THE MOX PLANT LITIGATION: THE FIRST HALF-LIFE

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I. INTRODUCTION

In 2001 Ireland commenced litigation against the United Kingdom (UK) over the construction and operation of a plant to produce mixed oxide fuels at the Sellafield nuclear complex in north-west England. This litigation, which had been only partially concluded at the time of writing, raises a series of fascinating and often complex issues of both international and EU law. These include the potential for overlapping jurisdiction between different international tribunals; the division of competence between the EC and its Member States in relation to participation in treaties; and the use of litigation as a strategy for settling inter-State disputes. The aim of this article, apart from giving a snapshot of the position that the increasingly tortuous course of this litigation had reached by January 2004, is to explore these issues. The article begins by setting out the background to the litigation and giving a quick overview of its course so far. It then explores in more detail the questions of overlapping jurisdiction of international tribunals and of EC law raised by the litigation, before concluding with a few, rather speculative, thoughts about Ireland's choice of litigation as a strategy.

II. BACKGROUND TO THE LITIGATION[1]

Sellafield (at one time known as Windscale) is the largest and oldest civilian nuclear complex in the UK. It is situated on the coast of Cumbria in north-west England. The nearest point in Ireland is some 112 miles away across the Irish Sea. Since the 1950s Sellafield has been the UK centre for the reprocessing of spent fuel rods from nuclear power stations. By the mid-1990s the Sellafield site contained, inter alia, the Calder Hall Magnox nuclear power station, a Magnox reprocessing plant (which had replaced an earlier reprocessing plant), a Thermal Oxide Reprocessing Plant (THORP) (which began operating in 1994), a MOX Demonstration Facility (producing small quantities of MOX

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[1] For further details, see the written pleadings of the parties in the various stages of the litigation, references to the sources of which are given in notes 11, 16, and 21 below.

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fuel), and a storage site for high-level radioactive waste. Discharges of radioactive matter (particularly low-level liquid waste) have been intentionally made from the Sellafield site into the Irish Sea for many years at levels that have had a significant impact on the marine environment.[2] Ireland has long been concerned about these discharges, and for many years has sought their reduction and elimination through diplomatic means.[3]

In 1992 British Nuclear Fuels (BNFL) (a company wholly owned by the British Government), which is the owner and operator of the Sellafield site, applied for permission to build a plant to make mixed oxide fuel (or MOX) from a mixture of reprocessed plutonium dioxide and uranium dioxide. The THORP plant, which in reprocessing spent fuel rods separates plutonium and uranium from fission products, was expected to constitute the primary source of plutonium oxide for the MOX plant. MOX is used as a fuel in certain types of nuclear reactor. As no such reactors exist in the UK, any MOX produced at Sellafield would be for export, mainly by sea. As part of the process involved in obtaining consent to build the plant, BNFL carried out an environmental impact assessment. The latter concluded that any radioactive discharges from the operation of the MOX plant would be insignificant. In 1994 the relevant UK authorities gave the necessary consent to build the plant, which was duly completed in 1995.

The next step was for BNFL to seek authorization to operate the plant. In order to do so, BNFL was required to satisfy the British authorities, first, that the plant would not release unacceptable levels of radioactive discharges into inter alia the marine environment, and, secondly, that the plant would be justified by the benefits that it would bring. In relation to the first requirement, the authorities concluded that the levels of discharges would not exceed those under existing authorizations, thus no new authorization was necessary. In addition, further to Article 37 of the Euratom Treaty,[4] which requires each Member State to inform it of any plans for the disposal of radioactive waste, the EC Commission in 1997 gave an opinion that operation of the MOX plant would not be liable to result in radioactive contamination significant to another Member State.[5] In relation to the question of justification, Article 6(1) of Euratom Directive 96/27[6] provides that any new practice that would cause

[2] RB Clark *The Waters around the British Isles: Their Conflicting Uses* (Oxford Clarendon Press 1987), at 237–41; Ospar Commission *Quality Status Report 2000 for the North-East Atlantic, Report III Celtic Seas*, at 63–7 and 108 (available at <http://www.ospar.org>.

[3] For further discussion, see text at nn 117–21 below.

[4] Treaty establishing the European Atomic Energy Community, 1957.

[5] Opinion of the Commission of 11 Feb 1997 concerning the Plan for the Disposal of Radioactive Waste, from the Operation of the Sellafield Mixed Oxide Fuel Plant of British Nuclear Fuels plc, Sellafield, Cumbria, UK, in accordance with Art 37 of the Euratom Treaty, OJ (1997) C68/4.

[6] Directive 96/27/Euratom laying down Basic Safety Standards for the Protection of the Health of Workers and the General Public against the Dangers arising from Ionizing Radiation, OJ (1996) L159/1. This replaced Directive 80/836/Euratom (OJ (1980) L246/1) with effect from 13 May 2000.

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exposure to radiation must be justified by its 'economic, social or other benefits in relation to the health detriments' it may cause, if its operation is to be authorized. In pursuance of this provision, the UK authorities held consultations between 1997 and 2001, reaching the conclusion in October 2001 that the plant was justified. Authorization for the commissioning of the plant was then given by the Nuclear Installations Inspectorate in December 2001.

Ireland objects to the MOX plant because in its view the plant will perpetuate and intensify nuclear reprocessing at Sellafield and result in additional radioactive discharges into the Irish Sea. It made representations during the consultations on justification of the plant, arguing that it was not justified, but to no avail. Ireland is also concerned about the transport of radioactive materials by ship to and from Sellafield through the Irish Sea.

III. THE COURSE OF THE LITIGATION

In June 2001 Ireland instituted proceedings under the Convention for the Protection of the Marine Environment of the North-East Atlantic, 1992[7] (the Ospar Convention), claiming that the UK was in breach of the Convention by having refused to make certain information available to it during the consultations on authorization. Four months later, in October 2001, shortly after the British Government had decided that the MOX plant was justified (thus opening the way to the commissioning of the plant), Ireland instituted proceedings against the UK under the UN Convention on the Law of the Sea[8] (UNCLOS), claiming that the authorization and operation of the plant breached or would breach various provisions of Part XII of UNCLOS relating to the prevention of marine pollution, cooperation in the protection of the marine environment and environmental impact assessment. The course of each of these sets of litigation will now be briefly surveyed.

A. Proceedings under the Ospar Convention

In addition to containing several provisions concerned with the prevention and reduction of pollution of the marine environment from land-based-sources (including nuclear facilities) and offshore installations, the Ospar Convention also contains provisions on access to information (which are modelled on EC Directive 90/313 on Freedom of Access to Environmental Information[9]).[10]

[7] (1993) 32 ILM 1069.

[8] 1833 UNTS 396.

[9] OJ (1990) L158/56. This Directive has been replaced by Directive 2003/4 (OJ (2003) L41/26) which Member States are required to implement by 15 Feb 2005.

[10] For detailed commentary on the Convention, see E Hey, T Ijlstra, and A Nollkaemper 'The 1992 Paris Convention for the Protection of the Marine Environment of the North-East Atlantic: A Critical Analysis' (1993) 8 International Journal of Marine and Coastal Law 1; and L de La Fayette 'The Ospar Convention Comes into Force: Continuity and Progress' (1999) 14 International Journal of Marine and Coastal Law 247.

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Under paragraph 1 of Article 9, parties to the Convention are required to ensure that their competent authorities make information of the kind described in paragraph 2 available to 'any natural or legal person, in response to any reasonable request.' The kinds of information listed in paragraph 2 include any available information 'on the state of the maritime area [and] on activities or measures adversely affecting or likely to affect it.' Under paragraph 3 requests for information may be refused on grounds inter alia of commercial confidentiality. Under Article 32, any dispute relating to the interpretation or application of the Convention, which cannot be settled by consensual means, may be referred by either party to the dispute to arbitration.

Following Ireland's institution of proceedings under Article 32 (the first, and so far only, time that these dispute settlement procedures have been invoked), an arbitral tribunal was constituted in October 2001, consisting of Professor Michael Reisman (chairman), Dr Gavan Griffith QC (appointed by Ireland) and The Rt Hon Lord Mustill PC (appointed by the UK). Written pleadings were filed between March and August 2002, oral proceedings took place in October 2002 and on 2 July 2003 the tribunal delivered its award.[11]

Ireland's complaint against the UK was that it had been denied access to material that had been deleted from the published versions of various reports prepared as part of the consultation process when the British government had been considering whether the MOX plant was justified. This, Ireland claimed, was a breach of Article 9 of the Ospar Convention. In response the UK argued that Article 9(1) of the Convention required only that a State party have in place a domestic framework for the disclosure of information (which it said that it had), and that the Article did not establish a direct right to receive information. But if in fact Article 9(1) did establish such a right, the information sought by Ireland did not fall within the type of information covered by Article 9(2) and in any case was covered by the exception of commercial confidentiality in Article 9(3). The Tribunal (Professor Reisman dissenting) disagreed with the UK over the scope of Article 9(1). In the view of the majority, Article 9(1) contained an obligation of result, namely that information of the kind specified in Article 9(2) must be made available to those requesting it.[12] On the other hand, a majority of the tribunal (Dr Griffith dissenting this time) agreed with the UK that the information to which Ireland had requested access was not of the kind that was covered by Article 9(2) as it did not relate directly to 'activities or measures *adversely* affecting or likely to affect' the maritime area (emphasis added), but rather to the question of the economic justification

[11] The text of the award, as well as the written and oral submissions of the parties, may be found on the web site of the Permanent Court of Arbitration at <http://www.pca-cpa.org>. For a more detailed account of the award than that which follows, see M Fitzmaurice 'Dispute Concerning Access to Information under Article 9 of the Ospar Convention (*Ireland v United Kingdom and Northern Ireland* [*sic*])' (2003) 18 International Journal of Marine and Coastal Law 541.

[12] Ibid, paras 132–8.

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of the MOX plant.[13] Thus, the tribunal concluded that there had been no breach of Article 9 by the UK.

B. Proceedings under UNCLOS

Under Part XV of UNCLOS, which deals with the settlement of disputes relating to the interpretation and application of the Convention, the parties to such a dispute must first of all seek to settle it through consensual means of their own choice (section 1 of Part XV). Only if resort to these means fails to settle the dispute, may a party to a dispute unilaterally invoke the compulsory dispute settlement procedures of section 2.[14] In the latter eventuality, the forum hearing the case will be an arbitral tribunal constituted in accordance with Annex VII, unless the parties have exercised their right to choose the International Court of Justice, the International Tribunal for the Law of the Sea (ITLOS) and/or an arbitral tribunal constituted in accordance with Annex VIII as their preferred forum and their choices coincide.[15] In the present case the UK had chosen the International Court of Justice as its preferred forum but Ireland had made no choice. The forum to hear the case was therefore bound to be an arbitral tribunal constituted in accordance with Annex VII.

As it may take some time for an Annex VII tribunal to be constituted, since agreement has to be reached on who are to be the arbitrators, Article 290(5) of UNCLOS provides that in the interim ITLOS (which is a permanent body) may be asked to prescribe provisional measures, should either party to the dispute be of the view that the urgency of the situation so requires. Acting under this provision, Ireland on 9 November 2001 asked ITLOS to prescribe measures that would require the UK to suspend authorization of the MOX plant or alternatively prevent its operation; ensure that there were no movements of any radioactive substances connected with the plant through its waters; and take no action that might aggravate the dispute or render its solution more difficult or that might prejudice the rights of Ireland in carrying out any decision on the merits that the Annex VII tribunal might render.

