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The OSPAR Arbitration of the MOX Plant Dispute

DANIEL M. BODANSKY
Emily and Ernest Woodruff Chair
in International Law
University of Georgia School of Law
bodansky@uga.edu

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Not so long ago, concerns were commonly expressed about the infrequency of international dispute settlement. More countries were withdrawing from the compulsory jurisdiction of the ICJ than accepting it. Proposals for an international criminal court had languished for decades. Except for a few regional tribunals, such as the European Commission and Court of Human Rights – and a few specialized areas, such as investment arbitrations – international dispute settlement was a rarity.[1] In international environmental law, there were *Trail Smelter* and the *Behring Fur Seals Arbitration*, and not much else[2] – on average, barely a case a decade through

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[1] *See, e.g.,* J.G. Merrills, *International Dispute Settlement* (Cambridge: Cambridge Univ. Press, 3rd ed. 1998), at 165 ("by comparison with domestic courts, international courts and tribunals occupy a relatively insignificant position").

[2] As Peter Sand noted in 1991, "One of the many myths of environmental law is the assumption – found in many legal textbooks – that international disputes in this field are settled along the lines of the 1941 *Trail Smelter* arbitration. Yet over the past 50 years, there have been only two inter-governmental dispute adjudications that could even remotely be compared to *Trail Smelter* – and even these claims (the 1957 *Lake Lanoux* arbitration between France and Spain and the 1968 *Gut Dam* arbitration between Canada and the USA) concerned classical questions of water use and flood damage, rather than a genuine environmental problem." Peter Sand, "New Approaches to Transnational Environment Disputes, *Int'l Envtl. Aff.* 3 (1991): 193-206, at 193; *see also* Richard B. Bilder, "The Settlement of Disputes in the Field of the International Law of the Environment," *Recueil des Cours*, 144 (1975): 139-239 (noting that "governments have tended to avoid judicial and liability-based methods of dealing with [international environmental questions]"). A useful compilation of early international decisions relating to the environment can be found in *International Environmental Law Reports*, vol. 1, edited by Cairo A.R. Robb (Cambridge:

the 1980s.

How different things look today. With the establishment of the International Criminal Court, the International Tribunal for the Law of the Sea (ITLOS), and the WTO Dispute Settlement Body, the revival of arbitration under the auspices of the Permanent Court of Arbitration, and the emergence of many new specialized international dispute settlement bodies, concerns are now more often expressed about the proliferation of tribunals and the potential fragmentation of international law.[3] Although, even now, few international environmental disputes have been decided through traditional means,[4] cases are frequently considered by newer, quasi-legal noncompliance mechanisms.[5]

The MOX litigation has been a poster child for the emerging issue of fragmentation in international law. It has involved proceedings in four different forums: an arbitral tribunal convened pursuant to Article 21 of the OSPAR Convention for the Protection of the Marine Environment of the North-East Atlantic,[6] ITLOS, an arbitral panel established under Annex VII of the UN Convention on the Law of the Sea (UNCLOS),[7] and the European Court of Justice(ECJ). The dispute concerns potential radioactive pollution of the Irish Sea from a mixed oxide (MOX) manufacturing plant at Sellafield, on the northwestern coast of England. Ireland initially brought a claim

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Cambridge Univ. Press 1999). It includes a total of only 10 cases, which it describes as representing "all of the well-known and some less well-known decisions of international tribunals" during the period from 1872 to 1968.

[3] "Symposium Issue: The Proliferation of International Judicial Bodies: Piecing Together the Puzzle," *NYU J. Int'l L. & Pol.* 31 (1999): 679-933; Jonathan I. Charney, "Is International Law Threatened by Multiple International Tribunals?" *Recueil des Cours* 271 (1998): 101.

[4] In addition to the *MOX Plant* case addressed in this volume, recent environmental cases include *Case Concerning the Gabcikovo-Nagymaros Project* (Hungary v. Slovakia), 1997 ICJ Rep. 92; *Southern Bluefin Tuna* (New Zealand v. Japan, Australia v. Japan), ILM 38 (1999): 1624; and the *Case Concerning Pup Mills on the River Uruguay* (Argentina v. Uruguay), which is currently pending in the ICJ. On international dispute settlement, s*ee generally* Cesare P.R. Romano, "International Dispute Settlement," in Daniel Bodansky, Jutta Brunnee and Ellen Hey, eds., *Oxford Handbook of International Environmental Law* (Oxford: Oxford Univ. Press 2007), at 1036.

[5] Jan Klabbers, "Compliance Procedures," in Bodansky, et al, *Oxford Handbook, supra* note 4, at 995.

[6] Convention for the Protection of the Marine Environment of the North-East Atlantic, 22 Sept. 1992, 32 ILM 1069.

[7] UN Convention on the Law of the Sea, *opened for signature* 10 Dec. 1982, 1833 UNTS 397. The UNCLOS claim led to the creation of a five-member arbitral panel under Article 287 and Annex VII of UNCLOS.

against the United Kingdom under the OSPAR Convention, on the ground that the United Kingdom had failed to provide Ireland with access to relevant information regarding its decision to commission the plant. While this case was still pending, Ireland raised a separate challenge under UNCLOS, arguing that the commissioning and operation of the MOX plant violated the UK's obligations under UNCLOS to protect the marine environment. Meanwhile, the European Commission, concerned about this ongoing dispute between two EU member states, initiated proceedings in the European Court of Justice, arguing that Ireland had violated the exclusive jurisdiction of the ECJ by submitting its dispute with England to arbitration under UNCLOS. Although these separate proceedings did not result in any direct conflicts – ITLOS declined to block the commissioning of the plant;[8] the OSPAR arbitral tribunal ruled against Ireland's claim to additional information; the ECJ ultimately found that it had exclusive jurisdiction over the dispute,[9] and the arbitral panel convened under UNCLOS Annex VII deferred to the ECJ's decision – the multiple proceedings raised concerns about forum shopping and jurisdictional conflict.

