"EXCLUSIVISM" IN INTERNATIONAL NUCLEAR LAW: THE CONCEPT REVISITED

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Abstract: The concept of “Exclusivism” is considered to represent one of the most characteristic features of International Nuclear Law. This concept is reflected by regulating matters of uses of nuclear energy and ionising radiation exclusively by distinct principles, that govern legal relations arising in these matters. The concept of “Exclusivism” has been widely reflected in the provisions of international conventions, which have been adopted since the 1960s. This article aims to revisit this concept, taking the most recent developments in international and European law into regard. The article is dealing with the reasons and origins of the concept of “Exclusivism” in International Nuclear Law, with reflections of this concept in existing international treaties and at last but not at least, with most recent tendencies, that aim at jeopardising this concept.

Keywords: international nuclear law, exclusivism, radioactive waste management, nuclear third party liability, transport of radioactive waste

I. INTRODUCTION

The concept of “Exclusivism” is considered to represent one of the most distinctive features of International Nuclear Law. Under this concept, relations arising in uses of nuclear energy and ionising radiation are to be regulated exclusively by distinctive principles, which do differ from the usual principles of common law. The objective of these principles is “to provide a legal framework for conducting activities related to nuclear energy and ionizing radiation in a manner which provides a proper balance between the risks and the benefits of the use of nuclear energy and ionising radiation notwithstanding the requirement that in case of conflict the protection against risk shall prevail.” The principles laid down by international conventions gov-

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3 “Exclusivism” is being defined as “the practice of being exclusive, mentally characterized by the disregard for opinions and ideas other than one’s own” by the American Heritage Dictionary of the English Language. 5th Edition. Boston: Houghton Mifflin Harcourt, 2016, p. 458.

erning the matters of nuclear third party liability (in particular in the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 1960, in the Brussels Convention on the Liability of Operators of Nuclear Ships of 1962, in the Vienna Convention on Civil Liability for Nuclear Damage of 1963, in the Brussels Supplementary Convention of 1963 and in the Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material of 1971) may serve as salient reflection of this concept. At the same time, a number of international conventions do explicitly declare their inapplicability to radioactive substances, or nuclear installations, leaving the matter to be regulated by special international agreements.

From very early on, the uses of nuclear energy and ionising radiation gave rise to the introduction of special international agreements designed to mitigate the effects of a technology which in many respects involves risks for human beings, and the environment in which they live. Consequently, the international law was called at a very early stage to regulate nuclear technology. However, any international conventions adopted in this field had to reflect distinctive political, economic, technical, scientific and at last but not at least military considerations. Consequently, international conventions adopted in this particular field aim in particular “to tame technology by means of the law, in particular, by establishing new legislation based on mixture of technological imperatives involved and the economic needs and legal requirements of the States and the society.”


12 PELZER, N. *The Hazards Arising out of the Peaceful Use of Nuclear Energy*. pp. 207–208.
plains to some extent why International Nuclear Law involves distinctive economic and technical considerations which give them their original character and constitute exceptions to the common law.

Having said this, this article aims at dealing with the concept of “Exclusivism” in International Nuclear Law regarding the question how this concept has been reflected in international agreements. Further, this article aims also to deal with most recent tendencies, aiming either directly or indirectly at jeopardising the concept of “Exclusivism”.

II. TWO FACES OF “EXCLUSIVISM” IN INTERNATIONAL NUCLEAR LAW

“Absolute Exclusivism”

The issue of military nuclear technologies and installations may serve as perfect example of how the concept of “Exclusivism” has been reflected in International Nuclear Law. It is a matter of fact that international conventions which had been adopted in the field of uses of nuclear energy and ionising radiation in the 1960s, did not address the issue of military technologies explicitly. However, the reference to “peaceful uses of nuclear energy” in those conventions has been interpreted as excluding any military technologies