ITLOS dealt with Ireland's request in an order made on 3 December 2001.[16] In order to prescribe provisional measures under Article 290(5),

[13] Ibid, paras 163–82. Dr Griffith thought that the majority had taken an overly narrow view of the scope of Art 9(2): see paras 34–135 of his dissenting opinion.

[14] For fuller discussion of the Convention's dispute settlement procedures, see, eg, ED Brown 'Dispute Settlement and the Law of the Sea: the UN Convention Regime' (1997) 21 Marine Policy 17; J Collier and AV Lowe *The Settlement of Disputes in International Law: Institutions and Procedures* (Oxford OUP 1999), ch 4; and JG Merrills *International Dispute Settlement* (3rd edn Cambridge CUP 1998), ch 8.

[15] See Art 287.

[16] *The MOX Plant Case (Ireland v United Kingdom), Request for Provisional Measures, Order of 3 December 2001*, (2002) 41 ILM 405. The text of the order, together with the pleadings of the parties, can also be found on the ITLOS website, <http://www.itlos.org>. For comment on the Order, see C Brown 'International Tribunal for the Law of the Sea: Provisional Measures before the ITLOS: The MOX Plant Case' (2002) 17 International Journal of Marine and Coastal Law

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ITLOS must be satisfied that prima facie the Annex VII tribunal would have jurisdiction and, secondly, that the urgency of the situation requires ITLOS to prescribe measures to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment. As regards the first requirement, ITLOS found that prima facie the Annex VII tribunal would have jurisdiction. (This point is discussed in more detail in the next section.) As regards the requirement of urgency (and it should be noted that in the context of Article 290(5) urgency relates to the period before the Annex VII tribunal is constituted, not to the period before that tribunal delivers its award), ITLOS dealt with this issue very briefly. It noted that in the oral proceedings before it the UK had said that there would be no import or export of nuclear materials to or from the MOX plant before October 2002. 'In the circumstances of this case, the Tribunal does not find that the urgency of the situation requires the prescription of the provisional measures requested by Ireland, in the short period before the constitution of the Annex VII arbitral tribunal.'[17] ITLOS therefore rejected Ireland's request for provisional measures.

Nevertheless, it went on to prescribe a measure of its own. Having pointed out that the duty of cooperation was a fundamental principle in the prevention of marine pollution under Part XII of UNCLOS and general international law, and that rights arose therefrom that ITLOS might consider it appropriate to preserve under Article 290, ITLOS declared that 'prudence and caution require that Ireland and the United Kingdom co-operate in exchanging information concerning risks or effects of the operation of the MOX plant and in devising ways to deal with them, as appropriate'.[18] ITLOS therefore prescribed the following provisional measure. Ireland and the UK should co-operate and should, for this purpose, enter into consultations forthwith in order to exchange further information with regard to possible consequences for the Irish Sea arising out of the commissioning of the MOX plant, monitor the risks or effects of the operation of the MOX plant for the Irish Sea, and devise, as appropriate, measures to prevent marine pollution which might result from the operation of the MOX plant. The parties were ordered to submit a report on the steps that they had taken to give effect to this measure by 17 December 2001.[19]

Two months after ITLOS made its Order, the Annex VII tribunal was duly constituted. Its members are Judge Thomas Mensah (President), Professor James Crawford SC (appointed by Ireland), Maître Yves Fortier QC, Professor

267; B Kwiatkowska 'The Ireland v. United Kingdom (Mox Plant) Case: Applying the Doctrine of Treaty Parallelism' (2003) 18 International Journal of Marine and Coastal Law 1; and V Lowe and R Churchill 'The International Tribunal for the Law of the Sea: Survey for 2001' (2002) 17 International Journal of Marine and Coastal Law 463 at 477–84.

[17] ITLOS Order of 3 Dec 2001, para 81. For comment on and some criticism of this aspect of the Order, see Lowe and Churchill, above n 16, at 481–2.

[18] Ibid, para 84.

[19] For comment on and some criticism of this aspect of the Order, see Brown, above n 16, at 281–3; Kwiatkowska, above n 16, at 41–6; and Lowe and Churchill, above n 16, at 482–3.

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Gerhard Hafner and Sir Arthur Watts QC (appointed by the UK). The Tribunal has to consider Ireland's claims that the UK has breached:

- its obligations under Article 206 of UNCLOS by failing to carry out a proper environmental impact assessment of the MOX and THORP plants, the additional waste to be stored at Sellafield, and the international movement of radioactive materials to be transported to and from the plant;
- its obligations under Articles 123 and 197 of UNCLOS by failing to co-operate adequately with Ireland over the protection of the marine environment of the Irish Sea; and,
- its obligations under Articles 192–4, 207, 211, and 213 by failing to take the necessary measures to protect and preserve the marine environment of the Irish Sea.[20]

Ireland has also asked the Tribunal to order the UK to prevent the operation of the MOX plant, the reprocessing of spent fuel at the THORP plant for the purposes of the operation of the MOX plant, and associated international movements of radioactive materials until the following conditions have been fulfilled: a proper environmental impact assessment has been carried out; it is shown that the operation of the MOX plant and associated international movements of radioactive materials will not result in any deliberate discharges of radioactive materials into the Irish Sea; and a comprehensive anti-terrorist strategy has been agreed with Ireland.

Exchanges of written proceedings took place between July 2002 and April 2003, and oral hearings were scheduled to take place during June 2003. However, on 13 June 2003 the President of the Tribunal issued a statement concerning the Tribunal's jurisdiction. He noted that the UK had raised two sets of objections to the jurisdiction of the Tribunal. The first concerned UNCLOS. Notwithstanding these objections, the Tribunal was of the view that it had prima facie jurisdiction, a matter discussed further in the next section. The UK's second set of objections concerned European Community (EC) law, and these raised a 'serious difficulty'.[21] These objections (which are considered in more detail below) essentially relate to the fact that UNCLOS is a mixed agreement to which both the EC and its Member States are parties. In the view of the Tribunal there was a real possibility that the European Court of Justice (ECJ) might be seised of the question as to whether the provisions of UNCLOS on which Ireland was relying fell within the competence of the EC. If the Tribunal was also to decide on this issue, there might be two

[20] This summary of Ireland's case is based on pp 3–4 of its Memorial, rather than its very extensive statement of claim. The latter is, in some respects (notably environmental impact assessment), narrower than Ireland's summary of it in its Memorial.

[21] Statement by the President, 13 June 2003, para 6. The statement, the various orders made by the Tribunal (referred to below) and the pleadings of the parties can all be found on the web site of the Permanent Court of Arbitration <http://www.pca-cpa.org>.

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competing decisions. Such a situation would not be 'in accord with the dictates of mutual respect and comity that should exist between judicial institutions deciding on rights and obligations as between States, and entrusted with the function of assisting States in the peaceful settlement of disputes between them'.[22] The Tribunal had therefore decided to suspend proceedings until not later than 1 December 2003 by which time it hoped to have a clearer picture of the EC legal position.[23] Finally the President indicated that the Tribunal was willing to consider the possibility of prescribing provisional measures if either party requested them. Ireland duly made such a request three days later, asking the Tribunal to order the UK to

- ensure that there were no radioactive discharges from the MOX plant or increased discharges from THORP;
- inform Ireland of any additional reprocessing at THORP or manufacturing at the MOX plant, the movement of any vessel carrying radioactive substances to or from Sellafield, and any radioactive discharges from Sellafield; and,
- take no action that might prevent full effect being given to the results of any environmental impact assessment that the Tribunal might order to be carried out.

On 24 June 2003 the Tribunal made an order in respect of Ireland's request.[24] Under Article 290(1) of UNCLOS the Tribunal may prescribe any provisional measures that it considers 'appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision', provided that it considers that prima facie it would have jurisdiction in respect of the dispute. Like ITLOS, the Tribunal was satisfied that this latter condition was fulfilled.[25] Given that the Tribunal was of the opinion that until the issues of EC law were resolved, there were 'substantial doubts' as to whether it would have jurisdiction to deal with the merits of the case,[26] it is perhaps a little odd that the Tribunal decided that prima facie it had jurisdiction. It may be that the Tribunal thought that because neither party had argued strongly that the ECJ would be likely to find that the provisions of UNCLOS at issue fell within the competence of the EC, it would ultimately turn out that the Tribunal would be found to have jurisdiction.

The Tribunal then turned to the question of whether it was appropriate to prescribe any provisional measures. It decided that it was not appropriate to do

[22] Ibid, para 11.

[23] The points made in the President's statement are repeated and expanded on in Order No 3 (below n 24), paras 14–30.

[24] *The MOX Plant Case (Ireland v United Kingdom)*. Order No 3. Suspension of Proceedings on Jurisdiction and Merits and Request for Further Provisional Measures. (Orders Nos 1 and 2 dealt with Ireland's amended statement of claim and extension of time limits for submitting written pleadings, respectively).

[25] Ibid, paras 14–17.

[26] Ibid, para 25.

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so in order to 'prevent serious harm to the marine environment' because in the Tribunal's view Ireland had not established that any harm that might be caused to the marine environment by the MOX plant would be 'serious'.[27] Unlike ITLOS, which avoided the issue, the Tribunal appears here to have decided between the competing views of Ireland and the UK as to the likely seriousness of any pollution resulting from the operation of the MOX plant. Like the Ospar Convention Tribunal, the Annex VII Tribunal appears to regard the burden of proof as falling on Ireland to show significant damage. Had both Tribunals applied the precautionary principle, which is explicitly incorporated in Article 2(2)(a) of the Ospar Convention, they might have reached a different view as to the burden of proof.[28] On the other hand, it is possible that they were precluded from doing so by their rules of procedure, each of which states that each party has the burden of proving the facts relied on to support its claim.[29] In any case it is arguable that even if the burden of proof had lain on the UK, it had discharged it by convincingly showing that there was no likelihood of significant pollution resulting from the MOX plant.[30]

The Tribunal then turned to the question of whether provisional measures should be prescribed to preserve the rights of the parties. It observed that international judicial practice confirmed that this should be done only where it could be shown that there was a situation of urgency and of irreparable harm to the rights claimed by the parties. In relation to the first set of measures sought by Ireland (relating to discharges), the Tribunal was not satisfied that there was an urgent and serious risk of harm to Ireland's rights.[31] As regards the third set of measures requested by Ireland, the Tribunal thought that such measures would not give the UK any clear guidance as to what conduct was expected of it.[32] In relation to the second set of measures requested by Ireland, the Tribunal noted that although there had been increased cooperation since ITLOS made its order in December 2001, cooperation and consultation had not always been as effective or as timely as it could have been. The Tribunal therefore recommended that the parties should seek to establish arrangements,

[27] Ibid, para 55.

