

OPINION OF ADVOCATE GENERAL

POIARES MADURO

delivered on 18 January 2006¹

1. These infringement proceedings require the Court to consider for the first time an alleged breach by a Member State of Article 292 EC and Article 193 EA. The Commission believes that Ireland has infringed these provisions, as well as Article 10 EC and Article 192 EA, by submitting a dispute with another Member State (the United Kingdom) to an arbitral tribunal established under the United Nations Convention on the Law of the Sea (hereinafter ‘Unclos’).

2. According to Article 292 EC and its identically worded counterpart, Article 193 EA, ‘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’. In order to establish whether these provisions were infringed, the Court must determine if the matters brought before the Arbitral Tribunal by Ireland fall within the scope of Community law.

I — The facts and the pre-contentious procedure

3. The present proceedings originate in a dispute between Ireland and the United Kingdom over the operation of a MOX plant in Sellafield, in the North West of England, on the coast of the Irish Sea. The plant is designed to recycle plutonium from spent nuclear fuel, by mixing plutonium dioxide with depleted uranium dioxide and converting it into mixed oxide fuel (MOX), which can be used as an energy source in nuclear power plants.

4. The United Kingdom approved the construction of the MOX plant by British Nuclear Fuel plc (hereafter ‘BNFL’) following an environmental impact study published by BNFL in 1993. The plant was completed in 1996. On 3 October 2001, after conducting five public enquiries into the economic justifications of the MOX plant, the United Kingdom granted authorisation to BNFL to operate the plant and manufacture MOX.

1 — Original language: Portuguese.

5. On 25 October 2001 Ireland, alleging various breaches by the United Kingdom of the provisions of Unclos, instituted proceedings concerning the MOX plant against the United Kingdom before an arbitral tribunal established under Annex VII of Unclos.²

7. By letter of 15 July 2003 Ireland explained that it disagreed with the views of the Commission. On 19 August 2003 the Commission addressed a reasoned opinion to Ireland on account of the institution of arbitral proceedings concerning the MOX plant against the United Kingdom under Unclos. On 16 September 2003 Ireland replied that it remained unconvinced of the Commission's point of view. The Commission brought the matter before the Court on 15 October 2003.

6. On 20 June 2002 a meeting was held between Ireland and the Commission services concerning the MOX plant disputes.³ On 15 May 2003 the Commission addressed a letter of formal notice to Ireland, expressing the view that by instituting proceedings against the United Kingdom under Unclos, Ireland had failed to fulfil its obligations under Articles 10 EC and 292 EC and Articles 192 EA and 193 EA.

II — The issues raised

8. The Court has only rarely been called to decide a dispute between two Member States.⁴ Yet, by virtue of Article 220 EC in conjunction with Article 227 EC, and Article 136 EA in conjunction with Article 142 EA, the Court has jurisdiction in such disputes where they concern the application and interpretation of the EC Treaty or the Euratom Treaty.⁵

2 — In addition, on 9 November 2001, pursuant to Article 290(5) Unclos, Ireland submitted a request to the International Tribunal for the Law of the Sea (ITLOS) for provisional measures, namely suspension of the authorisation of the MOX plant and a stop to international movements of radioactive materials associated with the MOX plant. ITLOS prescribed certain provisional measures different from those requested by Ireland: ITLOS, Order of 3 December 2001 in Case No 10, *The MOX Plant Case* (Ireland v United Kingdom), Provisional Measures, Reports of Judgments, Advisory Opinions and Orders 5 (2001), Part II, p. 51-54.

3 — Ireland had instituted related dispute settlement proceedings against the United Kingdom under the Convention for the Protection of the Marine Environment of the North East Atlantic ('OSPAR'). Ireland contended that the United Kingdom had breached Article 9 of the OSPAR Convention. The OSPAR Tribunal rejected the claims by Ireland: Final Award of 2 July 2003 in the Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention (Ireland v United Kingdom). The present infringement proceedings against Ireland concern only the institution of dispute settlement proceedings under Unclos.

