Policy Papers on
Transnational Economic Law

No. 39

MOX Plant Reloaded? - Reflections on Denmark's Legal Position in the Faroe Islands' "Mackerel War" with the EU

Clemens Wackernagel

Transnational
Economic Law
research Center

Faculty of Law
Martin-Luther-University
Halle-Wittenberg
Universitätsplatz 5
06099 Halle (Saale)
Germany

Tel.: +49 345 / 55 23149
/ 55 23180
Fax: +49 345 / 55 27201

E-Mail: telc@jura.uni-halle.de
www.telc.uni-halle.de

November 2013

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Introduction

On 4 November 2013, the Kingdom of Denmark, in respect to the Faroe Islands, requested consultations with the EU under the WTO's "Understanding on Rules and Procedures Governing the Settlement of Disputes" ("DSU"). The Faroe Islands did not file the request in their own right. Although they are a self-governing entity under Danish law, foreign policy is a responsibility of the Danish realm (Max Planck Encyclopedia of Public International Law, Faroe Islands, http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1283?rskey=R9zg7O&result=10&q=&prd=EPIL, visited on 19 November 2013).

The Danish request follows the EU's latest move in the so-called "Mackerel War" – the adoption of measures banning Faroese fish and certain vessels from EU ports (cf. http://www.ejiltalk.org/the-mackerel-war-goes-to-the-wto/, visited on 19 November 2013). If not resolved amicably, the consultations are only the first step in the WTO's dispute settlement mechanism. It further provides for compulsory panel proceedings that will eventually result in a binding decision by the WTO's Dispute Settlement Body (DSB). With the request, Denmark has triggered the unprecedented instance of a DSB decision potentially being rendered between an EU member state and the EU itself.

Prior to requesting consultations under the DSU, Denmark, again in respect of the Faroe Islands, had initiated arbitration under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS) against the European Union regarding the EU's threat of measures against the Faroe Islands.

The initiation of parallel dispute settlement proceedings is an issue widely commented upon in contemporary international law and scholarship. One only needs to remember the *Southern Bluefin Tuna* and the *Swordfish* cases (cf. Volker Röben, The *Southern Bluefin Tuna* Cases: Re-Regionalization of the Settlement of the Law of the Sea Disputes, Zeitschrift für ausländisches öffentliches Recht und Rechtsvergleichung, 2002, p. 61 et. seq.). Both cases arose out of the same facts but involved claims under different legal frameworks, which led to a number of questions such as the possibility of conflicting awards and the ensuing fragmentation of international law. If the Faroese case goes forward under both UNCLOS and the WTO, each tribunal may have a new opportunity to address the issue of parallel proceedings to a certain extent – keeping in mind that the Annex VII tribunal deals with *threats of measures* while the WTO proceedings concern the *actual measures*. Notwithstanding these quandaries, the Faroese can at least hope to have their interests recognized in one or both of the dispute settlement proceedings. So far, most tribunals perceived different international legal frameworks as self-contained regimes and refrained from taking parallel proceedings into account.

Denmark, as the formally acting party, is in a less comfortable situation because of EU law. While EU law does not apply to the Faroe Islands according to Article 355 (5) of the Treaty on the Functioning of the European Union (TFEU), it does very well to Denmark as such. Under the principles developed by the Grand Chamber of the European Court of Justice (ECJ) in the *MOX Plant* case (C-459/03, European Commission v Ireland, 30 May 2006), EU member states are obliged to submit a dispute concerning the interpretation and application of EU law to the ECJ. Both WTO law and UNCLOS are arguably part of EU law. As a result, Denmark has potentially violated its EU obligations by instigating dispute settlement proceedings before non-EU fora.

The position of Denmark is difficult and might be described as a situation of "little to win and much to lose": Any victory in one of the arbitrations will probably yield benefits for the Faroe Islands as a self-governing territory and not for Denmark as a whole. At the same time, the case creates a risk for Denmark to find itself subject to infringement proceedings before the ECJ. The outcome of such proceedings could have legal implications and political repercussions that go far beyond the present dispute. This paper is intended to shed some light on the case in the context of the ECJ's *MOX Plant* jurisprudence.