[28] In his dissenting opinion in the Ospar Convention arbitration, Dr Griffith regards the precautionary principle as shifting the burden of proof on to the UK to show that the MOX plant would not adversely affect the marine environment: see paras 72–6 of his dissenting opinion. In the ITLOS phase of the case Judge Wolfrum was of the view that the precautionary principle was not applicable in relation to provisional measures as it would effectively mean that such measures would have to be granted whenever an applicant argued with some degree of plausibility that its rights might be prejudiced or the marine environment harmed: see p 5 of his separate opinion. But see Judge Treves in the *Southern Bluefin Tuna* case, below at n 41, who sees a precautionary approach as inherent in the notion of provisional measures: see para 8 of his separate opinion. See further RR Churchill 'International Tribunal for the Law of the Sea: The Southern Bluefin Tuna Cases (*New Zealand v Japan; Australia v Japan*). Order for Provisional Measures of 27 August 1999' (2000) 49 ICLQ 979 at 988–9; and Brown, above n 16, at 283–6.

[29] Art 12(1) of the Annex VII Tribunal Rules of Procedure; Art 12(1) of the Ospar Convention Tribunal Rules of Procedure.

[30] See, in particular, ch 3 of its Counter-Memorial.

[31] Above n 24, para 62.

[32] Ibid, para 63.

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at a suitable intergovernmental level, for coordination of all the various agencies and bodies involved and review the whole system of intergovernmental notification and cooperation.[33] The Tribunal also affirmed the provisional measure prescribed by ITLOS and called on the parties, pending the final decision of the Tribunal, to ensure that no action was taken that might aggravate the dispute.

On 30 October 2003 the Commission of the EC instituted legal proceedings against Ireland before the European Court of Justice for alleged breaches of Community law, namely Articles 10 and 292 of the EC Treaty and Articles 192 and 193 of the Euratom Treaty.[34] A fortnight later the Tribunal issued a further order that continued the suspension of proceedings until the ECJ gives its judgment or the Tribunal determines otherwise. The Tribunal also decided that the provisional measures that it had ordered in June 2003 should continue, that Ireland and the UK should report to the Tribunal every 6 months on their compliance with those measures, and that Ireland should submit a report every six months on the development of proceedings before the ECJ.[35]

Given that cases against EU Member States before the ECJ usually take between about 18 months and 2 years, it is likely to be the latter half of 2005 before the Court gives judgment and the UNCLOS Annex VII Tribunal discovers whether or not it has jurisdiction to determine the merits of Ireland's claim.

IV. THE QUESTION OF COMPETING JURISDICTION

A. UNCLOS Perspectives

The proliferation of international courts and tribunals over the past two decades or so has given rise to two sets of concerns amongst international lawyers: first, that this development may lead to a fragmentation of international law as different tribunals adopt differing interpretations of the same points of international law; and, secondly, that the same dispute may be brought before two or more tribunals, thus leading to potentially conflicting decisions and/or forum shopping.[36] It is probably fair to say that fears about

[33] Ibid, paras 64–7.

[34] Case C-459/03, *Commission v Ireland* OJ (2004) C7/24. The issues in the case are discussed below: see text at n 71 et seq.

[35] *The MOX Plant* Case *(Ireland v United Kingdom)*. Order No 4 of 14 Nov 2003. Further Suspension of Proceedings on Jurisdiction and Merits.

[36] See, from amongst a growing literature on this topic, JI Charney 'Is International Law threatened by Multiple International Tribunals?' (1998) 271 Recueil des Cours 101; V Lowe 'Overlapping Jurisdiction in International Tribunals' (1999) 20 Australian Yearbook of International Law 191; BH Oxman 'Complementary Agreements and Compulsory Jurisdiction' (2001) 95 AJIL 191; and Y Shany *The Competing Jurisdictions of International Courts and Tribunals* (Oxford OUP 2003).

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the fragmentation of international law have so far not really been realized.[37] On the other hand, concerns about the potential for overlapping jurisdiction are real and are illustrated by the litigation over the MOX plant.

UNCLOS contains two provisions that are designed to address the potential problem of competing jurisdiction from non-UNCLOS tribunals. First, Article 281 provides that if the parties to a dispute concerning the interpretation or application of UNCLOS have agreed to seek settlement of that dispute by peaceful means of their own choice, UNCLOS dispute settlement procedures apply only where no settlement has been reached by recourse to those means and the agreement does not exclude any further procedure. Secondly, Article 282 provides that if the parties to a dispute concerning the interpretation or application of UNCLOS have agreed, through a general, regional or bilateral agreement or otherwise, that such a dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply instead of the UNCLOS procedures, unless the parties to the dispute agree otherwise.

There have so far been three cases brought under the UNCLOS dispute settlement procedures where the issue of the possible jurisdiction of a competing tribunal or dispute settlement system has arisen. The first was the *Southern Bluefin Tuna* cases between Australia and New Zealand on the one hand, and Japan on the other. In these joined cases Australia and New Zealand argued that certain Japanese fishing practices were a breach both of UNCLOS and the Convention for the Conservation of Southern Bluefin Tuna.[38] Like the *MOX Plant* case, the *Southern Bluefin Tuna* dispute was referred to an arbitral tribunal constituted under Annex VII of UNCLOS, as none of the parties to the dispute had exercised their option under Article 287 to choose a forum for dispute settlement.[39] Also, as in the *MOX Plant* case, ITLOS was asked to prescribe provisional measures pending the constitution of the Annex VII tribunal. As has been seen, to prescribe provisional measures under Article 290(5), ITLOS must be satisfied that prima facie the Annex VII tribunal would have jurisdiction. Japan argued that as the Southern Bluefin Tuna Convention contained its own dispute settlement procedures,[40] Article 282 meant that the tribunal would not have jurisdiction. ITLOS rejected this argument quite tersely. It noted that Article 282 applied only where another treaty contained provisions for compulsory dispute settlement, entailing a binding decision: the Southern Bluefin Tuna Convention dispute settlement procedures were not of

[37] Charney, above n 36, at 347 et seq. In the present litigation it is noteworthy that the Annex VII Tribunal in its order on provisional measures pays great attention to and follows the jurisprudence of the ICJ and ITLOS on provisional measures.

[38] 1819 UNTS 359.

[39] See text at n 15 above.

[40] These provide that the parties to a dispute are to consult among themselves with a view to having the dispute resolved by negotiation or other agreed means: any dispute not so resolved may be referred with the consent of all the parties to the dispute to the ICJ or arbitration.

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such a character.[41] The Annex VII Tribunal, however, took a very different view, seeing the issue in terms of Article 281 rather than Article 282. It held that the dispute settlement procedures of the Southern Bluefin Tuna Convention excluded recourse to any further procedures, thus, as a result of Article 281, preventing the Tribunal from having jurisdiction.[42] The Tribunal's decision has received considerable criticism because of its rather strained reading of the dispute settlement procedures of the Southern Bluefin Tuna Convention and its view that those procedures are applicable to disputes concerning the interpretation and application of UNCLOS, and for generally downplaying the compulsory element in the UNCLOS dispute settlement procedures.[43]

The second case where the question of competing jurisdiction between the UNCLOS dispute settlement procedures and other tribunals has arisen is litigation between Chile and the EC over fishing for swordfish by EC vessels in the south-east Pacific. In December 2000 Chile and the EC agreed to ask ITLOS to determine various aspects of the dispute. The EC had earlier submitted other elements of the dispute to the WTO dispute settlement procedures. In March 2001 the parties announced that they had reached a provisional arrangement concerning the dispute and therefore asked ITLOS to suspend the proceedings before it. On 15 March 2001 the President of the ITLOS Special Chamber to which the dispute had been referred made an order suspending proceedings, extending the 90-day time limit for the submission of preliminary objections concerning jurisdiction and admissibility so that it would commence on 1 January 2004.[44] A further order was made on 16 December 2003 extending this time limit for a further 2 years.[45] Proceedings before the

[41] *Southern Bluefin Tuna* Cases *(New Zealand v Japan); (Australia v Japan)*, Order for Provisional Measures of 27 Aug 1999, paras 53–5, (1999) 38 ILM 1624. Also on the ITLOS web site at <http://www.itlos.org>. For comment, see, eg, Churchill, above n 28; M Hayashi 'The *Southern Bluefin Tuna* cases: Prescription of Provisional Measures by the ITLOS' (2000) 13 Tulane Environmental Law Journal 361; and B Kwiatkowska 'The *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan)* Cases' (2000) 15 International Journal of Marine and Coastal Law 1.

[42] *Southern Bluefin Tuna* Case *(Australia and New Zealand v Japan)*, Award on Jurisdiction and Admissibility of 4 Aug 2000, paras 53–64 (2000) 39 ILM 1359.

[43] For such criticisms, see, for example, AE Boyle 'The Southern Bluefin Tuna Arbitration' (2001) 50 ICLQ 447; DA Colson and P Hoyle 'Satisfying the Procedural Prerequisites to the Compulsory Dispute Settlement Mechanisms of the 1982 Law of the Sea Convention: Did the Southern Bluefin Tuna Tribunal get it Right?' (2003) 34 Ocean Development and International Law 59; C Romano 'The Southern Bluefin Tuna Dispute: Hints of a World to Come . . . Like it or Not' (2001) 32 Ocean Development and International Law 313; and the opinion of the sole dissenting arbitrator in the Annex VII Tribunal, Sir Kenneth Keith. For support for the Tribunal's decision, see B Kwiatkowska 'The Australia and New Zealand v Japan Southern Bluefin Tuna Jurisdiction and Admissibility Award of the First Law of the Sea Convention Annex VII Arbitral Tribunal' (2001) 16 International Journal of Marine and Coastal Law 239.

[44] *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community)*, Order of 15 March 2001, at <http://www.itlos.org>.

[45] Order of 16 Dec 2003.

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WTO have also been suspended.[46] Thus, the question of overlapping jurisdiction between ITLOS and the WTO may never arise.[47]

The *MOX Plant* case is thus the third case so far in which the question of overlapping jurisdiction between the UNCLOS dispute settlement procedures and other tribunals has arisen, and arguably is the case in which this question has arisen in its most acute form. During the provisional measures phase of the litigation before ITLOS, the UK invoked Article 282 of UNCLOS. It argued vigorously that as the main elements of the dispute that Ireland had submitted to the Annex VII Tribunal were governed by the compulsory dispute settlement procedures of the Ospar Convention and/or the EC and Euratom Treaties, and as Ireland had initiated or was intending to initiate proceedings under those procedures, Article 282 applied and therefore the Annex VII Tribunal would not have jurisdiction.[48] ITLOS rejected this argument. It pointed out that the dispute settlement procedures under the Ospar and EU treaties dealt with disputes concerning the interpretation or application of those treaties, not disputes arising under UNCLOS. Even if the Ospar Convention and the EU Treaties contained rights and obligations 'similar to or identical with the rights or obligations set out in the [Law of the Sea] Convention, the rights and obligations under those agreements have a separate existence from those under the Convention'.[49] ITLOS also pointed out that identical or similar provisions in different treaties may be interpreted in different ways because of differences in the respective contexts, objects and purposes, subsequent practice of the parties and *travaux préparatoires* of the treaties concerned. Since the dispute before the Annex VII Tribunal concerned the interpretation or application of UNCLOS and no other agreement, only the dispute settlement procedures under UNCLOS were relevant to that dispute. Article 282 was therefore not applicable.[50] This is a very robust view of Article 282, and one with which not all the ITLOS judges were entirely happy.[51]

In the proceedings before the Annex VII Tribunal, the UK has repeated its view that Article 282 is applicable and thus deprives the Tribunal of jurisdiction.[52] The Tribunal, as has been seen, has not yet ruled definitively on the question of whether it has jurisdiction to decide the merits of the case. Nevertheless, it has had to consider whether prima facie it has jurisdiction for the purposes of prescribing provisional measures. In relation to the possible

[46] WT/DS/193/3, 6 Apr 2001.