13 The Treaty establishing the European Atomic Energy Community of 1957 merely declares in its Art. 2, that in order to perform its task, the Community shall “establish with other countries and international organisations such relations as will foster progress in the peaceful uses of nuclear energy” (emphasis added). The Paris Convention on Third Party Liability in the Field of Nuclear Energy of 1960 did not address the issue of military (defence) nuclear technologies in its provisions at all. However, the Brussels Supplementary Convention declares in its preamble the desire of its Contracting Parties to supplement the measures provided in the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 1960 with a view to increasing the amount of compensation for damage which might result from the use of nuclear energy for peaceful purposes (emphasis added). The Preamble to the Vienna Convention on Civil Liability for Nuclear Damage of 1963 reads very similar, stating that the Contracting Parties had recognised the desirability of establishing some minimum standards to provide financial protection against damage resulting from certain peaceful uses of nuclear energy (emphasis added). The only international convention regulating the issues of nuclear third party liability, which explicitly included military technologies under the scope of its application, was the Brussels Convention on the Liability of Operators of Nuclear Ships of 1962. This Convention explicitly covered also warships, that were defined as “any ship belonging to the naval forces of a State and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the Government of such State and whose name appears in the Navy List, and manned by a crew who are under regular naval discipline.” However, in particular due to the intention to cover also these military technologies, the Brussels Convention on the Liability of Operators of Nuclear Ships of 1962 has never been ratified by the required number of Signatories and consequently has never entered into force.

and installations from the scope of these conventions. Regarding the scope of application of the Treaty establishing the European Atomic Energy Community (Euratom) of 1957, this interpretation was later reconfirmed by the Court of Justice of the European Union in its two milestone decisions dealing with this issue.\textsuperscript{15}

To avoid any need of further re-interpretation, the issue of applicability to the military nuclear technologies and installations has been addressed explicitly in those international conventions, adopted in the post-Chernobyl period under the auspices of the International Atomic Energy Agency (IAEA). Consequently, the Convention on Nuclear Safety of 1994,\textsuperscript{16} the Protocol to Amend the Vienna Convention of 1997,\textsuperscript{17} the Protocol to Amend the Paris Convention of 2004\textsuperscript{18} and the Amendment to the Convention on the Physical Protection of Nuclear Material of 2005\textsuperscript{19} explicitly limit their scope of application to this technologies and facilities, operated for civil use.

Thus, due to implicit or explicit exclusion from the scope of several existing international conventions, the operation of military nuclear technologies and installations remains to fall exclusively under the legal framework created by concerned states. Stephen Gorove referred – with respect to the Euratom’s attempts to execute security controls in the French military installation at Marcoule site – to this specific phenomenon of International Nuclear Law as to “Absolute Exclusivism”.\textsuperscript{20} This reflects the interest of Contract-

