter has qualified the Brussels Protocol as a bilateral treaty. In so doing, he essentially relied on the Protocol's Chapter VIII, which explicitly underlines its "binding legal" character of the Protocol.[46] According to another opinion in scholarly writing, however, the Brussels Protocol lacks the character of a treaty, essentially since the Czech Republic did not consider it as a treaty and thus did not publish it in its official Gazette.[47] It is submitted that this view overlooks the objective nature of the concept of a treaty, which attributes the hallmarks of a treaty to instruments whose contents and context suggests that the parties intended to be bound by it.[48] In the words of the ICJ in the *Qatar v Bahrain* case:

> "The Court does not find it necessary to consider what might have been the intentions of the Foreign Minister of Bahrain or, for that matter those of the Foreign Minister of Qatar. The two ministers signed a text recording commitment accepted by their Governments, some of which were to be given an immediate application. Having signed such a text, the Foreign Minister of Bahrain, is not in a position subsequently to say that he intended to subscribe

[44] ICJ, Nuclear Tests (Australia v France), Judgment, ICJ Reports 1974, p. 253, paras. 42-43 and 51.

[45] PCIJ, Legal Status of Eastern Greenland, Recueil des Arrêts, A/B 53, 69 et seq.

[46] Manfred Rotter, "The Temelín Appeasement: a Microcosmic Case Study", in: Reinisch/Kriebaum (eds.), The Law of International Relations: liber amicorum Hanspeter Neuhold, Eleven International Publishing, Utrecht 2007, 316.

[47] Michael Geistlinger, "Völkerrechtliche Möglichkeiten zur Verhinderung des Kernkraftwerkes Temelín", in: Geistlinger (ed.), Umweltrecht in Mittel- und Osteuropa im internationalen und europäischen Kontext: Festgabe für Henn-Jüri Uibopuu zum 75. Geburtstag, BWV, Berlin 2004, 5-9.

[48] Malgosia Fitzmaurice, "The practical working of the law of treaties", in Evans (ed.), International Law, 2nd edition, OUP, Oxford, 2006, 188-189.

only to a `statement recording political understanding`, and not to an `international agreement`."[49]

Against this background, it is submitted that the more convincing arguments plead in favour of considering the Brussels Protocol as an international agreement.

3.2. The substantive rules foreseen by the Brussels Protocol

Viewed globally, the Brussels protocol recognised each State's sovereign right to its own energy policy and provides for joint monitoring and cooperation between the two States concerned. The crucial provisions of the protocol are contained in Chapter VI which relates to the "commercial operation" of the power plant. According to Chapter VI, the plant's blocks 1 and 2 will commence commercial operation only after successful completion of the technical authorisation procedure and a test run. During these phases all tests and inspections, as required by the programme authorised by the Czech Office for nuclear safety and by Czech law, have to be performed. Moreover, safety criteria in line with the state of the art prevailing in the EU Member States, including those to which the Protocol itself refers, must be fulfilled. Chapter VI goes on to stipulate that, in any event, the implementation of the safety goals and measures listed in Annex I is the precondition for the "commercial operation".

In view of this legal background, the question as to whether Annex I has been implemented is the central legal issue here. The answer to this question in turn depends on when the "commercial operation" of the Temelín plant has started since, pursuant to the Brussels Protocol, this is the decisive point in time for the assessment whether or not the safety goals and measures of Annex I have been complied with.[50]

The obligations incumbent on the Czech Republic before starting commercial operation of blocks 1 and 2 of the Temelín power plant can be summarised as follows:

1. All tests and inspections, as required by the programme authorised by the Czech Office for nuclear safety and by Czech law, have to be performed.
2. All safety criteria in line with the state of the art prevailing in the EU Member States, including those to which the Protocol itself refers, must be fulfilled.
3. This includes those state of the art-safety criteria, which have been stipulated in the agreement.
4. Independently of the foregoing requirements, all safety measures listed in Annex I must have been taken. Annex I contains seven safety goals and measures which must be implemented in conformity with Czech legislation. They refer to technical standards. Some safety measures require a certain conduct (*obligation de moyens*) whereas others require achievement of a certain result (*obligation de résultat*).[51]

[49] ICJ, Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, ICJ Reports 1994, p. 112, para. 27.

