ACCESS TO ENVIRONMENTAL INFORMATION IN INTERNATIONAL LAW – THE SIGNIFICANCE OF THE MOX PLANT CASE (IRELAND V. UNITED KINGDOM)

Submitted in partial fulfilment of the requirements of the degree LLM (Environmental Law)

By

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17 November 2005

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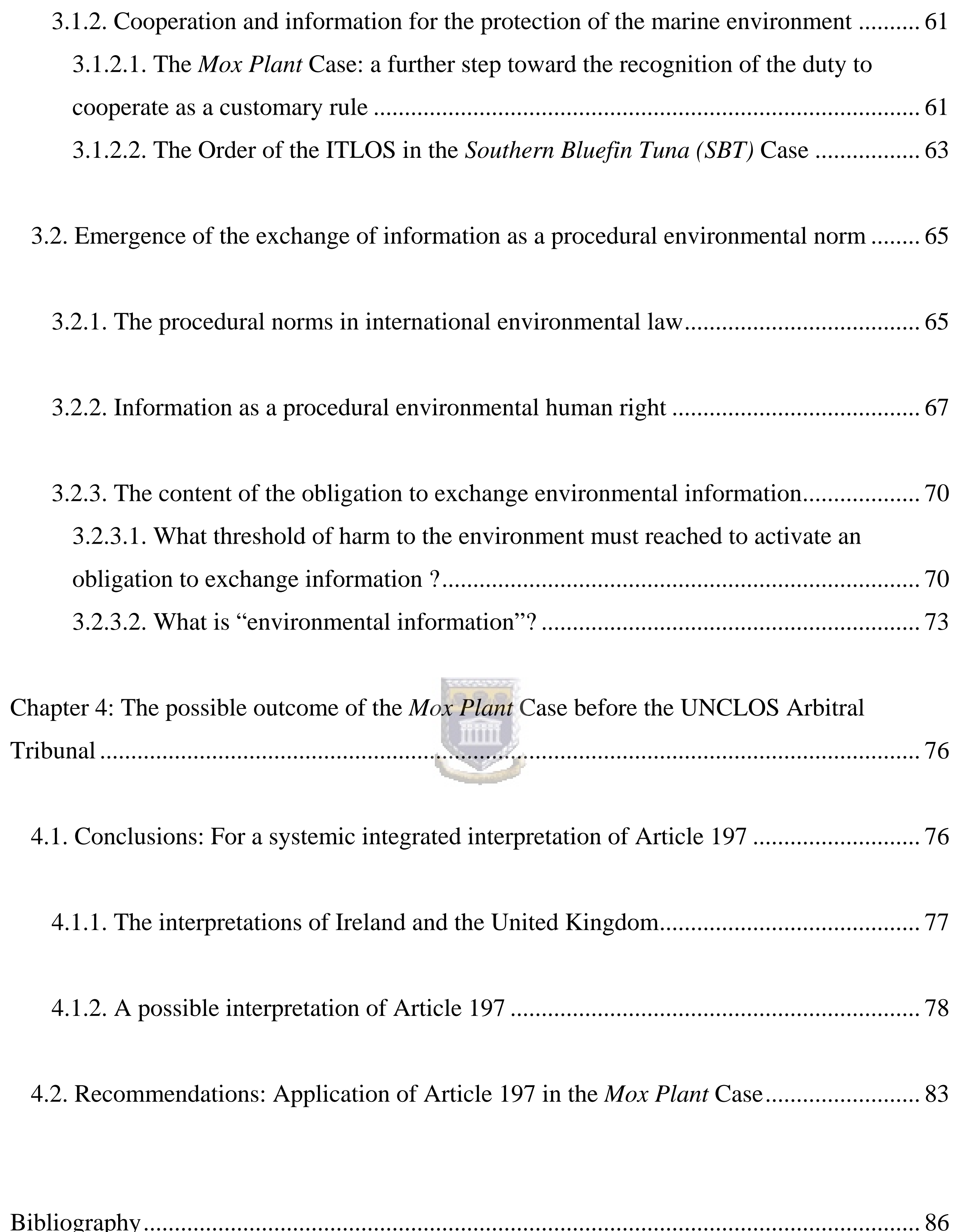

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Abbreviations used

CPPN	Convention on the Physical Protection of Nuclear Material
EC	European Community
EU	European Union
EURATOM	European Atomic Energy Community
GMO	Genetically Modified Organism
IAEA	International Atomic Energy Agency
ICJ	International Court of Justice
ILC	International Law Commission
IMO	International Maritime Organisation
ITLOS	International Tribunal for the Law of the Sea
MARPOL Convention	Convention for the Prevention of Pollution from Ships
NGO	Non Governmental Organisation
OECD	Organisation of Economic Cooperation and Development
OJCE	Official Journal of the European Community
OSPAR Convention	Convention for the Protection of the Marine Environment of the North-East Atlantic
PCA	Permanent Court of Arbitration
POPs Convention	Persistant Organic Pollutants Convention
SAR Convention	Convention on Maritime Search and Rescue
UNCLOS	United Nations Convention for the Law of the Sea
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environment Program
UNGA	United Nations General Assembly

Abstract

Ireland and the United Kingdom are since 1993 in conflict about a Mox plant at Sellafield, on the Irish Sea. This plant is designed to recycle the plutonium which is produced during the reprocessing of nuclear fuel to reclaim the uranium contained in it. Ireland has tried to contest the British decision to build and operate the Mox plant through all the legal means available. An important request of Ireland was to be more and better informed in order to better contribute to the protection of the marine environment of the Irish Sea. Ireland and the United Kingdom are Member of two important treaties addressing the issue of environmental information: the United Nations Convention on the Law of the Sea (UNCLOS), and the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention). Ireland has sought a remedy through the procedures of dispute settlement instituted by those two treaties. The *Mox Plant* Case is therefore very complex, each of these procedures being conducted within the textual confines of the treaties that govern them.

In July 2003 the Arbitral Tribunal constituted under the OSPAR Convention rejected Ireland's request to have access to more information about the Mox plant. The procedure introduced by Ireland in October 2001 before an Arbitral Tribunal constituted under the UNCLOS is still pending. In this context, waiting for the final decision of this Arbitral Tribunal, the ITLOS ordered in December 2001, as a provisional measure, that Ireland and the United Kingdom must cooperate and exchange information. In November 2003, the Arbitral Tribunal constituted under the UNCLOS has suspended the proceedings, waiting for a decision of the European Court of Justice (ECJ). Indeed the European Commission, backing up the position of the United Kingdom, initiated proceedings against Ireland before the ECJ in 2003.

The *Mox Plant* Case illustrates and addresses several predominant matters in international environmental law. Firstly it illustrates the complexity of a system where several treaties between the same parties regulate the same issues. As a consequence in this case not less than four international jurisdictions have been and are still involved in the matter, leading to procedural difficulties. Secondly the *Mox Plant* Case illustrates the considerable difference of opinion which exists in the area of international environmental law with respect to the meaning and nature of the notion of 'access to information', and its relationship to other

ancillary and concomitant notions, e. g. ‘collaboration’, ‘cooperation’, ‘participation’, etc., by and amongst states. The meaning of this concept, which is the cause of the dispute, differ depending on the context of treaty within which it is used.

From the analysis of the *Mox Plant* Case, in the context of the evolution of international law in general, and international environmental law in particular, the point is made on the strong link between the principle of cooperation and the right of access to environmental information, the first one necessarily including the latter to be effective. The other important element is the shift which is now established in international environmental law and governance from a strict application of the principle of state sovereignty, towards a more integrated vision. The interdependent nature of the environment makes necessary an interdependent governance and regulation of the issues related to it.

Chronological exposition

Date	Action	Outcome
1993	BNFL applies to the United Kingdom local authorities for the authorisation to build and operate the Mox Plant at Sellafield.	
1994	The competent authorities in the United Kingdom give the necessary consents to build the Mox Plant.	
1996	Construction of the Mox Plant completed.	
1996	Submission from the United Kingdom of its plan for the disposal of radioactive waste form the Mox Plant to the European Commission, in accordance with Article 37 of the Euratom Treaty.	
1997-2001	Process of consultation through the United Kingdom's Environment Agency, in accordance with the Directive EURATOM 80/836.	The United Kingdom finds that any environmental detriments the Mox Plant might cause are economically justified.
25 February 1997	Favourable Opinion of the European Commission on the process of the Mox Plant.	
4 April 1997	First submission of Ireland in the consultation process.	
December 1997	The consulting firm PA release a first report on the Mox Plant. Certain commercially confidential information is deleted in the public version.	In the second public consultation, Ireland maintains that this report has failed to provide in the public domain sufficient commercial information to justify the commissioning and operation of the plant.
June 1999	A new version of the PA report is released, with some of the omitted material restored.	In the third round of consultation Ireland raises the issue of compliance with the Directive 80/836 EURATOM, and the Directive 90/313/EEC on Freedom of Access to Information. Ireland requests a full copy of the PA report.
2001	Case brought by the NGOs Friends of the Earth and Greenpeace against the	Application for review, and appeal rejected (Decision of

	Secretary of State for the Environment, Food and Rural affairs and the Secretary of state for Health.	the Court of Appeal of England and Wales, 7 December 2001).
15 June 2001	Request of Ireland for the constitution of an Arbitral Tribunal under the OSPAR Convention.	
July 2001	Another consulting firm, ADL, release a report to the public. According to the Department of the Environment and the Department of Health, is only excluded the information whose publication would have caused unreasonable damage to BNFL's commercial operation.	
August 2001	Ireland requests an unedited version of the ADL Report, in order to make an independent analysis of the economic justification of the plant.	
September 2001	The English Department of the Environment reiterates the argument that the information excised from the public version of the ADL and the PA reports were commercially confidential information.	
3 October 2001	Decision of the United Kingdom approving the manufacture of Mox at Sellafield.	
25 October 2001	Introduction by Ireland of an arbitral procedure under the UNCLOS submission of its Statement of Claims).	
9 November 2001	Request by Ireland of provisional measures before the ITLOS, pending the constitution of the Arbitral Tribunal under the UNCLOS (urgent procedure).	
3 December 2001	Decision of the ITLOS on the provisional measures requested by Ireland.	The ITLOS prescribes as provisional measures that Ireland and the United Kingdom must cooperate and exchange information.
February 2002	Constitution of the Arbitral Tribunal under the UNCLOS.	Still pending.

July 2002	First Order of the Arbitral Tribunal under the UNCLOS.	This Order approves Ireland's Notification and Amended Statement of Claim.
December 2002	Second Order of the Arbitral Tribunal under the UNCLOS.	This Order establishes the timetable for the submission of the written pleadings.
July 2002 – April 2003	Ireland and the United Kingdom submit their written pleadings (Memorial, Counter Memorial, Reply, Rejoinder).	
10 to 21 June 2003	Hearings before the UNCLOS Arbitral Tribunal.	
16 June 2003	Submission by Ireland of a request for provisional measures before the UNCLOS Arbitral Tribunal, to preserve Ireland's rights under the UNCLOS and to prevent harm to the marine environment.	
24 June 2003	Third Order of the UNCLOS Arbitral Tribunal.	Suspension of proceedings on jurisdiction and merits, and rejection of the provisional measures requested by Ireland.
2 July 2003	Final Award of the Arbitral Tribunal constituted the OSPAR Convention, "Dispute concerning Access to Information under Article 9 of the OSPAR Convention".	Request of Ireland rejected.
30 October 2003	Initiation of proceedings by the European Commission against Ireland before the ECJ, for having instituted dispute settlement proceedings against the United Kingdom under the UNCLOS concerning the Mox Plant (violation of Articles 10 and 292 EC and Articles 192 et 193 EURATOM).	Still pending.
14 November 2003	Fourth Order of the UNCLOS Arbitral Tribunal.	Suspension of proceedings on jurisdiction and merits until the judgement of the ECJ in the case brought by the European Commission against Ireland.

Introduction

British Nuclear Fuel, plc (BNFL), a public limited company, fully owned by the United Kingdom, owns and operates a nuclear enterprise at Sellafield in Cumbria, in North-West England. Sellafield is the largest and oldest civilian nuclear site in the United Kingdom, and its activities have long been a source of controversies, both within the United Kingdom and abroad. "Foreign disquiet about Sellafield has been voiced particularly by Ireland and the Nordic states, which consider that Sellafield is responsible for unacceptably high levels of radioactivity in the marine environment of the Irish Sea".[1]

In 1993, BNFL applied to the local authorities for the authorisation to build and operate a MOX Plant, designed to recycle the plutonium which is produced during the reprocessing of nuclear fuel to reclaim the uranium contained in it. This very uranium is used to create a fuel composed of a mixture of plutonium dioxide and uranium dioxide, a mixed oxide or "mox" fuel, to be reused in nuclear reactor.[2] The competent authorities in the United Kingdom gave the necessary consents to build the plant in 1994, and the construction was completed in 1996. The manufacture of Mox in this very plant was approved by a decision made the 3 October 2001. This decision has generated a lot of legal processes. Several jurisdictions have been and are still involved in this matter.

First of all, this decision was challenged by Greenpeace and Friends of the Earth, two non governmental organizations, in the United Kingdom courts. However their application for review was rejected,[3] and failed on appeal.[4]

Separately, Ireland has challenged the decision before several international jurisdictions, always insisting on the importance of access to environmental information.

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[1] V. LOWE, R. CHURCHILL, "The International Tribunal for the Law of the Sea: Survey for 2001", *International Journal of Marine and Coastal Law*, vol. 17, number 4, 2002, p. 477.

[2] M. J.C. FORSTER, "The Mox Plant case – Provisional Measures in the International Tribunal for the Law of the Sea", *Leiden Journal of International Law*, vol. 16, number 3, October 2003, p. 612-613.

[3] *Friends of the Earth Ltd. And Greenpeace Ltd. v. Secretary of State for the Environment, Food and Rural Affairs and Secretary of State for Health*, 2001, quoted in PCA, *Dispute concerning Access to Information under Article 9 of the OSPAR Convention (Ireland vs. United Kingdom of Great Britain and Northern Ireland*, Final Award, The Hague, 2 July 2003, § 37.

[4] Court of Appeal, England and Wales, *Friends of the Earth Ltd. v. Secretary of State for Environment, Food and Rural Affairs*, 7 December 2001.

In June 2001, Ireland requested the constitution of an Arbitral Tribunal under Article 32 of the Convention for the Protection of the Marine Environment of the North-East Atlantic (the OSPAR Convention). It contended that the United Kingdom had to make available information relating to the proposed Mox Plant under Article 9 of the OSPAR Convention. The United Kingdom refused to do so. The Arbitral Tribunal gave its final Award in July 2003. It refused to comply with Ireland's request, as the information required did not fall under Article 9§2 of the OSPAR Convention, concerning rather economic elements of the plant than "environmental" information.[5]

In October 2001, Ireland introduced an arbitral procedure under Article 287 of the United Nations Convention of the Law of the Sea (UNCLOS). The decision has not been made yet. In an Order made in November 2003, the Arbitral Tribunal decided that "further proceedings in the case shall remain suspended until the European Court of Justice has given judgment or the Tribunal otherwise decides".[6]
In November 2001, Ireland also asked for provisional measures before the International Tribunal for the Law of the Sea (ITLOS). The procedure being an urgent one, the decision was given one month later, in December 2001. The ITLOS ordered the parties to co-operate and to engage in consultations without delay, including the exchange of information.[7]
Finally, the European jurisdiction is also concerned with this case. Backing up the position of the United Kingdom before the Arbitral Tribunal constituted under the UNCLOS, the European Commission initiated proceedings against Ireland before the European Court of Justice (ECJ) in 2003.

Access to environmental information is an important point sought by Ireland in those proceedings, directly as in the OSPAR Convention, or indirectly through the implementation of the duty to cooperate in the UNCLOS Arbitration.

Improving access to environmental information allows a better protection of the environment, inasmuch as it enables the States to have a better knowledge and understanding of the state of

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[5] PCA, *Dispute concerning Access to Information under Article 9 of the OSPAR Convention*, (Ireland vs. United Kingdom of Great Britain and Northern Ireland), Final Award, The Hague, 2 July 2003, § 182.
[6] Arbitral Tribunal constituted under Article 287, and under Article 1 of Annex VII to the United Convention on the Law of the Sea, for the *Mox Plant Case* (Ireland vs. United Kingdom), Order number 4 "Further Suspension of proceedings on Jurisdiction and Merits", 14 November 2003, p. 2.
[7] ITLOS, *The Mox Plant case (Ireland vs United Kingdom), Request for provisional measures*, Order dated December 3, 2OO1, Case number 10.

the environment and of the activities which present a risk for the environment, allowing them as a consequence to prevent the damages that could result from those activities. Several texts of international environmental law call for exchange of information, in the context of the United Nations, of the Organisation for Economic cooperation and Development (OECD), and at the European level.

Moreover, the exchange of information is more and more considered as part of the obligation of co-operation supported by the States. The obligation to cooperate is a clear requirement of the UNCLOS. In this text “the emphasis is no longer placed on responsibility or liability for environmental damage, but instead rests primarily on international regulation and co-operation in the protection of the marine environment”.[8] This instrument states the obligation of co-operation as a general principle for the protection and preservation of the marine environment, as well as a specific principle for states bordering on an enclosed or semi-enclosed sea, as it is the case of the Irish Sea. This very principle was also recognized by the ITLOS in the *Southern Bluefin Tuna* Case, and again in the *Mox Plant* Case. Some authors call this obligation a fundamental norm of the international legal order.[9]

Besides, the right to have access to environmental information is also one of the three procedural rights – together with public participation in decision making and access to justice – that have emerged as instruments to implement the human right to a healthy environment. This approach derives from the Principle 10 of the 1992 Rio Declaration, and is clearly the perspective of the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.

I subscribe to the opinion shared by some scholars that the obligation to cooperate, between States, between States and international organisations, or between States and parts of the so-called “civil society”, is nowadays becoming a fundamental principle of the management of environmental issues at least, if not of the management of all social and political issues. At the international level, the application of this duty to cooperate “balances the principle of

[8] P. BIRNIE, A. BOYLE, *International Law and the Environment*, Oxford University Press, 2nd edition, 2002, p. 348.
[9] Separate Opinion of Judge Wolfrum, in the Order given in the *Mox plant Case (Ireland vs. United Kingdom) Request for Provisional Measures*, Order number 10, 3 December 2001, p. 4.

sovereignty of States and thus ensures that community interests are taken into account *vis-à-vis* individualistic State interests".[10]

In its Separate Opinion to the ITLOS Order in the *Mox Plant* Case, Judge Wolfrum enunciated the view that " the obligation to cooperate is the overriding principle of international environmental law, in particular when the interests of neighbouring states are at stake", and that it "denotes an important shift in the general orientation of the international legal order".[11]

This perspective is perfectly compatible with the spirit of the 1972 and 1992 Environment Conferences. The States parts of the Stockholm Conference recognised and proclaimed in the 1972 Declaration on the Human Environment that "through ignorance or indifference we can do massive and irreversible harm to the earthly environment on which our life and well being depend. Conversely, through fuller knowledge and wiser action, we can achieve for ourselves and our posterity a better life in an environment more in keeping with human needs and hopes" (Article 6). Twenty years later, the Rio Declaration on Environment and Development stated in its Preamble the goal of the parties to establish "a new and equitable global partnership through the creation of new levels of cooperation among States, key sectors of societies and people".[12] This "new partnership" goes against the traditional conception of the international legal order, based on the strict respect of the sovereignty of States.