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\item In the case C-61/03 Commission vs. Great Britain, the Court of Justice ruled inter alia, that “in the absence of an express provision excluding activities connected to defence from the scope of the Treaty, it is necessary to have regard to other factors in order to determine whether the Treaty is intended also to govern, at least in certain spheres, the use of nuclear energy for military purposes. The evidence on interpretation to be taken into consideration cannot be limited to the historical background to the drawing up of the Treaty, or to the contents of the unilateral declarations made by the representatives of certain States who took part in the negotiations which led to the signature of that Treaty. As the Advocate General rightly pointed out in points 80 and 81 of his Opinion, it is clear from that background and certain declarations mentioned in the travaux préparatoires of the Treaty that its possible application to the military uses of nuclear energy was envisaged and discussed by the representatives of the States who took part in those negotiations. However, it is also apparent that they held differing opinions on that issue and that they decided to leave it unresolved. Consequently, the guidance provided by that evidence is not sufficient for it to be asserted that the framers of the Treaty intended to make its provisions applicable to military installations and military applications of nuclear energy. (…)” Further, in the case C-65/04 Commission vs. Great Britain, the Court of Justice stressed, that “the application of such provisions to military installations, research programmes and other activities might be such as to compromise essential national defence interests of the Member States. On the basis of those considerations, the Court concluded that, in view of the absence in the Treaty establishing the European Atomic Energy Community of any derogation laying down the detailed rules according to which the Member States would be authorised to invoke and protect those essential interests, activities falling within the military sphere are outside the scope of that Treaty.” Decisions are well analysed by ANDRES-ORDAX, B. Radiological protection and military activities: recent European case law. In: Nuclear Inter Jura 2007. Proceedings. Bruxeller: Ed. Bruylant, 2008, pp. 537–559.
\item The Convention on Nuclear Safety of 17th June 1994 entered into force on 24th October 1996.
\item The Protocol to Amend the Convention on Third Party Liability in the Field of Nuclear Energy of 29th July 1960, as amended by the Additional Protocol of 28th January 1964 and by the Protocol of 16th November 1982. The Protocol has not entered into force until now.
\item The Amendment to the Convention on the Physical Protection of Nuclear Material of 8th July 2005 entered into force on 18th June 2001.
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ing Parties to various international conventions to restrain control over this very sensitive area and to eliminate adoption of any supra-national binding frameworks concerning minimal standards in the areas above mentioned (third party liability, nuclear safety, nuclear security).

At the same time, the concept of “Absolute Exclusivism” reflects the intention of Contracting Parties to reach certain minimal standards regarding issues of transboundary importance, while restricting such minimal standards exclusively to peaceful uses of nuclear energy and ionizing radiation. Consequently, the concept of “Absolute Exclusivism” represents a delicate compromise between the desire of sovereign states to establish internationally binding rules for certain aspects of uses of nuclear energy on one hand and theirs endeavour to restrain rule-making powers regarding distinctive issues of state interest. The example of military nuclear technologies and installations shows the concept of “Exclusivism” as a negative concept of International Nuclear Law, i.e. the respective international conventions do regularly exclude certain installations from their scope of application, while they cover the installations operated for civilian purposes.

In this respect, it is interesting to refer to the text of the Joint Convention on the Safety of Radioactive Waste Management of 1997. On one hand, this Convention explicitly declares its inapplicability to “the safety of management of radioactive waste within military and defence programmes.” Thus, this provision of the Joint Convention integrates the concept of “Absolute Exclusivism” into the legal framework of radioactive waste management. At the same time, the Contracting Parties to the Convention referred to military programmes in the preamble, when stating that “the spent fuel and radioactive waste excluded from the present Convention because they are within military or defence programmes should be managed in accordance with the objectives stated in this Convention.” Consequently, this unique declaration serves a double purpose: On one hand, it does not jeopardise the concept of “Absolute Exclusivism” and therefore fits the interests of those Contracting Parties, operating military nuclear installations. On the other hand, it accommo-


23 “Unless declared as spent fuel or radioactive waste for the purposes of this Convention by the Contracting Party. However, this Convention shall apply to the safety of management of spent fuel and radioactive waste from military or defence programmes if and when such materials are transferred permanently to and managed within exclusively civilian programmes.” See Art. 3 Paragraph 3 of the Joint Convention.

dates the interests of other Contracting Parties\textsuperscript{25} and aims at accession of other states to the treaty.

“Relative Exclusivism”

Despite the reluctance of sovereign states to enter binding international obligations in the sensitive field of peaceful uses of nuclear energy and ionizing radiation, there is an interest of states to create an international framework, addressing the issues of transboundary nature and based on reciprocity. The legal framework governing the nuclear third party liability may serve as stringent example of this approach. Here, the international conventions (the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 1960 and the Vienna Convention on Civil Liability for Nuclear Damage of 1963) do provide distinctive liability principles. These liability principles were later re-confirmed in the provisions of the amendments to these conventions: in the Protocol to Amend the Vienna Convention of 1997 and in the Protocol to Amend the Paris Convention of 2004\textsuperscript{26}.