Background of the Dispute

The dispute between the Faroe Islands and the EU concerns the allocation of fishing quotas for Atlanto-Scandian herring. These quotas are determined jointly by the Faroe Islands, Iceland, Norway, the Russian Federation and the EU. These parties agree on a certain Total Allowable Catch ("TAC") that is based on recommendations from the International Council for the Exploration of the Sea ("ICES"). They further adopt an allocation key that stipulates how the TAC of the Atlanto-Scandian herring stock is divided among the coastal states. After negotiations about the allocation key for 2013 failed, the Faroe Islands unilaterally set a catch limit of 17% of the TAC citing higher numbers of Atlanto-Scandian herring in Faroese waters due to increased water temperature. The European Union rejected this allocation and instead deemed the Faroe Islands entitled to a percentage of 5.16 – a number that mirrors the percentage the parties agreed upon in previous sharing arrangements since 1996. In the eyes of the EU, the unilateral actions of the Faroe Islands constituted "fishery management measures […] that […] could result in the stock being at an unsustainable rate." As a result, the EU officially indicated to the Faroe Islands its "intention to identify the Faroe Islands as a country allowing non-sustainable fishing, and to adopt measures in respect of the Faroe Islands" under Regulation (EU) No 1026/2012 (letter of the European Commission to the Minister of Foreign Affairs, Denmark, and the Minister of Fisheries, Faroe Islands, of 17 May 2013).

On 17 June 2013, the Faroe Islands' Minister of Fisheries, Jacob Vestergaard, expressed his concern that "[t]hreatening the use of economic coercive measures in order to obtain advantages from the Faroe Islands is inconsistent with general principles of international law and a circumvention of applicable procedures in UNCLOS, which are available to the EU." If the EU did no cease its threats, the Faroe

Islands would consider consultations under UNCLOS and the Agreement on Fisheries between the EU, Denmark and the Faroese terminated. Vestergaard explicitly reserved the right to instigate "appropriate compulsory conciliation proceedings" (letter of the Ministry of Fisheries, Faroe Islands, to the European Commission of 17 June 2013).

The coastal states of the Atlanto-Scandian herring stock scheduled a meeting to continue negotiations about the allocation key for 2 and 3 September 2013. Before this meeting, on 31 July, a committee of EU member state representatives approved the European Commission's plans to adopt measures against the Faroe Islands.

Following this EU step, the Faroe Islands made good on the promise about compulsory proceedings. On 16 August 2013, Denmark, in respect of the Faroe Islands, filed a request for arbitration under Annex VII UNCLOS alleging a breach of the EU's obligation to resolve disputes by peaceful means under Article 279 UNCLOS.

On 21 August 2013, the EU published the "Commission Implementing Regulation (EU) No. 793/2013 of August 20 establishing measures in respect of the Faeroe Islands to ensure the conservation of the Atlanto-Scandian herring stock". Under the regulation, the EU banned the introduction to the EU and transhipment at EU ports of herring and mackerel caught under the control of the Faroe Islands as well as the use of EU ports by certain fishery vessels flying the flag of the Faroe Islands or authorized by the Faroe Islands. The EU measures took effect on 28 August 2013.

On 4 November 2013, Denmark, in respect of the Faroe Islands, requested consultations under Article 4.4 DSU. The office of Faroese Prime Minister Kaj Leo Holm Johannesen was quoted saying: "The measures implemented by the EU are in clear contravention of basic provisions of the WTO Agreement" and that "[c]ontrary to claims by the EU that the measures are a means to conserve the Atlanto-Scandian herring, the coercive measures implemented by the EU against the Faroe Islands appear designed to protect EU industry interests." (http://uk.reuters.com/article/2013/11/04/uk-eu-faroes-wto-idUKBRE9A30NN20131104, visited 19 November 2013). The request for consultations cites the EU's alleged failure to comply with its WTO obligations of General Most-Favoured-Nation Treatment, Freedom of Transit and the Elimination of Quantitative Restrictions under Article I (1), V (2), IX (1) GATT 1994 respectively (WT/DS469/1).

Similarities to and Differences from the *MOX Plant* Case

As an EU member state, Denmark is bound by EU law and thus not unconditionally free to initiate arbitral proceedings in matters concerning EU law. In the *MOX Plant* case, the ECJ considered a comparable set of facts and clarified member states' obligations in the case of intra-EU disputes.