4 — Thus far, five such disputes have been brought before the Court. In two instances the proceedings led to a judgment: Case 141/78 *France v United Kingdom* [1979] ECR 2923; and Case C-388/95 *Belgium v Spain* [2000] ECR I-3123. Two cases were withdrawn and removed from the register (order of 15 February 1977 in Case 58/77 *Ireland v France*, not reported; and order of 27 November 1992 in Case C-349/92 *Spain v United Kingdom*, not reported). One case is currently pending: Case C-145/04 *Spain v United Kingdom*.

5 — Other provisions in the EC Treaty and the Euratom Treaty under which disputes between Member States can be brought before the Court of Justice are Articles 88(2) EC, 95(9) EC, 239 EC, 298 EC and 154 EA.

9. Article 292 EC and Article 193 EA provide that this jurisdiction is exclusive. Together, these provisions establish what has been called a 'jurisdictional monopoly' for the Court of Justice regarding disputes between Member States concerning the application and interpretation of Community law.⁶

10. The Court's exclusive jurisdiction in disputes between Member States concerning Community law is a means of preserving the autonomy of the Community legal order.⁷ It serves to ensure that Member States do not incur legal obligations under public international law which may conflict with their obligations under Community law. Fundamentally, Article 292 EC and Article 193 EA express the duty of loyalty to the judicial system created by the Community Treaties. Member States have agreed to settle their differences through the ways provided in the Treaties; they must abstain from submitting disputes relating to those Treaties to other methods of settlement.⁸

11. The Commission contends that Ireland has infringed this rule by submitting its dispute with the United Kingdom regarding the MOX plant to arbitration by a tribunal established under Unclos. The essential question to be decided by this Court is whether that dispute concerns Community law. The Court must examine and compare, on the one hand, the scope of its jurisdiction and, on the other hand, the subject-matter of the dispute brought before the Arbitral Tribunal.

12. Before the Arbitral Tribunal, Ireland argues that the United Kingdom has breached three sets of obligations. First, the obligation to carry out a proper assessment of the potential effects of the authorisation of the MOX plant on the marine environment of the Irish Sea. In this regard, Ireland refers to Article 206 Unclos. Second, the obligation to cooperate with Ireland, as co-riparian of the semi-enclosed Irish Sea, in taking the necessary steps to preserve the marine environment of that sea. In this regard, Ireland refers to Articles 123 and 197 Unclos. Third, the obligation to take all the steps necessary to protect and preserve the marine environment of the Irish Sea. In this connection, Ireland invokes Articles 192, 193, 194, 207, 211, 213 and 217 Unclos.

6 — Mackel, N., 'Article 292 (ex-article 219)', in: Léger, P. (ed.), *Commentaire article par article des traités UE et CE*, Dalloz/Bruylant, Paris/Bruxelles, 2000, p. 1874. In similar words: Lasok, K., and Lasok, D., *Law and institutions of the European Union*, Reed Elsevier, 2001, p. 371. The ECSC Treaty contained a similar provision, Article 87 CS. On the difference in wording between this provision and Article 292 EC/193 EA, see Herzog, P., 'Article 219', in: Smit/Herzog, *The law of the European Community: a commentary on the EEC Treaty*, Bender, New York (1976), at 6-170.1-2.

7 — Opinion 1/91 of 14 December 1991 [1991] ECR I-6079, paragraph 35.

8 — Van Panhuys, H.F., 'Conflicts between the law of the European Communities and other rules of international law', 3 *Common Market Law Review* 420 (1966), p. 445.

13. The positions of Ireland and the Commission as regards the extent of the Court's jurisdiction over the MOX-plant dispute are

diametrically opposed. According to Ireland, none of the issues in dispute falls within the Court's jurisdiction. The Commission, on the other hand, argues that the entire dispute comes within the jurisdiction of the Court. For the purposes of the present proceedings, however, it is not necessary to establish whether the MOX-plant dispute falls wholly within the jurisdiction of the Court. It suffices to verify whether at least part of the subject-matter of the dispute is governed by Community law. If that is so then, in my view, a breach of Article 292 EC — or Article 193 EA, as the case may be — is established.