This volume focuses on the initial piece of the MOX puzzle – the proceedings brought by Ireland concerning access to information, which represented the inaugural arbitration under the OSPAR Convention. In its final award, the arbitral tribunal concluded that Article 9 of the OSPAR Convention imposes a direct duty on the United Kingdom to provide information (rather than merely a duty to establish a domestic regulatory scheme), but then construed the scope of this duty narrowly. The opinion has engendered considerable commentary,[10] and is notable not only for its specific conclusions regarding the nature and scope of the right of access to information, but for its more general discussion of the relationship of the OSPAR regime to other legal rules on access to information, including

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[8] *The MOX Plant Case* (Ireland v. UK), ITLOS Case No. 10 (Interim Measures, Order of 3 Dec. 2001), 41 ILM 405 (2002).

[9] *Commission of the European Communities v. Ireland*, Case 459/03, Judgment of 30 May 2006. The ECJ found that Ireland violated Art. 292 of the Treaty Establishing the European Community, 2002 OJ (C 325) 33.

[10] *See* Robin Churchill and Joanne Scott, "The MOX Plant Litigation: The First Half-Life," *International & Comparative Law Quarterly* 53 (2004): 643-76 (2004); Malgosia Fitzmaurice, "Dispute Concerning Access to Information under Article 9 of the OSPAR Convention," *International J. Marine & Coastal Law* 18 (2003): 541-58; Ted L. McDorman, "Access to Information under Article 9 of the OSPAR Convention," *American J. Int'l L.* 98 (2004): 330-39; Yuval Shany, "The First *MOX Plant* Award: The Need to Harmonize Competing Environmental Regimes and Dispute Settlement Procedures," *Leiden Journal of International law* 17 (2004): 815-27.

European Community directives and the 1998 Aarhus Convention.[11] The majority focused closely on the obligations created by the OSPAR Convention itself, and declined to apply rules found in other regimes or that have not yet achieved the status of law. The decision's strict interpretation of the right of access to information, and its unwillingness to progressively develop the law or to look beyond the OSPAR Convention in interpreting this right, has been criticized by some commentators and environmentalists.[12] One prominent scholar, who represented Ireland in the OSPAR proceedings, said that the majority's approach "suggests that environmental considerations – including international legal developments which have occurred since the 1980s – have perhaps not yet fully permeated the reasoning processes of some classical international lawyers."[13] But the majority's "legalistic" approach – its focus on the treaty text rather than on broader policy considerations – should not be surprising. Ireland chose to invoke a legalized method of dispute resolution to address a comparatively narrow legal issue regarding access to information. In a field where non-legal modes of dispute resolution are on the rise, and where the lines between "hard" and "soft" law are often blurry, the tribunal's punctilious approach to the distinction between law and policy reflected its view of its proper role as a legal institution.

Factual and Procedural Background

The Sellafield nuclear facility is located in northwest England, on the Irish Sea, 184 kilometers (114 miles) from the coast of Ireland. Established in 1947 to produce plutonium and other nuclear materials for the British atomic bomb project, Sellafield was the site of the world's first civilian nuclear reactor and has, throughout its history, played a central role in Britain's nuclear program, both military and civilian. It covers four square kilometers, employs approximately 10,000 people, and includes plutonium production facilities, reprocessing plants, and nuclear power reactors.

Sellafield's location on the Irish Sea has long raised fears in Ireland about potential radioactive contamination and, over the years, Ireland has

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[11] Convention on Access to Information, Public Participation in Decisionmaking and Access to Justice in Environmental Matters, 28 June 1998, 2161 UNTS 447; ILM 38 (1999): 517.

[12] *See, e.g.,* Shany, *supra* note 10.

[13] Philippe Sands, *Principles of International Environmental Law* (Cambridge Univ. Press, 2d ed. 2003), at 857-58.

repeatedly sought to close the Sellafield facility. According to Ireland, nuclear discharges from Sellafield have occurred since the early 1950s, making the Irish Sea one of the most radioactively-polluted, semi-enclosed seas in the world.[14] In addition to routine discharges, the Sellafield facility has experienced several significant accidents – the most severe, the Windscale fire in 1957,[15] which released large amounts of radiation into the marine environment. Although an OSPAR report noted in 2000 that the majority of radioactive inputs into the North-East Atlantic had been "drastically reduced," discharges of some radionuclides have increased since the mid-1990s as a result of the new Thermal Oxide Reprocessing Plant (THORP) at Sellafield.[16] Radioactive discharges from Sellafield are transported by ocean currents over a wide area, and have been detected as far away as Norway, which reportedly has considered taking legal action of its own against the United Kingdom.[17]

In 1992, British Nuclear Fuels (BNFL) – the government-owned company that operated the Sellafield facility until 2005 – decided to build a MOX manufacturing plant at Sellafield. MOX is a nuclear fuel produced from reprocessed plutonium and uranium oxides, which has been used in commercial reactors in France, Germany and Switzerland for more than twenty years. The plan for the Sellafield MOX plant was to import spent nuclear materials from foreign power plants, reprocess it at the THORP facility at Sellafield, and then use the reprocessed materials to manufacture MOX. At least initially, the MOX was to be re-exported back to foreign utilities by sea, since no nuclear reactors in the United Kingdom currently use MOX as a fuel.