The *MOX Plant* case arose out of a civilian nuclear complex on the English coast. The complex included a plant that produced mixed oxide fuel (MOX) from reprocessed plutonium dioxide and uranium dioxide. It involved a saga of arbitrations, each of which took their own stance as to its

relationship to parallel arbitration proceedings and EU law. Ireland instigated proceedings on preliminary measures against the UK before the International Tribunal on the Law of the Sea (ITLOS), an arbitration tribunal under the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR), and an Annex VII tribunal under UNCLOS – much to the dismay of the European Commission which in turn brought infringement proceedings before the ECJ.

On 3 December 2001 ITLOS issued its judgment on certain provisional measures demanded by Ireland, such as suspending the operation permit of the plant and prohibiting the UK from taking any actions that would aggravate the dispute. While ITLOS acknowledged the UK's submission that "certain aspects of the complaints of Ireland are governed by the Treaty establishing the European Community (hereinafter 'the EC Treaty') or the Treaty establishing the European Atomic Energy Community (hereinafter 'the Euratom Treaty') and the Directives issued thereunder and that States Parties to those Treaties have agreed to invest the Court of Justice of the European Communities with exclusive jurisdiction to resolve disputes between them concerning alleged failures to comply with such Treaties and Directives;" it gave decisive weight to the consideration that "even if the OSPAR Convention, the EC Treaty and the Euratom Treaty contain rights or obligations similar to or identical with the rights or obligations set out in the Convention [i.e. UNCLOS], the rights and obligations under those agreements have a separate existence from those under the Convention" and "that the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, inter alia, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*" (Ireland v. United Kingdom 'The *MOX Plant* Case', Provisional Measures, Order of 3 December 2001). As a result, the ITLOS tribunal assumed *prima facie* jurisdiction but denied Ireland's request for provisional measures for want of urgency. Instead, it obliged the parties to cooperate and enter into consultations.

The Annex VII tribunal was more sceptical with regard to the influence of EU law on its own jurisdiction under UNCLOS. In a statement by the president of the tribunal of 13 June 2003, the tribunal observed that the parallel OSPAR proceedings did not influence its jurisdiction over the dispute because these claims were essentially different from the UNCLOS claims. However, during the proceedings, the European Community (EC) formally asserted its "exclusive competence" over certain UNCLOS provisions as far as the EC's common rules were affected by these provisions. The EC based this assertion on Article 292 of the Treaty on the European Community (TEC) which prohibits member states from instigating dispute settlement mechanisms other than proceedings before the ECJ in matters of interpretation and application of EC law. The tribunal gave weight to the fact that UNCLOS is a mixed agreement under EU law, which means that due to the distribution of competencies under EU law not only the member states are party of UNCLOS but also the EC itself. The tribunal also considered that the European Commission might commence

infringement proceedings against Ireland, and concluded that there was a "real possibility that the Court of Justice might be seised of the dispute and rule that the dispute was a matter of Community law, thereby precluding the Tribunal's jurisdiction under Article 282 of the Convention" and that the ECJ might have to decide the question "whether the provisions of [UNCLOS] on which Ireland relies are matters relating to which competence has been transferred to the EC, and indeed that issues concerning the interpretation and application of the provisions of [UNCLOS] are as such matters of EC law. In these circumstances, whether and if so to what extent, all or any of the provisions of [UNCLOS] fall within the competence of the EC or its Member States would fall to be decided by the European Court of Justice." In order to avoid the possibility of "conflicting decisions on the same issues" and in line of what it understood as the "dictates of mutual respect and comity that should exist between judicial institutions deciding on rights and obligations between States", the tribunal decided to suspend further proceedings until 1 December 2003 (Ireland v. United Kingdom, 'The *MOX Plant* Case', President's Statement of 13 June 2003).

On 2 July 2003, the OSPAR tribunal issued its final award. Referring to ITLOS's order of 3 December 2001, it considered the OSPAR convention "a distinct legal regime" with "a particular and self-contained dispute resolution mechanism". Notwithstanding the fact that the EC was a party to OSPAR, the tribunal did not even consider suspending jurisdiction in a manner similar to the Annex VII tribunal. Given that Lord Mustill was sitting on both tribunals, this could at least not have been due to ignorance of the Annex VII tribunal's decision. The OSPAR tribunal eventually rejected Ireland's claims on the merits (Ireland v. United Kingdom, 'The OSPAR Arbitration', Final Award).