Each nuclear installation must have a person in charge: the operator. In the legal framework of the conventions, the operator is the person “designated”\textsuperscript{27} or “recognised”\textsuperscript{28} as the operator of a nuclear installation by the competent public authority. The operator of a nuclear installation is exclusively liable for nuclear damage.\textsuperscript{29} No other person may be held liable, and the operator cannot be held liable under other legal provisions. Subsequently, liability is legally channelled solely to the operator of the nuclear installation and is absolute. In relation to this, the conventions provide for very limited liability relief. The operator will be exonerated from liability only if he proves that the nuclear incident was directly due to armed conflict, hostilities, civil war, insurrection or a grave natural disaster, or that

\textsuperscript{25} Several Contracting Parties were convinced that the management of spent fuel and radioactive waste arising in the military sector should be subject to the same safety rules as the management of such material arising in the civilian sector and to the control of countries’ radiation protection and safety authorities. This approach was promoted in particular by Sweden, which in various international forums had repeatedly urged governments to ensure that their countries’ military activities conformed to strict environmental standards. Accordingly, his delegation believed that the envisaged convention should cover military spent fuel and radioactive waste, with reporting requirements designed to preclude the disclosure of classified information. Consequently, the final wording of the respective provisions, drafted by the legal and technical experts under the chairmanship of Professor Alec Baer, had resulted in a well balanced text which reflected a widespread spirit of compromise. See IAEA (ed.), Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management of 1997. Vienna: IAEA Law Series No. 1, 2006, pp. 76–77.


\textsuperscript{27} In this respect, the liability regime established by the international conventions is being interconnected with the national public law, regulating nuclear safety, in particular with the permit issued by the competent authority in order to operate the installation.

\textsuperscript{28} Consequently, the liability regime would be applicable even to those nuclear installations, being operated illegally on the territory of the Contracting Party.

\textsuperscript{29} The Vienna Convention provides (Art. X) that the operator has a right of recourse only if this is expressly provided for by a contract in writing, or – in case a nuclear incident results from an act or omission done with intent to cause damage – against the individual who has acted or omitted to act with such intent. The Paris Convention contains a similar provision (Art. 6/c).
it resulted wholly or partly either from gross negligence of the victim or from an act or omission of the victim with intent to cause harm. As a *quid pro quo* for the very strict conditions of the operator’s liability, the Contracting Party may limit the operator’s liability by the national legislation. However, the conventions do provide for a minimum possible liability limit. Further, the conventions require for congruence between operators’ liability and mandatory insurance. At the same time, the conventions provide that courts of the Installation State where the nuclear incident occurred will have exclusive jurisdiction over all actions brought for damages caused by a nuclear incident occurring in their territory. In a case where nuclear material in transport causes damage within the territory of an Installation State, the court where the nuclear material was situated at the time of damage will be exclusively competent. Consequently, in a strict contrast to the above described negative concept of “Absolute Exclusivism”, we face a positive concept here, i.e. establishing distinctive legal rules by means of binding international conventions.

It is a matter of fact that these principles of nuclear third party liability do differ considerably from the principles of the ordinary tort law. It is a matter of fact that the international conventions do establish a sort of exclusive legal framework of nuclear third party liability. However, the conventions fail to establish a completely comprehensive liability framework, when explicitly referring to the right of the Contracting Party to lay down a specific rule in the national framework. In contrast to the above-mentioned concept of “Ab-