[50] Manfred Rotter, "The Temelín Appeasement: a Microcosmic Case Study", in: Reinisch/Kriebaum (eds.), The Law of International Relations: liber amicorum Hanspeter Neuhold, Eleven International Publishing, Utrecht 2007, 319.

[51] Expert opinion of the international law department of the Austrian Ministry of European and international affairs on the Brussels Protocol, 14 May 2007 (on file with the author), 5.

It emerges from this analysis that the compliance *vel non* of the Czech Republic with the provisions of the Brussels Protocol is dependent on a technical evaluation of the standards and goals foreseen. For this reason, the question whether or not the Czech Republic has complied with the Brussels Protocol cannot be reliably determined in this paper. In 2006, a number of questions relating to the safety of the Temelín power plant appeared to be still open. Thus, the annual report of the Austrian Ministry of European and International Affairs declared the continuation of the dialogue on safety issues to be indispensable.[52] In an expert opinion prepared by the constitutional law department of the Austrian Chancellery in May 2007, the question as to the compliance of the Czech Republic was still referred to as a matter of technical evaluation, which, apparently, had not yet been concluded.[53]

3.3. Consequences of non-compliance

The Brussels Protocol does not contain any specific provisions, which would govern situations where one party fails to comply with its obligations under the Protocol. As a consequence, it is general international law, more precisely, the law on treaties and the law on State responsibility, which define the consequences of non-compliant conduct. Given that these rules are of a general nature they will not be discussed in the framework of the present paper.

[52] Federal Austrian Ministry of European and International Affairs, Foreign Policy Report 2006, 101.

[53] Expert opinion of the international law department of the Austrian Ministry of European and international affairs on the Brussels Protocol, 14 May 2007 (on file with the author), 6.

IV. Dispute settlement

One of the main deficiencies of the treaty and political framework between the Czech Republic and the Republic of Austria is the absence of a dispute settlement mechanism.[54] While this fact, from the perspective of effective treaty implementation, is deplorable, it can also be understood in terms of a deliberate decision of the two States involved to leave open the question of dispute settlement and thus to give preference rather to political than to legal and judicial processes. At the same time, it must not be forgotten that the means of peaceful settlement of disputes provided for in general international law (Article 33 UN Charter) could, to the extent desired by the parties, be deployed.[55] Therefore diplomatic methods to settle disputes relating to the implementation of the obligations agreed on between the two States certainly remain an option. It would hence be possible to continue direct negotiations between the parties but also to involve third parties in mediation or conciliation, as was the case with the European Commission in the Melk Process. Another alternative could be to agree on an inquiry, which could bring to light the factual basis for successful dispute settlement. All these methods mentioned in the end largely depend on political questions and decisions, which could not be satisfactorily addressed in the framework of this paper. It is thus proposed to analyse available legal methods of dispute settlement. The analysis will start by examining the availability of international courts and tribunals for the settlement of dispute with regard to Temelín. It will finally sketch out the role, which national courts could play.

1. Dispute settlement by international courts and tribunals

1.1. The European Court of Justice (ECJ)

Article 226 of the EC Treaty empowers the European Commission to act as the guardian of the EC Treaty and, to this effect, gives it competence to start infringement proceedings against a Member States, which infringes Community law. Article 227 extends this supervisory role to the Member States, which could thus equally commence proceedings against a Member State failing to abide by its obligations flowing from Community law.

In the course of the negotiations in the framework of the "Melk Process", Austria and the Czech Republic agreed on the common objective of including the bilateral obligations contained in the Brussels Protocol in a Protocol to the Act of Accession.[56] In the legal order of the European Community, protocols take the same legal rank as the EC Treaty itself and are thus considered as primary Community law.[57] As a consequence, a violation of the Brussels Protocol could at the same time amount to a violation of Community law which could be enforced by starting proceedings as per Article 227 of the EC Treaty.