The European Commission brought infringement proceedings against Ireland in October 2003. According to the Commission, Ireland had violated EU law by bringing proceedings under UNCLOS (the OSPAR arbitration was not raised as an issue) and by not consulting the Commission beforehand.

While the parties did not contest the ECJ's exclusive competence to decide matters of EC law, they took opposing views as to the ECJ's competence to decide matters under UNCLOS. The commission argued that UNCLOS was a mixed agreement under EU law and the ECJ had jurisdiction as soon as a dispute at least partly involved EC law and that such jurisdiction was exclusive. Ireland maintained that the arbitral proceedings under UNCLOS did not involve areas in which competence has been transferred to the EC.

On 30 May 2006, the ECJ ruled that the Ireland had violated its obligations from Article 10 and Article 292 of the Treaty Establishing the European Community (TEC). The changes of the Lisbon Treaty are unlikely to affect the ECJ's *MOX Plant* jurisprudence. Article 10 TEC was incorporated into Article 4 (3) of the Treaty on European Union (TEU); Article 292 TEC became Article 344 TFEU. The wording remained substantially the same. Article 4 (3) TEU reads in the relevant part: "The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties

or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives." Article 344 TFEU reads: "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein." The ECJ held that Ireland had invoked UNCLOS provisions before the arbitral tribunal, such as the provisions on the prevention of marine pollution, that fall largely in areas regulated by EC law. Since these UNCLOS provisions form, according to the *Haegemann*-Doctrine, "an integral part of the Community legal order" they fall within the exclusive jurisdiction of the ECJ (C-459/03, European Commission v Ireland, 30 May 2006, c.f. C-181-73, Haegeman v Belgian State, 30 April 1974). Ultimately, the ECJ assumed exclusive jurisdiction over whether provisions of an international agreement fall outside of its jurisdiction: "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."

Regarding the Commission's claim under Article 10 TEC [Article 4 (3) TEU], the ECJ identified the Article as a "general duty of loyalty" in relation to which Article 292 TEC [Article 344 TFEU] is the more "specific expression". Having found Ireland in violation of Article 292 [Article 344 TFEU], the Court did not issue a separate finding as to bringing proceedings before the UNCLOS tribunal under Article 10 TEC [Article 4 (3) TEU]. As to Ireland's failure to notify the Commission of its intention to initiate arbitral proceedings the ECJ pointed out "that, in all the areas corresponding to the objectives of the EC Treaty, Article 10 EC requires Member States to facilitate the achievement of the Community's tasks and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty". In the view of the Court the "act of submitting a dispute of this nature to a judicial forum such as the Arbitral Tribunal involves the risk that a judicial forum other than the Court will rule on the scope of obligations imposed on the Member States pursuant to Community law." Under these circumstances, the obligation of close cooperation under Article 10 TEC [Article 4 (3) TEU] involved an information and consultation duty with regard to the Commission prior to the initiation of non-EU dispute settlement proceedings (C-459/03, European Commission v Ireland, 30 May 2006).

The ECJ's decision in the *MOX Plant* case shows that it was not only determined to ensure coherence of the EC legal order with international obligations arising form mixed agreements but also that it wanted to determine autonomously what provisions of a mixed agreement fall outside its exclusive jurisdiction. It further expected a Member State under Article 10 TEC [Article 4 (3) TEU] to always pay due deference to general Community interests, even when there might be no EC competence (cf. Paul James Cardwell and Duncan French, Who Decides? The ECJ's Judgment on Jurisdiction in the *MOX Plant* Dispute, Journal of Environmental Law (2007) Vol. 19 No. 1, p. 124). Taken at face value,

these findings of the ECJ mean that the Community has a comprehensive expectation of loyalty and cooperation and that the ECJ will have the "the last word" in any dispute involving mixed agreements.