States must settle their differences within the Community.⁹

15. The Commission has presented three complaints. First, it maintains that the provisions of Unclos invoked by Ireland before the Arbitral Tribunal constitute part of Community law and accordingly fall within the Court's exclusive jurisdiction to settle a dispute between Member States. As a consequence, the institution of arbitral proceedings against another Member State concerning the Unclos provisions at issue amounts to a breach of Article 292 EC. Second, the Commission considers that Ireland has infringed Articles 292 EC and 193 EA by calling on the Arbitral Tribunal to apply the provisions of certain Community directives. Third, it contends that by instituting such proceedings Ireland has breached the duty of cooperation which can be derived from Article 10 EC and Article 192 EA.

14. This is not to say that the Court's jurisdiction extends to the entire dispute, merely because part of the dispute is covered by Community law. It may be that a dispute falls largely and perhaps predominantly outside the jurisdiction of the Court, and that only one or a few of the matters of contention come within its jurisdiction. However, in such circumstances Article 292 EC — or Article 193 EA — nevertheless precludes that the entire dispute, including the elements falling within the scope of Community law, is submitted to a method of settlement other than those provided for in the Community Treaties. After all, there is no threshold in the rules establishing the Court's jurisdictional monopoly. Whenever Community law is concerned, Member

16. I shall assess these three complaints in turn.

9 — This does not necessarily mean that Member States should always carefully isolate the Community elements from a dispute between them in order to bring only those elements before the Court of Justice, while submitting the rest of the dispute to another method of settlement. In theory, such a solution would be in line with Articles 292 EC or 193 EA. Yet, in practice it may be preferable to bring 'hybrid disputes' between Member States — concerning both matters falling within and matters falling outside the scope of the Court's jurisdiction — in their entirety before the Court under Article 239 EC or Article 154 EA.

III — The Court's jurisdiction as regards provisions of Unclos

17. Unclos is a mixed agreement. At the time when Ireland submitted the dispute with the United Kingdom to the Arbitral Tribunal, the European Community and 14 of its then Member States were parties to Unclos.¹⁰ The Community and the Member States that were parties to Unclos at the material time have assumed obligations under Unclos within their respective spheres of competence.¹¹ For example, the Community assumed obligations in the field of conservation and management of sea fishing resources, while the Member States assumed obligations in the field of the delimitation of maritime boundaries.¹²

18. It is the point of view of the Commission that the provisions of Unclos invoked by

Ireland against the United Kingdom come within the jurisdiction of the Court because they fall under the competence of, and were concluded by, the Community. In this connection, the Commission emphasises that the protection of the environment is an explicit objective of the Community, for which the Community has external competence. The Commission further points out that Council Decision 98/392/EC,¹³ by which the European Community concluded Unclos, was also based on Article 130s of the EC Treaty (now Article 175 EC).

19. In contrast, Ireland is of the opinion that there has been no transfer of competence from the Member States to the Community in the areas in which Ireland seeks to litigate against the United Kingdom. Ireland argues that the Community is a contracting party to Unclos only for those fields that fall within its exclusive external competence. In so far as Community instruments exist relating to the matters at issue in the MOX-plant dispute, these instruments provide for minimum standards and are not affected by the provisions of Unclos. According to Ireland, it

10 — Every Member State had ratified Unclos, except Denmark. At present, all Member States have ratified Unclos.

11 — See: Articles 4 and 5 of Annex IX to Unclos; and the Declaration of 1 April 1998 made by the European Community pursuant to Article 5(1) of Annex IX to Unclos and to Article 4(4) of the Agreement relating to the implementation of Part XI of Unclos. The Declaration will be considered below, at points 35 and 36.

12 — After all, these are matters that fall within the exclusive competence of, respectively, the Community and the Member States.

13 — Council Decision 98/392/EC of 23 March 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof (OJ 1998 L 179, p. 1).

follows that those provisions have not become part of Community law and that the Court does not have jurisdiction to determine Ireland's claim against the United Kingdom under Unclos.

20. Before assessing these arguments, I shall briefly reiterate the relevant case-law on the scope of the Court's jurisdiction in respect of mixed agreements.