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[54] Manfred Rotter, "The Temelín Appeasement: a Microcosmic Case Study", in: Reinisch/Kriebaum (eds.), The Law of International Relations: liber amicorum Hanspeter Neuhold, Eleven International Publishing, Utrecht 2007, 319.

[55] For more details, cf., John Merrills, "The means of dispute settlement", in Evans (ed.), International Law, 2nd edition, OUP, Oxford, 2006, 535 et seq.

[56] Manfred Rotter, "The Temelín Appeasement: a Microcosmic Case Study", in: Reinisch/Kriebaum (eds.), The Law of International Relations: liber amicorum Hanspeter Neuhold, Eleven International Publishing, Utrecht 2007, 317.

[57] Koen Lenaerts and Piet van Nuffel, Constitutional Law of the European Union, 2nd edition, Sweet & Maxwell, London, 2005, 17-061.

In spite of the declared common objective, a transformation of the Brussels Protocol into a Protocol to the Act of Accession was not achieved. Instead, only a "joint declaration" by the Czech Republic and Austria was annexed to the accession treaty.[58] Unlike protocols, declarations are not legally binding but only reflect the parties` interpretation of the law. Given that they are therefore not part of Community law, there appears to be no competence to bring a dispute with regard to the implementation of the Brussels Protocol to the ECJ.

Article 239 of the EC Treaty gives the ECJ an optional jurisdiction in any dispute 'which relates to the subject matter of this Treaty', if the Member States have chosen ad hoc to refer such a dispute to the ECJ. Whereas it appears possible to construe the Brussels Protocol, as enshrined in the joint declaration, as relating to the subject matter of the EC Treaty, referring a dispute to the ECJ on the basis of Article 239 of the EC Treaty would presuppose an agreement of the parties to the dispute to this extent. Therefore, it would be impossible to unilaterally submit such dispute to the ECJ.[59]

1.2. The International Court of Justice (ICJ)

The ICJ has contentious jurisdiction in respect of disputes between States, on the basis of the consent of the parties (cf. Article 34(1) of the ICJ Statute).[60] States may choose to consent to the Court's jurisdiction in an unlimited manner by making a declaration under the "optional clause" contained in Article 36(2) of the ICJ Statute, which reads as follows:

> "The States parties to the present Statute may at any time declare that they recognise as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
>
> (a) the interpretation of a treaty;
>
> (b) any question of international law;
>
> (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
>
> (d) the nature or extent of the reparation to be made for the breach of an international obligation."

Austria declared to accept the Court's jurisdiction in 1971.[61] By contrast, the Czech Republic so far has not declared its acceptance of the Court's jurisdiction. Owing to the consensual nature of the jurisdiction of the ICJ, the ICJ has consequently no jurisdictional basis with regard to a settlement of the Temelín dispute for the time being.

Admittedly, Austria could anyhow decide to bring the dispute before the ICJ which would give the Czech Republic the opportunity to accept the jurisdiction of the Court ad hoc (cf. Article 36(1) of the ICJ Statute), without, however, being obliged to do so. This option has

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[58] Manfred Rotter, "The Temelín Appeasement: a Microcosmic Case Study", in: Reinisch/Kriebaum (eds.), The Law of International Relations: liber amicorum Hanspeter Neuhold, Eleven International Publishing, Utrecht 2007, 318. Arguably, this has led to a bilateralisation of the dispute since, in the case of a protocol, all the EU Member States would have had to give their agreement for it to come into existence which is not the case with regard to a declaration.

[59] Cf., the expert opinion of the international law department of the Austrian Ministry of European and international affairs on the Brussels Protocol, 14 May 2007 (on file with the author), 11.

[60] Ian Brownlie, Principles of Public International Law, 7th edition, OUP, Oxford, 2008, 712.