In this light, Denmark's actions with respect to the Faroe Islands appear risky. The Treaty of Lisbon left most legal problems with regard to mixed agreements untouched. International agreements including mixed agreements remain an "integral part" of the community legal order as of their entering into force. While the ECJ based the application of the *Haegeman*-Doctrine in *MOX Plant* on Article 300 (7) TEC, it can now apply it on the basis of the normatively identical Article 216 (2) TFEU: "Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States." On that basis, it is improbable that the ECJ will relinquish its exclusive competence regarding the extent of Member States' obligations under mixed agreements established in *MOX Plant*. Accordingly, since UNCLOS and the WTO Agreement remain mixed agreements under the Treaty of Lisbon, Denmark might have violated its obligations arising from Article 4 (3) TEU and Article 344 TFEU by bringing arbitration claims in respect to the Faroe Islands.

As noted at the outset, however, the Faroe Island's case is in some respect different from the *MOX Plant* case. According to Article 355 (5) (a) TFEU, the "[EU] treaties shall not apply to the Faroe Islands". Furthermore, in *Council v. Portugal*, (C-149/96, Portuguese Republic v Council of the European Union, 23 November 1999) the ECJ held that WTO law has a different character than other international law. It is therefore necessary to separately address the influence of the *MOX Plant* jurisprudence on the Annex VII arbitration and the WTO proceedings.

MOX Plant and the Annex VII arbitration

Concerning Denmark's Annex VII arbitration, the *MOX Plant* principles are quite readily transferable. In this arbitration, Denmark claimed that the EU failed to comply with its UNCLOS obligation to settle disputes concerning the interpretation or application of UNCLOS by peaceful means. To make its case, Denmark has to refer to a dispute concerning a material standard of UNCLOS. The most likely standard is Article 63 which obliges the parties to cooperate in respect to "stock occurring within the exclusive economic zones of two or more coastal States". In fact, the Faroese have already cited this Article in the course of the dispute with the EU (http://www.ejiltalk.org/the-mackerel-war-goes-to-the-wto/, visited on 19 November 2013). The subject matter of this provision falls in the EU competence under Articles 191 and 192 TFEU, which is confirmed by the EU's and Denmark's declaration upon the ratification of UNCLOS (http://www.un.org/depts/los/convention_agreements/convention_declarations.htm, visited on 19 November 2013). The *MOX Plant* jurisprudence provides that where disputes arise under this obligation, they are subject to the ECJ's exclusive jurisdiction.

What remains is the effect of Article 355 (5) (a) TFEU, i.e. what it means for Denmark from the perspective of EU law that "the treaties shall not ap-

ply to the Faroe Islands." The application of the *MOX Plant* principles appears relatively straightforward from a strictly *formal* perspective: Denmark is the acting State in the Annex VII arbitration. The Faroe Islands are not an UNCLOS member in their own right. Accordingly, any decision of the Annex VII tribunal will be binding on Denmark as such, i.e. in accordance with Article 29 of the Vienna Convention on the Law of Treaties (VCLT) on Denmark's entire territory. This includes those territorial parts that are subject to EU law. Under Article 29 VCLT any different intention as to the territorial application of a treaty must "appear from the treaty" or be "otherwise established". Such an intention does not result from UNCLOS itself. While Denmark's declaration to UNCLOS states that the transfer of competence to the EU in certain areas "does not extend to the Faroe Islands or Greenland", this declaration is subject to Article 310 UNCLOS. Article 310 UNCLOS allows only declarations and statements that "do not purport to exclude or modify the legal effect of the provisions of the Convention." The fact that Denmark declared to retain competence with regard to the Faroe Islands cannot be read as having the effect that certain arbitral awards are binding on Denmark only with respect to the Faroese territory. Otherwise, Denmark's rights and obligations under UNCLOS would be altered. All legal effects of UNCLOS are effects Denmark assumed with regard to its entire territory, whether it exercises its rights and obligation autonomously or through the EU. An award of the Annex VII tribunal would thus touch upon issues that are governed by EU law and that are subject to the exclusive competence of the ECJ with regard to Denmark's main land where EU law is in force. At least with regard to that territory, it could be argued that Denmark violated the *MOX Plant* principles.