[47] For discussion of the litigation, see V Lowe 'The International Tribunal for the Law of the Sea: Survey for 2000' (2001) 16 International Journal of Marine and Coastal Law 549, at 567–9; Lowe and Churchill, above n 16, at 466–7; TL McDorman '*The Chile v EC Swordfish Case*' (2000) 11 Yearbook of International Environmental Law 585; and MA Orellana 'The Swordfish Dispute between the EU and Chile at the ITLOS and the WTO' (2002) 71 Nordic Journal of International Law 55.

[48] UK's Written Response, at 63–70.

[49] ITLOS Order of 3 Dec 2001, at n 16, para 50.

[50] Ibid, paras 51–3.

[51] See the separate opinions of Vice-President Nelson and Judges Anderson and Jesus.

[52] UK Counter-Memorial, at 99–103.

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application of Article 282 to the Ospar Convention, the Tribunal observed that while that Convention was

> relevant to some at least of the questions in issue between the Parties . . . the Tribunal does not consider that this alters the character of the dispute as one essentially involving the interpretation and application of the [UNCLOS] Convention. Furthermore, the Tribunal is not persuaded that the OSPAR Convention substantially covers the field of the present dispute so as to trigger the application of [A]rticles 281 or 282 of the Convention.[53]

This statement does not perhaps shed very much light on the Tribunal's view of the scope of Article 282. The first part of the statement may indicate that the Tribunal shares the view of ITLOS, that the rights and obligations of the Ospar Convention, even if similar to those of UNCLOS, are nevertheless to be regarded as quite separate and distinct for the purposes of dispute characterization and settlement. The second part of the statement suggests that the provisions of the Ospar Convention relate only to a rather small part of the dispute concerning the MOX plant. Given the measures relating to nuclear installations that have been adopted by the Ospar Convention Commission,[54] the Tribunal's view is debatable, although it must be admitted that the transport of radioactive substances by sea falls outside the scope of the Ospar Convention. Should the Tribunal eventually have to rule definitively on the question of whether it has jurisdiction, it is to be hoped that it will give a fuller explanation of why Article 282 is not relevant to the Ospar Convention.

When it came to the question of the possible overlap of its jurisdiction with that of the ECJ, however, the Tribunal took a much less cursory approach. It acknowledged that there was a real risk that there might be a conflict between the ECJ's view of where the division of competence between the EC and its Member States lies in relation to the provisions of UNCLOS at issue and its own view of the matter. There may be two reasons why the Tribunal took a much more considered view of the EC question than it did of the Ospar Convention. First, it probably thought that there was little likelihood of the Ospar Convention dispute settlement procedures being invoked in relation to the substance of the MOX plant dispute. Such procedures could only be invoked by Ireland, and presumably had Ireland been thinking of invoking them, it would have done so at the time that it raised the alleged breach of Article 9 of the Ospar Convention, as it would have been much simpler, quicker and cheaper to have dealt with all the issues together in one arbitration rather than two. In the case of the EC issue, however, proceedings could be instituted by a third party (the EC Commission). By the time that it issued its order on provisional measures, the Tribunal had been warned that the Commission was actively considering the institution of proceedings.[55]

[53] Above n 24, para 18.

[54] As to which see below n 119.

[55] The Commission had intimated this in a Written Answer in the European Parliament on 15 May 2003. Above n 24, para 21.

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A second reason why the Tribunal treated the objection to its jurisdiction based on EC law more seriously may be because of the nature of the dispute at issue. If the Tribunal shared the view of ITLOS as to the scope of Article 282, it would have regarded a dispute arising under the Ospar Convention as one involving the interpretation and application of that Convention, not the interpretation and application of UNCLOS. On the other hand, if the ECJ were to consider the question of the division of competence between the EC and its Member States in relation to UNCLOS, it would have to consider not only EC law as such, but also Annex IX of UNCLOS and the declarations made by the EC and its Member States thereunder (see further below), these definitely being questions concerning the interpretation and application of UNCLOS, as well as possibly other issues concerning UNCLOS. Interestingly, the Tribunal appears to see the suspension of proceedings while the ECJ determines the issues referred to it, not so much as an application of Article 282 (or 281), as a preliminary step that must be taken before the Tribunal can decide whether Articles 281 and 282 are applicable and therefore whether or not it has jurisdiction.[56] On the other hand, as there is already a dispute as to the interpretation and application of Annex IX of UNCLOS, one could regard the suspension of proceedings as an application (albeit possibly a temporary one) of Article 282.

B. EC Law Perspectives

(a) Arguments of the Parties—The question of possible competing jurisdiction between the UNCLOS dispute settlement bodies and the ECJ did not arise until a relatively advanced stage in the proceedings in the *MOX Plant* case.[57] In its written memorial in the Annex VII Tribunal proceedings, Ireland barely touched upon the EC law aspects of the jurisdictional question arising. Buoyed perhaps by the earlier decision of ITLOS accepting the prima facie jurisdiction of the Annex VII Tribunal, Ireland submitted that 'it is evident that this Annex VII Tribunal has jurisdiction to determine Ireland's claims concerning the interpretation and application of UNCLOS'.[58] Ireland hardly went further in its reply to the UK. It reiterated that the dispute concerned the interpretation and application of UNCLOS, and that the parties agreed that the Tribunal had jurisdiction over such disputes. It emphasized that Ireland was not inviting the Tribunal to exercise jurisdiction under any other international agreement, and that disputes arising under UNCLOS did not fall within the jurisdiction of dispute resolution mechanisms contained in other treaties. Again, it called forth the earlier ITLOS decision in support of its stance.[59]

[56] Ibid, para 23.

[57] It is true that there is some brief discussion in the UK's Written Response in the ITLOS phase of the proceedings (see paras 168–75), but this is of a fairly cursory nature, especially in relation to the matters considered below.

[58] Ireland's Memorial, 98.

[59] Ireland's Reply, 45–6.

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The UK, by contrast, entered lengthy written pleadings in respect of the EC dimension of the jurisdictional question, particularly in its rejoinder. The essence of the UK position would seem to be that it is for the EC, and not for the Member States, to exercise rights and obligations under UNCLOS, to the extent that these fall within areas in respect of which competence has been transferred from the Member States to the EC. This flows from Article 4(3) of Annex IX of UNCLOS. To the extent that such rights or obligations are justiciable as between Member States, they are justiciable as part of EC law, and hence *only* justiciable before the ECJ. It is for the ECJ to interpret and apply the provisions of treaties, which are binding on the EC, even 'in the case of such provisions located in mixed agreements'.[60]

> At heart, the jurisdictional issue presented in this case is not one of exceptional difficulty. Annex IX to UNCLOS, read with the Community's Declaration, provides that the Community shall exercise rights and perform duties on matters relating to which competence has been transferred to the Community. It adds that Member States shall not exercise those rights or perform those duties. In relation to third States, the Community is the bearer of the relevant rights and duties. As between one Member State and another, it makes no more sense to speak of reciprocal rights and duties under UNCLOS than it would to speak of reciprocal rights and duties under UNCLOS between Ontario and Quebec.[61]

The UK did not attempt to delimit, in a precise or comprehensive manner, the extent of the EC's jurisdiction under UNCLOS. Whereas in respect of certain issues (such as those relating to environmental impact assessment) the UK was happy to assert exclusive EC competence,[62] it desisted in general from specifying the 'extent' of that competence. Thus, the UK observed that '[t]o the extent that Articles 194, 207, 211, 213, 217, and 222 of UNCLOS affect the Community's common rules on the protection of the marine environment, it is for the Community and not for the Member States to exercise the rights and obligations deriving from those provisions of UNCLOS.'[63] This question-begging formulation sits uneasily with the UK's assertion that while any differences as to the extent of the EC's competence would be justiciable *only* in the ECJ, 'faced with the manifest existence of relevant EC legislation establishing common rules, it is not easy to see how such differences *could* arise.'[64]

The UK's submissions are ambiguous in one crucial respect. The focus of

[60] UK's Rejoinder, para 4.32. For an interesting and lucid account of the role of mixed agreements in Community law see J Heliskoski *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (The Hague Kluwer 2001). This book contains an in-depth discussion of the particular example of UNCLOS, and an account of the implications for dispute settlement of mixed agreements.

[61] Oral Proceedings, Day 3, at 3. It is interesting to note that Ireland agrees that the '[t]he issue of the competence of the EC and its Member States in the context of international agreements may appear complex, but, in reality, it is a relatively simple issue.' It seems that the only thing upon which the parties can agree is that the issues arising are straightforward!

[62] UK's Rejoinder, para 4.45.

[63] Ibid, para 4.50.

[64] Ibid, para 4.5.

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analysis is upon the extent of the EC's *exclusive* competence. Within this sphere, the UK is clear that any dispute between Member States may be justiciable only before the ECJ. Less certain is the issue of the status of UNCLOS in so far as its provisions fall within an area of concurrent rather than exclusive EC competence. The ambiguity which underlies the UK's position as regards areas of concurrent competence would seem to be reflected in its quest to demonstrate exclusive competence including, in the case of minimum standards, up to the point of those standards.[65]

Ireland, in the oral proceedings, also asserted that 'exclusive competence . . . is the foundation to consideration of the whole issue.'[66] Ireland, above all in the oral proceedings, rested its case upon the claim that '[e]xclusive competence is very much the exception' in relation to UNCLOS.[67] It placed emphasis, in particular, on the minimum nature of EC harmonization in respect of the environment, asserting that exclusive competence could never arise when EC rules established only minimum standards. Ireland claimed that in so far as the EC did not enjoy exclusive competence, it was not the case that Member States had 'transferred' competence to it, and it was consequently not the case that it would be for the EC to exercise rights, and perform obligations, pursuant to UNCLOS.[68] (This is a point to which we will return below.)