"State sovereignty in the legal senses signifies independence; that is, the right to exercise, within a portion of the globe and to the exclusion of other States, the functions of a State such as the exercise of jurisdiction and enforcement of laws over persons therein".[13]

This basic principle of the international legal order is more and more challenged by the development of international environmental law, which has recognised concepts such as for example the notion of common concern of humankind. "As our knowledge of the ecological interrelatedness of the planet broadens, more activities or resources may qualify as "common

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[10] Separate Opinion of Judge WOLFRUM, in the Order given in the *Mox plant Case (Ireland vs. United Kingdom) Request for Provisional Measures*, Order number 10, 3 December 2001, p. 4.
[11] *Idem.*
[12] *Declaration on Environment and Development*, adopted by the United Conference on Environment and Development in Rio de Janeiro, 3-14 June 1992.
[13] D. HUNTER, J. SALZMAN, D. ZAELKE, *International Environmental Law and Policy*, University Casebooks Series, Foundation Press, New York, 1998, p. 326.

concerns" of international society, which in turn provides conceptual justification for increasing international regulation".[14]

The traditional international legal order, based on States' sovereignty, is by its very essence opposed to what Professor Sands calls the environmental order, "which consists of a biosphere of interdependent ecosystems which do not respect artificial national territorial boundaries. The use by one State of natural resources within its territory will invariably have consequences for the use of natural resources and their environmental components in another State".[15] In his opinion international co-operation and the development of international environmental standards are "increasingly indispensable: the challenge for international law in the world of sovereign States is to reconcile the fundamental independence of each State with the inherent and fundamental interdependence of the environment".[16] Or, as Mr Ulfstein puts it: "the coherence between different sectors, an ecosystem approach, is an essential dimension of international environmental governance".[17]

The issues at stake in the *Mox Plant* Case between Ireland and the United Kingdom are part of this intellectual debate. The operation of nuclear facilities in the United Kingdom is likely to have ecological consequences for the environment of its neighbouring States. Ireland thus requires to be part of the decision process concerning such a facility, asking for more cooperation with the United Kingdom and as part of this cooperation to be given access to the relevant environmental information necessary to enable it to participate in an effective way.

The *Mox Plant* Case has been studied and is still pending before several international judicial institutions. Concerning the decisions already given, each of the Tribunals has given its own interpretation of the right of access to environmental information. Whereas it is one of the provisional measures the ITLOS ordered in 2001, the Arbitral Tribunal constituted under the OSPAR Convention has interpreted it, as contained in this convention, in a restrictive way.

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[14] *Idem*, p. 329.
[15] P. SANDS, *Principles of International Environmental Law*, 2nd edition, Cambridge University Press, 2003, p. 14.
[16] *Idem*.
[17] G. ULFSTEIN, "The Marine Environment and International Environmental Governance", in M. H. NORDQUIST, J. NORTON MOORE, S. MAHMOUDI, *The Stockholm Declaration and Law of the Marine Environment*, Martinus Nijhoff Publishers, The Hague, 2003, p. 102.

The *Mox Plant* Case is therefore particularly interesting as being at the crossroad of several institutions and texts. This case presents a focal point of different interpretations that exist at the international level concerning the right of access to environmental information. Because the possible outcome(s) of the case(s) concern the content and meaning of a norm that some authors consider to be a "fundamental norm of the international legal order", it can have a profound impact on the understanding of the legal context shaped by the modern interdependence of States.[18]

I shall first recall the background of the *Mox Plant* Case. The context, both factual and judicial, is necessary to understand all the implications of the case, particularly at this moment where the Arbitral Tribunal constituted under Annex VII of the UNCLOS has suspended its proceedings. I shall then in a second part recall the circumstances of the case under the Annex VII Tribunal. It is particularly interesting to examine the arguments of Ireland and of the United Kingdom: based on the same legal provisions, they reach different results through different legal reasoning. Then in a third part, it will be necessary to assess the standards that have emerged in terms of access to environmental information at the international level, and most importantly the significance of the *Mox Plant* Case on this particular point of international law. Finally, and as a conclusion, I shall try to anticipate the outcome of the judgement of the Annex VII Arbitral Tribunal, if it decides that it has the necessary jurisdiction to resume the proceedings.

[18] C. NOUZHA, « L'affaire de l'*Usine Mox* (Irlande c. Royaume-Uni) devant le Tribunal international du droit de la mer : quelles mesures conservatoires pour la protection de l'environnement ? », *Actualité et Droit International,* mars 2002, p. 11, www.ridi.org/adi/articles/2002/200203nou.htm (date on which first accessed : 10/08/2005).

Chapter 1: The background of the *Mox Plant* Case

The conflict between Ireland and the United Kingdom about the building and operation of the Mox Plant dates from long ago. Ireland contested this project since its beginning in 1993, and has consistently opposed the operation of the Mox Plant during the consultation phase. Between 1997 and 2001, the United Kingdom, through its Environment Agency, engaged in a process of "justification" of the Mox Plant. According to Ireland, which acted as a respondent in the several rounds of consultations that occurred before the final decision, this process was not transparent and did not take account of its concerns, including requests for further information.[19] Ireland did so even though the European Commission had approved the project in early 1997.

Ireland began the judicial battle against the Mox Plant even before the final decision authorising the operation of the Plant was made in the United Kingdom in October 2001.
In June 2001 Ireland requested an Arbitral Tribunal to be constituted under the OSPAR Convention to declare that the fact that certain information was not made available in the several rounds of consultations was contrary to the Article 9 of the OSPAR Convention. This Article concerns access to information "on the state of the maritime area, on activities or measures adversely affecting or likely to affect it and on activities or measures introduced in accordance with the Convention".[20] This OSPAR Tribunal gave its decision in July 2003.

Right after the United Kingdom's decision, Ireland introduced an arbitral procedure under the UNCLOS. Pending the constitution of the UNCLOS Arbitral Tribunal, Ireland applied to the ITLOS for provisional measures restraining the United Kingdom from commissioning the Plant in a request which was rejected in December 2001.[21] However, a provisional measure

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[19] *Memorial of Ireland in the Dispute concerning the Mox Plant, International Movements of Radioactive Materials, and the Protection of the Marine Environment of the Irish Sea* (Ireland vs. United Kingdom), vol. I, 26 July 2002, § 1.2, p. 3.
[20] *Convention for the Protection of the Marine Environment of the North-East Atlantic* (OSPAR), Paris 22 September 1992.
[21] ITLOS, *The Mox Plant case (Ireland vs United Kingdom), Request for provisional measures*, Order dated December 3, 2OO1, Case number 10.

was prescribed, which ordered the co-operation between the parties and the exchange of information between them.[22]

1.1. Factual background

According to the United Kingdom, the Mox Plant meets all the existing regulations regarding such a facility. One of its arguments to support this opinion is the approval of the plant and its operation by the European Commission. However, Ireland strongly and constantly opposed the operation of the Mox Plant during the consultation process which took place between 1997 and 2001.

1.1.1. The European Commission's approval of the Mox Plant's operation

In 1996 the United Kingdom submitted its plan for the disposal of radioactive waste from the Mox Plant to the European Commission, in accordance with Article 37 of the Treaty establishing the European Atomic Energy Community (EURATOM), to which Ireland and the United Kingdom are both parties.[23]

On 25 February 1997 the European Commission delivered a favourable opinion on the process of the Mox Plant. The Commission was then of the view that "the implementation of the plan for the disposal of radioactive wastes arising from the operation of the BNFL Sellafield mixed oxide fuel plant, both in normal operation and in the event of an accident of the type and magnitude considered in the general data, is not liable to result in radioactive contamination, significant from the point of view of health, of the water, soil or air space of another Member's space".[24]

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[22] *Idem*, § 89.
[23] Article 37 EURATOM Treaty: "Each Member State shall provide the Commission with such general data relating to any plant for the disposal of radioactive waste in whatever form as will make it possible to determine whether the implementation of such plan is liable to result in the radioactive contamination of the water, soil or airspace of another Member State. The Commission shall deliver its opinion within six months, after consulting the group of experts referred to in article 31".
The ECJ explained the purpose of this article in a 1988 case *Saarland and others vs. Minister for Industry.*
[24] European Commission Opinion under Article 37 EURATOM, 1997, OJCE C-86, p. 3.

This very point was and is still contested by Ireland, which developed several arguments during the "justification" process.

1.1.2. Ireland's position during the "justification" process (consultations 1997-2001)

In accordance with the European legislation, more specifically with the Directive EURATOM 80/836, the United Kingdom held from 1997 public consultations, aiming to ensure that any environmental detriments the Mox Plant might cause were economically justified.

Since its first submission in this "justification process", dated 4 April 1997, Ireland has constantly opposed the commissioning of the Mox Plant, and has been expressing concerns about the implications of the Sellafield site for the environment. Its main concern was the possible discharge of radioactive material into the Irish Sea. Those discharges could, according to Ireland, originate from Sellafield facilities or from the increased shipments of nuclear material through the Irish Sea.[25] Ireland also raised a concern about the quality of information available for consultation.[26] According to Ireland, "the quality of information available for consultation [was] deficient in many respects",[27] and this "failure to co-operate provoked Ireland into initiating proceedings under the 1992 OSPAR Convention to obtain access to information".[28]

In December 1997, the consulting firm PA released a first report (the PA Report) on the Mox Plant. In the version to which the public was given access, PA had deleted certain commercially confidential information, as well as specific financial, production and customer data. This approach was meant to place in the public domain information that allowed public review of the robustness of the BNFL economic case, without prejudicing the commercial interests of BNFL.[29]

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[25] T. L MCDORMAN, "Access to Information under Article 9 of the OSPAR Convention (Ireland vs. United Kingdom), Final Award, OSPAR Arbitral Tribunal, July 2, 2003", *The American Journal of International Law*, vol. 98, number 2, 2004, p. 332.

[26] PCA, *Dispute concerning Access to Information under Article 9 of the OSPAR Convention* (Ireland vs. United Kingdom of Great Britain and Northern Ireland), Final Award, The Hague, 2 July 2003, § 23.

[27] *Idem.*

[28] Memorial of Ireland in the *Dispute concerning the Mox Plant, International Movements of Radioactive Materials, and the Protection of the Marine Environment of the Irish Sea* (Ireland vs. United Kingdom), vol. I, 26 July 2002, § 4.2, p. 69.

[29] PCA, *Dispute concerning Access to Information under Article 9 of the OSPAR Convention* (Ireland vs. United Kingdom of Great Britain and Northern Ireland), Final Award, The Hague, 2 July 2003, § 26.

In the second public consultation, Ireland maintained that this PA Report had failed to provide in the public domain sufficient commercial information to justify the commissioning and operation of the plant.[30]

In June 1999, the decision was taken at the Ministerial level to release a new version of the PA Report, with some of the omitted material restored. This led to a third round of consultation, in which Ireland raised the issue of compliance with the Directive 80/836 EURATOM, and the Directive 90/313/EEC on Freedom of Access to Information, and requested a full copy of the PA Report.[31]

In 2000 Ireland requested once more the information edited out of the original PA Report, invoking Article 9 of the OSPAR Convention. The answer of the United Kingdom Department of Environment was that the Government did not wish to prejudice the commercial interests of the enterprise by disclosing commercially confidential information.[32]

In 2001, Ireland maintained that the information contained in the consultation papers and the absence of critical information relating to economic factors made it impossible for the reader to assess the justification of the proposed Mox Plant.[33]

In July 2001 another consulting firm, ADL, released a report to the public (the ADL Report). According to the Department of the Environment and the Department of Health, the published version excluded only that information whose publication would have caused unreasonable damage to BNFL's commercial operations or to the economic case for the Mox Plant.[34] In August 2001, Ireland requested an unedited version of the ADL Report, in order as usual to make an independent analysis of the economic justification of the plant.[35]

The final decision to go on with the operation and commissioning of the Mox Plant was taken by the United Kingdom on 3 October 2001.

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[30] *Idem*, § 27.
[31] *Idem*, § 30.
[32] *Idem*, § 32.
[33] *Idem*, § 34.
[34] *Idem*, § 35.
[35] *Idem*, § 36.

On 15 June 2001, Ireland requested that an Arbitral Tribunal be constituted under Article 32 of the OSPAR Convention.[36] In September 2001, the English Department of the Environment reiterated the argument that the information excised from the public version of the ADL and the PA Reports were commercially confidential information, and therefore did not fall within the scope of Article 9(2) of the OSPAR Convention. In its Statement of Claim, Ireland requested complete copies of both the PA and the ADL Reports.

1.2. Judicial background

The OSPAR Tribunal gave its decision on the 2nd of July 2003. Although it accepted its jurisdiction, it refused to accede to Ireland's request, agreeing with the United Kingdom that the information sought by Ireland did not fall within Article 9(2) of the Convention. In the meantime, Ireland had begun a procedure for the creation of an Arbitral Tribunal under Annex VII of the UNCLOS. It had also requested provisional measures from the International Tribunal for the Law of the Sea (ITLOS), that were refused on December 2001. However, the ITLOS ordered the cooperation of the parties as a provisional measure.

1.2.1. The OSPAR litigation

In the Award given in July 2003, the Arbitral Tribunal analysed Article 9 of the OSPAR Convention, entitled "Access to information". The Tribunal first established its jurisdiction over the dispute under the first paragraph, but denied to Ireland the right to have access to the information excised from the PA and the ADL Reports, arguing that this information did not fall within the definition of "environmental information" meant to be given access to as stated in the second paragraph of Article 9.

[36] Article 32 of the OSPAR Convention provides that "Any disputes between Contracting Parties relating to the interpretation or application of the Convention, which cannot be settled otherwise by the Contracting Parties concerned, for instance by means of inquiry or conciliation within the Commission, shall at the request of any of those Contracting Parties, be submitted to arbitration under the conditions laid down in this Article".

1.2.1.1. The jurisdiction of the Tribunal: the implementation of Article 9 §1 is assigned to a tribunal established under the OSPAR Convention

The first paragraph of Article 9 reads as follows:

> "The Contracting Parties shall ensure that their competent authorities are required to make available the information described in paragraph 2 of this Article to any natural or legal person, in response to any reasonable request, without that person having to prove an interest, without unreasonable charges, as soon as possible and at the latest within two months."

After having analysed the language of the OSPAR Convention, and the structure of the third paragraph of Article 9, the Tribunal concluded that the obligation of Article 9 §1 was to be construed "as expressed at the mandatory end of the scale".[37] The Tribunal admitted that the requirement in Article 9 §1 "to ensure" the obligated result, imposed an obligation of result rather than merely to provide access to a domestic regime which is directed in obtaining the required result.[38] The level of engagement established in this paragraph was an obligation aimed at obtaining a result (*obligation de résultat*), rather than an obligation to use a procedure which could lead to a result (*obligation de moyens*).

As a consequence, this paragraph required that information falling within the meaning of Article 9 §2 (and not excluded under Article 9 §3) was in fact disclosed in conformity with the Article 9 obligation imposed upon each Contracting Party.

The decision on this particular point was not reached without difficulty by the Tribunal. One of the judges, Professor Reisman, explained in a Declaration attached to the Award that in his opinion, the Tribunal should have analysed the Article 9 §1 in relation with the Directive 90/313 EEC Freedom of Access to Environmental Information.

The Parties and the Tribunal agreed to admit that Article 9 §1 was directly inspired by the Directive. However, the Tribunal considered that "the adoption of a similar or identical definition or term in international texts should be distinguished from the intention to bestow

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[37] Permanent Court of Arbitration, *Dispute concerning Access to Information under Article 9 of the OSPAR Convention* (Ireland vs. United Kingdom of Great Britain and Northern Ireland), Final Award, The Hague, 2 July 2003, § 134.

[38] *Idem*, § 137.

the same normative status upon both instruments".[39] The Tribunal relied on the Order given by the ITLOS in December 2001, in the *Mox Plant* Case.[40] According to the Tribunal, each of the OSPAR Convention and Directive 90/313 was an independent legal source that established a distinct legal regime and provided for different legal remedies. "The primary purpose of employing the similar language was to create uniform and consistent legal standards in the field of the protection of the environment, and not to create precedence of one set of legal remedies over the other".[41]

On the contrary, Professor Reisman considered that the Tribunal should have read Article 9 §1 "in the light of the same objects and purposes as the contracting Parties would appear to have been pursuing in directive 90/313".[42] The obligation of the Directive was closely linked to an exclusively municipal remedy. Moreover, the new Directive 2003/4 (revision of the 1990 Directive) reinforced this position and elaborated the municipal remedial process. As a consequence, to the extent that the States made adjustments appropriately in domestic law, according to their treaty obligations, they have fulfilled their obligations.[43] In the specific *Mox Plant* Case, the United Kingdom law system fell below the standards required by the OSPAR Convention. It had therefore fulfilled its obligation under Article 9 §1 of the latter Convention. For this interpretation, Professor Reisman relied upon the work of the International Law Commission (ILC) on International Liability for injurious consequences arising out of acts not prohibited by international law, and on the decision of the International Court of Justice (ICJ) in the *LaGrand* case[44].

[39] *Idem*, § 141.
[40] ITLOS*, The Mox Plant Case (Ireland vs. United Kingdom), Request for Provisional Measures*, Order number 3 December 2001, number 10, § 50: "Even if the OSPAR Convention, the EC Treaty and the EURATON Treaty contain rights or obligation similar to or identical with the rights and obligations set out in the Convention [on the Law of the Sea], the rights and obligations under those agreements have a separate existence from those under the Convention [on the Law of the Sea]".
[41] Permanent Court of Arbitration, *Dispute concerning Access to Information under Article 9 of the OSPAR Convention* (Ireland vs. United Kingdom of Great Britain and Northern Ireland), Final Award, The Hague, 2 July 2003, § 143.
[42] Declaration of Professor Reisman in the PCA *Dispute concerning Access to Information under Article 9 of the OSPAR Convention* (Ireland vs. United Kingdom of Great Britain and Northern Ireland), Final Award, The Hague, 2 July 2003, § 10.
[43] Declaration of Professor Reisman in the *Dispute concerning Access to Information under Article 9 of the OSPAR Convention* (Ireland vs. United Kingdom of Great Britain and Northern Ireland), PCA, Final Award, The Hague, 2 July 2003, § 11.
[44] ICJ, *LaGrand case* (Germany v. United States of America), Judgement, 27 June 2001.

1.2.1.2. The information concerned by Article 9 §2: definition of information "about the state of the maritime area"

The second paragraph of Article 9 reads as follows:

> "The information referred to in paragraph 1 of this Article is any available information in written, visual, aural or data-base form on the state of the maritime area, on activities or measures adversely affecting or likely to affect it and on activities or measures introduced in accordance with the Convention".