Approval of the MOX plant involved both domestic and international elements. Pursuant to domestic law, BNFL applied to the local authorities for permission to build the plant and prepared an environmental impact statement. British authorities concluded that the radioactive discharges from the MOX plant would be minimal, at levels permissible under existing

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[14] *MOX Plant Case* (Ireland v. UK), Memorial of Ireland, 26 July 2002, at 9, *available at* www.pca-cpa.org..

[15] Until 1981, the Sellafield facility operated under the name of Windscale.

[16] OSPAR Commission, 2000 Quality Status Report, http://www.ospar.org/eng/html/welcome.html. According to the EC Commission, nuclear discharges in 1997 were only about 1% of levels in the 1970s. Churchill and Scott, *supra* note 10, at 673.

[17] Memorial of Ireland, *supra* note 14, at para. 1.68.

authorizations.[18] Domestic approval to build the MOX plant was granted in 1994 and construction proceeded between 1994 and 1996.

Before the plant could be approved, however, the United Kingdom also needed to meet two requirements under European Community law – one concerning the plant's environmental impacts and the other concerning its economic justification – which occupied an additional five years.

First, Article 37 of the Treaty Establishing the European Atomic Energy Community (EURATOM) requires states to provide the European Commission with information concerning plans to dispose of nuclear wastes, so that the Commission can determine whether the plan "is liable to result in the radioactive contamination of the water, soil or airspace of another member State."[19] Pursuant to this requirement, the United Kingdom submitted detailed information to the Commission about the potential environmental impacts of the MOX plant. In February 1997, the European Commission issued an opinion that, in essence, gave the plant a clean bill of health, finding that normal discharges from the MOX plant would have "negligible" effects on other member states, and that even unplanned discharges resulting from an accident would not likely result in "significant" radioactive contamination from "the health point of view." The Commission concluded that "both in normal operation and in the event of an accident of the type and magnitude considered in the general data," the MOX plant "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" (Decision, para. 17) – findings that, according to the United Kingdom, Ireland never contested.[20]

In addition to this environmental requirement, EURATOM directives require member states to perform a cost-benefit analysis of every new activity that results in exposure to ionizing radiation, to ensure that the

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[18] As the United Kingdom explained, the manufacture of MOX "is essentially a dry process so that any discharge of liquid effluent would be minimal." Memorial of United Kingdom, at para. 2.5.

[19] Treaty Establishing the European Atomic Energy Community, 25 Mar. 1957, 298 UNTS 167, *as amended by* Treaty of Nice (2001), 2001 O.J. (C.80) 1. The EURATOM Treaty was one of the founding instruments of the European Communities. Article 37 requires states to provide the European Commission with "general data relating to any plan 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."

[20] Counter-Memorial of the United Kingdom, at para. 2.7.

activity is "justified by the advantages which it produces."[21] Pursuant to these directives, the United Kingdom held five public consultations between 1997 and 2000 on the economic justification of the MOX plant, and commissioned two separate economic analyses by private consulting firms, one by the PA Consulting Group in 1997 and another by Arthur D. Little (ADL) in 2001, both of which concluded that the plant was economically justified. On the basis of the public consultations and reports, the UK Secretaries of State for Health and for Environment, Food and Rural Affairs determined on 3 October 2001 that the MOX plant was justified in accordance with EURATOM requirements.

The proposed MOX plant at Sellafield raised strong opposition by Ireland. Ireland wanted to see the Sellafield facility shut down, not expanded, and expressed concern both about routine discharges from the new plant and from the increased activity at the existing THORP facility, as well as about potential accidents during the transport of nuclear materials across the Irish Sea to and from Sellafield. Throughout the domestic approval process for the MOX plant, Ireland worked actively to stop it from proceeding, first by questioning the adequacy of the government's environmental impact assessment, and later, during the public consultations about the economic justification for the plant, by questioning the quality of the information provided, including the PA report, which the United Kingdom released only in redacted form. In July 1999, and again in 2000 and 2001, Ireland requested the full, unredacted version of the PA report under EC Directive 90/313 on Freedom of Access to Environmental Information and under the OSPAR Convention. The United Kingdom declined to release the full report, however, claiming that it contained confidential business information.

Faced with the imminent commissioning of the MOX plant by the United Kingdom, Ireland launched a multi-prong challenge on the basis of international law. Interestingly, Ireland chose not to proceed under the EURATOM Treaty (or under European Community law more generally), which establishes the most specific international regulatory regime applicable to the MOX plant, even though Ireland apparently believed that the decision to authorize the MOX plant violated several EURATOM

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[21] EURATOM Directive 80/836, 15 July 1980, art. 6. In the course of the MOX dispute, Directive 80/836 was replaced by EURATOM Directive 96/29, which requires that a activity's "health detriment" be justified by its "economic, social or other benefits." Directive 96/29, art. 6(1), 15 May 1996. Directive 96/29 entered into force in May 2000 and governed the last rounds of consultations in 2001. (Final Award, para. 33)

directives.[22] Instead, it relied on two more general treaties: the OSPAR Convention, which addresses marine pollution of the North-East Atlantic, and the UN Convention on the Law of the Sea, which establishes a comprehensive regime for the world's oceans. Ireland initiated arbitral proceedings under OSPAR on 15 June 2001 and under Annex VII of UNCLOS on 25 October 2001.