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30 Art. 9 of the Paris Convention, Art. IV of the Vienna Convention.
31 The Paris Convention provides (Art. 7) a minimal liability limit of not less than 5 million SDR. At the same time, the maximum liability limit of 15 million SDR has been established by this convention. The Vienna Convention provides (Art. V, Par. 1 and 3) that the liability of the operator may be limited by the Contracting Party to not less than US $ 5 million for any one nuclear incident. The US $ referred to in this Convention is a unit of account equivalent to the value of the United States dollar in terms of gold on 29 April 1963, that is to say US $ 35 per one troy ounce of fine gold.
32 The Paris Convention provides (Art. 10) that the operator shall be required to have and maintain insurance or other financial security of the amount established pursuant to Article 7 and of such type and terms as the competent public authority shall specify. The Vienna Convention provides (Art. VII, Par. 1) that the operator shall be required to maintain insurance or other financial security covering his liability for nuclear damage in such amount, of such type and in such terms as the Installation State shall specify. The Installation State shall ensure the payment of claims for compensation for nuclear damage which have been established against the operator by providing the necessary funds to the extent that the yield of insurance or other financial security is inadequate to satisfy such claims, but not in excess of the limit, if any, established pursuant to Article V. However, in this regard, the Convention also provides that Contracting Party or any of its constituent sub-divisions, such as States or Republics, are not required to maintain insurance or other financial security to cover their liability as operators.
33 Art. 13 of the Paris Convention, Art. XI, Par. 1 of the Vienna Convention.
35 E.g., the Vienna Convention provides, that the liability of the operator may be limited by the Installation State to not less than US $ 5 million for any one nuclear incident. Consequently, the Contracting Party has right to provide for a specific amount of liability in the limits established by the Convention. Also, the Contracting Party is free to establish for unlimited liability of the operator.
solute Exceptionalism”, we face another concept of International Nuclear Law, which may be described as “Relative Exceptionalism”.

The concept of “Relative Exceptionalism” reflects a compromise between two contradictory interests of sovereign states. On one hand, the concept reflects the interest to create certain binding rules by the means of binding international conventions, covering the issues of transboundary risk arising from the operation of nuclear installation for peaceful purposes. On the other hand, the concept of “Relative Exceptionalism” also reflects the interest of sovereign states to maintain law-making powers in this sensitive area of national economy. Consequently, the concept of “Relative Exceptionalism” has been reflected also in other international conventions, which either do establish distinctive framework for certain aspects of peaceful uses of nuclear energy, or do explicitly exclude their applicability on those aspects.

Reconciliation of both concepts by non-binding instruments

Taking account of the above described tensions between contradictory interests, the sovereign states often choose cautiously those obligations that they desire to make legally binding. In this respect, we may refer to Charles Lipson, who generally suggests four reasons why states may opt for choosing non-binding instruments rather than legally binding hard law: (1) to avoid formal and visible pledges; (2) to avoid ratification; (3) to be able to renegotiate or modify as circumstances change; and (4) to achieve a result. In International Nuclear Law, states often make use of soft law (les normes sauvages or para droit) for a variety of reasons, such as when legally binding commitments are unwanted or unavailable. Due to the non-binding nature of these instruments, soft law can be adopted more rapidly and when it fails to meet the current challenges, it can be quickly amended or replaced.
Thus, soft law can be said to respond to the challenges of contradictory interests being present in the field of International Nuclear Law, when there is no animosity to establish binding rules among the concerned states but there is an urgent need to take some action. At this place, two interesting examples of such non-binding instruments issued by the IAEA can be mentioned:

The “Code of Practice on the International Transboundary Movement of Radioactive Waste” was issued in relation to the adoption of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal of 1989. During this negotiation process, a difference of opinion emerged between those states which thought that international law did not ensure adequate surveillance of radioactive waste movements and those that were reluctant for the convention to cover also the nuclear field. This confrontation was to result in exclusion of “wastes which, as a result of being radioactive, are subject to other international control systems, including international instruments, applying specifically to radioactive materials.” The issue raised by this compromise is in fact, that no such instrument existed at the time of the adoption of the Basel Convention. Development of the “Code of Practice” does therefore go some way towards filling that gap. It was at a later stage that the Joint Convention on the Safety of Radioactive Waste Management of 1997 would, in its Art. 27 on transboundary movements convert the principles set out in the “Code of Practice” into binding hard law.