The Order (No 3) of the Tribunal is more nuanced as regards the premise that it is the scope of the EC's exclusive jurisdiction, which is determinative of the issue before it. Its order seems to be based upon a clear acceptance, shared by both the UK and Ireland, that it does not enjoy jurisdiction in so far as the matter at hand falls within the exclusive competence of the EC. However, the Tribunal also expressed a reluctance to proceed as regards those provisions of UNCLOS, which might appear *not to fall* within the EC's exclusive competence. This is

[65] Look, for example, at paras 4.43–4.51 in the UK Rejoinder where the UK repeatedly uses the phrase 'affects' or 'would affect' Community roles, calling into play the ERTA doctrine (on which see 661 below). This might be thought to be particularly problematic when it comes to the issue of minimum standards. See the discussion during Day Three of the oral proceedings. The UK asserted that it was 'ill-founded' to suggest that 'minimum standards are incompatible with exclusive competence' (at 14). It is certainly the case that minimum harmonization will not invariably lead to exclusive Community competence by virtue of the ERTA doctrine. It would not be sensible, however, to exclude entirely the possibility that minimum standards might on occasion be such as to pre-empt the external relations competence of the Member States. As the recent 'Open Skies' (see, eg, Case C-467/98 *Commission v Denmark* [2002] ECR 1-9519) litigation shows, it is necessary to make a determination on a case by case basis, having regard to the scope of the precise Community rule, and to the nature of the external obligation in question It is interesting to note that the European Court has found as regards the internal dimension of Community law, that minimum harmonization measures may, on occasion, give rise to 'exhaustive' harmonization. This is particularly the case where the minimum measure also regulates in a detailed manner the circumstances in which stricter standards may be applied. Thus, minimum harmonization may, on occasion, be exhaustive harmonization, and may as such pre-empt Member States' recourse to the free movement exceptions. This may be thought to indicate that the mere fact that a measure pursues a minimum harmonization approach is not in and of itself definitive when it comes to the question of the pre-emption of Member States' competence. This example from the internal sphere may, arguably, apply by way of analogy to the external domain.

[66] Proceedings Day Two, at 9. [67] Ibid, at 19. [68] Ibid, at 22–4.

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due in part to persistent uncertainty as to the scope of the EC's exclusive competence, and to the recognition of the Tribunal that it would be for the ECJ to resolve this. The reluctance of the Tribunal to proceed, even in areas apparently outside of the EC's exclusive competence, is explained also on the basis that 'there is no certainty that any such provisions would in fact give rise to a self-contained and distinct dispute capable of being resolved by the Tribunal'.[69] As we will see below, the jurisdictional questions arising are particularly difficult as regards those areas of UNCLOS which may be determined to fall within the concurrent (as opposed to the exclusive) competence of the EC and the Member States.

There follows an analysis of the EC law issues in the MOX case. While this draws upon the proceedings before the Tribunal, it represents an attempt to develop an independent account of the key issues arising.

V. ANALYSIS OF THE EC LAW LSSUES

A. The Division of Competence between the EC and its Member States in relation to UNCLOS

As has been seen, UNCLOS adopts an approach to dispute settlement through Articles 281 and 282 that is generally deferential to possible competing tribunals. The EC, by contrast, adopts an approach to dispute settlement which is strikingly assertive. Article 292 EC provides that:

> Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein.

Article 193 of the Euratom Treaty, also at issue in the MOX dispute, adopts an identical approach.[70] Thus, key to any assessment of the jurisdiction of the Tribunal in a dispute between two Member States is the question of whether the provisions of UNCLOS at issue in that dispute *concern the interpretation or application* of the EC Treaty. To the extent that they do, Article 292 EC will apply.

The ECJ has recognized that international agreements to which the EC is party form an integral part of EC law.[71] This would seem, in the eyes of the ECJ, to flow from the relevant Council decision concerning the conclusion by the EC of that agreement. The EC is a party to UNCLOS.[72] Nonetheless, the

[69] Above n 24, para 26.

[70] Except where otherwise specified, the following analysis of Art 292 EC may be taken to apply also to Art 193 Euratom.

[71] Case 181/73 *Haegemann* [1974] ECR 449, para 5. See, for a discussion of this and related issues, I Cheyne 'International Instruments as a Source of Community Law' in A Dashwood and C Hillion (eds) *The General Law of EC External Relations* (London Sweet & Maxwell 2000), at 254. See also chapter 2 of the same volume, also by Cheyne.

[72] See Annex IX of UNCLOS concerning accession by international organizations, and Council Decision 98/392 EC, OJ (1998) L179/1.

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issue of its status in the EC legal order is made more complex by virtue of its (UNCLOS') identity as a mixed agreement; an agreement concluded not just by the EC but by fourteen out of fifteen of its Member States.[73] From the point of view of EC law, UNCLOS would seem to encompass three categories of provisions:

- Areas falling within the exclusive competence of the Member States (in areas where the EC enjoys no competence to act);
- Areas falling within the exclusive competence of the EC (in areas where the Member States enjoy no residual competence to act); and,
- Areas falling within the concurrent competence of the EC and the Member States (areas in respect of which either the EC or the Member States could act, alone or jointly).

As regards the first two categories, while demarcation difficulties arise, the position in law is straightforward. Areas falling within the exclusive competence of Member States will *not* be part of EC law and will not be deemed to concern the interpretation or application of the EC Treaty. To this extent at least, Article 292 EC will not bite. On the contrary, for areas falling within the exclusive competence of the EC, the international agreement in question will form part of EC law and will be subject to the strictures of Article 292 EC. In such circumstances, the Member States are, in reality, not party to the international agreement in question (or at least they are not party to those aspects of the agreement that fall within the EC's exclusive competence) and hence, in law, no dispute under that agreement can arise between them in relation to its interpretation or application.

In practice, the extent of the EC's exclusive competence will be hotly contested. Certain articles in the EC Treaty have been deemed by the ECJ to confer exclusive competence. At least prior to the revision at Nice, the common commercial policy under Article 133 EC would be an example of such.[74] As is well known, exclusive competence may arise by a second, less straightforward, route, flowing from the famous *ERTA* doctrine propounded by the ECJ.[75] As Dashwood and Heliskoski succinctly put it: 'treaty-making power becomes the sole prerogative of the Community, once measures have been adopted by the institutions pursuant to an objective authorized by the Treaty, in so far as acceptance of international commitments by the Member States might interfere with the operation of those measures'.[76] Thus, in so far

[73] Denmark is not a party at present.

[74] See M Cremona 'External Economic Relations and the Amsterdam Treaty' in D O'Keeffe and P Twomey (eds) *Legal Issues of the Amsterdam Treaty* (Oxford Hart Publishing 1999) at 225.

[75] Case 22/70 *Commission v Council (ERTA)* [1971] ECR 263.

[76] 'The Classic Authorities Revisited' in Dashwood and Hillion, above n 71, at 3 and 17. The authors distinguish between two ways in which external relations competence can arise, absent express conferment by the Treaty. First, by way of the *ERTA* doctrine as described above and, second, by way of what they call the 'complementarity principle'. This applies where 'the possibility of entering into international agreements is seen as necessary for the attainment of the

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as provisions contained in UNCLOS may affect common rules adopted by the EC, it will enjoy exclusive competence in respect of them. This will not invariably be the case in so far as the relevant EC rules only establish minimum standards, or only partially cover the field in question.[77]

Before proceeding to the third category (concurrent competence), it is important to acknowledge that already the existence of profound delimitation difficulties as regards the extent of the EC's exclusive competence in relation to UNCLOS, would present the Annex VII Tribunal with a problem. The extent of this competence is a matter of law. It is, from the perspective of the EC, unequivocally a matter of law relating to the interpretation or application of the EC Treaty. It is a question to be determined by the ECJ in accordance with the mechanisms laid down in the EC Treaty. No mechanism is established providing for cooperation between the ECJ and the Annex VII Tribunal. The ECJ enjoys no jurisdiction to answer questions referred to it by such a Tribunal. Annex IX of UNCLOS does, however, anticipate the existence of delimitation difficulties. Article 5(5) provides that:

> Any State Party may request an international organization and its [M]ember States which are States Parties to provide information as to which, as between the organization and its [M]ember States, has competence in respect of any specific question which has arisen. The organization and the [M]ember States concerned shall provide this information within a reasonable time. The international organization and the [M]ember States may also, on their own initiative, provide this information.[78]

This mechanism is flawed in a number of important ways. First, it may well be that EC Member States would be precluded, as a matter of EC law, from having recourse to this mechanism in *inter se* disputes. It seems likely that the lodging of such a request by, say, Ireland in the context of the MOX dispute

particular objective for the purpose of which "Community law has created for the institutions of the Community powers within its internal system"' (at 12). See, in particular, Opinion 1/91 which makes it clear that such competence may well be non-exclusive other than where, as Dashwood and Heliskoski put it, 'the activity authorized by the relevant [internal] legal basis is one which, by its very nature, precludes concurrent action by the Member States, if it is to be successfully undertaken' (at 18).

[77] See n 65 above and Opinion 2/91, [1993] ECR I-1061 as regards both of these propositions, and Opinion 1/94, [1994] ECR I-5267 as regards the latter. For a discussion see D O'Keeffe 'Exclusive, Concurrent and Shared Competence' in Dashwood and Hillion, above n 71, at 179. See op cit n 65 on minimum standards.

[78] See also Art 6(2) of Annex IX of UNCLOS which builds on this as regards state responsibility: 'Any State Party may request an international organization or its [M]ember States which are State Parties for information as to who has responsibility in respect of any specific matter. The organization and the [M]ember States concerned shall provide this information. Failure to provide this information within a reasonable time or the provision of contradictory information shall result in joint and several responsibility.' See also Art 5(3) of Annex IX which provides that Member States of an international organization which is party to the Convention shall be presumed to have competence over all matters governed by the Convention in respect of which transfers of competence to the organization have not been specifically declared, notified or communicated by those States. See also Heliskoski, above n 60.

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would be regarded as a breach of the duty of loyal cooperation in Article 10 EC.[79] Secondly, though this mechanism leaves open the possibility that the EC or a Member State may seize the initiative as regards the provision of information on competence, there exists no mechanism internal to the EC legal order whereby an EC institution or a Member State may seek the prior opinion of the ECJ as regards the division of competence in respect of a concluded agreement.[80] More generally, and related to this, as responsibility for the provision of this information does not lie at the door of the ECJ, any information provided will not, as a matter of EC law, be authoritative.

Leaving on one side the practical difficulties associated with the delimitation of exclusive EC competence, it is appropriate to turn now to the complex question of concurrent competence. Within the broad reach of UNCLOS are areas of law, which fall neither within the exclusive competence of the Member States, nor within that of the EC. These areas of law fall within the shared (in the sense of concurrent)[81] competence of the EC and the Member States. In respect of these areas, it would be open to the EC to conclude the agreement. It would be also be open to the Member States to do so. In accordance with the above analysis, such concurrent competence would seem to persist for those parts of UNCLOS in respect of which the EC does not enjoy a priori exclusive competence on the basis of the Treaty, and in relation to which there are no EC rules liable to be affected within the meaning of the *ERTA* doctrine. Relevant here is the wide breadth of many of the general obligations arising under UNCLOS (see, for example, Part XII concerning the protection and preservation of the marine environment) and the fact that such EC law measures enacted pursuant to the environment legal basis are, by nature, minimum harmonization measures.[82]

To the extent that external relations powers are shared in this way, 'there will be a political choice to be made . . . between acting under the powers of the Member States or under those of the Community'.[83] This is a key point and one that is often overlooked. To the extent that the EC's competence to enter UNCLOS is concurrent, not exclusive, there is a *factual* question to be answered as to whether the EC did exercise competence in respect of the relevant parts of the agreement.[84] We know that the Community's competence

[79] For a discussion of the extent of Member State duties in the external relations sphere based on Art 10, see the contribution by S Hyett in Dashwood and Hillion, above n 71, at 248 and Heliskoski above n 60.

[80] Art 300(6) may be used only in respect of 'envisaged agreements'.

[81] For a very useful typology of mixed agreements, and a break-down of different kinds of non-exclusive EC competence, including concurrent competence, see A Rosas 'The European Union and Mixed Agreements' in Dashwood and Hillion, above n 71, at 200.