Of the two challenges, Ireland's claims under UNCLOS were more sweeping and, in contrast to the OSPAR proceedings, raised environmental issues directly. Ireland alleged that the United Kingdom had violated its duties under UNCLOS to: (1) carry out a proper environmental assessment of the likely impacts of the MOX plant on the marine environment of the Irish Sea, as required by UNCLOS Article 206; (2) cooperate with Ireland to protect a semi-enclosed sea pursuant to UNCLOS Articles 123 and 197; and (3) take all necessary steps to protect and preserve the marine environment of the Irish Sea pursuant to UNCLOS Articles 192, 193, 194, 207, 211, 212, 213, 217 and 222. On 9 November 2001, Ireland applied for provisional measures to suspend authorization of the MOX plant and to prevent the marine transport of radioactive materials to and from the plant. Because there had not yet been time to constitute an arbitral panel, the Irish request for provisional measures was considered by ITLOS, which found that Ireland had failed to show that the situation was urgent and therefore declined to block the plant, although it ordered that Ireland and the United Kingdom enter into consultations with one another.[23] Two years later, in June 2003, the Article VII Arbitral Tribunal that by now had been constituted, decided to suspend further proceedings pending a resolution of the United Kingdom's objection that the European Court of Justice had exclusive jurisdiction over the issues in the case under Article 292 of the EC Treaty.[24] Later that year, the European Commission initiated an infringement proceeding against Ireland in the European Court of Justice (ECJ) and, in 2006, the ECJ ruled that the claim by Ireland against the

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[22] In a letter of 16 October 2001, Ireland claimed that the United Kingdom's decision to authorize the MOX plant violated Directive 85/337/EEC, Directive 80/836/EURATOM, and Directive 96/239/EURATOM.

[23] *MOX Plant Case* (Ireland v. UK), ITLOS Case No. 10 - Request for Provisional Measures, Order of 3 Dec. 2001, ILM 41 (2002): 405 (2002), available at www.itlos.org. *See* Malcolm J.C. Forster, "The MOX Plant Case – Provisional Measures in the International Tribunal for the Law of the Sea," *Leiden J. Int'l L.*, 16 (2003): 611-19.

[24] *MOX Plant Case* (Ireland v. UK), Order No. 3, Suspension of Proceedings on Jurisdiction and Merits (UNCLOS Annex VII Arbitral Tribunal, 24 June 2003), 42 ILM 1187 (2003), available at www.pca-cpa.org. Article 292 of the EC Treaty provides; "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."

United Kingdom violated European Community law.[25]

By contrast to the UNCLOS proceeding, the OSPAR arbitration involved a much narrower issue, involving the right of access to information under Article 9 of the OSPAR Convention. Ireland claimed that the United Kingdom violated Article 9 by refusing to provide it with the unredacted version of the PA and ADL reports, which prevented Ireland from conducting a meaningful review of the economic justification for the MOX plant pursuant to EURATOM Directive 96/29. To hear Ireland's claim, a three-person arbitral panel was constituted in October 2001, and the parties agreed to designate the International Bureau of the Permanent Court of Arbitration (PCA) as the registry for the arbitration. The arbitral tribunal held a hearing in October 2002 and issued its final award on 2 July 2003.

OSPAR Convention

Adopted in 1992 to combine and update two earlier treaties addressing pollution of the North-East Atlantic,[26] the OSPAR Convention consists of 34 articles and five annexes, which comprehensively address all sources of marine pollution of the North-East Atlantic. Among its substantive obligations, OSPAR requires parties to:

- take all possible steps to prevent and eliminate pollution (article 2(1)(a))
- apply the precautionary principle and the polluter pays principle (article 2(2))
- apply best available techniques and best environmental practice (article 2(3)).

Specific types of marine pollution – including pollution from land-based sources, pollution by dumping, and pollution from offshore sources – are

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[25] *Commission of the European Communities v. Ireland*, Case C-459/03, Judgment of 30 May 2006; *see* Cesare C.P. Romano, *Commission v. Ireland*, *American J. Int'l L.* 101 (2007): 171-78; Nikolaos Lavranos, "MOX Plant Dispute," *European Constitutional L. Rev.* 2 (2006): 456-69.

[26] Oslo Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft 15 Feb. 1972, 932 UNTS 3, 11 ILM 262; Paris Convention for the Prevention of Marine Pollution from Land-Based Sources, 4 June 1974, 1546 UNTS 119, 13 ILM 352.

addressed in separate articles and annexes.[27] The Convention also establishes the OSPAR Commission to supervise implementation of the Convention, review the condition of the maritime area, and draw up programs and measures for the prevention and elimination of pollution (article 10). Over the last twenty years, the OSPAR Commission (and its predecessor, the Paris Commission), at Ireland's urging, have adopted numerous measures to prevent pollution from ionizing radiation.[28]

Rather than invoking these substantive environmental provisions, however, Ireland instead based its claim against the United Kingdom on the procedural requirement in Article 9 regarding access to information. Article 9 obligates the contracting parties "to 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." Paragraph 2 defines the information subject to this disclosure requirement as "any available 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." Paragraph 3 recognizes various exceptions, including the right of states to refuse to provide information, "in accordance with their national legal systems and applicable international regulations," where the information affects "commercial and industrial confidentiality."