Ireland sought the release by the United Kingdom of 14 categories of information, namely the estimated annual production capacity of the Mox facility, the time taken to reach this capacity, sales volumes, the probability of achieving higher sales volumes, the probability of being able to win contracts for recycling fuel in "significant quantities", the estimated sales demand, the percentage of plutonium already on site, maximum throughput figures, the life span of the Mox facility, the number of employees, the price of Mox fuel, whether and to what extent there are firm contracts to purchase Mox from Sellafield, arrangements for transport of plutonium, and Mox from, Sellafield, the likely number of such transport.[45] These are the categories of information that the united Kingdom refused to include in the PA and ADL Reports, arguing that they were protected by commercial confidentiality.

Reading Article 9 §2, the Tribunal noted that three categories of information must be given access to in accordance with Article 9 §1: the information on the state of the maritime area, the information on activities or measures adversely affecting or likely to affect the state of the maritime area, and the information on activities or measures introduced in accordance with the Convention.

The Tribunal established first that none of the previous 14 categories of information can be characterized as information on the state of the maritime area, the first category.[46] The Parties both agreed previously that the category concerned in this case was the second one mentioned

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[45] Permanent Court of Arbitration, *Dispute concerning Access to Information under Article 9 of the OSPAR Convention* (Ireland vs. United Kingdom of Great Britain and Northern Ireland), Final Award, The Hague, 2 July 2003, § 161.

[46] *Idem*, § 163.

in Article 9 §2, the information on activities or measures adversely affecting or likely to affect the state of the maritime area.[47]

The Tribunal interpreted this second category very narrowly. It stated that "Article 9 §2 is not a general freedom of information statute. The information here is restricted in a number of ways".[48] The Tribunal considered that the restrictive effect of the language used (with the specific term *adversely*) is clear; therefore the Tribunal maintained this standard. The Tribunal finally concluded that Ireland had not established that the categories of information that it sought from the PA and ADL Reports fell under the second category of Article 9 §2.[49]

Gavan Griffith, one of the judges of this Arbitral Tribunal, gave a dissenting opinion about this specific point. He argued that the Tribunal interpreted the second category of Article 9 §2 incorrectly. In his opinion, the majority had adopted an "unnaturally confined approach",[50] by limiting the analysis to the categories of redaction in disregard of their contents. Griffith was of the opinion that the Tribunal should have identified whether the Reports as a whole fell within the scope of the definition given in the second category of Article 9 §2. Griffith pleaded for an inclusive approach to the definition of the information concerned by Article 9. For that he relied upon international and United Kingdom domestic jurisprudence.
He stated that a detailed and comprehensive regime for exceptions to Article 9 §1 and §2 is furnished by Article 9 §3. Thus there is no need to introduce another limitation, and the majority should have left the exceptions from disclosure at the level of Article 9 §3.[51]

Moreover, Griffith criticized the majority for having rejected the possibility of substantial environment damage to the Irish Sea arising from the commissioning of the Mox Plant. Indeed, the Tribunal found that "Ireland [had] failed to demonstrate that the 14 categories of redacted items in the PA and ADL Reports [were] (…) likely adversely to affect the maritime area",[52] thus letting the burden to prove adverse effects falling on Ireland. Griffith qualified

[47] *Idem*, § 169.
[48] *Idem*, § 170.
[49] *Idem*, § 182.
[50] Dissenting Opinion of Gavan Griffith QC in the PCA *Dispute concerning Access to Information under Article 9 of the OSPAR Convention* (Ireland vs. United Kingdom of Great Britain and Northern Ireland), PCA, Final Award, The Hague, 2 July 2003, § 44.
[51] *Idem*, § 52.
[52] Permanent Court of Arbitration, *Dispute concerning Access to Information under Article 9 of the OSPAR Convention* (Ireland vs. United Kingdom of Great Britain and Northern Ireland), Final Award, The Hague, 2 July 2003, § 179.

this finding as “summary”, insufficient to enable the Tribunal to make its decision against Ireland.[53]

This decision certainly did not reach the best environmental result, especially because of the narrowness of the law applied and the strictness of the textual interpretation.[54] Indeed, the Tribunal interpreted the right of access to information contained in the OSPAR Convention as a “self-contained regime”: this meant that other international texts relating to the same topic, and which might have concerned the Parties to the dispute directly, were not taken into account for the solution of the litigation. The texts which were specifically concerned were the Rio Declaration of 1992, the Aarhus Convention of 1998, that the Parties had not ratified, but that they had both signed at the time of the proceedings, and the draft proposal for the now Directive 2003/4 EC, revision of the Directive 90/313. According to the Tribunal, it had not been authorized to apply “evolving international law and practice”, and could not do so.[55] It recognized that it must engage in “contemporisation” when construing an instrument earlier concluded, but refused for this purpose to apply texts that wre not law, like the Rio Declaration, the Aarhus Convention or the draft proposal for the new EC Directive.[56]

The Tribunal also refused to apply the Directive 90/313 to determine the meaning of Article 9, whereas this Directive was “effective law”, binding both Ireland and the United Kingdom, and from which the Article 9 was directly inspired. According to the majority, “each of the OSPAR Convention and Directive 90/313 is an independent legal source that establishes a distinct legal regime and provides for different legal remedies”.[57] The Tribunal specified that “the primary purpose of employing the similar language is to create uniform and consistent legal standards in the field of the protection of the marine environment, and not to create precedence of one set of legal remedies over the other.[58] As a consequence, the Tribunal analysed Article 9 as providing an *obligation de résultat*, whereas the Directive (by the very fact of having the legal nature of a Directive) provided an *obligation de moyens*.

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[53] Dissenting Opinion of Gavan Griffith QC in the PCA *Dispute concerning Access to Information under Article 9 of the OSPAR Convention* (Ireland vs. United Kingdom of Great Britain and Northern Ireland), PCA, Final Award, The Hague, 2 July 2003, § 71.
[54] T.L. MCDORMAN, *op. cit.*, p. 338.
[55] Permanent Court of Arbitration, *Dispute concerning Access to Information under Article 9 of the OSPAR Convention* (Ireland vs. United Kingdom of Great Britain and Northern Ireland), Final Award, The Hague, 2 July 2003, § 101.
[56] *Idem*, § 103.
[57] *Idem*, § 142.
[58] *Idem*, § 143.

Not being bound by other international instruments, the Tribunal could only assert a very limited jurisdictional competence regarding the right of access to information.[59] Yuval Shany for example found the approach taken by the majority "hardly consistent with the trend of *expanding* the right of access to environmental information found in modern international law and European law instruments. (…) The award appear[ed] to be "at odds" with the objective of the OSPAR Convention stated in its Preamble to adopt on a regional basis more stringent measures for environmental protection than those afforded at global level".[60]

This narrow position is also "at odds" with the order made by the ITLOS. This Tribunal prescribed cooperation and exchange of information between the parties as a provisional measure, that the parties should enforce "forthwith".

1.2.2. The Irish request for provisional measures before the ITLOS

The procedure for obtaining provisional measures is a very speedy one. On 25 October 2001, Ireland submitted its Statement of Claim, instituting arbitral proceedings "in the dispute concerning the Mox Plant, international movements of radioactive materials, and the protection of the marine environment of the Irish Sea". On 9 November 2001, Ireland submitted to the ITLOS a request for the prescription of provisional measures under article 290 § 5 of the UNCLOS, pending the constitution of the arbitral tribunal in this very case. The ITLOS gave its Order on the 3 December 2001, less than one month later.

The Order itself was quite short (only 14 pages). The ITLOS first established its jurisdiction to prescribe provisional measures pending the constitution of the Annex VII Arbitral Tribunal. It then examined very quickly the measures requested by Ireland, and rejected them. It finally prescribed that the Parties should cooperate, and in particular exchange information relating to the possible consequences of the commissioning of the Mox Plant for the Irish Sea.

Ireland requested two types of provisional measure from the ITLOS. On the one hand, it requested that the United Kingdom should immediately suspend the authorisation of the Mox

[59] Y. SHANI, "The First *MOX Plant* Award: The Need to Harmonize Competing Environmental Regimes and Dispute Settlements Procedure", *Leiden Journal of International Law*, vol. 17, number 4, December 2004, p. 821.
[60] *Idem.*

Plant dated 3 October 2001, and that it should ensure no movements into or out of the waters under its sovereignty of any radioactive substances which were associated with the operation of the Mox Plant.[61] On the other hand, Ireland requested the insurance from the United Kingdom that the dispute submitted to the Annex VII Tribunal would not be aggravated, extended or rendered more difficult of solution, and that no action would be taken that might prejudice the rights of Ireland in respect of the carrying out of the decision of the Annex VII Tribunal.[62]

Article 290 §1 and §5 contain detailed provisions about the regime of the provisional measures under the UNCLOS. Several conditions must be fulfilled in order for the ITLOS to be able to prescribe such measures: first of all, the ITLOS must decide whether the Tribunal to be constituted would *prima facie* be competent to have the required knowledge about the substance of the dispute. Once this point has been established, the ITLOS must be satisfied that the measures at stake are aimed to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment. Finally, the urgency of the situation must require such measures.

1.2.2.1. The *prima facie* jurisdiction of the Annex VII Arbitral Tribunal

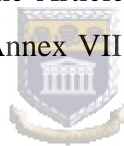
The first condition established by Article 290 §5 of the UNCLOS in order for the ITLOS to prescribe provisional measures was that this Tribunal must find that "*prima facie* the tribunal which is to be constituted would have jurisdiction". In this case "the tribunal was unanimously satisfied that the Annex VII arbitral tribunal would, prima facie, have jurisdiction over the dispute".[63]

Concerning that point the ITLOS followed Ireland's argument:[64] as the dispute concerned the interpretation and application of certain provisions of the UNCLOS, the condition of Article

[61] ITLOS, *The Mox Plant Case (Ireland vs. United Kingdom) Request for Provisional Measures*, Case number 10, Order of the 3 December 2001, § 27.
[62] *Idem.*
[63] D. ABRAHAMS, "Significant Environmental Cases July 2001 June 2002", *Journal of Environmental Law*, December 2002, vol. 14, p. 391.
[64] A. FONDIMARE, « Affaire de l'usine MOX (Irlande c. Royaume-Uni), Mesures conservatoires », Jurisprudence internationale, Tribunal International du Droit de la Mer, 2ème semestre 2001, *Actualité et Droit* International, 31 janvier 2002, www.ridi.org/adi/eei/fondtidm2001.htm (date on which first accessed: 10/08/2005).

288 §1 of the Convention was fulfilled. This Article stated that a tribunal constituted under Annex VII "shall have jurisdiction over any dispute concerning the interpretation or application of this Convention". Dismissing the dispute settlement procedures contained in the OSPAR Convention and the EURATOM and EC Treaties, which contained provisions similar to the UNCLOS' provisions at stake in the dispute, and which were binding both for Ireland and the United Kingdom, the ITLOS stated that "even if those agreements contain[ed] rights or obligations similar to or identical with the rights or obligations set in the UNCLOS, the rights or obligations set in those instruments [had] a separate existence from those under the Convention [of the Law of the Sea]".[65] The ITLOS concluded that "since the dispute before the Annex VII Tribunal concern[ed] the interpretation and application of the Convention [of the Law of the Sea], and no other agreement, only the dispute settlement procedures under the Convention [of the Law of the Sea] were relevant to that dispute".[66]

Furthermore, according to the Tribunal there had been sufficient exchange of views between the Parties, without reaching an agreement, before the submission of the Statement of Claim by Ireland. The condition contained in the Article 283 of the UNCLOS had therefore been fulfilled, and the ITLOS found that the Annex VII Arbitral Tribunal would have *prima facie* jurisdiction.[67]



1.2.2.2. The necessity for the ITLOS to prescribe provisional measures pending the constitution of the Annex VII Arbitral Tribunal

According to Article 290 §1 of the UNCLOS, the purpose of provisional measures was to preserve the respective rights of the Parties to the dispute or to prevent serious harm to the marine environment. Article 290 §5 gives the condition that must be fulfilled for the ITLOS to prescribe provisional measures pending the constitution of the Annex VII Arbitral Tribunal: the ITLOS must consider that the urgency of the situation so requires, "in the sense that action prejudicial to the right of either Parties or causing serious harm to the marine environment is likely to be taken before the constitution of the Annex VII arbitral tribunal".

[65] ITLOS, *The Mox Plant Case (Ireland vs. United Kingdom) Request for Provisional Measures*, Case number 10, Order of the 3 December 2001, § 50.
[66] *Idem*, § 52.
[67] *Idem*, § 62.

After having considered the particular situation of this case, the ITLOS did not find that "the urgency of the situation require[d] the prescription of the provisional measures requested by Ireland, in the short period before the constitution of the Annex VII Arbitral Tribunal".[68] The ITLOS rejected Ireland's argument that its rights under certain provisions of the UNCLOS would be "irrevocably violated" if the Mox Plant began its operation before the United Kingdom had fulfilled its duties under the UNCLOS. Ireland argued that some discharges into the marine environment would occur with irreversible consequences, and that the danger of radioactive leaks and emissions would be greatly magnified.[69]

The ITLOS did not accept this argument. On the contrary, it based its decision on assurances given by the United Kingdom, that there would be no additional marine transport of radioactive material either to or from Sellafield as a result of the commissioning of the Mox Plant, and that there would be no export of Mox fuel from the Plant until October 2002, and no import to the THORP Plant of spent nuclear fuel pursuant to contracts for conversion to the Mox Plant within that period. Therefore the ITLOS found that the condition of urgency required by Article 290 §5 did not arise, and refused to prescribe the provisional measures requested by Ireland.

However, the ITLOS used its discretion under Article 89 §5 of the Rules of Procedure of the Tribunal to prescribe measures different in whole or in part from those requested. The Tribunal affirmed the importance of the duty to cooperate, "a fundamental principle in the prevention of the pollution of the marine environment under Part XII of the Convention and general international law".[70] As a consequence the ITLOS prescribed as a provisional measure that Ireland and the United Kingdom should cooperate and should enter in consultation, and specifically exchange information about possible consequences of the commissioning of the Mox Plant on the Irish Sea, monitor risks or the effect of the Mox Plant on the Irish Sea, and devise measures to prevent pollution of the marine environment. The Parties had furthermore to submit to the Tribunal a report and information on compliance with the measure prescribed, not later than 17 December 2001.[71]

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[68] *Idem*, § 81.
[69] *Idem*, § 67-69.
[70] *Idem*, § 82.
[71] *Idem*, § 89.

In a Joint Declaration attached to the Order, Judges Caminos, Yamamoto, Park, Akl, Marsit, Eiriksson and Jesus justified their decision as being based on the almost total lack of agreement on the scientific evidence with respect to the possible consequences of the operation of the Mox Plant on the marine environment of the Irish Sea, and on an almost complete lack of cooperation between the Governments of Ireland and United Kingdom with respect to the environmental impact of the planned operation. The ITLOS hoped that the result of the obligation to cooperate would include "a common understanding of the scientific evidence and a common appreciation of the measures which had to be taken with respect to the plant to prevent harm to the marine environment".[72]

The ITLOS in this Order, by prescribing it as a provisional measure, showed that it attached a lot of importance to the duty to cooperate, and to its corollary the exchange of information. "Substantively, the case may well be remembered [the] longest for its contribution to the developing principle of co-operation and consultation in international environmental law".[73] Judge Wolfrum, in a Separate Opinion, went even further and qualified this obligation to cooperate with other states whose interests may be affected as a *Grundnorm*, as a fundamental norm, of Part XII of the UNCLOS, and of customary international law for the protection of the environment.[74]

The problem of cooperation was also a major argument developed by Ireland in its complaint against the United Kingdom before the Annex VII Arbitral Tribunal. In its Statement of Claim, Ireland required that this Arbitral Tribunal declare that the United Kingdom had breached its obligations under Article 123 ("Cooperation of States bordering enclosed or semi-enclosed seas") and Article 197 ("Cooperation on a global or regional basis") of the UNCLOS, and had failed to cooperate with Ireland in the protection of the marine environment of the Irish Sea, in particular by refusing to share information with Ireland. The proceedings before this Tribunal were however currentlly suspended, the Tribunal having decided to wait for the decision of the European Court of Justice about a request brought by the European Commission against Ireland: the Commission was of the mind that since the European Union is a party to the UNCLOS, as are Ireland and the United Kingdom, the

[72] Joint Declaration of Judges Caminos, Yamamoto, Park, Akl, Marsit, Eiriksson and Jesus, in the Order given in the *Mox Plant Case (Ireland vs. United Kingdom) Request for Provisional Measures*, Order number 10, 3 December 2001.
[73] M. J. C. FORSTER, *op. cit.*, p. 619.
[74] Separate Opinion of Judge Wolfrum, in the Order given in the *Mox Plant Case (Ireland vs. United Kingdom) Request for Provisional Measures*, Order number 10, 3 December 2001, p. 4.

European Court should be competent to decide in the *Mox Plant* Case concerning Ireland's allegation that the United Kingdom had acted in violation of several provisions of the UNCLOS.

Chapter 2: The pending *Mox Plant* Case under Annex VII to the UNCLOS Arbitral Tribunal

The Arbitral Tribunal which Ireland requested the creation of under Annex VII to the UNCLOS was duly constituted in February 2002. Since then, this Tribunal has already made four Orders. The first one, in July 2002, approved Ireland's Notification and Amended Statement of Claim. The second one, in December 2002, established the timetable for the submission of the written pleadings. The Memorial, Counter Memorial, Reply and Rejoinder were submitted within the stated time limits, between July 2002 and April 2003. The hearings were held between 10 and 21 June 2003. On 16 June 2003, Ireland submitted to the Arbitral Tribunal a request for provisional measures to preserve Ireland's rights under the UNCLOS and to prevent harm to the marine environment. On 24 June 2003, the Arbitral Tribunal made its third Order, "Suspension of proceedings on Jurisdiction and Merits, and Request for further Provisional Measures". "Noting that co-operation between the parties continued to be problematic, the Annex VII Tribunal ordered the parties to seek to establish arrangements at a suitable inter-governmental level for the co-ordination of all the various agencies and bodies involved".[75] A fourth Order was issued by the Arbitral Tribunal on 14 November 2003, suspending further the proceedings on jurisdiction and merits.

2.1. The debated question of the jurisdiction of the Arbitral Tribunal

2.1.1. The first suspension of proceedings, Order number 3

In this Order, the Arbitral Tribunal examined the question of its jurisdiction in the present case between Ireland and the United Kingdom. It first agreed with the ITLOS, which found that the Arbitral Tribunal would have *prima facie* jurisdiction. "However, before proceeding to any final decision on the merits, the Tribunal [had to] satisfy itself that it [had] jurisdiction

[75] J. HARRISON, "Significant International Environmental Law Cases 2003, *Journal of Environmental Law*, 2005, vol. 17, p. 137.

in a definitive sense".[76] According to Article 288 §1 of the UNCLOS, the Arbitral Tribunal constituted pursuant to Annex VII to the UNCLOS should "have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part".