Looking at the dispute from a *material* point of view might yield a different result: Under Article 355 (5) (a) TFEU the EU accepted the "splitting" of Denmark's territory in one part that is subject to EU law and one part that is not. Ignoring Denmark's special arrangement with regard to the Faroe Islands in the case of a dispute would be contradictory behaviour. Moreover, the Faroese are party to Fisheries and Trade agreements with the EU; hence, they have been treated as an autonomous entity by the EU in the past. While the award would *formally* be binding on Denmark as a whole, there would be no *material* effects on Denmark as an EU member state, since the territory of Denmark subject to EU law is not a party to the fisheries negotiations. The Faroe Islands autonomously negotiated the allocation key of the TAC with the other coastal states of the Atlanto-Scandian herring stock, and they autonomously negotiated with the EU up to the present dispute. EU law including UNCLOS's rights and obligations between Denmark as an EU member state and the EU as such, would not be concerned by whatever decision the Annex VII tribunal might render regarding Denmark with respect to the Faroe Islands. As a result, it could be argued that Denmark has not violated its obligation under Article 344 TFEU.

Should the arbitration go forward and should the Commission consider infringement proceedings, its task, and eventually the task of the ECJ, will be to find criteria for deciding between

the *formal* and the *material* approach in order to assess whether the Annex VII arbitration concerns EU law. This might be the Achilles' heel of Denmark's legal position in the dispute. The crucial aspect of *MOX Plant* consisted in the ECJ's assertion of its exclusive competence to rule on the extent of its jurisdiction over international agreements within the EU legal order: "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" (see above). In a dispute of high economic and political importance for the EU and with a clarifying function as to EU law, it remains to be seen whether the ECJ is inclined give up its role as ultimate arbiter and to defer to Denmark's sole judgment. The Commission might be even more inclined to initiate infringement proceedings at least pre-emptively given the fact that the Faroese through Denmark can still apply to ITLOS for provisional measures against the EU. Once issued, such measures would be binding on the EU irrespective of the ECJ's view as to its exclusive competence. As seen in the ITLOS *MOX Plant* proceedings, ITLOS would probably not stay proceedings to defer to the ECJ.

MOX Plant and the WTO proceedings

Denmark's request for arbitration at the WTO is not only the first of its kind but it might present the opportunity for the ECJ to clarify on important legal issues. The first question in this context is whether the WTO agreement forms part of the EU legal order in a way that triggers the ECJ's exclusive competence under the *MOX Plant* principles. Under the already mentioned *Haegeman* Doctrine, international agreements constitute, "as far as concerns the Community, an act of one of the institutions of the Community within the meaning of subparagraph (b) of the first paragraph of Article 177 [Treaty of the European Economic Community, EEC]. The provisions of the agreement, from the coming into force thereof, form an integral part of Community law" (C-181-73, Haegeman v Belgian State, 30 April 1974). The resulting direct effect of international agreements, i.e. the lacking need of an explicit transformation act into the EU legal order, has so far not been accorded to WTO law by the ECJ. In Portugal v Council, the ECJ held: "It is only where the Community intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreement, that it is for the Court to review the legality of the Community measure in question in light of the WTO rules" (C-149/96, Portuguese Republic v Council of the European Union, 23 November 1999). This statement can be understood in a way that WTO law without further preconditions is not part of the EU legal order. In that case the ECJ's exclusive competence to rule on the WTO agreements' effects in EU law would not be triggered (Comment of Geraldo Vidigal on http://www.ejiltalk.org/the-mackerel-war-goes-to-the-wto/, visited 19 November 2013). This view, however, would misread the ECJ's position. The question of the direct effect of WTO law in the EU legal order is distinct from and subordinated to the Court's exclusive jurisdiction to determine the scope of international agreements' rights and

obligations within the EU legal order. Determining these rights and obligations comprises the decision about direct effect of certain provisions of international agreements. Accordingly, Portugal v Council does not influence the ECJ's exclusive jurisdiction regarding the legal effect of the WTO Agreement in the EU legal order.

Since the WTO Agreement falls squarely into the EU's competence under Article 207 TFEU, the *MOX Plant* principles apply *prima facie*. The same observations that have been made with regard to the Annex VII arbitration are relevant also with regard to the WTO proceedings: While Denmark might formally violate its obligation under Article 344 TFEU by virtue of it being bound as a whole by the WTO obligations, the material effects of any award will concern only the Faroe Islands. Again it remains to be seen whether the Commission and ECJ are prepared to give up "the last word" in this respect and defer to Denmark.