Even though the OSPAR Convention is an environmental agreement, Ireland's access to information claim implicated environmental issues only obliquely, since the information in question concerned the economic justification for the MOX plant, rather than its environmental impacts. As Robin Churchill and Joanne Scott have noted, Ireland's decision to pursue its access to information claim under the OSPAR Convention rather than under European Community law was "in many ways ... surprising,"[29] since the OSPAR Convention is not a "general freedom of information statute"

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[27] With respect to land-based sources of marine pollution, OSPAR article 3 requires parties to "take all possible steps to prevent and eliminate pollution from land-based sources." This general obligation is elaborated in Annex I (which requires parties to use best available techniques for point sources and best environmental practice for point and diffuse sources (Annex I, art. 1.1), take preventive measures to minimize the risk of pollution caused by accidents (art. 1.3), subject point source discharges to strict regulation (art. 2.1), and provide for a system of regular monitoring and inspection (art. 2.2)), as well as in various recommendations of the OSPAR Commission.

[28] See OSPAR Radioactive Substances Strategy. The decisions and recommendations of the OSPAR Commission (and its predecessor, the Paris Commission) can be found at http://www.ospar.org/eng/html/strategies/strategy-05.htm.

[29] Churchill and Scott, *supra* note 10, at 674.

(Final Award, para. 170), and the EC directive on access to information (Directive 90/313) "has a wider ambit" than Article 9 and has been interpreted broadly by the European Court of Justice.[30] Ireland insisted that the information it had requested, although primarily economic in orientation, was nevertheless within the scope of Article 9 because it related to an activity adversely affecting or likely to affect the marine environment.

The Final Award

The case before the Arbitral Tribunal involved three issues:

(1) Whether Article 9(1) establishes a duty on the United Kingdom to directly provide information, or only a duty to establish a domestic framework for the disclosure of information?

(2) Whether the information requested by Ireland falls under Article 9(2)?

(3) If so, whether the information is privileged under Article 9(3) because of its confidential nature.

On the first issue, the two party-nominated arbitrators – Gavan Griffith and Lord Mustill (with Michael Reisman dissenting) – concluded that the OSPAR Convention imposes a direct duty on the United Kingdom to provide information, rather than simply a duty to establish a domestic regulatory framework, as the United Kingdom argued. But, on the second question, a different majority – this time consisting of Lord Mustill and Michael Reisman, with Gavan Griffith dissenting – held that the information requested by Ireland did not fall within the scope of Article 9(2), because it was neither "information ... on the state of the maritime area," nor information on activities "adversely affecting or likely to effect" the maritime area. Having concluded that the requested information was not covered by Article 9, Lord Mustill and Michael Reisman held that the Tribunal did not need to address the final question of whether the requested information is privileged under Article 9(3).

[30] *Id*.

Applicable Law

Initially, the arbitral tribunal considered the applicable law. In its pleadings, Ireland introduced materials regarding the right of access to information in other international instruments, including

- the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters – a treaty that neither Ireland nor the United Kingdom had ratified at the time of the case and that had not yet entered into force;[31]
- two non-binding instruments, the 1992 Rio Declaration on Environment and Development and the 1998 Sintra Ministerial Statement;
- various EC directives, including Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment[31] and its successor, Directive 2003/4/EC of 28 January 2003 on public access to environmental information.[32]

The majority (consisting of Professor Reisman and Lord Mustill) made four major findings regarding the applicable law:

First, the majority held that its subject-matter jurisdiction (jurisdiction *rationae materiae)* extended only to the parties' obligations under the OSPAR Convention itself, not obligations created by other legal instruments, a conclusion that the dissent accepted (Dissenting Opinion, para. 3). By its terms, OSPAR Article 32, under which the arbitral tribunal operated, is limited to disputes "relating to the interpretation or application of the Convention," not other legal instruments, so the majority's conclusion on this issue is unexceptionable. Although Article 32(6)(a) directs arbitral tribunals to resolve disputes "according to the rules of international law," the majority did not think that it was "reasonable to suppose" that this language was intended to create "an unqualified and comprehensive jurisdictional regime" (Final Award, para. 85). As a result, the majority found that the arbitral tribunal could decide only whether the United Kingdom's refusal to

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[31] The Aarhus Convention entered into force on 30 October 2001. The United Kingdom ratified it on 25 February 2005, but Ireland still had not ratified the Convention as of 18 September 2007.

[31] OJ L 158, 23.6.1990, p. 56-58.

[32] OJ L 41/26, 14.2.2003, p. 26-32.

provide the unredacted PA and ADL reports was consistent with its obligations under OSPAR Article 9, not under other legal instruments such as the Aarhus Convention or EC directives.