Ireland contended that the Arbitral Tribunal had jurisdiction over the dispute, which concerned Ireland's rights under the UNCLOS. According to Ireland, the rights embodied in the Convention, although they could be found in other international instruments such as the OSPAR Convention or the EC and EURATOM Treaties, had however a greater breadth in the UNCLOS. Ireland maintained that "there [was] no reason why the existence of narrower rights under other treaties should bar Ireland from relying upon its wider rights under the UNCLOS".[77] The ITLOS accepted this argument, and established in its Order that the Arbitral Tribunal which would be instituted under Annex VII to the UNCLOS would have *prima facie* jurisdiction, thus enabling the ITLOS to order provisional measures.

In its Memorial before the Arbitral Tribunal, Ireland tried to argue for a rather broad interpretation of the role of the UNCLOS. According to Ireland, "UNCLOS assume[ed] an integrating function, bringing together conventional and customary norms, and regional and global norms".[78]

Article 293 §1 of the UNCLOS states that the Arbitral Tribunal "shall apply this Convention and other rules of international law not incompatible with this Convention". Ireland analysed this Article as directing the Tribunal "to apply all the relevant rules of international law in identifying the nature and extent of each State's obligations, and in determining whether a State's behaviour is in conformity with those obligations. The only limitation on that direction is that the Tribunal [had to] be satisfied that the other rules of international law [were] 'not incompatible' with UNCLOS".[79] Those "other rules of international law which [were] to be applied or taken into account by the Arbitral Tribunal" were according to Ireland to be found in "internationally agreed rules set forth in other international treaties, rules of customary international law, and internationally agreed standards and recommended practices and

[76] Arbitral Tribunal Constituted Pursuant to Article 287, and Article 1 of Annex VII, of the United Nations Convention on the Law of the Sea, *Order number 3 in the MOX Plant Case (Ireland v. United Kingdom)*, "Suspension of Proceedings on jurisdiction and Merits, and Request for further Provisional Measures, 24 June 2003, p. 5, § 15.

[77] Memorial of Ireland in the *Mox Plant Case (Ireland v. the United Kingdom)*, 26 July 2002, p. 97, § 5.16.

[78] *Idem*, p. 100, § 6.7.

[79] *Idem*, p. 101, § 6.7.

procedures, including those adopted by international organisations at the regional and global levels".[80]

The treaties concluded at the regional level relied upon by Ireland include the 1973 International Convention for the Prevention of Pollution from Ships (amended in 1978, MARPOL 73/78), the 1979 International Convention on Maritime Search and Rescue (SAR Convention), the 1992 OSPAR Convention and the 1998 Sintra Ministerial Statement adopted by the Ministers of the OSPAR parties, the 1980 Convention on the Physical Protection of Nuclear Material (the CPPN), the 1997 Joint Convention on the Safety of Radioactive Waste Management, and the 1991 UN Economic Commission for Europe Convention on Environmental Impact Assessment in a Transboundary Context. At the global level, Ireland refers *inter alia* to numerous international conventions adopted under the auspices of the International Atomic Energy Agency (IAEA).[81]

Concerning customary international law, Ireland stated that two norms were especially pertinent: the obligation to apply the precautionary principle, and the obligation, pursuant to the concept of sustainable development, to ensure that current norms and standards of environmental protection were to be applied to the authorisation of the Mox Plant.[82]

Finally, Ireland relied upon various agreed standards and recommended practices and procedures. Those included several International Maritime Organisation (IMO) Codes, the IAEA guidelines, the 1987 UNEP Guidelines on Environmental Impact Assessment, the 1992 Agenda 21, the 1995 UNEP Global Programme of Action for the Protection of the Marine Environment from Land-Based Activities, the 1998 OSPAR Strategy with Regard to Radioactive Substances, and the 2002 Bergen Ministerial Declaration.[83]

According to Ireland those rules and standards were to be applied or taken into account by the Arbitral Tribunal, to inform the content of the UNCLOS rules and obligations.

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[80] *Idem*, p. 102, § 6.12.
[81] *Idem*, p. 102, § 6.13 to p. 105 § 6.20.
[82] *Idem*, p. 105, § 6.21.
[83] *Idem*, p. 109, § 6.35.

The United Kingdom contested this approach in its Counter-Memorial. It stated that Ireland sought to "enlarge the jurisdiction of the Tribunal, by reference to Article 293 §1 of UNCLOS, which [governed] the entirely separate question of applicable law".[84]

According to the United Kingdom, "disputes as to the interpretation of the [different international Conventions, as well as resolutions, recommendations, and statements of international organisations and conferences relied upon by Ireland [were] manifestly not disputes concerning the interpretation or application of UNCLOS within Article 288 §1. (…) They [were] therefore beyond the jurisdiction of the present Tribunal".[85]

Concerning the EC law provisions, the United Kingdom developed a specific argument. It first noted that the UNCLOS was a "mixed agreement": the Member States of the EC and the Community itself were both parties to it.[86] When depositing its instrument of formal confirmation of the UNCLOS, the EC made a Declaration stating that with regard to the provisions of Part XII (which concern the protection and preservation of the marine environment), this was a matter on which competence was distributed between the Community and the Member States. The United Kingdom quoted the Declaration: "with regard to the provisions of maritime transport, safety of shipping and the prevention of marine pollution contained *inter alia* in Part II, III, V, VII and XII of the Convention, 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".[87]

The United Kingdom relied upon a 1982 ECJ case, *Hauptzollamt Mainz v. Kupferberg* (Case 104/81), in which the ECJ stated that "the provisions of an agreement [concluded by the Community institutions] form an integral part of the Community legal system". In its judgment dated 19 March 2002 *Commission v. Ireland* (Case C-13/00), the ECJ confirmed this position in the case of a mixed agreement, as in the case of an agreement concluded by the Community to the exclusion of its Member States.[88]

[84] Counter-Memorial of the United Kingdom in the *Mox Plant Case (Ireland v. the United Kingdom)*, 9 January 2003, p. 104, § 4.25.
[85] *Idem*, p. 104, § 4.24.
[86] *Idem*, p. 101, § 4.18.
[87] *Idem*, p. 101, § 4.19.
[88] *Idem*, p. 102, § 4.20.

Furthermore, Articles 292 of the EC Treaty, and 193 of the EURATOM Treaty provided in identical terms 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".[89] The United Kingdom stated that those Treaties made their own provisions for the settlement of disputes in respect of provisions of those treaties, Community instruments such as Directives and treaties within the Community legal order. "Insofar as Ireland's claims [were] more properly brought under the Community Treaties, this Tribunal [lacked] jurisdiction".[90]

The Arbitral Tribunal, in its Order number 3, distinguished also between what it called "international law issues" and "EC law issues".

Concerning the international law issues, the Tribunal agreed with the United Kingdom concerning the "cardinal distinction" between the scope of the jurisdiction under Article 288 §1, and the applicable law under Article 293 §1. It also agreed with the fact that if any aspects of Ireland's claims arose directly under legal instruments other than the Convention, such claims would be inadmissible. However, it did not consider that in this case Ireland had failed to state and plead a case arising substantially under the Convention.[91]

A difficulty arose for the Tribunal concerning the "EC law issues". The Arbitral Tribunal disagreed on this point with the statement made by the ITLOS in the provisional measures phase.

The ITLOS in its Order of 3 December 2001 had established that disputes settlement procedures under the EC and EURATOM Treaties dealt "with disputes concerning the interpretation or application of those agreements, and not of the UNCLOS".[92] The Order continued: "even if those agreements [contained] rights or obligations similar to or identical with the rights or obligations set out in the [UNCLOS], the rights or obligations set under

[89] Consolidated Version of the Treaty establishing the European Community, Rome, 25 March 1957, OJCE C-325/33 to C-325/184, 24 December 2002

[90] *Counter-Memorial of the United Kingdom in the Mox Plant Case (Ireland v. the United Kingdom)*, 9 January 2003, p. 103, § 4.22.

[91] Arbitral Tribunal Constituted Pursuant to Article 287, and Article 1 of Annex VII, of the United Nations Convention on the Law of the Sea, *Order number 3 in the MOX Plant Case (Ireland v. United Kingdom), Suspension of Proceedings on Jurisdiction and Merits, and Request for further Provisional Measures*, 24 June 2003, p. 6, §19.

[92] ITLOS, *The Mox Plant Case (Ireland vs. United Kingdom), Request for Provisional Measures*, Order number 3 December 2001, number 10, § 49.

those agreements [had] a separate existence from those under the Convention".[93] The ITLOS therefore concluded to the exclusive jurisdiction of the Arbitral Tribunal, stating that "since the dispute before the Annex VII Arbitral Tribunal [concerned] the interpretation and application of the Convention, and no other agreement, only the dispute settlement procedures under the Convention [were] relevant to that dispute".[94]

The Arbitral Tribunal gave a different interpretation, following the United Kingdom's reasoning. This came also from the notification to the Tribunal of a Written Answer given by the European Commission in the European Parliament on 15 May 2003, in which the Commission stated that it was "examining the question whether to institute proceedings under Article 226 of the EC Treaty".[95] This declaration led the Arbitral Tribunal to consider that there was a "real possibility that the ECJ [might] be seized of the question whether the provisions of the Convention on which Ireland [relied were] matters in relation to which competence [had] been transferred to the EC, and whether the exclusive jurisdiction of the ECJ (…) [extended] to the interpretation and application of the Convention".[96] According to the President of the Arbitral Tribunal, Judge Thomas A. Mensah, "whether, and if so to what extent, all or any of the provisions of the 1982 Convention [fell] within the competence of the EC or its Member States would fall to be decided by the ECJ".[97]

The Tribunal was of the opinion that those "EC law issues" related to matters which essentially concerned "the internal operation of a separate legal order (namely the legal order of the European Communities), to which both of the parties to the present proceedings [were] subject and which (…) [were] to be determined within the institutional framework of the European Communities".[98] The resolution of this matter in a definitive way was necessary to avoid doubts whether the jurisdiction of the Tribunal could be firmly established".[99]

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[93] *Idem*, § 51.
[94] *Idem*, § 52.
[95] Arbitral Tribunal Constituted Pursuant to Article 287, and Article 1 of Annex VII, of the United Nations Convention on the Law of the Sea, *Order number 3 in the MOX Plant Case (Ireland v. United Kingdom), Suspension of Proceedings on Jurisdiction and Merits, and Request for further Provisional Measures*, 24 June 2003, p. 7, § 21.
[96] *Idem*, p. 7, § 21.
[97] Statement by the President of the Arbitral Tribunal Constituted Pursuant to Article 287, and Article 1 of Annex VII, of the United Nations Convention on the Law of the Sea, *The Mox Plant Case*, § 8.
[98] Arbitral Tribunal Constituted Pursuant to Article 287, and Article 1 of Annex VII, of the United Nations Convention on the Law of the Sea, *Order number 3 in the MOX Plant Case (Ireland v. United Kingdom), Suspension of Proceedings on Jurisdiction and Merits, and Request for further Provisional Measures*, 24 June 2003, p. 8, §24.
[99] *Idem*, p. 8, §25.

Moreover, the Tribunal refused to give a decision, which would be binding for the Parties, when the ECJ could as well give a decision final and binding for the parties to the dispute. The Arbitral Tribunal refused to take the chance of resulting in two conflicting decisions, which "would not be helpful to the resolution of the dispute between the parties".[100]

For all these reasons, the Arbitral decided in its Order number 3 that "further proceedings in the case were suspended until not later than 1 December 2003.[101]

2.1.2. The action brought before the ECJ by the European Commission and the reaction of the Annex VII Arbitral Tribunal

On 30 October 2003, the European Commission brought a case against Ireland before the ECJ. The Commission claimed that "by instituting dispute settlement proceedings against the United Kingdom under the UN Convention for the Law of the Sea concerning the Mox Plant located at Sellafield, Ireland [had] failed to fulfil its obligations under Articles 10 and 292 EC and Articles 192 and 193 EURATOM".[102]

"In EC law, the division of competences between the EC and the Member States in general is governed by the following model: the EC has exclusive external competence in the strict technical sense that Member States' action is *per se* pre-empted in this field. (…) Other than that, the EC and the Member States enjoy shared competences. This includes the environment. Here legislation by the EC does not *per se* pre-empt the Member States externally but only to the extent that their action would affect the operation of the Community legislation".[103]

The argument of the Commission was similar to the one of the United Kingdom before the Arbitral Tribunal concerning the "EC law issues". It was based on the fact that the EC was a Party to the UNCLOS. Therefore the provisions of the UNCLOS invoked by Ireland, as well

[100] *Idem*, p. 9, §28.
[101] *Idem*, Order, p. 20.
[102] *Action brought on 30 October 2003 by the Commission of the European Communities against Ireland*, Case C-459/03, OJCE C 7/24, 10 January 2004.
[103] V. RÖBEN, "The Order of the UNCLOS Annex VII Arbitral Tribunal to Suspend Proceedings in the Case of the MOX Plant at Sellafield: How Much Jurisdictional Subsidiarity?", *Nordic Journal of International Law*, Vol. 73, 2004, p. 238.

as a number of the Community Acts invoked by Ireland, were provisions of Community law. The Commission claimed that Ireland had as a consequence violated the exclusive jurisdiction of the ECJ enshrined in Articles 292 EC and 193 EURATOM, and had violated the duty of co-operation incumbent on it under Articles 10 EC and 192 EURATOM.[104]

The ECJ is now seized of the Mox Plant's case. It must now decide on its potential exclusive jurisdiction in this case.

Following the statement made by the Agent of Ireland, the Arbitral Tribunal a few days later decided that "further proceedings in the case [should] remain suspended until the ECJ has given judgment or the Tribunal otherwise determines". Pending this decision, "the Tribunal [should] remain seized of the dispute".[105]

The continuation of the case now depends on the judgment the ECJ will make. If it decides that it has exclusive jurisdiction in this case, it will have to apply and interpret the provisions of the UNCLOS, as well as the provisions of EC law, relied upon by Ireland in its Memorial. However, the ECJ could decide that it has jurisdiction only for the interpretation and application of the provisions of EC law. In that case, the Arbitral Tribunal would declare itself competent with regard to the provisions of the UNCLOS, and make a decision on the Merits of the case.

However, it is interesting to compare the different arguments Ireland and the United Kingdom have developed with regard to access to information and the duty to cooperate under the UNCLOS. I shall now indicate the major points of Ireland's argument, and then examine the United Kingdom's argument in this regard.

[104] *Idem*.

[105] Arbitral Tribunal Constituted Pursuant to Article 287, and Article 1 of Annex VII, of the United Nations Convention on the Law of the Sea, *Order number 4 in the MOX Plant Case (Ireland v. United Kingdom), Further Suspension of Proceedings on Jurisdiction and Merits, and Request for further Provisional Measures*, 14 November 2003, Order p. 2.

2.2. The arguments developed by the parties regarding access to information under the UNCLOS

2.2.1. Ireland's argument for a wide interpretation of the duty to cooperate under the UNCLOS

In its Memorial, Ireland distinguished three categories of legal obligations that the United Kingdom had in its opinion failed to fulfil:

- To carry out a proper assessment of the likely impact of the MOX development upon the marine environment of the Irish Sea before authorising that development.
- To co-operate with Ireland, as co-riparian of the semi enclosed Irish Sea, in taking the steps necessary to protect and preserve the marine environment of that sea.
- The obligation placed directly upon the United Kingdom itself to take all the steps necessary to protect and preserve the marine environment of the Irish Sea.[106]

The second point is a procedural concern. According to Ireland the United Kingdom had failed to co-operate with Ireland as the obligations assumed by the United Kingdom under the UNCLOS required, and continued to manifest an unwillingness to co-operate in a meaningful manner.[107] Ireland claimed that the United Kingdom had a duty to co-operate under two provisions of the UNCLOS: Article 123 and Article 197.

Article 123 is titled "Cooperation of States bordering enclosed or semi-enclosed seas". It reads as follow:

> "States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavour, directly or through an appropriate regional organization:
>
> (a) to coordinate the management, conservation, exploration and exploitation of the living resources of the sea;

[106] Memorial of Ireland in the *Dispute concerning the Mox Plant, International Movements of Radioactive Materials, and the Protection of the Marine Environment of the Irish Sea (Ireland vs. United Kingdom)*, vol. I, 26 July 2002, pp. 3-4, § 1.3.
[107] *Idem*, p. 139, § 8.3.

(b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;

(c) to coordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;

(d) to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this article."

Article 197, "Cooperation on a global or regional basis", establishes a general duty to co-operate:

"States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features."

The argument of Ireland was established in three points: Ireland began by asserting the fundamental importance of the duty to cooperate, which in its view was broad enough to contain an obligation to inform. Concerning the operation of the Mox Plant, the United Kingdom had failed to fulfil its obligation to inform Ireland in a proper way.

2.2.1.1. The legal force and importance of the duty to co-operate

According to Ireland, the language used in Article 197 showed that there was a legal obligation to implement the duty to cooperate. Ireland submitted that even if that duty was usually secured simply by following the practices of good neighbourliness (*voisinage*) and diplomatic courtesy, it did not rest solely upon considerations of international comity, and had a specific legal content.[108]

[108] Memorial of Ireland in the *Dispute concerning the Mox Plant, International Movements of Radioactive Materials, and the Protection of the Marine Environment of the Irish Sea (Ireland vs. United Kingdom)*, vol. III, 26 July 2002, p. 147, § 8.41.

Moreover Ireland quoted Principle 24 of the 1972 Stockholm Declaration, which states that "co-operation (…) is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres".[109]

This duty to co-operate was also strengthened in the context of the Mox Plant by Article 123 of the UNCLOS, which concerns precisely the cooperation of States bordering semi-enclosed seas. The Irish Sea is an example of a semi-enclosed sea. Ireland maintained that this Article contained the duty of co-ordination as a directly binding legal obligation.[110] Furthermore, this Article contained an obligation of co-operation couched in the language of a moral obligation. According to Ireland, this Article imposed on State parties to *try*, in good faith, to achieve the ultimate goal to achieve coordination. It did not impose a duty to achieve it in every case.[111] Even if it was expressed in hortatory rather than in mandatory language, it did not mean that it was without legal effect.[112] First it was an element in the interpretation of other binding UNCLOS obligations in so far as they fell to be applied in the context of enclosed or semi-enclosed seas. Second, according to the principle of good faith, a blanket refusal to co-operate would not be compatible with the implementation of the UNCLOS in good faith. Finally, this Article had legal effect in relation to the principle of the abuse of rights, contained in Article 300 of the UNCLOS, which states: "State Parties shall exercise the rights, jurisdiction and freedoms assumed under this Convention in a manner which would not constitute an abuse of rights".[113]

From the analysis of Articles 123 and 197 of the UNCLOS, as well as of the States practice, Ireland tried to establish the specific legal content of the duty to co-operate, and to apply it to the present case, in order to demonstrate that the United Kingdom had not fulfilled its duty to co-operate, in particular by not having provided Ireland with sufficient information concerning the Mox Plant.

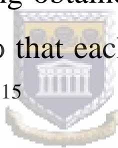
[109] *Idem*, p. 147, § 8.46.
[110] *Idem*, p. 143, § 8.20.
[111] *Idem*.
[112] *Idem*, p. 143, § 8.23.
[113] *Idem*, p. 143 to 146, § 8.23 to 8.39.