21. The Court has repeatedly held that its jurisdiction extends to provisions in mixed agreements.¹⁴ Notably, in its decision in *Haegeman* the Court stated that the provisions at issue in that case formed an integral part of Community law.¹⁵ As a consequence, the Court is competent to give preliminary rulings on their interpretation and to deliver judgment in the event Member States of the Community fail to fulfil their obligations

under those provisions.¹⁶ Yet, it cannot be concluded from the Court's case-law that all provisions in a mixed agreement are automatically within the Court's jurisdiction. The Court follows a more delicate approach. It considers that 'mixed agreements concluded by the Community, its Member States and non-member countries have the same status in the Community legal order as purely Community agreements, *in so far as the provisions fall within the scope of Community competence*'.¹⁷

22. To the extent that the Community has assumed obligations under a mixed agreement, the norms by which the Community is bound form part of Community law.¹⁸ In that quality they are binding on the Community and its Member States,¹⁹ and they are subject to the Court's jurisdiction.²⁰ There is no doubt that the Community has

14 — Opinion of Advocate General Tesaro in Case C-53/96 *Hermès v FHT* [1998] ECR I-3603, at point 8.

15 — In *Haegeman* the Court was asked, by way of preliminary reference, to interpret certain trade provisions in the EEC's Association Agreement with Greece. On the subject of its jurisdiction, the Court considered: 'The provisions of the Agreement, from the coming into force thereof, form an integral part of Community law ... [T]he Court accordingly has jurisdiction to give preliminary rulings concerning the interpretation of this agreement' (Case 181/73 *Haegeman* [1974] ECR 449, paragraphs 5 and 6. See also Case 104/81 *Kupferberg* [1982] ECR 3641, paragraph 13; and Opinion 1/91 of 14 December 1991 [1991] ECR 6079, paragraphs 37 and 38).

16 — Opinion 1/91, cited above, paragraph 38.

17 — Case C-239/03 *Commission v France* [2004] ECR I-9325, paragraph 25 (emphasis added). See also Case C-13/00 *Commission v Ireland* [2002] ECR I-2943, paragraph 14; and, to the same effect, Case 12/86 *Demirel* [1987] ECR 3719, paragraph 9.

18 — Case C-300/98 *Dior and Others* [2000] ECR I-11307, paragraph 33. See also the Opinion of Advocate General Reischl in Case 65/77 *Razanatsimba* [1977] ECR 2229, at 2243: 'The only condition [for the Court of Justice to have jurisdiction to deal with the questions which have been raised] is that the Community must be bound by the agreement in question and that it must also be bound by the provision whose interpretation is requested.'

19 — To that effect: Case 38/75 *Nederlandse Spoorwegen* [1975] ECR 1439, paragraph 16.

20 — By virtue of Articles 300(2) EC and 220 EC. See also: Schermers, H.G., and Waelbroeck, D.F., *Judicial protection in the European Union*, Kluwer Law International, The Hague/London/New York, 2001, p. 296-297.

assumed obligations under a provision of a mixed agreement, when this provision applies to matters that come within the scope of the Community's exclusive competence — as was the case with the trade provisions in *Haegeman*. Conversely, when a provision applies solely to matters falling within the exclusive competence of the Member States, the Member States have assumed obligations under that provision, not the Community.²¹

23. The question becomes more difficult when a provision in a mixed agreement may apply to a matter falling under the concurrent competence of the Community and its Member States. It will be recalled that, in an area such as environmental policy,

where the Treaty provides for concurrent competence,²² both the Community and the Member States are allowed to undertake obligations themselves with third countries. However, once the Community has undertaken such obligations, or once it has adopted internal measures, Member States are prohibited from undertaking obligations which could affect the common rules thus established.²³

24. Both Ireland and the Swedish Government submit that, when concluding *Unclos*, the European Community only exercised its *exclusive* external competence in the area of protection of the marine environment. Ireland further contends that the provisions relevant in the *MOX Plant* dispute do not come within the scope of the Community's exclusive competence, because they merely set minimum standards and consequently are not of such a kind as to affect Community common rules.²⁴ In support of its position, Ireland relies on the Declaration