Second, although the majority acknowledged that arbitral tribunals can look to other legal instruments in interpreting OSPAR (Final Award, para. 105), they must do so in good faith. As the majority observed, "A treaty is a solemn undertaking and States Parties are entitled to have applied to them and to their peoples that to which they have agreed and not things to which they have not agreed. (Final Award, para. 102). Ultimately, the majority declined to use the definition of "environmental information" in the Aarhus Convention in interpreting the scope of Article 9, not because the use of the Aarhus Convention for interpretive purposes was impermissible, but because the language in OSPAR differs from that in Aarhus – OSPAR does not refer to "environmental information," so the definition of that term in the Aarhus Convention is not directly relevant.

Third, the Tribunal declined to apply either the Sintra Ministerial Statement (in which the OSPAR ministers agreed "to prevent pollution of the maritime area from ionizing radiation through progressive and substantial reductions of discharges") or two OSPAR Commission decisions on non-reprocessing of spent nuclear fuels, which do not legally apply to the United Kingdom. In the majority's view, the Sintra Ministerial Statement was "plainly exhortatory" (Final Award, para. 91) and, in any event, does not directly concern access to information, which was the basis of Ireland's claim.

Finally, the majority insisted that, absent a specific instruction from the parties, it could apply only existing law (*lex lata*), not "evolving" norms *in statu nascendi* – or "almost law," as the majority somewhat disparagingly characterized such norms. As the majority noted, "A tribunal established under the OSPAR Convention cannot go beyond existing law. This is not to say that the tribunal cannot apply customary international law of a recent vintage, but that it must in fact be customary international law." (Final Award, para. 100)

Although the majority's discussion of the applicable law has come under criticism,[33] none of these views is particularly controversial. They all reflect the commonplace view that an arbitral tribunal, as a legal body, has a limited mandate to apply existing law, rather than to develop the law in what it deems to be a "progressive" direction. In analyzing the majority's analysis, it is important to distinguish carefully what the majority did – and

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[33] Shany, *supra* note 10, at 822.

did not – say. First, the majority did *not* assert that the OSPAR Convention is a self-contained regime, as some commentators have claimed.[34] In interpreting the OSPAR Convention, a tribunal can look to other legal instruments. Instead, the majority's view of OSPAR might better be characterized as that of an independent legal instrument, whose provisions have their own separate legal status and are not necessarily co-extensive with the legal rights found in other instruments. Second, the majority did not assert that interpretation is a static process, which cannot take into account developments in the law. Indeed, it agreed with Ireland that "current international law and practice" can be used in interpreting OSPAR, pursuant to Article 31(3)(b) and (c) of the Vienna Convention on the Law of Treaties (Final Award, para. 101). The only thing the Tribunal cannot do, in the majority's view, is to apply current international law and practice as such. Thus, to the extent that OSPAR establishes a narrower right of access to information than more recent practice, the arbitral tribunal must apply OSPAR, rather than the more expansive right that has developed subsequently.

The Nature of the Duty to Provide Access to Information

The first substantive issue addressed by the Tribunal concerned the nature of the duty imposed by OSPAR regarding access to information. Article 9(1) of OSPAR provides:

> The Contracting parties shall ensure that their competent authorities are required to make available the information described in paragraph 2 of this Article 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.

According to Ireland, Article 9 creates a direct obligation to provide information, which the United Kingdom violated by failing to release the full versions of the PA and ADL reports. In response, the United Kingdom argued that Article 9 imposes a duty merely to establish a domestic regulatory framework requiring disclosure of information. On this view, specific claims for access to information (such as Ireland's request for the unredacted versions of the PA and ADL reports) are not governed by Article 9, but rather by a state's domestic regulatory framework, and should be

[34] *Id.* at 816.

decided by national courts rather than an international tribunal.[35] Failure to provide information in a particular case would not violate Article 9; rather, a state would violate Article 9 only if it failed to establish an appropriate regulatory framework (for example, because its framework levies "unreasonable charges" or does not require domestic authorities to provide information within two months, contrary to the terms of Article 9).

In rejecting the United Kingdom's argument, the majority found that Article 9(1) establishes an "obligation of result" – namely to make available the information specified in Article 9(2) – rather than merely an obligation to put in place a domestic regulatory framework (Final Award, para. 137). In the majority's view, the verb used in Article 9(1) ("ensure") establishes an obligation "at the mandatory end of the scale," which must involve more than a comparatively weak obligation to establish a domestic regulatory framework. (Final Award, para. 134) The fact that Article 9 was modeled on EC Directive 90/313 (which creates only a duty to establish a domestic framework) does not mean that Article 9 is similarly limited, according to the majority, since Article 9 has "an independent legal source that establishes a distinct legal regime and provides for different legal remedies" (Final Award, para. 142). In dissent, Professor Reisman argued that the majority's conclusion violates a key canon of treaty interpretation, namely that "a legal text should be interpreted in such a way that a reason and a meaning can be attributed to every world in the text."[36] The majority's interpretation of Article 9(1) failed to do so, Professor Reisman argued, because it read Article 9(1) to mean, "the Contracting Parties shall ...make available the information described in paragraph 2 of this Article," omitting the words in the ellipsis, "ensure that their competent authorities are required to." (Declaration, para. 5)

On this issue, Professor Reisman seems to have the better of the argument. The majority's analysis of the Article 9(1) issue is not altogether clear, and much of it begs the question or suggests false contrasts between its conclusion and the opposing view. For example, the Tribunal observes that Article 9(1) establishes an "enforceable obligation" rather than an "aspirational objective." (Final Award, para. 127) But reading Article 9(1) as imposing a requirement to establish a domestic regime, as the United Kingdom contended, would not make the provision merely aspirational in

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[35] Counter-Memorial of the United Kingdom, 6 June 2002, at paras. 3.4-3.7. The United Kingdom argued that it had satisfied the requirements of Article 9 through its adoption of the 1992 Environmental regulations. *Id.* at para. 3.12.