[61] See Austrian Official Gazette BGBl. Nr. 249/1971.

been made use of in the case of *Djibouti v France*[62], in which, in spite of the absence of France's acceptance of the Court's jurisdiction in the given case, Djibouti seized the Court with a dispute involving France. In its application to the Court, Djibouti invited France to accept the Court's jurisdiction. France subsequently accepted the invitation extended by Djibouti.[63] In any event, Austria would have no legal means at its disposal to compel the Czech Republic to accept the Court's jurisdiction.

1.3. The European Court of Human Rights (ECHR)

Applications by both States and individuals to this Court are conceivable as long as it can be established that one of the fundamental rights enshrined in the ECHR has been violated by the Czech Republic *qua* its operation of the Temelín plant without complying with certain safety standards. Whereas, at first sight, such violations seem to be difficult to establish, occasional reference has been made to this course of action.[64] A detailed examination of relevant fundamental rights guarantees, however, goes beyond the scope of this study.

1.4. Arbitral tribunals

1.4.1. The problem of consent

Just like submitting a dispute to the ICJ, establishing an arbitral tribunal would require the consent of both parties involved. In so far, reference is made to the above considerations. At present, no initiatives have been taken to establish an arbitral tribunal.

1.4.2. The lessons from the MOX plant arbitration

Given the attendant overlaps between European Community law and international law, the choice of dispute settlement mechanisms is further limited, as is apparent from the recent MOX plant arbitration.[65] Such overlaps could in particular flow from the application of Community law with regard to conducting an EIA (see Fn. 35 above).

The MOX plant dispute involved two arbitral tribunals established under the OSPAR and UNCLOS conventions respectively, ITLOS as well as the ECJ. Its factual background is centred on the authorisation and operation of the MOX plant in Sellafield, Cumbria, a plant designed to convert plutonium from spent nuclear fuel into a fuel called MOX[66] which is used as an energy source in nuclear power stations. The two arbitrations initiated by Ireland related to two distinct claims:

First, before an arbitral tribunal established under the OSPAR Convention, Ireland demanded the disclosure of all relevant information relating to radioactive discharges of the MOX plant pursuant to Article 9 of the OSPAR Convention, which requires States parties to make

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[62] ICJ, Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), judgment of 4 June 2008.

[63] ICJ, Press Release Nr. 2006/32 of 10 August 2006.

[64] See Michael Geistlinger, "Völkerrechtliche Möglichkeiten zur Verhinderung des Kernkraftwerkes Temelín", in: Geistlinger (ed.), Umweltrecht in Mittel- und Osteuropa im internationalen und europäischen Kontext: Festgabe für Henn-Jüri Uibopuu zum 75. Geburtstag, BWV, Berlin 2004, 25 et seq.

[65] For a more detailed exposition of the MOX plant arbitration, see Bernhard Hofstötter, "'Can She Excuse My Wrongs?' - The European Court of Justice and International Courts and Tribunals", in: Croatian Yearbook of European Law and Policy, Zagreb 2007, 391 et seq.

[66] An acronym for 'mixed oxide fuel'.

available information on the state of the maritime area and on activities or measures adversely affecting or likely to affect it (Article 9(1) and (2) OSPAR).

Second, Ireland alleged a violation by the United Kingdom of the environmental obligations incumbent on States parties to UNCLOS. More specifically, Ireland argued inter alia that the United Kingdom had failed to take the necessary measures to prevent, reduce and control pollution of the marine environment of the Irish Sea by discharges of radioactive materials and wastes originating from the MOX plant. An arbitral tribunal established under Article 287 UNCLOS[67] should adjudicate this latter set of claims. Even before the beginning of the oral pleadings before the UNCLOS arbitral tribunal, it had become known that the European Commission was contemplating instituting infringement proceedings under Article 226 EC. This had raised the tribunal's fear of two possibly conflicting decisions which would be unhelpful to the parties seeking resolution of their dispute, and obviously contributed to its decision to stay proceedings.[68] The imminent danger of the Commission starting proceedings finally materialised at around the time when the UNCLOS arbitral tribunal rendered Order No. 3.[69] The Commission based its argument on the following heads of complaint: by bringing proceedings under UNCLOS, Ireland had failed to respect the exclusive jurisdiction of the Court as enshrined in Article 292 EC as well as the corresponding provision in the EURATOM Treaty. Moreover, it had violated its duty of cooperation under Article 10 EC as it had failed to inform and consult with the Commission.