2.2.1.2. The content of the duty to co-operate: includes a duty to inform

Ireland contended in its Memorial that state practice revealed several elements that together make up the duty to co-operate. Analysing this state practice, Ireland contended that "the duties to inform, to consult and to co-ordinate (…) together make up the duty to co-operate".[114]

Ireland first quoted the 1979 International Convention on Maritime Search and Rescue (the SAR Convention), and specifically its Chapter 3, as an example of the content of the duty to co-operate. This Chapter established three distinct elements of the co-operation between states:

- an implicit duty to inform other parties concerned of the facilities and arrangements in place to assist with search and rescue missions;
- a duty to react to that information, or to seek such information if it has not already been given, and to take it into account in planning;
- a duty to coordinate: a duty, having obtained the information and consulted the other States, to try to arrange matters so that each state's activities complement and do not conflict with those of other states.[115]



Ireland also relied upon the Draft Articles of the International Law Commission on the Prevention of Transboundary Harm from Hazardous Activities. This work emphasised the duties to inform, to consult and to coordinate when there was a risk of "significant transboundary harm". This kind of risk included both risks taking the form of a high probability of causing significant transboundary harm and a low probability of causing disastrous transboundary harm. In this context "'significant' is something more than 'detectable' but need not be at the level of 'serious' or 'substantial'".[116]
In particular, Article 8 of the International Law Commission's Draft Articles states that

> "If the assessment referred to in Article 7 indicates a risk of causing significant transboundary harm, the state of origin shall provide the State likely to be affected with timely notification of the risk and the assessment and shall transmit to it the

[114] *Idem*, p. 152, § 8.55.
[115] *Idem*, p. 149, § 8.48.
[116] *Idem*, p. 149, § 8.50.

> available technical and all other relevant information on which the assessment is based".[117]

The International Law Commission specified that this information "includes not only what might be called raw data, namely fact sheets, statistics, etc., but also the analysis of the information which was used by the State of origin itself to make the determination regarding the risk of transboundary harm. The reference to the available data includes also other data which might become available later after transmitting the data which was initially available to the States likely to be affected".[118]

Article 12 of the Draft Articles relates specifically to the exchange of information. It provides that

> "while the activity is being carried out, the States concerned shall exchanged in a timely manner all available information concerning that activity relevant to preventing significant transboundary harm or at any event minimizing the risk thereof. Such an exchange of information shall continue until such time as the States concerned consider it appropriate even after the activity is terminated".[119]

The International Law Commission has specified that the information to be exchanged under this Article "is whatever would be useful, in the particular instance, for the purpose of the prevention of risk of significant harm".[120]

Ireland relied upon the Draft Articles of the International Law Commission to the extent that it considered this work as reflecting "the minimum requirements of existing obligations of co-

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[117] ILC, *Draft articles on Prevention of Transboundary Harm from Hazardous Activities*, adopted at its fifty-third session (2001), Report of the International Law Commission on the work of its Fifty-Third Session, *Official Records of the General Assembly, Fifty-Sixth session, Supplement number 10* (A/56/10), November 2001.

[118] ILC, *Commentaries to the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, adopted at its fifty-third session (2001), Report of the International Law Commission on the work of its Fifty-Third Session, *Official Records of the General Assembly, Fifty-Sixth session, Supplement number 10* (A/56/10), November 2001.

[119] ILC, *Draft articles on Prevention of Transboundary Harm from Hazardous Activities*, adopted at its fifty-third session (2001), Report of the International Law Commission on the work of its Fifty-Third Session, *Official Records of the General Assembly, Fifty-Sixth session, Supplement number 10* (A/56/10), November 2001.

[120] ILC, *Commentaries to the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, adopted at its fifty-third session (2001), Report of the International Law Commission on the work of its Fifty-Third Session, *Official Records of the General Assembly, Fifty-Sixth session, Supplement number 10* (A/56/10), November 2001.

operation under general international law, underpinning the particular requirements applicable under the UNCLOS and in the European and Northeast Atlantic regions”.[121]

In its Memorial Ireland separately examined the three elements of the duty to co-operate. I shall insist now particularly on the argument developed by Ireland with regard to the duty to inform.

2.2.1.3. The content of the duty to inform according to Ireland

Ireland thus maintained that there was “a duty on UNCLOS States Parties to inform potentially affected States of activities that are capable of having significant environmental consequences in the territory of the other State”.[122]

Ireland relied upon various types of international texts and instruments to build a definition of this duty to inform, and to contend that the obligation to inform was part of customary international law. Besides the Draft Articles of the International Law Commission, Ireland relied upon bilateral and multilateral treaties,[123] and upon other international non binding instruments.[124]

Ireland also relied on two decisions of international tribunals. Ireland first recalled the decision of the Arbitral Tribunal constituted in the *Lac Lanoux* Case, between France and Spain. Analysing the reasoning of the Tribunal in the decision made in 1957, Ireland concluded that “a State that is under the duty to co-operate cannot simply put the duty to one

[121] Memorial of Ireland in the *Dispute concerning the Mox Plant, International Movements of Radioactive Materials, and the Protection of the Marine Environment of the Irish Sea (Ireland vs. United Kingdom)*, vol. III, 26 July 2002, p. 152, § 8.54.

[122] *Idem*, p. 152, § 8.56.

[123] The treaties relied upon by Ireland are the following: the 1909 Convention Concerning Boundary Waters between the United States and Canada, the 1929 Convention between Norway and Sweden on certain Questions Relating to the Law on watercourse, the 1931 General Convention Concerning the Hydraulic System Concluded Between the Kingdom of Romania and the Kingdom of Yugoslavia, the 1932 Convention between Poland and the USSR Concerning Juridical Relations on the State Frontier, the 1960 Convention between Austria, Switzerland and the German Lander of Bavaria and Baden-Wurtemberg on the Protection of Lake Constance against Pollution, the 1974 Nordic Environmental Protection Convention, and the 1979 Geneva Convention on long Range Transboundary Air Pollution.

[124] The other international instruments relied upon by Ireland included: the 1972 UNGA Resolution 2995 (XXVII) on Co-operation between States in the Field of the Environment, the UNGA Resolution 3281 (XXIX) the Charter on Economic Rights and Duties of States, the 1978 UNEP Council Document on Natural Resources Shared by Two or More States, the 1994 Convention on Nuclear Safety, the 1974, 1976, 1977, 1978, and 1988 OECD Recommendations on Transfrontier Pollution, the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context.

side by claiming that its proposed act will have no harmful impact upon other States to whom the duty is owed".[125]

Then Ireland quoted the decision of the International Court of justice in the *Corfu Channel* Case[126]. According to Ireland this decision "lends support to the view that there is a fundamental duty to inform potentially affected States in the vicinity of risks emanating from material or activities located within a State's territory".[127]

In the definition submitted by Ireland, the condition necessary to create an obligation to provide information was that the activities must be capable of having "significant environmental consequences". Ireland submitted that possible pollution was significant "if there is a high probability of pollution arising, even if that pollution [might] cause relatively little harm. Possible pollution [was] also significant even if there [was] only a low probability of pollution, if that pollution would cause a great deal of harm".[128] Ireland relied on those both possibilities in the *Mox Plant* Case. Ireland further insisted on the seriousness of the nuclear activity, and emphasised that it was "in all practical senses impossible to remove radioactive pollution from the sea and seabed. (…) In all cases, the half-life of the radioactive material [was] such that radioactive pollution [was], in human terms, completely irreversible".[129]

Finally, Ireland summarized that the information concerned by this duty to inform was the information about "any activity (either planned or actual) which [entailed] a risk of transboundary harm (…) [and] all the necessary information relating to the nature of the activity, the risks involved, as well as the injury [might] cause". The role of this duty to inform was to "enable the potentially affected State to make its own evaluation of the situation (…) [and] to provide the parties with an opportunity for finding an amicable solution to the problems raised".[130]

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[125] Memorial of Ireland in the *Dispute concerning the Mox Plant, International Movements of Radioactive Materials, and the Protection of the Marine Environment of the Irish Sea (Ireland vs. United Kingdom)*, vol. III, 26 July 2002, p. 155, § 8.62.
[126] ICJ, *The Corfu Channel Case (Merits)*, United Kingdom v. Albania, 9 April 1949.
[127] *Idem*, p. 155, § 8.63.
[128] *Idem*, p. 156, § 8.66.
[129] *Idem*, p. 156, § 8.67.
[130] *Idem*, p. 156, § 8.68.

2.2.1.4. The United Kingdom's failure to fulfil its duty to inform in the *Mox Plant* Case

Ireland considered that the United Kingdom had not made sufficient information available to enable Ireland to make its own assessment of the implications and risks arising from the Mox Plant, therefore violating its duty to co-operate under the UNCLOS. Ireland maintained that the obligation of the United Kingdom had two facets: in one hand the United Kingdom must on its own initiative have notified Ireland of the plans for the Mox Plant; in the other hand the United Kingdom must also have responded in a timely and substantive fashion to Ireland's reasonable requests for further assistance and information on the activities related to the proposed Mox Plant and the international movements of radioactive materials associated with the operation of the plant.[131]

Even though Ireland recognised that there had been continuing contacts between the Irish and British authorities over the years, Ireland contested that the procedures had led in practice to a sufficient degree of co-operation to enable the United Kingdom to fulfil its obligation under the UNCLOS.[132]

Ireland quoted several letters sent to the United Kingdom to request access to information related to the Mox Plant, requests which had according to Ireland not received appropriate answers, or even no answer at all. Ireland also recalled the withholding by the United Kingdom of information contained in the ADL and PA Reports, for which Ireland had initiated an action under the OSPAR Convention. That information had been consistently refused by the United Kingdom on grounds of commercial confidentiality[133].

Ireland further contended that the United Kingdom had a specific duty to co-operate, and therefore to provide Ireland with sufficient information about nuclear security of the Sellafield site, particularly in relation to the terrorist threat. To support its claim Ireland relied upon Articles 123, 193, 194, 206 and 207 of the UNCLOS, as well as upon several other international instruments: the 1980 Convention on the Physical Protection of Nuclear Material, the IAEA Guidelines for Physical Protection of Nuclear Material and Nuclear

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[131] *Idem*, p. 163, § 8.97.
[132] *Idem*, p. 162, § 8.95.
[133] The OSPAR Arbitral Tribunal released its decision in July 2003. Ireland wanted the Arbitral Tribunal to classify some information part of the consultants' reports as environmental information in the meaning of Article 9 of the OSPAR Convention. As a consequence Ireland would have been entitled to have access to that information. The Arbitral Tribunal, however, rejected the request of Ireland (see *supra*).

Facilities, the 1994 Convention on Nuclear Safety, and the 1997 Joint Convention on the Safety of Fuel Management and on the Safety of radioactive Waste Management.[134]

Ireland submitted that it had responsibilities to its own population and to the international community to put in place adequate measures guard against risks of terrorist attacks. In order to do so, Ireland was entitled to be given the necessary information by the United Kingdom.[135]
In the same perspective, Ireland claimed that the Articles 123, 193, 194, 206 and 207 of the UNCLOS imposed on the United Kingdom an obligation of co-operation, and therefore to provide information, with regard to the shipment of nuclear material associated with the Mox Plant. This duty also existed under other international instruments, which were relevant as guides to the detailed interpretation of the UNCLOS provisions and as "other rules of international law" under Article 293 §1 of the UNCLOS. Those instruments are the 1980 Convention on the Physical Protection of Nuclear Material, the IAEA Guidelines on Physical Protection of Nuclear Material and Nuclear Facilities, and various IMO instruments. Ireland also recalled several international non binding instruments (Decisions of international organisations, Declarations of groups of states) that demonstrated international concerns about those matters and the cardinal importance of consultation, co-operation and exchange of information, which had been recognized in a number of very recent international meetings.[136]

Concerning specifically the security of shipments associated with the Mox Plant, Ireland claimed that the United Kingdom had not provided sufficient information to enable Irish authorities to prepare for the arrival of the shipments, to develop a preparedness, response and co-operation framework, in order to respond if incidents should take place.[137]

Ireland contended that even if the United Kingdom was aware of Ireland's need for such information, it had been "progressively reducing the amount of information shared with Ireland"; Ireland also noted that even when the United Kingdom did pass information to Ireland, "it [seemed] sometimes to be couched in a language that [was] designed more to mould itself around the contours of the United Kingdom's legal obligations than to

[134] *Idem*, p. 176 to 183, § 8.165 to 8.203.
[135] *Idem*, p. 183, § 8.203.
[136] *Idem*, p. 190, § 8.235.
[137] *Idem*, p. 191, § 8.241.

communicate facts".[138] Furthermore, according to Ireland the concern of the United Kingdom to keep information concerning the shipments out of the hands of terrorists and saboteurs did not justify the United Kingdom in withholding such information from the Irish Government.[139]

Ireland concluded that the United Kingdom had violated Articles 123 and 197 of the UNCLOS, failing to fulfil its duty of co-operation. It had in particular failed to provide Ireland with adequate information of the environmental consequences arising from the Mox Plant. Ireland now claimed that the United Kingdom must repair its past omissions, by *inter alia* providing more information to Ireland, on a timely and complete basis, and by developing more effective mechanisms for the transmission of information.[140]

2.2.2. The United Kingdom's answer to Ireland's argument

The United Kingdom contested that it had failed to fulfil its obligations under the UNCLOS concerning its duty to co-operate and to inform Ireland with regards to the Mox Plant. The United Kingdom proposed a different interpretation of Articles 123 and 197 of the UNCLOS, and thus maintained that it had always acted in conformity with those provisions.

2.2.2.1. The United Kingdom's interpretation of Article 123 of the UNCLOS

The United Kingdom rejected Ireland's assertion that this Article should have any binding effect. It stated that it was "clear from the wording of that Article that it is hortatory only, [and that] it imposes no immediately binding obligations, whether of co-operation or co-ordination".[141]

The United Kingdom based this statement on the negotiating history of Article 123, and on the Separate Opinion of Judge Anderson in the provisional measures phase of the case. Judge

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[138] *Idem*, p. 192, § 8.245, and p. 193, § 8.256.
[139] *Idem*, p. 197, § 8.273.
[140] *Idem*, p. 199, § 8.287.
[141] *Counter-Memorial of the United Kingdom in the Mox Plant Case (Ireland v. the United Kingdom)*, 9 January 2003, p. 139, § 6.11.

Anderson stated that "Article 123 does not require co-operation to be at the bilateral level so long as there is co-operation through an appropriate regional body". As emphasised as well by the United Kingdom, the European Communities, EURATOM, the OSPAR Commission, and the International Council for the Exploration of the Sea were according to him appropriate bodies through which co-ordination is achieved.[142]

The United Kingdom further contested Ireland's statement that although couched in hortatory language, it provided legal binding effect in three ways. First the United Kingdom did not agree that Article 123 required other Articles of the Convention to be interpreted by reference to the particular characteristics of a semi-enclosed sea.[143] It then contested the interpretation of this Article in relation to Article 300, which concerns the principles of good faith and of abuse of rights.

Concerning the principle of good faith, the United Kingdom quoted the jurisprudence of the ICJ, which demonstrated that although this principle was "one of the basic principles governing the creation of and performance of legal obligations, it [was] not in itself a source of obligation where none would otherwise exist".[144] The United Kingdom concluded that as Article 123 did not impose a legal obligation, Article 300 "[added] nothing of present relevance".[145] However, the United Kingdom insisted on the fact that there was "no basis for an allegation of bad faith". Ireland wrongly contended that there had been an "outright, blanket refusal to co-operate or co-ordinate actions and plans" about the Mox Plant.[146]

The United Kingdom advanced that Ireland's reliance on abuse of rights was also misconceived. The United Kingdom stated that what should be demonstrated was an abuse by the United Kingdom in the exercise of its own rights, jurisdiction and freedoms, and not as Irelands maintained an abuse by the United Kingdom of Ireland's rights.[147] The United Kingdom established that the principle of abuse of rights was therefore of no use for Ireland, as the Articles of the UNCLOS Ireland relied upon (Articles 192, 193, 194, 197, 206, 207,

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[142] Separate Opinion of Judge Anderson, in the Order given in the *Mox Plant Case (Ireland vs. United Kingdom) Request for Provisional Measures*, Order number 10, 3 December 2001, p. 4.
[143] *Counter-Memorial of the United Kingdom in the Mox Plant Case (Ireland v. the United Kingdom)*, 9 January 2003, p. 141, § 6.19.
[144] ICJ, *Land and Maritime Boundary between Cameroon and Nigeria (preliminary Objections)*, 1998, and ICJ, *Border and Transborder Armed Action (Jurisdiction and Admissibility)*, Nicaragua v. Honduras, 1988.
[145] *Idem*, p. 143, § 6.24.
[146] *Idem*, p. 143, § 6.23.
[147] *Idem*, p. 144, § 6.27.

211, and 213) did not "grant the United Kingdom any rights or confer any power on it. All of them [created] obligations for States Parties".[148]

Having established that Article 123 of the UNCLOS was of no use for the present case, the United Kingdom examined the other provision relied upon by Ireland as establishing a duty to co-operate, and therefore to inform, Article 197.

2.2.2.2. The United Kingdom's interpretation of Article 197 of the UNCLOS

In its Counter-Memorial the United Kingdom gave a much narrower interpretation of Article 197 of the UNCLOS than Ireland. Ireland claimed that this Article contained a broad duty to co-operate, which it analysed as gathering duties to inform, to consult, and to co-ordinate. On the contrary the United Kingdom recalled the express formulation of Article 197, which states that "states shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, *in formulating and elaborating international rules, standards and recommended practices and procedures* consistent with this Convention, for the protection and preservation of the marine environment". The United Kingdom contended that this was precisely what it had done at least since the conclusion of the UNCLOS, directly and through international organisations, including the European Community, EURATOM, the IMO, the IAEA and the OSPAR Commission.[149] The United Kingdom affirmed that nothing in the drafting history of Article 197 could lead to the view that this Article engaged the States Parties in a more general approach to international cooperation.[150]

However, the United Kingdom discussed the argument proposed by Ireland concerning the duty to inform.