The “Code of Conduct on the Safety and Security of Radioactive Sources” was developed in two stages. A first version of the “Code” was approved in 2000. Subsequently, a group of experts conducted a review of the “Code”, to verify its effectiveness and to consider of the increased concerns about the problem of the safety of radioactive sources in light of the events of 11th September 2001. This work was to culminate in the current text of the “Code”. Also here, the choice of a non-binding instrument reflected “tensions between the desire to harmonise the practice of states and their reluctance to be legally bound by texts which are both complex and ambitious.” As a delicate quid pro quo, the member states of the IAEA were asked by the General Conference to notify support of the IAEA’s efforts to enhance the

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41 Adopted by the General Conference of the International Atomic Energy Agency on 21st September 1990 by Resolution GC(XXXIV)/RES/530.
44 At this time, illegal disposal of hazardous waste (including radioactive waste) was being alleged in certain states of the third world and the stir caused by these allegations led to the banning of such activities under the Fourth ACP-EEC Convention of 1989 (“Lomé IV Convention”) and subsequently under the Bamako Convention on the ban on the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa of 1991.
46 Adopted by the General Conference of the International Atomic Energy Agency on 19th September 2003 by Resolution GC(47)/RES/7.B.
safety and security of radioactive sources and to comply with the requirements of this “Code”. At the same time, perhaps worried by the boldness of this approach, the General Conference did feel it necessary to specify, that this procedure would remain “exceptional”, with no legal force and could not constitute a precedent for other non-binding instruments. It is a matter of fact, that it remained unique to date.

The efforts to reconcile the divergent interest by the means of the soft law remain to be subject of contradictory evaluations by the scientific literature. Katia Boustany was critical towards the unclear nature of obligations arising from this type of instruments, which – per her opinion – “raises the question of what such a tool could add to the normative setting.” In this regard, she considered the adoption of non-binding instruments in peaceful use of nuclear law to represent a kind of “legal evasion.” However, other authors were less sceptical by evaluating the impact of soft law. “On the one hand, it is true that a code is not technically legally binding and the rules are not rules of law; but on the other hand, it cannot be denied that such rules have practical or legal effect - a code can still have a significant impact on state action. Although the norms are not adopted as law, and are of a non-binding form, they frequently are intended to alter the behaviour of their targets.” The subtlety of the processes by which contemporary international law can be created is no longer adequately captured by reference to the orthodox categories of custom and treaty. The role of soft law as an element in international law-making is now widely appreciated, and its influence throughout international law is evident. “Soft legalization has a number of significant advantages, including that it is easier to achieve, provides strategies for dealing with uncertainty, infringes less on sovereignty, and facilitates compromise among differentiated actors.” The mechanism established by the “Code of Conduct on the Safety and Security of Radioactive Sources” shows a rather more positive picture. Until most recently, 134 states have made the notification envisaged in the “Code” to the Director General of the IAEA.

III. “EXCLUSIVISM” IN INTERNATIONAL NUCLEAR LAW JEOPARDISED

The concept of “Exclusivism”, i.e. establishing distinctive rules by means of binding international conventions, is considered to represent a very specific feature of International Nuclear Law. Consequently, these rules represent certain generally accepted standards

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48 Pursuant to the Operative Paragraph (4) of the resolution GC(47)/RES/7.B., the General Conference urged “each State to write to the Director General that it fully supports and endorses the IAEA’s efforts to enhance the safety and security of radioactive sources, is working toward following the guidance contained in the IAEA Code of Conduct on the Safety and Security of Radioactive Sources, and encourages other countries to do the same.”