[82] See Art 176 EC.

[83] Dashwood and Heliskoski, above n 71, at 17.

[84] The fact that UNCLOS is a mixed agreement does not help us in this respect. It is generally recognized that there are areas within it which fall within the exclusive competence of Member States. Rosas offers the example of 'questions of territorial jurisdiction, navigation and passage' (above n 81, at 204). For this reason mixity is required and in itself tells us nothing about any political choice that may have been taken in respect of areas of concurrent competence.

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exists; what we do not know is whether on this occasion it chose to exercise it. To the extent that it did, UNCLOS would constitute an integral part of EC law and be deemed to concern the interpretation and application of the EC Treaty pursuant to Article 292 EC. To the extent that it did not, it would not. The fact that an 'act' of one of the EC institutions (and an international agreement entered into by the EC may be conceived of as such an act) stems from the exercise of non-exclusive as opposed to exclusive competence is not such as to render it any less a part of EC law. A particular measure either is or is not a part of EC law; this is not a question of degree. A given instrument does or does not relate to the interpretation or application of the EC Treaty; again this is not a question of degree.

In seeking an answer to this political question, as concerns UNCLOS, it may be helpful to have regard to the Declaration submitted by the EC pursuant to Article 2 of Annex IX thereof.[85] The purpose of this is to specify the matters governed by the Convention in respect of which 'competence has been transferred to that organization by its [M]ember States which are signatories, and the nature and extent of that competence'. That such a declaration may not—as a matter of EC law—be regarded as authoritative in legal terms need not detain us here. We are looking to the Declaration to gain insight into the (factual not legal) question as to whether the political decision to which Dashwood and Heliskoski refer was exercised in the EC's favour. To the extent that the Declaration provides that there has been a 'transfer' of competence from the Member States to the EC, it will be for the EC to exercise the rights and to perform the obligations flowing from UNCLOS.[86] To this extent, these areas may properly be regarded as forming part of EC law.

Predictably perhaps, the EC's Declaration is ambiguous in this regard. The Declaration 'indicates the competence that the Member States have transferred to the Community'. It goes on to acknowledge that 'the Community has exclusive competence for certain matters and shares competence with its Member States for certain other matters'. However, the Declaration does not state

[85] Under Art 5(2) a Member State of an international organization is required to make a declaration when it ratifies UNCLOS or at the time when the organization ratifies UNCLOS, whichever is the later, specifying those matters governed by the Convention in respect of which competence has been transferred. The twelve Member States that ratified prior to the EC (including Ireland and the UK) all made declarations recalling that they had transferred competence to the EC 'in respect of certain matters governed by' UNCLOS. The declarations then added that a detailed declaration on the nature and extent of the competences transferred would be made in due course in accordance with the provisions of Annex IX. Although the EC ratified UNCLOS in 1998, no further declarations have been made by the Member States as required by Art 5(2) of Annex IX and as foreshadowed in their own declarations on ratification of UNCLOS. In relation to the two Member States which ratified UNCLOS after the EC (which according to Art 5(2) should make declarations about competence upon ratification), Belgium simply refers to the EC declaration, while Luxembourg makes no declaration at all. See also Art 5(4) which requires that an international organization or State party to UNCLOS shall promptly inform the UNCLOS depositary of any changes to the distribution of competences as between them, including new transfers of competence.

[86] Annex IX, Art 4(3).

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clearly whether such shared as well as exclusive competences should be considered to have been *transferred* within the meaning of the Declaration.[87] Under the heading, 'Matters for which the Community has exclusive competence', it is pointed out that the Member States have transferred competence to the EC with regard to the conservation and management of sea fishing resources. Thus, as regards a priori, Treaty-based exclusivity, there can be little doubt that such a transfer has taken place. However, in respect of those areas in relation to which the EC and the Member States initially share competence (as, for example, in respect of Part XII of UNCLOS, the part at issue in this case), the Declaration observes that:

> The Community has exclusive competence only to the extent that such provisions of the Convention or legal instruments adopted in implementation thereof affect common rules established by the Community. When Community rules exist but are not affected, in particular in cases of Community provisions establishing only minimum standards, the Member States have competence, without prejudice to the competence of the Community to act in this field. Otherwise competence rests with the Member States.
>
> A list of relevant Community acts appears in the Appendix. The extent of Community competence ensuing from these acts must be assessed by reference to the precise provisions of each measure, and in particular, the extent to which these provisions establish common rules.

As such the Declaration distinguishes between the various kinds of competence outlined above, but does not categorize each, relative to the verb 'to transfer'. In a literal sense, it may be thought that the verb 'to transfer', connoting conveyance from one place or situation to another, implies something more absolute than the sharing of power associated with concurrent competence. This sense may be thought to be reinforced by the language of the Declaration above, where it provides that when EC rules are not affected Member States have competence, without prejudice to that of the EC. This qualified Member State competence would seem to fall short of the act of conveyance associated with the more emphatic notion of transferrance.[88]

As such, it would be possible to make a credible argument to the effect that concurrent competences have not been 'transferred' to the EC. Such an argument would be credible but by no means water-tight. On the contrary, it would be possible to argue that the verb 'to transfer' may also be used in a looser

[87] Recall that Annex IX UNCLOS also uses this same language, providing, as noted previously, that in areas in which competence has been transferred, it is for the international organization in question (the EC here) to exercise the rights and perform the obligations arising under the agreement.

[88] This is central to the case made by Ireland in its oral proceedings. It argued that Member States do not transfer competence unless the international organization in question becomes exclusively competent in the sphere. Ireland's position is somewhat ambiguous as to whether competence may be deemed to have been transferred in so far as exclusivity is not a priori, but is rather based upon the application of the *ERTA* doctrine, by virtue of there being common EC rules which are liable to be affected. See Oral Proceedings, Day Two, at 18 and 23 in particular.)

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sense to relate also to those cases where Member States have conferred competence on the EC, including cases where Member States also retain competences. The Declaration is genuinely ambiguous. It does not provide us, in the case of UNCLOS, with a clear answer to Dashwood and Heliskoski's political question as to whether, as regards areas of concurrent competence, a decision was taken to act under the EC's powers or under those of the Member States. As such the existence of 'substantial doubts'[89] as to the jurisdiction of the Arbitral Tribunal flows not only from the considerable uncertainty which characterizes the scope of the EC's exclusive competence, but also from the uncertain status of those parts of the Convention which fall within the concurrent competence of the EC and its Member States. This latter question assumes particular importance in view of the fact that only fourteen of the EC's present fifteen Member States are party to UNCLOS.[90] For the fifteenth Member State, areas of concurrent competence will be binding only to the extent that they are characterized as forming part of EC law.

B. The Options open to Ireland to challenge the UK under the EC Law

As noted, the European Commission has instituted an action against Ireland alleging failure to comply with Article 292 EC, and with its duty of loyal cooperation pursuant to Article 10 EC. This case will not examine the merits of the MOX plant dispute, but will focus rather upon the kind of questions—relating to competence and jurisdiction—discussed above. In the event that the ECJ does hold that Ireland has breached the EC Treaty by virtue of its attempted recourse to binding Annex VII arbitration under UNCLOS, it seems likely that the Arbitral Tribunal will, definitively, decline jurisdiction in this case. This then raises the issue of whether other routes may be available, under the EC Treaty, whereby Ireland could proceed, or could have proceeded, against the UK on the basis of its alleged failure to comply with the relevant provisions of UNCLOS. Four options may be adumbrated as being open to Ireland:[91]

[89] Above n 24, para 25.

[90] As noted previously, Denmark is not yet a party to UNCLOS. Of the ten new Member States, eight have ratified the Convention (Estonia and Latvia being the exceptions).

[91] It is worth noting that this reference to the Treaty would include not only mechanisms established by the Treaty itself, but also those constituted by acts adopted pursuant to the Treaty, and in accordance with it. Though UNCLOS may be considered such an act, it does not permit Annex VII arbitration to be instituted by a Member State of an international organization in so far as the dispute concerns matters in relation to which competence has been transferred. This would seem to flow from Art 4(2) of Annex IX which provides that it is for the international organization in question to exercise the rights and to perform the obligations on matters relating to which competence has been transferred by its Member States. Those Member States shall not exercise such competence as has been transferred. It will also be apparent that, in the light of this, it will be for the EC to institute any action against a third State, in so far as the subject matter of the dispute falls within the scope of the competence transferred to it.

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- to proceed directly against the UK in the ECJ for its failure to comply with UNCLOS, to the extent that UNCLOS forms part of EC law. The necessary powers are laid down in Article 227 EC. No time-limits operate to constrain Member States in this respect;[92]
- to seek to persuade the European Commission to proceed directly against the UK in the ECJ for its failure to comply with UNCLOS, to the extent that UNCLOS forms part of EC law. The Commission enjoys the necessary powers pursuant to Article 226 EC. No time-limits constrain the Commission in this respect;
- to institute an action for judicial review in a UK court, challenging the lawfulness of the UK government's decision to authorize the commissioning and operation of the MOX plant. Such an action for judicial review must be brought promptly and, at any rate, within 3 months.
- to proceed under Directive 90/313, in so far as the Irish case was concerned with access to environmental information.[93] This Directive requires that public authorities make available information relating to the environment to any natural or legal person without it being necessary for that person to demonstrate an interest. It is subject to important exceptions, including in relation to commercial and industrial confidentiality, but any person who considers that his or her request for information has been unreasonably refused or ignored, or has been inadequately answered, may seek judicial or administrative review of this decision.

None of these first three options would be entirely satisfactory from the perspective of Ireland. The fourth would offer, at best, partial relief in that it is confined to the sphere of access to environmental information. As regards the first, such an action would run counter to a deeply entrenched convention in the EC, whereby Member States desist from proceeding directly against one another in this way. In the history of the EC, only two judgments have been issued against Member States by the ECJ pursuant to direct actions instituted by Member States.[94] As regards the second, Ireland would not exercise any control over the process. Any decision to proceed against the UK would depend upon there being a majority of the College of Commissioners in favour of such an action. The discretion of the Commission is absolute, and it need not provide reasons for its decision. Bearing in mind that the Commission has issued a favourable opinion concerning the operation of the MOX plant, under

[92] See, eg, Case C-13/00 *Commission v Ireland*, concerning the failure by Ireland to adhere within the prescribed period to the Berne Convention for the Protection of Literary and Artistic Works.

[93] OJ (1993) L 158/56.

[94] Most recently Case C-388/95 *Belgium v Spain* [2000] ECR I-3121 (concerning designation of origin in respect of quality wines) and Case 141/78 *France v United Kingdom* [1979] ECR 2923 (concerning the size of mesh in fishing nets). This latter case is of some interest to the current discussion.