The risk of infringement proceedings is even higher with regard to the WTO proceedings because Denmark's move apparently comes at a surprise for the Commission (http://gavclaw.com/2013/11/08/is-something-fishy-in-the-state-of-denmark-faroe-islands-wto-and-uncloslitigation-provides-a-honey-pot-to-trade-and-eu-lawyers/, visited 19 November 2013). Accordingly, the dispute might call into question Denmark's compliance with its duty to consult under Article 4 (3) TEU. As seen in *MOX Plant*, the ECJ interprets this provision rather extensively. Furthermore, Denmark's apparent conflict of interest between loyalty to the EU and to the Faroese might also play a role under this Article.

Implications for the Faroe Islands and Denmark

In the case of infringement proceedings and an eventual decision of the ECJ, the Faroese future possibilities of international dispute settlement are at stake. Should the ECJ follow the *formal* approach outlined above and hold Denmark in violation of its EU obligations for initiating the UNCLOS and WTO proceedings, it would be clear that these options are not open to the Faroese against the EU – a fact that will have implications for future negotiations. While this might seem "unfair" because the EU is an overly powerful negotiation partner in relation to the Faroese, there is no general right to legal recourse against the EU in international law. From the perspective of international law, notably Article 27 VCLT, the internal allocation of public power within a state is of no relevance to the extent of that state's international obligations. If Denmark and Faroese choose to continue the present internal arrangement, it will be up to them to negotiate dispute settlement clauses in the Faroese's fishery and trade agreements. With regard to the WTO, the Faroese have the possibility to accede if they fulfil the preconditions of a separate customs territory under Article XII of the WTO Agreement. This possibility, however, does not exist regarding UNCLOS.

Should the ECJ follow the *material* approach, the situation is the opposite and the Faroese will have ready legal recourses against the EU in the future – again with significant implications on future fisheries negotiations. As to the present arbitrations, it remains to be seen how the dispute develops. If the cases go forward, the Annex VII tribunal is probably more likely than a

WTO panel to stay proceedings under Article 282 UNCLOS in case of infringement procedures brought by the Commission.

In any case, infringement proceedings and any adverse decision by the ECJ will probably not be without political consequences for Denmark. Since the Faorese economy depends almost entirely upon the fishing industry, a decision preventing Denmark from taking up the Faroese dispute might lead to a new discussion about independence, thus touching upon Denmark's inner stability with regard to the Faroe Islands.

Conclusion

It appears that Denmark has in fact "little to win and much to lose" in this dispute. Whether it was wise to give the EU potential judicial power over the dispute and by implication over the Faroe Island's future means of dispute settlement is beyond this article's judgment. It can go both ways. Maybe it was a bold and clever move that will force the emperor to acknowledge publicly that he has no clothes. Having a firm decision that international dispute settlement is a ready option could substantially bolster the Faroese negotiation power with respect to the EU. Yet, the move may backfire and bring about repercussions for Denmark's political arrangement with the Faroese. Given a wary Commission and an always-active ECJ, Denmark's move is likely to trigger some EU reaction – if only to safe face and increase negotiation leverage on the side of the EU.

From a merely legal perspective the case is fascinating – not just because it is uncharted territory. From parallel proceedings to the operation of autonomous legal systems in international law, from the proliferation of international courts and tribunals to fragmentation of international law and from the relationship between the EU legal order to all these fields, the case presents a cross-section of contemporary international legal problems. Behind these pressing and less pressing, theoretical and practical issues, there lies the true challenge of international law be it fragmented or not: managing what is of common concern with due regard to particular but legitimate interests. That being said, the legal situation in this particular case might not be up to the task. It neither allows giving special consideration to the Faroese dependence on fishery nor taking into account the need for sustainable fishing. The issues will turn on rules about judicial competence yet the case is much more. The factual matrix is politically sensitive. As such it is probably best resolved by diplomatic means.

Clemens Wackernagel, LL.M. (Harvard) is a researcher and doctoral student at the Chair for Public Law, European Law and International Law (Prof. Dr. Christian Tietje, LL.M. (Michigan)) as well as at the Transnational Economic Law Research Center (TELC) at the Faculty of Law, Economics and Business of the Martin Luther University Halle-Wittenberg.

The author would like to thank Prof. Dr. Christian Tietje, LL.M. (Michigan) for his support and very valuable comments on this paper.