The United Kingdom contested first the example chosen by Ireland to demonstrate the content of a possible duty to co-operate, arguing that the 1979 International Convention on Maritime Search and Rescue did not contain provisions governing or defining any general duty to

[148] *Idem*, p. 146, § 6.31.
[149] *Idem*, p. 147, § 6.36.
[150] *Idem*, p. 148 et 149, § 6.38 et 6.39.

supply information, consult or co-ordinate. Moreover, the United Kingdom insisted on the difficulty to see the relevance of this Convention to the operation of a land-based Mox Plant.[151]

Concerning the International Law Commission's Draft Articles on the Prevention of Transboundary Harm form Hazardous activities, the United Kingdom specified that they were not a source of legal obligations under the UNCLOS, and that even if they were, they would not be relevant in this case as the operation of the Mox Plant did not carry a high probability of causing significant transboundary harm nor a low probability of causing disastrous transboundary harm.[152] On the contrary the United Kingdom had continuously asserted that "discharges from the Mox Plant are and will continue to be insignificant".[153]

The United Kingdom then stated that it had fulfilled its obligation assumed under Article 197 of the UNCLOS to co-operate in formulating and elaborating the rules, standards and recommended practices and procedures related to the Mox Plant. This co-operation had taken place under the aegis of the IAEA, the IMO, the EC, EURATOM, the OSPAR Commission, as well as through the bilateral consultations instituted with Ireland, and the various arrangements for co-ordination and monitoring which were in operation between British authorities and agencies and their Irish counterparts.[154] To illustrate those bilateral relations, the United Kingdom referred to diplomatic contacts, the United Kingdom-Ireland contact group, the British-Irish Council, the British-Irish Inter-Parliamentary Body, the Draft Coastguard Agreement, the exchange of information between the United Kingdom's Health and Safety Executive and the Radiological Protection Institute of Ireland, the co-operation between the Radiological Protection Institute of Ireland and the United Kingdom's National Radiological Protection Board, the Draft Agreement on Early Notification, the Food Standards Agency contacts, and the United Kingdom's invitation to improve these arrangements after the Order of the ITLOS dated 3 December 2001, which Ireland had not yet responded.

The United Kingdom concluded its argument about co-operation and information by stating that "the process of evaluating the co-operation achieved by the parties [was] not advanced by

[151] *Idem*, p. 149, § 6.40.
[152] *Idem*, p. 149, § 6.41.
[153] *Idem*, p. 15, § 1.47.
[154] *Idem*, p. 154, § 6.55.

the selective quotation of letters written over a long period, for the purpose of finding what one side may, with retrospect, consider to be deficiencies here or there and presenting these as an amalgam". The United Kingdom considered the exchanges it described in its Counter-Memorial as "demonstrating a degree of co-operation, including the supply of information, far exceeding the requirements of the UNCLOS".[155]

[155] *Idem*, p. 180, § 6.136.

Chapter 3: Access to environmental information in international law

The protection of the environment is nowadays equally a question of "procedure" than of "substance". In elaborating standards of protection of the environment, of particular species or of ecosystems or of biodiversity in general, states have created substantive rules, to obtain particular results in the limitation of the pollution of air, water, and soil, or to protect biodiversity and ecosystems. But at the same time, rules have emerged which address the procedural aspect of the protection of the environment. "These procedural principles and rules, both customary and conventional, clarify and/or elaborate upon the procedural duties of due care or diligence of the states to protect the environment. They also supplement the implementation of the objectives of the substantive principles and rules. Examples include the principle of information exchange, the principle of environmental impact assessment, the principle of prior notification, the principle of warning, and the principle of consultation".[156] These rules answer the question of "how?" the environment is to be protected. The exchange of information certainly belongs to this category.

In its Order dated 3 December 2001, the ITLOS prescribed one provisional measure under Article 290 §5 of the UNCLOS. The Tribunal prescribed that Ireland and the United Kingdom should cooperate, and for this purpose enter into consultations, in order to, among others, "exchange further information with regard to possible consequences for the Irish Sea arising out of the commissioning of the MOX plant".[157] This provisional measure was later confirmed by the Annex VII Arbitral Tribunal, in its Order number 3.[158]

The ITLOS considered that "prudence and caution require that Ireland and the United Kingdom cooperate in exchanging information concerning risks or effects of the operation of the MOX Plant and in devising ways to deal with them, as appropriate".[159] Moreover, it

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[156] T. IMAWA, "Emerging Principles and Rules for the Prevention and Mitigation of Environmental Harm", in E. BROWN WEISS (Ed.), *Environmental Change and International Law: New Challenges and Dimensions*, United Nations University Press, Tokyo, 1992, www.une.edu/unupress/unupbooks/uu25ee/uu25ee0k.htm (date on which first accessed: 23/05/2005).

[157] ITLOS, *The Mox Plant Case (Ireland vs. United Kingdom) Request for Provisional Measures*, Case number 10, Order of the 3 December 2001, Order.

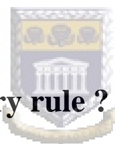
[158] Arbitral Tribunal Constituted Pursuant to Article 287, and Article 1 of Annex VII, of the United Nations Convention on the Law of the Sea, *Order number 3 in the MOX Plant Case (Ireland v. United Kingdom), Suspension of Proceedings on jurisdiction and Merits, and Request for further Provisional Measures*, 24 June 2003, p. 20, Order.

[159] ITLOS, *The Mox Plant Case (Ireland vs. United Kingdom) Request for Provisional Measures*, Case number 10, Order of the 3 December 2001, § 84.

qualified the duty to cooperate as a "fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law".[160] Therefore it was entitled to preserve it under Article 290 of the Convention, by the prescription of a provisional measures.

3.1. Cooperation between states in international law

The ITLOS clearly established the link between information and cooperation. According to the Tribunal the exchange of information was the first step in the fulfilment of the duty to cooperate which existed between Ireland and the United Kingdom. Furthermore, the Tribunal stressed the fundamental value of the duty to cooperate. There has been a lot of doctrinal debate concerning the character of this duty as a norm of customary international law. The Order of the ITLOS, supported by the Order number 3 of the Arbitral Tribunal, can be seen as a further step in this direction.



3.1.1. The duty to cooperate: a customary rule ?

Cooperation is certainly one of the most important aspects of international law. According to Kiss and Shelton, "an obligation to cooperate with other states derives from the very essence of general international law, and finds reflection in the existence and proliferation of international institutions".[161] Other authors also maintain that the duty to cooperate is a "binding principle of international law",[162] or that "the obligation to cooperate with your neighbors is a cornerstone of international law".[163]

Judge Singh notes the growing "permeability" of national boundaries, blurring the distinction between local, national and international issues. "The way in which the policies of certain nations – including economic, trade, monetary, and most sectoral policies – are increasingly tending to reach into the "sovereign" territory of other nations, serves to limit those nations'

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[160] *Idem*, § 82.
[161] A. KISS, D. SHELTON, *International Environmental Law*, 3rd edition, Transnational Publishers, New York, 2004, p. 28.
[162] D. HUNTER, J. SALZMAN, D. ZAELKE, *op. cit.*, n. 12, p. 374.
[163] D. HUNTER, J. SALZMAN, D. ZAELKE, *International Environmental Law and Policy – Teacher's Manual*, 2nd Edition, University Casebooks Series, Foundation Press, New York, 2002, p. 113.

options in devising national solutions to their "own" problems. This fast-changing context for national action has introduced new imperatives and new opportunities for international co-operation – and for international law".[164]

3.1.1.1. Cooperation in general international law

The United Nations Charter includes "international cooperation in solving international problems of an economic, social, cultural, or humanitarian character (…)" among the purposes of the United Nations (Article 1 §3).

The 1970 United Nations Declaration of Principles on International Law further established that:

> "States have the duty to co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences. (…) States should co-operate in the economic, social and cultural fields as well as in the field of science and technology and for the promotion of international cultural and educational progress".[165]

Since the recognition of the protection of the environment as a fundamental goal of the international community in the nineteen seventies, cooperation has been included among the principles to be implemented in order to achieve this goal.

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[164] Judge Nagendra SINGH, in Expert Group on Environmental Law of the World Commission on environment and Development (1987, quoted in C. L. BLAKESLEY, E. B. FIRMAGE, R.F. SCOTT, S.A. WILLIAMS, *The International Legal System, Cases and Materials*, 5the edition, University Casebook Series, Foundation Press, New York, 2001, p. 468.

[165] UNGA Resolution 2625, *Declaration of Principles on International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, 24 October 1970.

3.1.1.2. Cooperation in international environmental law

The principle of cooperation is particularly applicable to environmental law. A large number of environmental matters are common to several States in a particular region, like the pollution of a semi-enclosed sea in the *Mox Plant* Case. Some environmental matters are even common to the international community as a whole, such as problems of climate change. Indeed, cooperation related to environmental matters is part of many international and regional instruments, and has been evidenced in several decisions of international jurisdictions.

Principle 24 of the 1972 Stockholm Declaration on the Human Environment "reflects a general political commitment to international cooperation in matters concerning the protection of the environment".[166] This Principle states that

> "International matters concerning the protection and improvement of the environment should be handled in a co-operative spirit by all countries, big or small, on a equal footing.
> Co-operation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States".

The "essential" character of cooperation was again affirmed in the 1992 Rio Declaration on Environment and Development, in Principle 7:

> "States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem".

Moreover Principle 27 states that:

> "States and people shall cooperate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development".

[166] P. SANDS, *op. cit.*, p. 249.

“More generally the Stockholm Declaration in its entirety, as well as the Rio Declaration twenty years later, set forth the need and obligation to cooperate”.[167] Indeed the principle of cooperation is mentioned several times in each of those documents, relating to various spheres of the global promotion and protection of the environment.

The *raison d’être* of the principle of cooperation is very clearly pointed out in the Stockholm Declaration, Article 7:

> “A growing class of environmental problems, because they are regional or global in extent or because they affect the common international realm, will require extensive cooperation among nations and action by international organizations in the common interest”.

Cooperation between States is also mentioned in Principle 22 in the view “to develop further the international law regarding liability and compensation for the victims of pollution or other environmental damage”.

The Rio Declaration confirms the perspective of Stockholm and goes further, enunciating in its Preamble the “goal of establishing a new and equitable partnership through the creation of new levels of cooperation amongst states, key sectors of society and people”. Cooperation is then mentioned in Principle 12 “to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries”, in Principle 13 “regarding liability and compensation for the victims of pollution or other environmental damage”, and in Principle 14 “to discourage and prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation”. Moreover the Principles should generally be fulfilled by cooperation in good faith and in a spirit of partnership (Principle 27).

The General Assembly of the United Nations also stressed as early as the nineteen seventies the need for cooperation between States in protecting the environment. For example through Resolution 2995 (XXVII), the General Assembly emphasized that

[167] D. HUNTER, J. SALZMAN, D. ZAELKE, *op. cit.*, p. 376.

> "in exercising their sovereignty over their natural resources, states must seek, through effective bilateral and multilateral co-operation or through regional machinery to preserve and improve the environment".[168]

The General Assembly confirmed this position in Resolution 3129 (XXVIII), and reaffirmed

> "the duty of the international community to adopt measures to protect and improve the environment and particularly the need for continuous international collaboration to that end".

In this Resolution the General Assembly considered "necessary to ensure effective co-operation between countries through the establishment of adequate international standards for the conversation and harmonious exploitation of natural resources common to two or more states".[169]

At this stage, the principle of co-operation seemed to be awarded an important role in the protection and conservation of the environment. Among the general principles and rules of international environmental law, the cooperation principle is "sufficiently well established to provide the basis for an international cause of action: that is to say, to reflect an international customary legal obligation the violation of which would give rise to a free-standing legal remedy".[170] The international community seemed also to agree on the specific "content" of the cooperation principle. The four texts mentioned above all refer to the exchange of information as a means to enforce it.

3.1.1.3. Cooperation requires exchange of information

The Rio Declaration states that "the free flow of up-to-date scientific information and transfer of experience must be supported and assisted, to facilitate the solution of environmental problems" (Principle 20). The Rio Declaration confirms that "States should cooperate to

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[168] UNGA Resolution 2995 (XXVII), *Co-operation between States in the Field of the Protection of the Environment*, 2112th Plenary Meeting, 15 December 1972.
[169] UNGA Resolution 3129 (XXVIII), *Co-operation in the Field of the Environment Concerning Natural Resources Shared by Two or More States*, 2199th Plenary Meeting, 13 December 1973.
[170] P. SANDS, *op. cit.*, p. 232.

strengthen endogenous capacity-building for sustainable development by improving scientific understanding through exchanges of scientific and technological knowledge" (Principle 9). Moreover "States shall facilitate and encourage public awareness and participation by making information widely available" (Principle 10).

The same approach is found in the United Nations General Assembly Resolutions. Resolution 2995 states that "co-operation between states in the field of the environment (…) will be effectively achieved if official and public knowledge is provided of the technical data relating to the work to be carried out by states within their national jurisdiction, with a view to avoiding significant harm that may occur in the environment of the adjacent area". Resolution 3129 specifies that "co-operation between countries sharing such natural resources and interested in their exploitation must be developed on the basis of a system of information and prior consultation".

From these four "early" texts it can be deduced that the principle of cooperation is one of the most fundamental in the field of the protection of the environment. "On the basis of these documents, it may be concluded that there is an agreement on (…) [the fact that] international cooperation and institutional arrangements are essential".[171] The principle of cooperation was established from the very beginning of the recognition of the importance of environmental matters at the international level. Moreover, what must particularly be noticed is the strong link which has already been made between cooperation and information. The sharing and exchange of environmental information has since then been viewed as a necessary prerequisite to an efficient cooperation between states. Since the nineteen seventies the need for cooperation at the international level has been nothing but growing. It is now recognised as necessary between states, but also between states and non-governmental organisations, and between states and the individuals themselves. In all these circumstances, exchanges of information remain the basic element, necessary as a first step to implement cooperation systems. This has been and is still being developed until today, in the various fields of international environmental law. "Greater cooperation is clearly called for (…) and is now, in the context of sustainable development, especially necessary in relation to the transfer of technology, information, data, scientific advice, financial assistance, etc.".[172]

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[171] G. ULFSTEIN, *op. cit.*, p. 101-102.
[172] P. BIRNIE, "Impact on the Development of International Law on Cooperation: the United Nations Law of the Sea, Straddling Stocks and Biodiversity Conventions", in M. H. NORDQUIST, J. NORTON MOORE, S.

Cooperation between states, and its link with efficient exchange of information, have in particular been relevant in the field of the protection of the marine environment. The seas and oceans, by their very nature, are particularly requiring cooperation between states for their protection. The *Mox Plant* Case relates specifically to this issue of cooperation and information exchange in the management of a marine environment, the Irish Sea, a semi-enclosed sea of which both Ireland and the United Kingdom are coastal states.

3.1.2. Cooperation and information for the protection of the marine environment

3.1.2.1. The *Mox Plant* Case: a further step toward the recognition of the duty to cooperate as a customary rule

"Cooperation among states is the most urgent requirement for effective protection of the world's ocean environment. States have been aware of this need for many years".[173] Birnie quotes for example the cooperation in 1882 of six North Sea states, to prescribe and enforce regulations concerning fishing in the North Sea. She also quotes the Convention on Fishing and the Conservation of the Living Resources of the High Seas, adopted in 1958 at the First United Nations Conference on the Law of the Sea. This text noted that "the nature of the problems involved in their conservation was such that they be solved, wherever possible, on the basis of international cooperation through concerted action of all the states concerned".[174]

Adopted in 1982, the UNCLOS "requires states to co-operate".[175] "Under the Law of the Sea Convention, cooperation – and especially regional cooperation – is no longer a matter of discretion of the States concerned, but an international obligation".[176] This duty to cooperate is set forth in Article 197.

According to Birnie it is not certain "whether ongoing "cooperation requirement" under the UNCLOS (…) in fact includes the kind of legally-binding commitments that can be identified

MAHMOUDI, *The Stockholm Declaration and Law of the Marine Environment*, Martinus Nijhoff Publishers, the Hague, 2003, p. 85.
[173] *Idem*.
[174] *Idem*.
[175] G. ULFSTEIN, *op. cit.*, p. 102.
[176] R. LAGONI, "Regional Protection of the Marine Environment in the Northeast Atlantic Under the OSPAR Convention of 1992", in M. H. NORDQUIST, J. NORTON MOORE, S. MAHMOUDI, *The Stockholm Declaration and Law of the Marine Environment*, Martinus Nijhoff Publishers, the Hague, 2003, p. 197.

as establishing a customary "law of cooperation".[177] But the Order made by the ITLOS in the *Mox Plant* Case is a further step in establishing the duty to cooperate as a principle of customary law in international environmental law, particularly concerning the protection of the marine environment.

The ITLOS's Order on provisional measures "makes concrete the duty of states to consult and cooperate".[178] The Tribunal recognised that "the duty to co-operate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law, and that rights arise therefrom which the Tribunal may consider appropriate to preserve under Article 290 of the Convention".[179] In his Separate Opinion, Judge Wolfrum goes a bit further, stating that "the obligation to co-operate with other states whose interest may be affected is a *Grundnorm* of Part XII of the Convention [of the Law of the Sea], as of customary international law for the protection of the environment".[180]

The Tribunal did, however, not stop there. It added a concrete dimension to the "fundamental duty to cooperate". By establishing 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",[181] as well as by requiring exchange of information between Ireland and the United Kingdom as a way to fulfil their duty to cooperate,[182] the ITLOS makes clear that information and cooperation are closely related, that the latter cannot be implemented if the first does not exist. The exchange of information can therefore be considered as a "necessary prerequisite" for the fulfilment of the fundamental duty to cooperate between states, which exists in international environmental law, and particularly for the protection of the marine environment.

Such a decision has previously been made by another Order of the ITLOS. The matter of cooperation in the protection and preservation of the marine environment was considered by

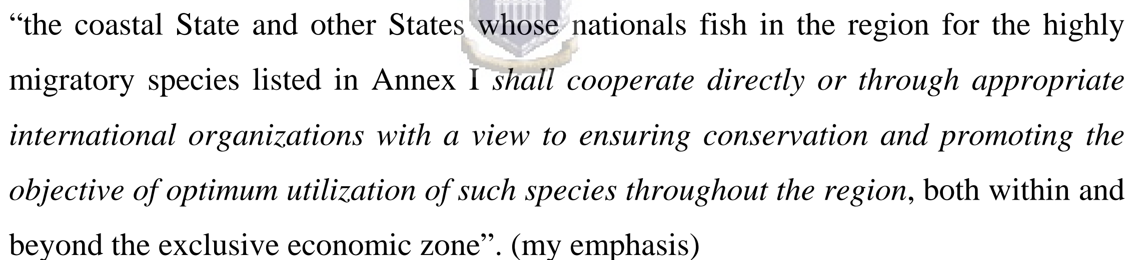
[177] P. BIRNIE, *op. cit.*, p. 85.
[178] A. KISS, D. SHELTON, *op. cit.*, pp. 30-31.
[179] ITLOS, *The Mox Plant Case (Ireland vs. United Kingdom) Request for Provisional Measures*, Case number 10, Order of the 3 December 2001, § 82.
[180] Separate Opinion of Judge WOLFRUM, in the Order given in the *Mox Plant Case (Ireland vs. United Kingdom) Request for Provisional Measures*, Order number 10, 3 December 2001, p. 4.
[181] ITLOS, *The Mox Plant Case (Ireland vs. United Kingdom) Request for Provisional Measures*, Case number 10, Order of the 3 December 2001, § 84.
[182] *Idem*, Order.

the Tribunal in the *Southern Bluefin Tuna (SBT)* Case, in an Order made in 1999. In this case cooperation between the parties was at stake.