The Court started by pointing out that, from the viewpoint of the Community legal order, UNCLOS is a mixed agreement which shares the same legal characteristics as agreements concluded by the Community alone. Thus, according to settled case law its provisions form an integral part of the Community legal order.[70] As Article 292 EC only establishes a judicial monopoly of the ECJ with regard to the interpretation and application of the Treaty, the Court went on to examine whether the provisions of UNCLOS at issue – essentially those relating to marine environmental pollution – relate to a competence exercised by the Community. Referring to a number of directives adopted in the field, it concluded that 'the matters covered by the provisions of the Convention relied on by Ireland before the Arbitral Tribunal are very largely regulated by Community measures'.[71] Consequently, in applying its long-standing *ERTA* jurisprudence,[72] the Court held that the provisions of UNCLOS invoked by Ireland before the arbitral tribunal come within the scope of Community competence and form part of the Community legal order, in turn triggering the Court's jurisdiction.[73]

Next, the Court turned to the question whether its jurisdiction could be considered exclusive in light of the dispute settlement system provided for by UNCLOS. Here, the Court reiterated its approach expounded in Opinion 1/91, according to which international agreements cannot affect the allocation of responsibilities defined in the Treaties and thus the autonomy of the Community legal system. The Court found confirmation of the exclusivity of its jurisdiction

[67] It is to be noted that Article 287 UNCLOS, whilst providing for compulsory dispute settlement, leaves the choice of means to the discretion of the parties. Thus, states may chose one or more of the following dispute settlement bodies: ITLOS, the ICJ and/or arbitral tribunals. Since in this case there was no common agreement on a more institutionalised form of dispute settlement between the parties, only arbitration could be resorted to.

[68] MOX Plant Case (Ireland v UK) (Suspension of Proceedings on Jurisdiction and Merits, Order No 3 of 24 June 2003), paras 21 and 28.

[69] Robin Churchill and Joanne Scott, 'The MOX Plant Litigation: The First Half-Life' (2004) 53 ICLQ 643, 656.

[70] Case C-459/03 Commission v Ireland [2006] ECR I-4635, paras 82-84.

[71] Case C-459/03 Commission v Ireland [2006] ECR I-4635, para 110.

[72] Case 22/70 Commission v Council [1971] ECR 263.

[73] Case C-459/03 Commission v Ireland [2006] ECR I-4635, paras 120-121.

in Article 292 EC.[74] Whereas one could therefore expect that the Community system of judicial protection, more precisely Article 227 EC, would simply override the dispute settlement provisions in UNCLOS, the Court found a stepping stone for a more harmonious interpretation in Article 282 UNCLOS, which contains a conflict of jurisdictions clause. If the parties to a dispute 'have agreed, through a general, regional or bilateral agreement or otherwise' to a particular procedure entailing a binding decision, this procedure shall take precedence over the normal procedure provided for in UNCLOS. Thus, the Court found that UNCLOS itself is amenable to an interpretation avoiding an infringement of the Court's exclusive jurisdiction.[75]

In sum, the Court found Ireland precluded from initiating proceedings before the arbitral tribunal in light of its own exclusive jurisdiction.[76] As the Court explains, just the manifest risk that the jurisdictional order laid down in the Treaties and, consequently, the autonomy of the Community legal system, may be adversely affected is sufficient for finding a breach of Article 292 EC,[77] regardless of whether or not an arbitral tribunal has been called upon to actually pronounce on a rule of Community law. In a most important obiter dictum the Court explains: 'It is for the Court, should the need arise, to identify the elements of the dispute which relate to provisions of the international agreement in question which fall outside its jurisdiction.'[78] In other words, the Court clearly reserves for itself a *compétence de la compétence* of sorts to determine the outer limits of its exclusive jurisdiction, and in this way hedges its pre-eminence over international arbitral tribunals.