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the Euratom Treaty,[95] it seems improbable that the Commission would choose to proceed in this way. As regards the third route, judicial review before a domestic court, the problems would be legion. Even leaving aside questions of access to the court,[96] it would be unimaginable for a UK court to seek to resolve legal questions of such novelty and complexity without making a reference for a preliminary ruling from the ECJ. Consequently, the prospect of considerable delay would militate strongly against this option. Moreover, though national courts are obliged, in circumstances laid down by the ECJ, to consider granting interim relief, they enjoy considerable room for manoeuvre in determining whether in fact to do so.[97]

The effectiveness of any one of these three routes would also depend upon the relevant parts of UNCLOS being viewed as justiciable before the relevant court; national or European. This would be a question for the ECJ and, as Cheyne puts it, 'it has become increasingly evident from the case law that a wide assertion of jurisdiction does not necessarily lead to justiciability'.[98] Cheyne helpfully identifies two stages to the (direct) justiciability threshold. According to the first, the ECJ will seek to determine whether the relevant provisions of the agreement are sufficiently clear, precise and unconditional to lend themselves to judicial application. According to the second, the ECJ will have regard to the nature and purpose of the agreement as a whole, in order to assess 'whether justiciability would be appropriate'.[99] Experience with the WTO Agreement would seem to suggest that these same hurdles do not apply as regards the 'indirect' or 'interpretative' effect of international agreements.[100]

It is notable too, though not necessarily problematic, that to the extent that UNCLOS is deemed to be justiciable (directly or indirectly), it will fall for interpretation before the ECJ. As such, not only will it be susceptible to the typically contextual and teleological approach to interpretation favoured by this Court, but its interpretation will also take shape within the broader framework of EC law. Thus, for example, it will be construed having regard to the EC's commitment to aim at a high level of environmental protection, and to the integration of environmental policy considerations into other substantive areas. It will be read in the light of EC law general principles, such as proportionality, and Treaty-based foundational principles such as the precautionary

[95] OJ (1997) C68/4. See also Commission Opinion of 26 Nov 2002 concerning the plan for the disposal of radioactive waste arising from the operation of the MOX Demonstration Facility at Sellafield located in the UK, in accordance with Art 37 of the Euratom Treaty (OJ (2002) C 292/7). It seems unlikely that such Commission Opinions would be susceptible to judicial review given that they do not have binding force or produce legal effects.

[96] There does not seem to be any reason why, in principle, Ireland could not proceed by way of an action for judicial review, assuming that it meets the relevant standing requirements. See, for an example of a sovereign State instituting such an action before a UK court, *Kuwait Airways Corporation v Iraqi Airways Co* [2002] UKHL 19.

[97] See, for example, Case C-143/88 *Zuckerfabrik* [1991] ECR I-415; Case C-465/93 *Atlanta* [1995] ECR I-3761; and Case C-213/89 *Factortame* [1990] ECR I-2433.

[98] Above n 71, at 258.

[99] Ibid, at 260.

[100] See, eg, Case T-18/99, *Cordis Obst* [2001] ECR II-913.

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principle and the principle that environmental damage as a priority be rectified at source.[101] Though some such EC law principles have their origins in international law, their evolution at the hands of the EC's political and judicial institutions is such that they frequently acquire a meaning which is distinct. Likewise, UNCLOS' explicit supremacy clause notwithstanding,[102] it seems inconceivable that the ECJ would endorse any interpretation of it that is not compatible with the European Treaties. From the perspective of EC constitutional law, the validity of that part of UNCLOS, which forms part of the EC legal order, will depend upon its conformity with the Treaties. Though one might hope, 'bearing in mind considerations of mutual respect and comity'.[103] that the ECJ would have regard to the 'case law' of dispute settlement bodies constituted pursuant to UNCLOS, and notably to that of the International Tribunal for the Law of the Sea, it seems very likely that a distinctively European take on UNCLOS would emerge.

VI. THE QUESTION OF COMPETING JURISDICTION— OSPAR CONVENTION PERSPECTIVES

Like UNCLOS, the Ospar Convention is a mixed agreement.[104] Unlike UNCLOS, however, the Convention does not require regional economic integration organizations and their Member States that are parties to it to indicate how competence is divided between them. Nor, unlike UNCLOS (and the EC and Euratom Treaties), does the Ospar Convention have any provisions relating to potential problems of overlapping jurisdiction.

As has been seen, Article 9 of the Ospar Convention, the provision on access to information that was at issue before the Ospar Convention arbitral tribunal, is clearly modelled on EC Directive 90/313. It is therefore at least arguable that this provision of the Ospar Convention falls within an area of law for which the EC is competent in relation to the Convention. The same sort of questions thus potentially arise as have arisen before the UNCLOS Annex VII tribunal. The UK raised this issue only in a rather cursory way before the Ospar Tribunal,[105] and the Tribunal itself dealt with the issue only briefly in passing. It observed that the similar language of the Directive and Article 9 did

[101] Art 174(2) of the EC Treaty.

[102] Art 4(6) of Annex IX provides that: 'In the event of a conflict between the obligations of an international organization under the Convention and its obligations under the agreement establishing the organization or any acts relating to it, the obligations under this Convention shall prevail.'

[103] Above n 24, para 28.

[104] The parties to the Convention include the EC and all the pre-2004 Member States except Austria, Greece, and Italy.

[105] UK Counter-Memorial, at 22–3. Interestingly, in its Rejoinder in the Annex VII Tribunal proceedings (at 63), the UK argues that issues concerning access to information fall within the EC's competence as far as UNCLOS is concerned. If this is correct, it would seem that such issues should also fall within EC competence as far as the Ospar Convention is concerned.

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not limit a party's choice of forum to either the ECJ or an Ospar arbitral tribunal, nor did it give one precedence over the other.[106] It may be that the Tribunal's reference to the provisions of the Directive and Article 9 as each constituting a 'distinct legal regime'[107] should be seen as reflecting a view similar to that of ITLOS in the provisional measures phase of the *MOX Plant* case that the rights and obligations under one treaty (*in casu* UNCLOS), even if similar to those of another treaty, have a separate existence, thus justifying the use of that treaty's dispute settlement procedures.[108] However, this does not address the point that the Ospar Convention is a mixed agreement and that therefore Ireland may not have any rights under it in relation to the matter at issue in the arbitration.

VII. APPLICABLE LAW

In both the Ospar Convention and UNCLOS proceedings, questions have arisen as to what law, apart, obviously, from the primary instruments themselves, should or may be applied by the tribunals concerned. As regards the Ospar Convention, under Article 32(6)(a) an arbitral tribunal shall 'decide according to the rules of international law, and, in particular, those of the [Ospar] Convention.' Ireland argued that the Tribunal should take account of a number of instruments in interpreting and applying Article 9 of the Ospar Convention, including the Sintra Ministerial Statement of 1998,[109] the Rio Declaration of the UN Conference on Environment and Development, 1992[110] and the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998.[111] A majority of the Tribunal (Dr Griffith dissenting) rejected Ireland's approach. The competence of an arbitral tribunal established under Article 32 was not intended to extend to obligations that the parties might have under other instruments. 'Interpreting Article 32(6)(a) otherwise would transform it into an unqualified and comprehensive jurisdictional regime, in which there would be no limit *ratione materiae* to the jurisdiction of a tribunal.'[112] The Tribunal fails here to distinguish sufficiently between applicable law and the question of jurisdiction, and causes some confusion by referring to Article 32(6)(a), which deals with applicable law not jurisdiction. The latter is dealt with by Article 32(1) of the Convention and provides that an Ospar arbitral tribunal

[106] Award, above n 11, para 143. [107] Ibid, para 142.

[108] There is no discussion at all in the Ospar Convention arbitration of the possible relationship of the Convention's dispute settlement procedures to those of UNCLOS. This omission may well be due to the fact that UNCLOS does not establish an unequivocal right to information of the kind sought by Ireland.

[109] A statement made by ministers of States parties to the Ospar Convention, available on the Ospar Commission's web site, <http://www.ospar.org>.

[110] (1992) 31 ILM 874. [111] (1999) 38 ILM 517.

[112] Above n 106, para 85.

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has jurisdiction over disputes relating to the interpretation and application of the Ospar Convention. In the present case the Tribunal makes it clear (quite correctly, it would seem) that jurisdiction relates only to such disputes, and not to disputes arising under other treaties. However, Ireland was not arguing for a wider view of the Tribunal's jurisdiction.

The provisions on applicable law in Article 32(6)(a), quoted above, are not straightforward. In particular, it is not clear, in the context of a dispute being heard by an Ospar arbitral tribunal, what is the ambit of the phrase 'the rules of international law.' The Tribunal makes no attempt to explore this issue or relate it to the dispute before it. Instead it focuses on another reference to applicable law, in Article 9 itself. Paragraph 3 states that 'the preceding paragraphs do not affect the right of a party, "in accordance with . . . *applicable international regulations*" to refuse a request for information on various grounds, including commercial confidentiality' (emphasis added). Ireland argued that the emphasized phrase includes actual and evolving international law and practice (including those instruments referred to above) relating to access to environmental information. The UK, on the other hand, argued that there were no applicable international regulations other than EC Directive 90/313. The Tribunal did not really choose between these points of view. Instead it simply observed that 'although the issue does not arise, the Tribunal agrees with Ireland's proposal to "draw on current international law and practice . . ." but only insofar as such law and practice are relevant and admissible under Article 31(3)(b) and (c) of the Vienna Convention [on the Law of Treaties]'.[113] As the issue did not arise, it was not necessary for the Tribunal to decide whether any of the instruments referred to by Ireland did amount to relevant rules of international law within the meaning of Article 31(3)(c) of the Vienna Convention, nor what the relationship of such rules might be to the 'rules of international law' referred to in Article 32(6)(a) of the Ospar Convention.

Article 293 of UNCLOS provides that a tribunal dealing with a dispute relating to the interpretation and application of UNCLOS shall apply that Convention 'and other rules of international law not incompatible with' it. In the proceedings before the UNCLOS Annex VII Tribunal, Ireland has urged the Tribunal to consider as applicable law for the purposes of Article 293 more than 20 international instruments including the Ospar Convention, various IAEA Conventions and the customary law norms of the precautionary principle and sustainable development.[114] The UK has objected to this.[115] Plainly it will be for the Tribunal to consider whether the instruments referred to by

[113] Ibid, para 101. Art 31(3) of the Vienna Convention provides that in interpreting a treaty there shall be taken into account with its context inter alia (b) any subsequent practice in the application of the treaty that establishes the agreement of the parties to the treaty regarding its interpretation and (c) any relevant rules of international law applicable in the relations between the parties.

[114] See Ireland's Memorial, at 102–10. See also 47–52 of its Reply.

[115] UK Counter-Memorial, at 103–7. See also 65–73 of its Rejoinder.

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Ireland fall within the notion of applicable law at the merits stage, should that stage ever be reached. Nevertheless, in its order on provisional measures, the Tribunal was at pains to emphasize the distinction between the scope of its jurisdiction (under Article 288) and the law that the tribunal should apply (dealt with by Article 293). Under Article 288 the Tribunal only had jurisdiction to rule on disputes concerning the interpretation and application of UNCLOS, not other instruments. 'To the extent that any aspects of Ireland's claims arise directly under legal instruments other than the [UNCLOS] Convention, such claims may be inadmissible.' [116] This is a rather more satisfactory approach than that of the Ospar Tribunal.