3.1.2.2. The Order of the ITLOS in the *Southern Bluefin Tuna (SBT)* Case

In their Notifications and Statements of Claim presented for the constitution of an Arbitral Tribunal under Annex VII of the UNCLOS, New Zealand and Australia "alleged that Japan had failed to comply with its obligation to cooperate within the conservation of the SBT stock by *inter alia*, undertaking unilateral experimental fishing for SBT in 1998 and 1999". Therefore Australia and New Zealand requested the Arbitral Tribunal to be constituted to judge and declare "that Japan has breached its obligations under Article 64 (…) of UNCLOS (…) by failing in good faith to cooperate with New Zealand and Australia with a view to ensuring the conservation of SBT".[183]

Article 64 of the UNCLOS provides that



> "the coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I *shall cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region*, both within and beyond the exclusive economic zone". (my emphasis)

The ITLOS established that the duty to cooperate stated in Article 64 was applicable in this case, as the SBT is included in the list of highly migratory species contained in Annex I to the UNCLOS. However, the provisional measures finally prescribed did not explicitly include a general obligation to cooperate, as later in the *Mox Plant* Case. The Tribunal simply ordered that "Australia, Japan and New Zealand should resume negotiations without delay with a view to reaching agreement on measures for the conservation and management of SBT".[184]

Nevertheless, the ITLOS made use of the same reasoning in the *Mox Plant* Case as it did in the *SBT* Case, in two areas. First the Tribunal considered that "the parties should in the

[183] ITLOS, *Southern Bluefin Tuna Cases*, Cases number 3 and 4 (New Zealand v. Japan; Australia v. Japan), Request for Provisional Measures, Order dated 27 August 1999, § 28 and 29.
[184] *Idem*, Order, § e).

circumstances act with prudence and caution to ensure that effective conservation measures [were] taken to prevent serious harm to the stock of SBT".[185] Secondly, and as such a measure, "the parties should intensify their efforts to cooperate with other participants in the fishery for SBT with a view to ensuring conservation and promoting the objective of optimum utilization of the stock".[186]

The obvious parallel that can be noticed between the two decisions is not by chance. The ITLOS used the same language in the two decisions. In both cases cooperation was required by "prudence and caution". The difference here was one of degree. In the *SBT* Case, cooperation was only a wish (the parties "should" intensify their efforts) and was not reflected in the final Order. In the *Mox Plant* Case, the injunction to cooperate was much stronger. It was itself the provisional measure prescribed by the Tribunal, and was sufficiently detailed to include an obligation to exchange information. Between 1999 and 2001, a big step was made towards the effective implementation of the duty to inform and the duty to cooperate. This was certainly due to the context and the particular circumstances of the case. As was underlined in a Joint Declaration to the ITLOS SBT Order, "cooperation among the members of the Commission for the Conservation of Southern Bluefin Tuna, at both the scientific and governmental levels, has not been effective in recent years".[187] On the contrary Ireland and the United Kingdom were very close in their diplomatic relations. They were both Members of the European Union, thus having created between them strong links of cooperation from several years. Moreover they had both signed the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. Therefore it could perhaps be said that Ireland and the United Kingdom had already reached a high level of engagement concerning matters of information and cooperation in environmental matters, thus enabling the ITLOS to go further when prescribing provisional measures.

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[185] *Idem*, § 77.
[186] *Idem*, § 78.
[187] Joint Declaration of Vice-President Wolfrum and Judges Caminos, Marotta Rangel, Yankov, Anderson and Eiriksson, in ITLOS, *Southern Bluefin Tuna Cases*, Cases number 3 and 4 (New Zealand v. Japan; Australia v. Japan), Request for provisional measures, Order dated 27 August 1999.

3.2. Emergence of the exchange of information as a procedural environmental norm

Environmental principles and rules are often divided in two complementary categories: the substantive and the procedural norms. Substantive norms can be defined as "norms that establish rights and obligations concerning the environment, as opposed to 'procedural norms' that prescribe the method or process for implementing substantive norms or for their enforcement".[188] The issues of cooperation and exchange of information take place in the latter category.

3.2.1. The procedural norms in international environmental law

Okowa notices since the 1972 UN Conference on the Human Environment the "proliferation of treaty instruments requiring states not so much to prevent environmental harm as to observe a number of discrete procedures before permitting the conduct of activities that may cause such harm".[189] She quotes among others the 1982 UNCLOS, the UNEP Regional Seas Conventions, the treaties on the conservation of nature, the treaties on the utilization of international watercourses, the Barcelona Convention for the Protection of the Mediterranean against Pollution, the 1974 Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea, the 1978 Kuwait Regional Convention, the Abidjan Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region, the 1979 ECE Convention, the 1991 US/Canada Air Quality Agreement, the 1991 UN Convention on Industrial Accidents, and the ECE EIA Convention. These treaties "in varying degrees provide for duties of prior assessment, notification, exchange of information and consultation".[190] From those bilateral and multilateral treaties, she concludes "the evidence that procedural obligations are now a general requirement in the field of environmental protection".[191]

It has also been said that the procedural requirements are implicit in the substantive norms of prevention. For example "a state cannot fulfil its obligation to prevent transfrontier

[188] E. BROWN WEISS, S.C. MCCAFFREY, D. BARSTOW MAGRAW, P.C. SZASZ, R.E. LUTZ, *International Environmental Law and Policy*, Aspen Law and Business, New York, 1998, p. 315.
[189] P.N. OKOWA, "Procedural Obligations in International Environmental Agreements", *British Yearbook of International Law*, 1996, vol. LXVII, p. 274.
[190] *Idem*, p. 320.
[191] *Idem*, p. 318.

environmental harm unless it conducts an environmental impact assessment to determine whether a planned activity will cause such harm and provides prior notification of its plans to potentially affected states so that they may determine for themselves whether such harm is likely to occur".[192]

Okowa distinguishes several rationales of those procedural obligations. First they serve as a "vehicle for the resolution of conflict between states proposing the conduct of activities and those likely to be affected". Secondly they serve an instrumental function, "to assist the state of origin in reaching substantively correct decision". Then they encompass a "broad notion of fairness", "a form of procedural due process", in dictating a "predetermined method of conducting the decision-making process". Finally they "epitomize new trends of international law", which ensure "that governments involve those likely to be affected by proposed activities in the decision-making processes".[193]

Several forms of cooperation are designed in environmental treaties. "These rules take a variety of forms, such as requirements of environmental impact assessment, prior notification of planned activities posing a risk of transfrontier environmental harm, sharing of data and information, consultations, negotiations, and fact-finding".[194] All those mechanisms are based on clear information, which must be shared, provided to the other states which might have an interest or which might be affected by the activity undertaken. The exchange of information is of special importance, inasmuch as it supports the entire basis of the environmental procedural requirement. According to Sands, all those procedural rules that I mentioned are different forms of the provision of information. Precisely, Sands identifies "nine separate but related techniques concerning the provision and dissemination of information".[195] He quotes information exchange, reporting and the provision of information, consultation, monitoring and surveillance, notification of emergency situations, public right of access to information, public education and awareness, eco-labelling, and eco-auditing and accounting. In his opinion, "information is widely recognised as a prerequisite to effective national and international environmental management, protection, and cooperation".[196] He quotes several

[192] E. BROWN WEISS, S.C. MCCAFFREY, D. BARSTOW MAGRAW, P.C. SZASZ, R.E. LUTZ, *International Environmental Law and Policy*, Aspen Law and Business, New York, 1998, p. 350.
[193] P.N. OKOWA, *op. cit.*, pp. 277-278.
[194] E. BROWN WEISS, S.C. MCCAFFREY, D. BARSTOW MAGRAW, P.C. SZASZ, R.E. LUTZ, *op. cit.*, p. 350.
[195] P. SANDS, *op. cit.*, p. 828.
[196] *Idem*, p. 826.

treaties which contain provisions related to the dissemination of information, such as the 1986 IAEA Notification Convention, the 1989 Basel Convention, or more recently the 1998 Aarhus Convention, the 1998 Chemicals Convention, the 1997 Kyoto Protocol, the 2000 Biosafety Protocol, and the 2001 POPS Convention.

Concerning specifically the exchange of information, which is at stake in the *Mox Plant* Case, Sands notices that the general obligation of one state to provide general information on one or more matters on an *ad hoc* basis to another state, especially in relation to scientific and technical information, is found, "in one form or another, in virtually every international environmental agreement".[197]

So it may be said that the trend in this area of international environmental law is toward the recognition of the exchange of information as a necessary basis for the implementation of the procedural requirements that now rule the implementation of the substantive norms of international environmental law.

The problem of procedural requirements is also found is another area of international law, which is related to the protection of the environment. The human right to a healthy environment is part of certain treaties of international human rights, and tends to be affirmed quite strongly today. But although there is still controversy on its specific substantive content, its procedural aspect is on the contrary now well established. In this context access to information is one of the pillars on which is based the human right to a healthy environment.

3.2.2. Information as a procedural environmental human right

The problematic of the procedural environmental human right is particularly relevant in the European region. The Aarhus Convention, which is the most encompassing instrument in this regard, was developed under the auspices of the United Nations Economic Commission for Europe. The Treaty has now been signed by most of the European countries, including Ireland. The United Kingdom ratified it in February 2005.

[197] *Idem*, p. 827.

The approach adopted in the field of environmental procedural human rights is similar to the approach adopted in the field of environmental procedural rights between states. The principle is that "environmental protection and sustainable development cannot be left to governments alone".[198] As between states the best environmental decisions can only be reached with the participation of the state of origin of the pollution and the states potentially affected by this pollution, all of them being provided with clear and detailed information, regarding individuals "if more development projects focused on encouraging environmental organizing, spurring local peoples' participation in key decisions, and providing access to environmental information, both the environment and the most vulnerable members of society would benefit substantially".[199]

The 1992 Rio Declaration states in its Principle 10 that

> "environmental issues are at best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making process. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided".[200]

"Similarly, Chapter 23 of Agenda 21, on strengthening the role of major groups, proclaims that individuals, groups and organisations should have access to information relevant to the environment and development, held by national authorities, including information on products and activities that have or are likely to have a significant impact on the environment, and information on environmental protection matters".[201]

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[198] M. FITZMAURICE, "Public Participation in the North American Agreement on Environmental Cooperation", *ICLQ*, vol. 52, April 2003, p. 334.
[199] A.SACHS, *Eco-Justice: Linking Human Rights and the Environment*, Worldwatch Paper 127, 1995, p.45.
[200] *Rio Declaration on Environment and Development*, adopted by the United Conference on Environment and Development in Rio de Janeiro, June 3-14, 1992.
[201] A. KISS, D. SHELTON, *op. cit.*, p. 669.

The 1998 Aarhus Convention[202] is according to Koffi Annan, "by far the most impressive elaboration of principle 10 of the Rio Declaration, which stresses the need for citizen's participation in environmental issues".[203] In its Article 1, it states that those three principles shall be guaranteed by the state parties, "in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being". In this treaty access to information is elaborated as the basic requirement which must permit the participation of the citizens in the environmental decision-making process, and must enable them to have an effective remedy in case of environmental harm.

What is noticeable with regard to environmental human rights is the parallel that can be drawn with environmental procedural requirements in the relations between states. In both cases, a government is no longer entitled to act completely alone regarding activities that may affect the environment. Governments must take into account the positions of other states and of individuals which might be affected by such an activity. The point is that the participation of such other States and individuals will only be possible if they are provided with clear, detailed and sufficient information, in order to enable them to participate in an effective manner.

"In the context of human rights and the environment, the right to information may also be considered a right of states *vis à vis* other states or of states *vis à vis* transnational corporations. In this context a state's access to information would enable it to transmit the information to its residents and to otherwise protect the human rights of those residents.[204]

The importance of procedural requirements in international environmental law is now difficult to deny. It seems well established that states must not only protect and preserve the environment, but also that they must do so by following specific rules for decision-making. Furthermore, the particular standing of the exchange of information principle seems also to be a normal requirement for the management of environmental issues. However, what is not perfectly clear yet is the specific content of this duty to inform.

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[202] Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters, adopted by the UNECE in Aarhus, Denmark, 25 June 1998.
[203] Koffi Annan, Secretary-General to the United Nations, www.unece.org/env/pp.
[204] D. HUNTER, J. SALZMAN, D. ZAELKE, *International Environmental Law and Policy*, 2nd edition, University Casebooks Series, Foundation Press, New York, 2002, p. 1317.

3.2.3. The content of the obligation to exchange environmental information

Several questions arise regarding the duty to inform that can be found in several environmental instruments. The question of the threshold from which information must be made available is not clearly and uniformly resolved at the international level nor the nature of the information which must be shared.

3.2.3.1. What threshold of harm to the environment must reached to activate an obligation to exchange information ?

"The duty to exchange information on (potentially) harmful transboundary pollution can be considered a rule of international law. The difficulty lies in the delineation of the rule's extent. It is not clear what degree of harm or risk is necessary to actually "activate" the duty. State practice points to a relatively high threshold".[205]

Since the Chernobyl accident in 1986, the duty to inform or to notify potentially affected States of an emergency situation has been strongly established. Since then, this duty has progressively moved toward a lower threshold. Several treaties require a transboundary environmental harm or at least a significant risk of environmental harm to activate the duty. However, the 1998 Aarhus Convention represents a rupture with this approach as it requires environmental information to be made available to the public in every circumstance, without requiring the proof of a transboundary harm nor of a risk of such harm.

In emergency situations (such as for example the escape of hazardous substances following an accident) the early availability of information "is necessary to allow other states and members of the international community to take the necessary actions to minimize damage".[206]

Clear formulation of the duty to inform in emergency situations can be found in the 1992 Rio Declaration, Principle 18, in the 1982 UNCLOS, Article 198, in the 1989 Basel Convention on Transboundary Movements of Hazardous or other Wastes, Article 13, in the 1992

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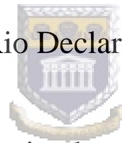
[205] E. BROWN WEISS, S.C. MCCAFFREY, D. BARSTOW MAGRAW, P.C. SZASZ, R.E. LUTZ, *op. cit.*, p. 375.

[206] P. SANDS, *op. cit.*, p. 842.

Convention on the Transboundary Effects of Industrial Accident, in the 1992 Biodiversity Convention, and in the 2000 Biosafety Protocol. As far as non binding instruments are concerned, this very duty can be found in the 1974 OECD Recommendation C(74) 224 on Principles Concerning Transfrontier Pollution Paragraph 9, in the 1988 OECD Council Decision on the Exchange of Information Concerning Accidents Capable of Causing Tranfrontier Damage, and in the 1978 UNEP Principles of Conduct.

Several scholars consider this duty to inform in an emergency situation as a rule of customary international law[207].

The same conclusion could be reached concerning information on activities other than emergencies, when there is a significant harm or risk of harm to the environment. Here the threshold required to give rise to a duty to inform is lowered; emergency is not required, and a simple risk of harm is sometimes sufficient, if this risk is "significant". This notion of significant risk is found in several international instruments: the United Nations General Assembly 1972 Resolution 2995, the 1987 Brundtland Report of the World Commission on Environment and Development, and the Rio Declaration Principle 19, which provides that:



> "States shall provide prior and timely notification and relevant information to potentially affected states on activities that may have a significant adverse transboundary environmental effect".

The 1974 OECD Recommendation states that in the case in a country of "works or undertaking which might create a significant risk of pollution, this country should provide early information to other countries which are or might be affected".
The more recent ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities also refer to the notion of risk of significant harm in its Article 8:

> "If the assessment referred to in Article 7 indicates a risk of causing significant transboundary harm, the state of origin shall provide the state likely to be affected with

[207] P. SANDS, *op. cit.*, p. 841-843.

timely notification of the risk and the assessment and shall transmit to it the available technical and all other relevant information on which the assessment is based".[208]

Sands suggests that "customary law does and should require states planning activities which might entail a significant risk of transfrontier pollution to give early notice to a state likely to be affected".[209]

A third step seem to be now achieved with regard to the provision of information on the environment in circumstances other than emergencies. At this stage neither a risk of significant harm nor a significant risk of harm is required. The duty to provide information is completed by a right to obtain access to information; it derives from the Rio Declaration, Principle 10 and from the theory of procedural environmental human rights. Several texts create such an obligation to provide information.

The 1992 OSPAR Convention was the first international convention to provide such a specific rule, in its Article 9:

> "The Contracting Parties shall ensure that their competent authorities are required to make available the information described in paragraph 2 of this Article to any natural or legal person, in response to any reasonable request, without that person's having to prove an interest, without unreasonable charges, as soon as possible and at the latest within two months".

In the 1998 Aarhus Convention access to information is the first of the three pillars on which is constructed "the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being" (Article 1).
In a very detailed manner Article 4 provides that:

> "Each Party shall ensure that (…) public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation (…)

[208] ILC, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, adopted at its 53rd session, Official Records of the General Assembly, 56th Session, Supplement number 10 (A/56/10), chp. V.E.1).
[209] P. SANDS, *op. cit.*, p. 837.

(a) Without an interest having to be stated;

(b) In the form requested (…)".

The second paragraph specifies that "the environmental information (…) shall be made available as soon as possible, and at the latest within one month after the request has been submitted".

These texts, which are both applicable at least to the United Kingdom (Ireland has not yet ratified the Aarhus Convention) could be said to indicate a trend in international environmental law tending toward the recognition of a duty to provide the public with access to environmental information even without a risk of harm to the environment, and a corollary right to have access to this information. However, those rights are not unlimited, and both the OSPAR and the Aarhus Conventions contain provisions restraining the access to information, by the exclusion of certain categories.

3.2.3.2. What is "environmental information"?

The Decision of the OSPAR Arbitral Tribunal in the *Mox Plant* Case gave a narrow interpretation of the definition of information contained in Article 9§2 of the OSPAR Convention. According to this Article, the information that must be made available is

> "any available information in written, visual, aural or data-base form on the state of the maritime area, on activities or measures adversely affecting or likely to affect it and on activities or measures introduced in accordance with the Convention".

In this case Ireland requested from the United Kingdom fourteen different categories of information, such as for example the estimated annual production capacity of the Mox facility, the sales volumes, the percentage of plutonium already on site, the number of employees, etc.[210] Ireland's theory was one of "inclusive causality", which make that "anything which facilitated the performance of an activity is to be deemed part of that activity".[211]

[210] PCA, *Dispute concerning Access to Information under Article 9 of the OSPAR Convention* (Ireland vs. United Kingdom of Great Britain and Northern Ireland), Final Award, The Hague, 2 July 2003, § 161.

[211] *Idem*, § 164.