With regard to the alleged breach of the duty of consultation and information with the Community institutions pursuant to Article 10 EC, the Court notes an obligation of Member States for consultation prior to instituting dispute settlement proceedings, which Ireland failed to observe.[79]

[74] Case C-459/03 Commission v Ireland [2006] ECR I-4635, para 123.

[75] Case C-459/03 Commission v Ireland [2006] ECR I-4635, para 124.

[76] Case C-459/03 Commission v Ireland [2006] ECR I-4635, para 133.

[77] Case C-459/03 Commission v Ireland [2006] ECR I-4635, para 154-156.

[78] Case C-459/03 Commission v Ireland [2006] ECR I-4635, para 135.

[79] Case C-459/03 Commission v Ireland [2006] ECR I-4635, paras 172-182.

2. The role of national courts

On 31 July 2001 the Province of Upper Austria, which is the owner of several pieces of land used for agricultural purposes, instituted proceedings against the operator of the Temelín nuclear power plant. The land in question is situated about 60 kilometres from the Temelín plant. The action sought an order to put an end to the influences on the land caused by ionising radiation emanating from the power plant which, according to the plaintiff, constituted a nuisance in accordance with national law. The defendant submitted that, in light of Article 16 of the applicable Brussels Convention[80], the Austrian courts lacked jurisdiction. This view was accepted by the Linz Regional Court but overturned on appeal by the Linz Higher Regional Court, which held that the Austrian courts had jurisdiction. The Austrian Supreme Court, to which the judgment of the Higher Regional Court had been appealed, decided to stay proceedings and to submit a question for a preliminary ruling to the ECJ. The Supreme Court wanted to know whether "proceedings which have as their object rights *in rem* in immovable property" was to be interpreted as including a (preventive) action for injunction against the influences of ionising radiation emanating from he Temelín nuclear power plant.[81]

The ECJ held that, in view of the context of Article 16 of the Brussels Convention, it was to be interpreted as meaning that the exclusive jurisdiction of the courts of the State where the property is situated does not encompass all actions concerning rights *in rem* in immovable property, but only those which both come within the scope of the Brussels Convention and are actions which seek to determine the extent, content, ownership or possession of immovable property or the existence of other rights *in rem* therein. As a consequence, "an action, possibly preventive, for cessation of nuisance, such as that brought in the dispute in the main proceedings, does not fall within the category of actions as defined in the previous paragraph".[82]

Given the Court's interpretation, the plaintiff's action could not succeed. The role of national courts with regard to the Temelín dispute must consequently be regarded as rather insignificant.

[80] Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, OJ 1978 L 304, p. 36. Article 16 reads as follows: "The following courts shall have exclusive jurisdiction, regardless of domicile: 1. (a) in proceedings which have as their object rights in rem in immovable property or tenacies of immovable property, the courts of the Contracting State in which the property is situated; …".

[81] Case C-343/04 Land Oberösterreich v ČEZ a.s. [2006] ECR I-4557, para. 19.

[82] Case C-343/04 Land Oberösterreich v ČEZ a.s. [2006] ECR I-4557, paras. 30-31.

V. Conclusions

The analysis in the previous chapters has identified a dense legal framework for decisions relating to nuclear power plants in neighbouring States. As has been seen, this framework fleshes out the principle of prevention and provides for an invaluable and important procedural reference point for seeking mutually acceptable outcomes. This is true of the Espoo and Aarhus Conventions but applies with equal force to the ILC draft articles whose legal relevance, however, must, in the absence of an international agreement endorsing them, be decided on a case by case basis. This framework is complemented by the rules of general international law which, however, as far as nuclear power plants are concerned, are either contested or provide little concrete guidance on the legal relationship between neighbouring States.