[36] Declaration of Professor W. Michael Reisman, para. 6 (quoting the International Court of Justice in the *Anglo-Iranian Oil Company* case).

character. The issue in the case is not whether Article 9(1) is aspirational or mandatory; rather, the question is, what does Article 9(1) require – the actual provision of information, or merely the establishment of a domestic regulatory scheme? Similarly, the Tribunal canvasses the "carefully crafted hierarchy of obligations" in OSPAR, and notes that the verb, "ensure," which is used in Article 9(1), reflects a "strong" level of expression that is at the "mandatory end of the scale." (Final Award, paras. 133-134) Admittedly, "ensure" is a strong term, but this begs the question, what must a party ensure? The Tribunal suggests that it would be "discordant" to combine a strong term ("ensure") with a weak obligation (setting up a domestic regulatory regime). But there is nothing inconsistent or incoherent about a treaty provision requiring states to establish a domestic regulatory regime that "ensures" a particular result. This is, in fact, a comparatively strong obligation, not a weak one. Finally, the majority suggests that, even if Article 9 requires states to put in place a domestic framework, states are still responsible for the adequacy of their framework. As the majority notes, "even where international law assigns competence to a national system there is no exclusion of responsibility of a State for the inadequacy of such a national system or the failure of its competent authorities to act in a way prescribed by an international obligation or implementing legislation." (Final Award, para. 146) Moreover, OSPAR clearly contemplates that domestic proceedings are not exclusive, since it creates its own international dispute settlement system under Article 32 (Final Award, para. 143). These points are all true, but there is no disagreement about any of them: the United Kingdom admitted that it could be held responsible internationally if its domestic regulatory framework was found inadequate. Its argument was simply that Ireland had not made this contention.

The Tribunal characterized the issue regarding Article 9(1) as whether the provision imposes an "obligation of result" (to make available the specified information) or an obligation of conduct (to impose a requirement on domestic authorities). (Final Award, para. 137) But this way of characterizing the issue is confusing, since the term "obligations of result" has two quite different meanings. In one sense, most international obligations could be considered "obligations of result," since, typically, international law simply requires a country to comply with its obligations, but does not specify the means it must use to do so. In this context, an obligation of result is weaker than an obligation of conduct, which specifies not simply a required result, but how a state must achieve that result – just as, in European Union law, a "directive" is a weaker type of requirement than a "regulation," since it allows states the choice of form and method. But the term, "obligation of result," is also sometimes used in a quite different way. Particularly in the context of problems that result primarily

from private conduct not fully controlled by the government, such as global warming, an obligation of result represents a stronger, not weaker, type of international obligation that an obligation of conduct. A country can comply with an obligation of conduct simply by performing the required action (for example, in the case of climate change, by adopting energy efficiency standards or a carbon tax), even if that conduct does not achieve the desired result (reducing carbon emissions by a particular amount). To comply with an obligation of result, in contrast, a country must do whatever it takes to achieve the required outcome.

In the *OSPAR Case*, the confusion between the two senses of the term, "obligation of result," is apparent from the fact that both the Tribunal and the United Kingdom argued that Article 9(1) establishes an obligation of result: the Tribunal in the sense of a stronger type of obligation, guaranteeing a particular outcome; the United Kingdom in the weaker sense of an EU directive, which leaves states with discretion regarding implementation.[37] Ironically, on either interpretation of Article 9(1), if the information requested by Ireland was objectively covered by Article 9(2) (and did not qualify for one of the exceptions in Article 9(3)), then failure by the United Kingdom to provide that information could arguably be construed as a violation of Article 9(1) – either directly (under the Tribunal's approach), or indirectly, by demonstrating that the UK's domestic regulatory scheme, as applied, did not satisfy Article 9(1), since it failed to "ensure" that domestic authorities were "required" to turn over the information specified in Article 9(2). The two interpretations end up in pretty much the same place because, even if one interprets Article 9(1) as imposing an obligation of conduct, the required conduct – namely, to establish a domestic regulatory framework – must ensure a particular result. The difference between the two interpretations is not that one permits an international claim by Ireland and the other consigns Ireland to UK domestic remedies; rather, the difference concerns the timing and degree of international review. Ireland contended – and the majority agreed – that it could bring an international claim directly for failure to provide covered information. In contrast, under the United Kingdom's approach, Ireland would have had to pursue the matter in British courts first, before bringing an international claim, and the British authorities would have been entitled to a "margin of appreciation" in applying their domestic framework[38] – although, even here, the term, "ensure," in Article 9(1), significantly limits a state's discretion.

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[37] Memorial of United Kingdom, para. 3.11.

[38] Declaration of Professor Reisman, at para. 18.

Scope of the Right of Access to Information

Having decided that Article 9(1) establishes a direct right of access to information, the arbitral tribunal then turned to the question of whether the information sought by Ireland fell within the scope of Article 9(2). On this question, a different majority (this time consisting of Lord Mustill and Professor Reisman, with Gavan Griffith dissenting) held that the information was not covered by Article 9(2) and therefore the arbitral tribunal needed to address the final question of whether the requested information is privileged under Article 9(3).