51 WETHERALL, A. Normative Rule Making at the IAEA: Codes of Conduct. pp. 75–76.


adopted by the community of sovereign states, and reflect their agreement to fulfil these standards.\textsuperscript{54} However, it is a matter of fact that very recently, the international community of states faces certain tendencies, aiming either directly or indirectly at jeopardising the concept of “Exclusivism”. In this regard, two examples of such efforts can be mentioned:

In the first place, proposals concerning a prospective harmonisation of nuclear third party liability by means of EU law are to be mentioned. There is no legal framework on nuclear third party liability at the EU level. The liability framework is basically governed by the existing multilateral treaties in this field and by legislation that differs from one member state to the next, depending on which treaty or treaties, if any, it has signed and ratified.\textsuperscript{55} Consequently, the European Commission published a legal study\textsuperscript{56} in 2009, proposing various options how to approach the issue, \textit{inter alia} by a directive providing for some minimal standards of nuclear third party liability.\textsuperscript{57} Regarding this option, it is important to note that the Union most recently decided to also target liability matters through a directive in other fields that were traditionally governed by international treaty.\textsuperscript{58} In the aftermath, the Commission addressed

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\item “Accession of Euratom to the Paris Convention on Third Party Liability in the Field of Nuclear Energy”, TREN/CC/01 – 2005. However, this Report was not approved in any way by the European Commission and should not be relied upon as a statement of Commission views.
\item This is the case with the liability for maritime claims, which are currently governed by a framework of international conventions under the aegis of the International Maritime Organization. As the European Commission stated in its proposal for a directive on ship-owner civil liability and financial guarantees (COM (2005) 593 final, sub paragraph 120): “A number of international conventions on the civil liability of ship owners have been adopted. These conventions all have limitations, starting with the fact that most have not entered into force, and that those which have entered into force have done so only in some countries… For this reason the Commission is herewith proposing to follow a pragmatic two-step approach. As a first step, it is proposed that all member states become contracting parties to the umbrella international convention on liability for maritime transport, which is the 1996 Convention on the Limitation of Liability for Maritime Claims. The directive would also incorporate this convention into Community law in order to ensure its full and uniform application all over the EU… It is to be noted that, in parallel to this directive, member states are preparing to ratify the above-mentioned conventions on hazardous and noxious substances and bunker oil. As a second step, the Commission will seek a mandate for negotiating, within the IMO, the revision of the above-mentioned 1996 Convention, in order to review the level at which ship-owners lose their right to limited liability.” The Commission also had to deal with whether to rely exclusively on the framework created by existing international conventions and the future development of this framework, or to address existing problems with an initiative under EU law: “The two options are: to promote the implementation of international conventions. The relatively slow pace of national ratification processes makes the date of entry into force and the geographical scope of these conventions uncertain. This directive would be the most proper binding instrument under which these conventions can be swiftly and uniformly applied at EU level. In addition, it should be noted that this approach would presuppose that the member states which are contracting parties to the 1996 Convention denounce it in good time and, at the latest, by the end of the transposition period for this Directive… Action at the level of the International Maritime Organization has limitations. In addition, the objectives of the conventions may not correspond to citizens’ current expectations and do not follow the trends of modern law… The approach is therefore to establish a new, uniform legal framework at European Union level, which will fully enforce the internationally recognized principles and will adapt them where necessary” (COM (2005) 593 final, sub paras. 230, 324 and 325).
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the member states with a questionnaire in 2013, identifying the introduction of unlimited liability of operators as one of the options of the prospective harmonisation. Obviously, such a step would be in strict contradiction with the legal regime established under the Vienna Convention on Civil Liability for Nuclear Damage of 1963, which provides expressively that the liability of the operator may be limited by the Contracting Party.