At any rate, the effectiveness of this legal framework presupposes that States involved have become parties to the conventions mentioned above. Even if two given neighbouring States have ratified the conventions, still the problem of their applicability *ratione temporis* remains which excludes their relevance for "old" nuclear power plants, being those, which have been constructed before the entry into force of the relevant conventions. As demonstrated by the example of Temelín, the non-applicability of a conventional framework may give rise to disputes which in the end will have to be settled by deploying ad hoc legal solutions, let alone diplomatic or other "extra-legal" efforts. It is precisely this problem of applicability which prompted the Czech Republic and Austria to look for a bilateral solution which was facilitated by the mediation/good offices of the European Commission. The shortcomings of non-applicability could effectively be remedied by the innovative feature of a retroactive application of an authorisation system, as foreseen in the ILC draft articles. However, for the time being, it seems safer to conclude that this issue amounts to a progressive development of international law instead of its codification.

Even though substantive agreement could be found between the Czech Republic and Austria in the framework of the Melk Process, the absence of a dispute settlement mechanism remains deplorable and questions the very effectiveness of the legal arrangements made. This absence requires parties to have recourse to the generally acknowledged means of peaceful dispute settlement. The applicability of legal methods will generally depend on the consent of both parties to the dispute. Unilateral action in case of non-compliance will thus be of limited success only. In the end, effectiveness of the bilateral agreement depends on a *bona fide*-implementation of the legal arrangement by both sides.

In spite of this unsatisfactory situation, in providing for the establishment of a fact-finding commission, Article 19 of the ILC draft articles, also in this respect, could add a useful tool at the disposal of the parties to a dispute. This could be particularly useful to ascertain contested technical facts and find a common agreement with regard to them.

It would be preferable to have a permanent institution to settle environmental disputes between Member States. At the same time, too much optimism is not in place. The ITLOS is empowered to apply the rules on marine environmental protection contained in the UNCLOS. However, its docket has remained small and insignificant, according to some. On a more general level, the creation of a special chamber for environmental matters in the ICJ has not seen any success since States have never brought any disputes to this chamber.

In the end, the challenge for the policy-maker in international environmental law is to create sufficiently flexible institutions which can decide quickly and allow the parties to have a say in their composition and their rules of procedure. This may be one of the lessons to be learned from the MOX plant arbitration. The rest is for the future.

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The present paper identifies and analyses rules and principles, both in conventional and customary international law, which govern the legal relationship between neighbouring States, one of which, in exercising its national sovereignty translating into a freedom of choice of energy sources, has chosen to construct and/or operate a nuclear power plant. This involves first and foremost a study of treaty-based participatory rights and/or duties of consultation. Having identified relevant obligations as the derive from international law, the paper takes the dispute between the Czech Republic and the Republic of Austria with regard to the nuclear power plant in Temelín (Czech Republic) as a case study and examines the management of this dispute. The substantive analysis is complemented by a discussion of possible avenues of judicial dispute settlement, both before international and national courts.

Cette étude identifie et analyse les règles et les principes du droit international des traités ainsi que du droit international coutumier qui régissent les relations juridiques entre des Etats voisins, lorsque l'un de ceux-ci, exprimant sa souveraineté nationale au travers de sa liberté de choix de ses sources d'énergie, décide de construire et/ou d'exploiter une centrale nucléaire. Ceci requiert tout d'abord un examen des droits de participation et/ou des devoirs de consultation basés sur les traités. Après avoir identifié les obligations pertinentes dérivées du droit international, l'étude présente le conflit opposant la République Tchèque et la République d'Autriche à propos de la centrale nucléaire de Temelín (République Tchèque) et en examine sa gestion. L'analyse est complétée par une présentation des voies judiciaires de règlement des conflits, envisageables auprès des tribunaux internationaux et nationaux.

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