The Tribunal did not follow this route, and interpreted the Article 9§2 in a very narrow way, limiting its scope: "the scope of the information is not environmental, in general, but, in keeping with the focus of the OSPAR Convention, 'the state of the maritime area'"[212]. Therefore the Tribunal was able to conclude that none of the fourteen categories of information sought by Ireland could "plausibly be characterised as 'information on the state of the maritime area'".[213]

In its Dissenting Opinion Judge Gavan Griffith expressed his disagreement with this conclusion. In his opinion the Tribunal was wrong in confining the terms of the second category of information considered by Article 9§2, namely information "on activities or measures adversely affecting or likely to affect the state of the maritime area", so as to reduce it only to information on the state of the maritime area. According to Judge Griffith, this created a redundancy, as the information on the state of the maritime are was already considered in Article 9§2.[214]

This narrow definition can be compared with the wider one given in the Aarhus Convention. In the latter text, environmental information, to which access is guaranteed by the Article 4, encompasses the state of elements of the environment (this including in particular the biological diversity and its components, including GMOs), the factors (such as substances and energies, but also activities or measures, including policies, legislation, etc.) affecting or likely to affect the elements of the environment, and cost-benefit and other economic analyses and assumptions used in environmental decision-making, and finally the state of human health and safety, inasmuch as they may be affected by the state of the elements of the environment, or through these elements, by the factors, activities or measures mentioned above (Article 1).
It was the argument of Ireland, rejected by the Tribunal, to extend the definition of environmental information given by the OSPAR Convention so as to include "cost-benefit and other economic analyses and assumptions used in environmental decision-making", by

[212] *Idem*, § 163.
[213] *Idem*, § 163.
[214] Dissenting Opinion of Gavan Griffith QC in the PCA *Dispute concerning Access to Information under Article 9 of the OSPAR Convention* (Ireland vs. United Kingdom of Great Britain and Northern Ireland), PCA, Final Award, The Hague, 2 July 2003, § 38.

application of Article 31(3) c) of the 1969 Vienna Convention on the Law of Treaties,[215] in order to reveal what was implicit in the OSPAR Convention.

Both the OSPAR and Aarhus Conventions give similar justifications for the refusal of a request for environmental information. Those include the confidentiality of the proceedings of public authorities, international relations, national defence, public security, the course of justice, commercial and industrial confidentiality, intellectual property rights, the confidentiality of personal data and/or files, the interests of a third party which has supplied the information without being under a legal obligation to do so, the interests of the environment, if the disclosure would make it more likely that the environment to which such material relates would be damaged.

However, the Aarhus Convention specifies that those grounds for refusal “shall be interpreted in a restrictive way”, and insists on the “public interest served by disclosure” (Article 4). Even though the access to information is restricted by many “grounds for refusal”, the Aarhus Convention currently provides for the broadest right of access to environmental information. And this especially since the very narrow interpretation made by the OSPAR Arbitral Tribunal in the *Mox Plant* Case.

All these developments reinforce the idea that the legal requirement of the exchange of environmental information is of a very broad scope. It supports all the international environmental law. This law, based on the intrinsic interdependence of the environment, and of the ecosystems, implies that a high degree of cooperation be achieved between States (as well as with the non governmental organizations and the international organizations). This high level of cooperation requires as a necessary prerequisite the exchange of information, in order to achieve the best environmental decision possible. It could be today the emergence of the principle of information exchange as a customary rule of international environmental law. However, this principle is far from being unlimited.

[215] Article 31(3) c) of the 1969 Vienna Convention on the Law of Treaties states as a general rule of interpretation of treaties that “there shall be taken into account, together with the context (…) any relevant rules of international law applicable in the relations between the parties”.

Chapter 4: The possible outcome of the *Mox Plant* Case before the UNCLOS Arbitral Tribunal

Depending on the outcome of the procedure instigated by the European Commission against Ireland before the European Court of Justice, the Arbitral Tribunal could be entitled to give a decision on the merits of the *Mox Plant* Case. If so its decision would be of great importance concerning the specific matter of the access to information. This could be for this Tribunal an occasion to affirm the value and the force of the duty to inform of activities likely to have an harmful effect on the environment. This would entail a broad interpretation of Article 197 of the UNCLOS, on which Ireland has based its argument to require access to information.

In the same perspective the ECJ, if it recognises itself competent to apply the UNCLOS in the present litigation between Ireland and the United Kingdom, could as well give a broad interpretation of Article 197 on cooperation.

If so, those decisions would be in total accordance with the actual trends in international law, and more specifically in environmental international law, which require effective cooperation between states (as well as between states and other elements of the international society), in order to implement efficiently the objectives of the international legal order.

I shall argue here that the Arbitral Tribunal should seize this opportunity to apply a broad notion of cooperation. It has the sufficient legal power to do so, and doing so it would improve the protection of the environment.

4.1. Conclusions: For a systemic integrated interpretation of Article 197

The Arbitral Tribunal could give an extensive interpretation of Article 197. It could give to the obligation to cooperate under the UNCLOS its place among the fundamental rules relating to the protection of the marine environment, and of the environment in general. The Tribunal could at the same time affirm the importance and role of the duty to exchange information in order to fulfil the duty to cooperate.

Article 197 states that

> "States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features".

In their Memorials, Ireland and the United Kingdom gave different interpretations of this text. The Tribunal, whatever the interpretation it would choose, would be entitled to interpret the duty to cooperate contained in this Article in a way such as to recognise its fundamental status.

4.1.1. The interpretations of Ireland and the United Kingdom

According to the United Kingdom, Article 197 provided "for cooperation in formulating and elaborating international rules, standards and recommended practices and procedures (…) it [was] not concerned with the implementation of those rules, standards, practices and procedures".[216] Moreover, the United Kingdom contended that Article 197 referred to cooperation on a global basis, and as appropriate, on a regional basis. It did not refer to bilateral cooperation.[217] The United Kingdom considered as a consequence that it had not breached the obligation contained in this Article, having for several decades cooperated for the purpose of "*formulating and elaborating international rules, standards and recommended practices and procedures*", on both a global and a regional basis, directly and through competent international organisations, including the European Community, Euratom, IMO, IAEA and the OSPAR Commission".[218]

Ireland supported a different view. In its Reply, it insisted on the fact that "Article 197 does not oblige States Parties to cooperate for the purpose of formulating and elaborating

[216] Rejoinder of the United Kingdom in the Mox Plant Case (Ireland v. the United Kingdom), 24 April 2003, § 7.8.
[217] *Idem*, § 7.9.
[218] Counter-Memorial of the United Kingdom in the Mox Plant Case (Ireland v. the United Kingdom), 9 January 2003, § 6.36.

international rules, standards and recommended practices and procedures", but "obliges States Parties to cooperate "in formulating and elaborating international rules, standards and recommended practices and procedures".[219] Whenever state parties formulate and elaborate international rules, etc., they must cooperate.

The difference between those two interpretations is quite subtle, and the position of the Arbitral Tribunal should enlighten this point, by giving an authoritative interpretation of Article 197.

4.1.2. A possible interpretation of Article 197

The *Mox Plant* Case could be a good opportunity for the Arbitral Tribunal to state a wide interpretation of Article 197. This Article could encompass a large duty to cooperate, not only in formulating rules, standards and procedures, but also in the enforcement of such rules, standards and procedures, in the large perspective to preserve efficiently the marine environment. Indeed, Article 197 was adopted in 1982, ten years only after the Stockholm Conference on the Human Environment, where the first stones for international environmental law were put in place. Since then the corpus of international rules intending to preserve the environment has been growing, and is now very developed.[220] Several new concepts have emerged and are nowadays firmly established in international environmental law, such as for example the principle of precaution, or the principle of cooperation and of exchange of information. The provisions of the Montego Bay Convention which deal with issues of environmental protection can not be read separated to those evolutions. Without going to an "extreme" position where Article 197 may be interpreting as containing an obligation where none exists, a too restrictive interpretation, which would limit the scope and effect of the duty to cooperate, would be here difficult to justify.

In the *Mox Plant* Case particularly, several arguments can be raised in favour of such a broad interpretation, related directly to the UNCLOS, to the context of the *Mox Plant* Case, or related to the general international law principles.

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[219] Reply of Ireland in the Dispute concerning the Mox Plant, International Movements of Radioactive Materials, and the Protection of the Marine Environment of the Irish Sea (Ireland v. the United Kingdom), 7 March 2003, § 7.38.
[220] P. SANDS, *op. cit.*, p. 127-128.

The 1969 Vienna Convention on the Law of Treaties gives in its Article 31 general rules for the interpretation of treaties. The first paragraph of this Article states that

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

The UNCLOS was designed by state parties "prompted by the desire to settle, in a spirit of mutual understanding and cooperation, all issues relating to the law of the sea" (Preamble, §1). Cooperation between states is required concerning several aspects of the Convention: in the conservation and management of living resources, in the construction and improvement of means of transport, in the marine scientific research, and in the development and transfer of marine technology. Concerning specifically Ireland and the United Kingdom in the *Mox Plant* Case, the Arbitral Tribunal will have to take into account the Article 123.

The situation of the Irish Sea is directly concerned with this Article, as it is a semi-enclosed sea. The duty assumed by states bordering an enclosed or semi-enclosed sea to cooperate "in the exercise of their rights and in the performance of their duties under this Convention", even if expressed in an hortatory language, has legal consequences: to the minimum it expresses the opinion of the parties regarding the attitude they should adopt regarding such seas. As those seas are "shared" between the coastal States, cooperation must be implemented.

Another provision of Article 31 of the Vienna convention important in this case in the paragraph 3) c), which states that for the interpretation of treaties

> "there should be taken into account (…) any relevant rules of international law applicable in the relations between the parties".

McLachlan analyses this subparagraph as formulating a general principle of treaty interpretation: the principle of "systemic integration" within the international legal system.[221] Noting that the international legal system has nowadays become very complex, being "full of universal, regional or even bilateral systems, subsystems and sub-subsystems of different

[221] C. MCLACHLAN, "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention", *ICLQ*, vol. 54, number 2, April 2005, p. 279.

levels of legal integration", he observes that this leads to the increasing concern about the fragmentation of international law. The principle of systemic integration is meant to be a technique of interpretation "that permits reference to other rules of international law offers the enticing prospect of averting conflict of norms, by enabling the harmonisation of rules rather than the application of one norm to the exclusion of another".

The foundation of this principle is that treaties are "creatures of international law". As legal texts they "only make sense within the context of the system that gives them authority and meaning", and therefore they must "be applied and interpreted against the background of the general principles of international law". The goal of an integrated interpretation of treaties is to reduce fragmentation and promote coherence in international law.
Concretely, and this being limited to "hard cases" – and McLachlan recognises that the *Mox Plant* Case is one of those – it may be sometimes necessary to use other international sources of law to determine the particular meaning of certain provisions of a treaty.

Sands also notes in recent years the growing "willingness of international courts charged with the interpretation and application of an international agreement to have regard to rules of international environmental law arising outside the treaty which is being interpreted".[222] This position is backed among others by the decision of the ICJ in the *Gabcikovo-Nagymaros* Case: the Court recognised that it is appropriate, in interpreting and applying environmental norms, to have regard to new norms and standards which my have been developed in the period after a treaty has been adopted. The Court states precisely that "such new norms have to be taken into consideration, and such new standards given proper weight, not only when states contemplate new activities but also when continuing with activities begun in the past".[223]

This approach is very close to the position of the OSPAR Tribunal in the *Mox Plant* Case: this Tribunal accepted that it was entitled to draw upon current international law and practice in construing this treaty obligation. However, it held that neither of the instruments contended for by Ireland were in fact rules of law applicable between the parties and therefore declined to apply them: the Rio Declaration does not create binding obligations for its signatories, and

[222] P. SANDS, *op. cit.*, p. 131.
[223] *Idem*, p. 133.

the Aarhus Convention had not been ratified at that moment by neither Ireland nor the United Kingdom.

One of the Arbitrators, however, dissented on this point. Gavan Griffith insisted on the fact that the Aarhus Convention was in force, and that it had been signed by both Ireland and the UK. The latter had publicly stated its intention to ratify that Convention as soon as possible. In Griffiths' opinion, this was sufficient to allow the OSPAR Tribunal to consider the Aarhus Convention at the least as "evidence of the common views of the two parties on the definition of environmental information". This position was furthermore in conformity with the principle stated in Article 18 of the 1969 Vienna Convention, which obliges a state that has signed but not ratified a treaty to "refrain from acts which would defeat the object and purpose" of the treaty, "until it shall have made its intention clear not to become a party to the treaty".

In the present case, the Arbitral Tribunal constituted under the UNCLOS could place its reasoning in the same perspective. Moreover, this very approach of systemic integrated interpretation is also part of the requirements of the UNCLOS: Article 293 provides that the Arbitral Tribunal "shall apply this Convention and other rules of international law not incompatible with this Convention".

With an integrated approach, the Arbitral Tribunal could interpret Article 197 of the UNCLOS in the light of the current development of general international law, in particular regarding the emergence on one hand of the obligation to cooperate as a fundamental principle of international environmental law, and on the other hand of the exchange of information as a "necessary prerequisite" for the fulfilment of the duty to cooperate.

Besides, in so doing the Tribunal would place itself in accordance with the Order made by the ITLOS in the provisional measures phase. Indeed, the ITLOS considered in this Order the duty to cooperate as "a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law", going so far as to prescribe cooperation between Ireland an the United Kingdom as a provisional measure, requiring the exchange of further information with regard to the incidence of the Mox Plant on the marine environment of the Irish Sea.

Finally, if the Arbitral Tribunal did not give Article 197 such a broad meaning so as to encompass a broad duty to cooperate between states, even a strict reading of this Article must include a duty to exchange information. If the Tribunal was to interpret this Article such as to give it the meaning contended by the United Kingdom, the exchange of information would be an important part of it. The United Kingdom contended that the duty to cooperate stated in Article 197 only covered a duty to cooperate to the formulation of international rules, standards and other recommended practices and procedures. Such rules existed, so the United Kingdom had fulfilled its obligation. However, even such a strict interpretation for Article 197 could not delete the exchange of information as a prerequisite. To get an efficient cooperation to formulate rules, all parties must get appropriate information on the topics of those new rules. The exchange of information must be seen then as an obligation which must be fulfilled regularly, even when no new rules are being formulated, so as to allow the parties, when such a moment comes, to cooperate efficiently, and with all the necessary knowledge.

The Arbitral Tribunal will have the difficult task to determine the exact meaning of Article 197. The words employed are vague, and the difference between the interpretations proposed by the United Kingdom and Ireland are quite subtle. Unfortunately, the French version of the text is of no help. It states that

> « Les Etats coopèrent au plan mondial et, le cas échéant, au plan régional, directement ou par l'intermédiaire des organisations internationales compétentes, à la formulation et à l'élaboration de règles et de normes, ainsi que de pratiques et procédures recommandées de caractère international compatibles avec la Convention, pour protéger et préserver le milieu marin, compte tenu des particularités régionales ».

The Tribunal would have the same difficulty to determine the meaning of *la coopération à la formulation de règles, normes, pratiques et procédures recommandées*, being a *coopération dans le but de formuler des normes*, or a *coopération par le biais de la formulation de normes*.

Nevertheless, the consequences of this interpretation could be important: by choosing a wide interpretation, the Tribunal would stress the obligation to cooperate at the international level for the protection of the environment.

After having determined the meaning of Article 197, the Arbitral Tribunal will have to apply the rule which will have been emerged to the concrete circumstances of the *Mox Plant* Case.

4.2. Recommendations: Application of Article 197 in the *Mox Plant* Case

I start from the proposition that the Arbitral Tribunal constituted under the UNCLOS has accepted to apply the systemic integrated interpretation principle in its interpretation of Article 197. Having regard to the context, to the other international conventions applicable between the parties, and to the emergence of the duty to cooperate as predominant in environmental protection, the Arbitral Tribunal has defined the obligation to cooperate contained in Article 197 as being of a broad meaning, and as including a duty to exchange information.

A question must, however, still be solved in order for the Tribunal to apply this Article to the present situation: the threshold. From which level of pollution must cooperation and exchange of information take place? Is a risk sufficient to trigger this obligation? If so, which "level of risk" is necessary?

In more and more instruments, a risk of environmental harm is sufficient to start cooperation. Those texts consider generally that there must be a significant risk of harm, or a risk of significant harm.

In the *Mox Plant* Case, the Arbitral Tribunal will have to determine if the risk is sufficient to give birth to an obligation to cooperate and to exchange information between Ireland and the United Kingdom. Surprisingly, among all the instances which have been examining this case, no consensus exist regarding the impact on the environment of the Mox Plant. Some contend with the United Kingdom that this impact is minimum, and will not affect the Irish Sea ecosystems, while other are more sceptical about the complete absence of risk.

The European Commission has been of the opinion that the discharges from the Sellafield site relating to the Mox Plant were of very little impact on the health or on the environment. In an opinion given in February 1997 under Article 37 of the EURATOM Treaty, it contended that "under normal operating conditions, the discharge of liquid and gaseous effluents will be

small fractions of present authorized limits and will produce an exposure of the population in other Member States that is negligible from the health point of view".

The Commission further contended that "in an event of unplanned discharges of radioactive waste which may follow an accident on the scale considered in the general data, the doses likely to be received by the population in other Member States would not be significant from the health point of view".

The conclusive view of the European Commission is that "the implementation of the plan for the disposal of radioactive wastes arising from the operation of the BNFL Sellafield mixed oxyde fuel plant, both in normal operation and in the event of an accident of the type and magnitude considered in the general date, is not liable to result in radioactive contamination, significant from the point of view of health, of the water, soil or airspace of another Member State".[224]

But this view is not generally shared. For example Judges Caminos, Yamamoto, Park, Akl, Marsit Eiriksson and Jesus, in their Joint Declaration to the Order of ITLOS in the provisional measures phase, found that an important characteristic of the dispute between Ireland and the United Kingdom was "an almost total lack of agreement on the scientific evidence with respect to the possible consequences of the operation of the MOX Plant on the marine environment of the Irish Sea".[225]

This statement has led the judges to invoke "prudence and caution" to prescribe cooperation and exchange of information between the parties as provisional measures.

In the particular circumstances of the case, the Arbitral Tribunal could as well invoke the precautionary approach to order the parties to cooperate. It would follow its position in the provisional measures phase, where it confirmed the measures previously ordered by the ITLOS, which were founded on a precautionary approach. Those provisional measures have proven their efficiency: "there is now improved cooperation between Ireland and the UK over

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[224] *Dispute concerning Access to Information under Article 9 of the OSPAR Convention (Ireland vs. United Kingdom of Great Britain and Northern Ireland*, Final Award, The Hague, 2 July 2003, § 17.

[225] Joint Declaration of the Judges Caminos, Yamamoto, Park, Akl, Marsit, Eiriksson and Jesus, in the ITLOS Order on the "Request for provisional measures", *Mox Plant* case, Case number 10 (Ireland v. United Kingdom), 3 December 2OO1.

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".[226]

It has even been argued that the provisional measures ordered by the ITLOS were unnecessary, inasmuch as "both Ireland and the United Kingdom have duties to cooperate, negotiate and to take the other's considerations into account under the LOSC (Articles 123 and 197), the Euratom treaty, and customary international law (…). It would have been possible for the ITLOS merely to note the existence of these obligations".[227] However, the fact for several international jurisdictions to stress the need for an improved cooperation between states serves to emphasize the role of the duty to cooperate in the modern international society.

[226] R. CHURCHILL, J. SCOTT, "The MOX Plant Litigation: the First Half-Life", *International and Comparative Law Quarterly*, vol. 53, number 3, July 2004, p. 675.

[227] C. BROWN, "Provisional Measures before the ITLOS: the MOX Plant Case", *International Journal of Marine and Coastal Law*, vol. 17, number 2, June 2002, p. 283.

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