In this respect, the Court of Justice stressed that “the Member States have a choice as to the appropriate steps to be taken, they are nevertheless under an obligation to eliminate any incompatibilities existing between a pre-Community convention and the EC Treaty. If a Member State encounters difficulties which make adjustment of an agreement impossible, an obligation to denounce that agreement cannot therefore be excluded. (…) As regards the argument that such denunciation would involve a disproportionate disregard of foreign-policy interests of the (…) Republic as compared with the Community interest, it must pointed out that the balance between the foreign-policy interests of a Member State and the Community interest is already incorporated in (…) the Treaty, in that it allows a Member State not to apply a Community provision in order to respect the rights of third countries deriving from a prior agreement and to perform its obligations thereunder. That article also allows them to choose the appropriate means of rendering the agreement concerned compatible with Community law.”

Member states thus have the obligation to align their international treaty commitments and as ultima ratio terminate their participation in treaties that conflict with EU law.

Consequently, any legislative action establishing obligatory unlimited liability will jeopardise the distinctive liability rules, established by means of international law.

While the above-mentioned ideas have never been submitted by the European Commission as an official draft, the provisions of the directive 2011/70/Euratom do provide for other obligations, establishing potential conflict with the framework established by international conventions. The Directive provides that a shipment of radioactive waste from a member state to a third state is possible only if a bilateral agreement has entered into force between the member state concerned and a third country to use a disposal facility in one of them. Such an agreement must “take into account the criteria established by the Commission.” It is a matter of fact that these “criteria” have to take “due account of, inter alia, relevant safety standards of the IAEA, facilitating Member States to evaluate whether requirements for exports are met.” However, this requirement opens the doors for establishing much stricter rules than those provided by the safety standards of the IAEA. Further, the Directive stipulates that shipment of radioactive waste from a member state to a third state is possible only when the country of destination has radioactive waste management and disposal programmes with objectives representing a high level of safety equivalent to those established by this Directive.

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62 Here, the Directive 2011/70/Euratom refers in its Art. 4 Paragraph 4 to the criteria established by the Commission in accordance with Article 16(2) of Directive 2006/117/Euratom on the supervision and control of shipments of radioactive waste and spent fuel, OJ L 337, 5.12.2006, pp. 21–32.
In this respect, the provisions of the Directive may serve as a salient example of a tendency which is described as “European Exceptionalism” in scientific literature. Consequently, we face “the expanding legislative activity of the European institutions reaches out beyond the borders of the European legal system and incidentally affects the EU Member States’ autonomous relations with third parties.” In this respect, it was also stressed that “since European integration is designed to administer and regulate an increasing number of issues, the autonomous international obligations of the EU Member States may become an obstacle.”

In other words, the “European Exceptionalism” means exporting of own standards and rules into the binding obligations of the member states. Such a tendency can be acceptable only to the extent in which the EU law does reflect the standards established by the existing international conventions, governing the peaceful uses of nuclear energy and ionizing radiation. However, the tendencies to supersede these distinctive rules by own standards and principles may have negative impact on universally accepted obligations and may potentially harm the legal regime established by international community of states.

IV. CONCLUSIONS

The concept of “Exclusivism” in International Nuclear Law reflects the efforts of the international community of states to address risks arising from peaceful uses of nuclear energy and ionizing radiation. These risks are addressed by a unanimous agreement on establishment of distinctive rules by means of the international conventions. Due to a very special nature of the risk potentially arising, these distinctive rules do considerably differ from the ordinary rules of the common law. Consequently, the concept of “Exclusivism” may be considered as a particular manifestation of “Universalism” in international law.

At the same time, the concept of “Exclusivism” represents an outcome of a delicate compromise between interests of sovereign states to create certain binding rules, covering the issues of transboundary risk and the interest of sovereign states to maintain law-making powers in this sensitive area of national economy. Consequently, the distinctive set of rules, as provided by existing international conventions do represent a valuable outcome of long-lasting developments and are worth to preserve and maintain.

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65 Ibid.

66 In this respect, the Directive 2011/70/Euratom correctly refers in its Art. 4 Paragraph 4 to “an agreement (concluded) with the Community covering spent fuel and radioactive waste management” or (alternatively) to obligations arising from the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management of 1998.