VIII. CONCLUSIONS

Of the two sets of legal proceedings instituted by Ireland against the UK in relation to the MOX plant at Sellafield, only those under the Ospar Convention have been concluded. Proceedings under UNCLOS appear destined to continue for several more years. This litigation has so far shed some interesting light on the position where two or more international tribunals have jurisdiction in relation to the same dispute, especially the notion of one tribunal giving way to another for reasons of mutual respect and comity. The litigation has also contributed to the jurisprudence of international courts and tribunals on provisional measures and provided a rare example of the practical application of compulsory dispute settlement procedures of a regional treaty concerned with the law of the sea. The next phase of the litigation, assuming it continues, may well be even more interesting for academic lawyers. The European Court of Justice may have to explore the difficult question of the division of competence between the EC and its Member States in relation to participation in UNCLOS (at least as regards its environmental provisions), although, given the nature of Article 226 EC proceedings, it is possible that the Court will do no more than rule that difficult questions as to the division of competence arise and that Ireland is in breach of its EC Treaty obligations by seeking to have those questions resolved elsewhere (without the Court itself at this stage answering those questions). Eventually the ECJ, or the Annex VII Tribunal, will have to rule on the scope of the obligations of UNCLOS relating to environmental impact assessment, cooperation over protection of the marine environment, and the control of land-based pollution.

There remains, however, the question as to why Ireland embarked on the MOX plant litigation. It is difficult at first sight to see how Ireland might obtain much advantage from its litigation, at least from a strictly legal point of view. It has been the desire of Ireland for many years to get the Sellafield site

[116] Order No 3, para 19.

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closed down;[117] or, failing that, to obtain substantial reductions in the amounts of radioactive matter discharged into the Irish Sea. To this latter end Ireland has long conducted a diplomatic campaign, pursued both on the bilateral level and through various regional fora, especially the Ospar Convention Commission (and its predecessor Paris Commission)[118] and the North Sea Conferences. Together with the Scandinavian States (which are concerned about the levels of radioactivity in the waters off their coasts emanating, as a result of ocean currents, from Sellafield), Ireland has been instrumental in persuading the Ospar and Paris Commissions to adopt a number of measures requiring a significant reduction of pollution caused by radioactive discharges[119] and the North Sea Conferences to call for a minimisation of radioactive discharges.[120] Such discharges from Sellafield have decreased very significantly since those measures were adopted. According to the EC Commission, discharges by 1997 were only about one per cent of the peak levels of the 1970s,[121] although there are still significant levels of technetium discharges. It is likely that this decrease is partly due to the Ospar Commission measures and North Sea Conference declarations, although domestic environmental and political pressures and developments in technology have doubtless also had a significant influence. Further reductions in radioactive discharges from Sellafield may be expected. Under the Ospar Strategy with regard to Radioactive Substances adopted in 1998, discharges of radioactive substances are to be reduced by 2020 to levels 'where the additional concentrations in the marine environment above historic levels, resulting from such discharges . . . are close to zero'. Each party (including therefore the UK) has produced a national plan to achieve this objective. Implementation of such plans is monitored by the Ospar Commission.

[117] See, eg, its proposals for the closure of Sellafield made to the Paris Commission (referred to below) in 1987 and 1988 (9th Annual Report of the Paris Commission (1987), at 22–3 and 10th Annual Report of the Paris Commission (1988), at 8–9) and statements made by various Irish ministers quoted in the UK's Counter-Memorial in the UNCLOS Annex VII tribunal proceedings, at 7–8.

[118] Established by the Convention for the Prevention of Marine Pollution from Land-based Sources, 1974, UK Treaty Series 1978, No 64. The Paris Commission was replaced by the Ospar Commission when the Ospar Convention came into force in 1998.

[119] See, eg, Paris Commission Recommendations 88/4, 88/5, 91/4 and 93/5; Ospar Commission Strategy with regard to Radioactive Substances, 1998 (updated in 2003); and Ospar Commission Decisions 2000/1 and 2001/1, all at <http://www.ospar.org>. See also L de La Fayette 'The Ospar Convention Comes into Force: Continuity and Progress' (1999) 14 International Journal of Marine and Coastal Law 247, at 275–9.

[120] First North Sea Conference Declaration, 1984, para C12; Second Declaration, 1987, para 39 of Part XVI; Third Declaration, 1990, para 31 (texts of the three declarations in D Freestone and T Ijlstra (eds) *The North Sea: Basic Legal Documents on Regional Environmental Co-operation* (Dordrecht Graham & Trotman 1991), 3, 40 and 61); Fourth Declaration, 1995, paras 55–62; and Fifth Declaration, 2002, para 65 (the latter two declarations are at <http://odin.dep.no/nsc/>).

[121] OJ (1998) C117/122. See also Ospar *Quality Status Report* (available at <http://www.ospar.org>) para 4.8.2. According to the UK's Written Response in the proceedings before ITLOS (para 99), the Radiological Protection Institute of Ireland has acknowledged that radiation doses from Sellafield do not pose significant health risks to Irish people.

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Ireland may therefore regard its diplomatic efforts as having had some success. It is not immediately obvious that it will gain much more through litigation, especially the litigation that it has embarked on. The discharges of radioactive matter from the MOX plant appear to be insignificant, less than one per cent of the total from the Sellafield site.[122] There are four matters relating to the plant that are the subject of litigation. The first is access to information excised from reports prepared during consultations on the justification for the MOX plant. As has been seen, Ireland's efforts to gain access to this information failed before the Ospar arbitral tribunal. In many ways it is surprising that Ireland chose to litigate under the Ospar Convention rather than EC law. The advantage of utilising the latter would have been that the relevant law, Directive 90/313,[123] has a wider ambit than Article 9 of the Ospar Convention, since it applies to environmental information generally, rather than just to information relating to activities that adversely affect the marine area. Furthermore, the ECJ has generally taken a broad approach to interpreting the Directive,[124] unlike the rather narrow focus taken by the majority of the Ospar tribunal. Article 4 of the Directive provides that a person whose request for information has been unreasonably refused may seek a judicial or administrative review of the decision under the relevant national system. Thus, had Ireland made a request to have access to the excised information under the UK's Environmental Information Regulations (which implement the Directive) and had that request been refused, it would have been open to Ireland to have sought review before the appropriate UK body. Had that been unsuccessful, Ireland could then have complained to the EC Commission or brought an action before the ECJ, alleging breach of the Directive by the UK. Of course, Ireland might still have fallen at the hurdle of the commercial confidentiality exception. A further reason for Ireland to have proceeded in this way, rather than under the Ospar Convention, was that the whole context of the dispute relating to access to information essentially concerned EU law, especially Euratom Directive 96/27.[125] The information to which Ireland desired to have access related to the economic justification for the MOX plant: it presumably wanted access to this information so that it could challenge the UK authorities' finding that the MOX plant met the requirements of Article 6(1) of the Directive.

[122] UK Rejoinder, at 24. Ireland acknowledges this, but argues that the discharges from the MOX plant cannot be considered in isolation but must be assessed with discharges from THORP, as the latter will reprocess more spent radioactive fuel and over a longer period of time than if the MOX plant were not in operation: see Ireland's Reply, at 1. The question of whether there is a link of this kind between the MOX and THORP plants is the subject of fierce debate between Ireland and the UK. Given that THORP is responsible for not insignificant discharges into the Irish Sea, it seems a little odd that Ireland did not make pollution from THORP (or indeed the Selllafield site as a whole) the subject of litigation in its own right, rather than trying to link it to the MOX plant.

[123] Above n 9.

[124] See, for example, Case C-321/96 *Mecklenberg* v *Kreis Pinneberg-Der Landrat* [1998] ECR I-3809.

[125] OJ (1996) L 159/1.

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The second issue in the MOX plant litigation is the allegedly inadequate environmental impact assessment carried out in respect of the MOX plant. Again Ireland's choice of forum seems questionable. Aside from the fact that the issue may fall within the EC's competence in respect of UNCLOS (thus depriving the Annex VII Tribunal of jurisdiction), the ECJ would seem to be a more appropriate place to have begun proceedings than the Tribunal because EC law on environmental impact assessment[126] has a wider and more precise ambit than Article 206 of UNCLOS. Furthermore, even if the issue does eventually fall to be decided by the Annex VII Tribunal, there is a risk that Ireland's claim under Article 206 will fail for temporal reasons. Planning for the MOX plant and the allegedly defective environmental impact assessment took place well before the entry into force of UNCLOS for the UK in August 1997. Even were the Annex VII Tribunal (or the ECJ) to rule that the original environmental impact assessment was inadequate and that a new assessment was required, there is no guarantee that such an assessment would produce a result favourable to Ireland.

The third issue is that of pollution prevention. A combination of the broad nature of the relevant UNCLOS provisions coupled with the fact that the MOX plant is unlikely to cause any significant pollution of the Irish Sea (at least viewed on its own—the position might be different if discharges from THORP were linked to it), suggest that it may difficult for the Annex VII Tribunal to conclude that the UK is in breach of its obligations under UNCLOS. In any case, the Ospar dispute settlement procedures would seem more appropriate than those of UNCLOS. The substance of Ireland's case against the UK under UNCLOS is heavily based on alleged failures to comply with Ospar instruments, and it is far from certain that the Annex VII Tribunal will regard them as falling within the notion of the applicable law that it is directed to apply by Article 293 of UNCLOS. On the other hand, had Ireland decided to proceed under the Ospar Convention, the same kind of jurisdictional problem might well have arisen as with the UNCLOS Annex VII arbitration, since the Ospar Convention is also a mixed agreement.

On the final issue involved in the MOX plant litigation, Ireland has had some success. The result of the ITLOS and Annex VII Tribunal provisional measures is that there is now improved cooperation between Ireland and the UK over developments at the MOX plant and related matters, and Ireland is now much better informed as to what is happening. This is a not inconsiderable benefit to Ireland.

The reason why Ireland decided to utilize the UNCLOS dispute settlement procedures, despite their limitations, may have been because an Annex VII tribunal was the only forum out of those available before which all three issues

[126] Directive 85/337 on the Assessment of the Effects of Certain Public and Private Projects on the Environment, OJ (1985) L175/40, (as amended by Directives 97/11 (OJ (1997) L73/5) and 2003/35 (OJ (2003) L156/17).

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involved in the litigation (environmental impact assessment, cooperation and pollution) could be dealt with together. Furthermore, the UNCLOS procedures were the only ones that could provide Ireland with the opportunity to seek provisional measures in the short period of time between the decision that the MOX plant was justifiable and its intended commissioning.

It was suggested above that, from a purely legal perspective, the fruits of Ireland's litigation may turn out to be rather meagre. It may therefore be that amongst the reasons for Ireland embarking on a strategy of litigation over the MOX plant are political considerations. First, there is a considerable opposition to Sellafield among the general public of Ireland, as demonstrated by the fact that in 2002 93 per cent of Ireland's 1.3 million households sent post cards to the British Prime Minister and the chairman of BNFL calling for Sellafield to be closed down.[127] By instituting legal proceedings against the United Kingdom, the Irish Government could claim that it was doing something about Sellafield and engage with the significant political pressure to which it was subject. Secondly, the present litigation may be intended as a warning to the United Kingdom that it can expect more of the same should it ever consider authorizing any further developments at Sellafield. Given the extensive, complex and protracted nature of the MOX plant litigation, it seems unlikely that the British Government would view a repeat of this experience with equanimity.

[127] Ireland's Memorial to the Annex VII Tribunal, at 24.

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