Article 9(2) encompasses three categories of information: first, "information ... on the state of the maritime area"; second, information on "activities or measures adversely affecting or likely to affect" the maritime area; and third, information on "activities or measures introduced in accordance with the Convention." Lord Mustill and Professor Reisman initially concluded that the information requested by Ireland did not concern "the state of the maritime area," and therefore was not encompassed by the first category of information. As they noted, it is "manifest" that "none of the ... 14 categories [of information requested by Ireland] can plausibly be characterized as 'information ... on the state of the maritime area'" (Final Award, para. 163) Moreover, Ireland had not argued that the information concerned an "activity or measure introduced in accordance with the Convention," under the third category. So attention thus focused on the second category, namely, information on activities or measures "adversely affecting or likely to affect" the maritime area.

Ireland contended that this category should be given a broad scope, encompassing any information relevant to the decision to approve an activity affecting the marine environment. In support of this view, it argued that other international instruments interpret the right of access to information broadly, including EC Directives 90/313 and 2003/4, the 1998 Aarhus Convention, and Principle 10 of the 1992 Rio Declaration on Environment and Development. The 1998 Aarhus Convention, in particularly, explicitly encompasses within its definition of "environmental information" exactly the type of information at issue in the OSPAR case, namely, information on "cost-benefit and other economic analyses and assumptions used in environmental decision-making."[39] In Ireland's view, Article 9 of OSPAR should be interpreted in light of this emerging right to information under international environmental law more generally.

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[39] Aarhus Convention, para. 2.3(b).

The majority's rejection of Ireland's claim has been read by some as resting on a narrow interpretation of what constitutes "environmental information," which ignores these recent developments in international environmental law. In its pleadings, the United Kingdom characterized the Irish position as depending on a principle of "inclusive causality," requiring disclosure of information about every step in the causal chain leading to decisions about activities that might affect the marine environment. Instead, the United Kingdom argued that Article 9 should be read more narrowly, as limited to information about the environmental effects of an activity. At times, the majority's opinion seems to endorse this view about the limited types of information covered by Article 9(2) and to reject the principle of inclusive causality. To the extent this is true, then the majority's conclusion runs counter to its observation that the reference to "any information" in Article 9(2) "requires an applier to interpret extensively *within* each of the three categories" and not to imply any selection or restriction (Final Award, para. 167) As the majority notes, "Once a matter is found to fall within one of the categories of Article 9(2), the presumption is that it is within the scope of the OSPAR Convention." Under this reasoning, economic information on an activity likely to adversely affect the maritime area is not *ipso facto* outside the scope of Article 9(2), even if it does not constitute "environmental information," since Article 9(2) is not limited to environmental information but instead encompasses "any information." To the extent that the majority's opinion suggests otherwise, and rejects the theory of inclusive causality, then this conclusion is inconsistent with the majority's own analysis of Article 9(2).

The majority also puts forward an alternative argument, however, which has a more solid basis, namely that the information requested by Ireland was outside the scope of Article 9(2), not because it focused on economic rather than environmental information, but because it did not meet the threshold requirement that it relate to an activity "adversely affecting or likely to affect" the marine environment. In its claim, Ireland had not focused on the environmental impact of the MOX plant, instead emphasizing its right of access to information. Gavan Griffith argued in dissent that Ireland did not need to establish the risk of environmental harm, since according to the precautionary principle, the burden of proof should be on the United Kingdom to show that the MOX plant was safe, not on Ireland to show that it was hazardous. (Dissenting Opinion, paras. 72-73) But, although the OSPAR Convention, in general, endorses the precautionary principle, the specific language of Article 9(2) takes a narrower approach, requiring a "likelihood" of adverse impacts. Moreover, although the majority put forward no evidence in support of its conclusion that the MOX plant was not "likely" to harm the marine environment (Dissenting Opinion, para. 92), the

European Commission had previously concluded that the plant would have a "negligible" effect – a conclusion that Ireland apparently did not specifically challenge.

Of course, if Ireland had been seeking information about the environmental impacts of the MOX plant, then it might have had a stronger argument that it could not be expected to establish a likelihood of adverse environmental effects in order to have a right to the information, when that was the very issue about which it was seeking information in the first place. But, in this case, Ireland was not seeking information about environmental impacts; rather, it was seeking information on the economic justification for the plant. So the United Kingdom's refusal of Ireland's request did not prejudice the ability of Ireland to show that the MOX plant was likely to have adverse environmental effects, in order to establish its claim under Article 9(2).

Conclusion

In many contexts, the distinction between "hard" and "soft" law often seems more apparent than real. On the one hand, "hard" norms often go unenforced and have relatively little effect on conduct; on the other, "soft" norms can be hugely influential.[40] But one arena in which the distinction between hard and soft law remains crucial is legal dispute resolution. After reading Article 9(1) rather loosely, the majority interpreted Article 9(2) strictly, refusing to interpret its scope in light of emerging norms that had not yet achieved the status of law. In doing so, the majority not only decided the particular issues in the case, but reaffirmed the distinctive character of legalized methods of dispute settlement.

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[40] *See generally* Dinah Shelton, *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford: Oxford Univ. Press 2003); Kenneth Abbott and Duncan Snidal, "Hard and Soft Law in International Governance," *International Organization* 54(3) (2000): 421-56.