21 — In such a situation, the Court does not have jurisdiction in respect of that provision (see, to that effect, Opinion of Advocate General Tesauro in *Hermès v FHT*, cited above, at point 19). However, a provision in a mixed agreement may also apply *both* to situations falling within the scope of national law *and* to situations falling within the scope of Community law. It will be recalled that, in such cases, the Court has jurisdiction to interpret the provision in the context of a preliminary ruling, even as regards situations falling within the scope of national law (*Hermès v FHT*, cited above, paragraphs 32-33; see also Case C-89/99 *Schieving-Nijstad and Others* [2001] ECR I-5851, paragraph 30). The basis for this aspect of the Court's jurisdiction is the duty of cooperation between Member States and the institutions of the Community (Joined Cases C-300/98 and C-392/98 *Dior and Others* [2000] ECR I-11307, paragraph 38). On this topic: Heliskoski, J., 'The Jurisdiction of the European Court of Justice to Give Preliminary Rulings on the Interpretation of Mixed Agreements', [2000] 4 *Nordic Journal of International Law* 395-412; Koutrakos, P., 'The Interpretation of Mixed Agreements under the Preliminary Reference Procedure', [2002] 7 *European Foreign Affairs Review* 25-52.

22 — Title XIX of the Treaty. The competence of the Community to conclude agreements with third parties is expressly recognised in Article 174(4) EC.

23 — Case 22/70 *Commission v Council (ERTA)* [1971] ECR 263, paragraph 17. See also the *Open Skies* judgments: Case C-466/98 *Commission v United Kingdom* [2002] ECR I-9427; Case C-467/98 *Commission v Denmark* [2002] ECR I-9519; Case C-468/98 *Commission v Sweden* [2002] ECR I-9575; Case C-472/98 *Commission v Luxembourg* [2002] ECR I-9741; Case C-475/98 *Commission v Austria* [2002] ECR I-9797; and Case C-476/98 *Commission v Germany* [2002] ECR I-9855.

24 — In this respect, Ireland relies on Opinion 2/91 of 19 March 1993 [1993] ECR I-1061. See, in particular, paragraph 18 thereof.

on competence, which the Community made at the time of its confirmation of Unclos.²⁵

cised both its exclusive and its non-exclusive external competence in the area of environmental protection when it acceded to Unclos.

25. If Ireland were correct in holding that the Community only exercised its exclusive external competence, then the Court would indeed have to carefully verify the scope of that competence — in the same way as it did in the *Open Skies* judgments²⁶ — in order to determine whether the relevant Unclos provisions have become subject to the Court's jurisdiction as an integral part of the Community legal order.

26. However, to my mind, the premiss that, when concluding Unclos, the Community merely acted within the scope of its exclusive competence, is incorrect.

27. Unclos was concluded on behalf of the European Community by Council Decision 98/392. As the Commission rightly points out, this decision is based, among others, on Article 130(s) of the Treaty. It would appear therefore that, as regards the provisions of Unclos relating to the protection of the marine environment, the Community exer-

28. This is confirmed, moreover, by the fact that, at the time of the conclusion of Unclos, a wide range of Community measures in this area already existed.

29. In this regard, the Commission argues that an analogy can be drawn with two previous infringement proceedings relating to mixed agreements: *Commission v Ireland*²⁷ and *Commission v France*.²⁸ In both cases the Court held that it had jurisdiction, noting that the agreements under discussion came 'in large measure within Community competence'.²⁹ Yet, I am only partly convinced by the Commission's comparison. To my mind, a parallel can be drawn with *Commission v France*, but not with *Commission v Ireland*.

30. In its judgment in *Commission v Ireland*, the Court addressed the question whether it had jurisdiction in infringement proceedings

25 — Declaration of 1 April 1998 made by the European Community pursuant to Article 5(1) of Annex IX to Unclos and to Article 4(4) of the Agreement relating to the interpretation of Part XI of Unclos (hereafter 'the Declaration').

26 — Cited at footnote 23 above.

27 — Cited above.

28 — Cited above.

29 — *Commission v France*, cited above, paragraph 27; *Commission v Ireland*, cited above, paragraph 16.

concerning Ireland's failure to adhere within the prescribed period to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act). The Court considered that it had jurisdiction because the Berne Convention covered an area which came 'in large measure within the scope of Community competence'.³⁰ However, this phrase must be understood in the context of the particularity that the case concerned the infringement of the obligation to *adhere* to the Berne Convention.³¹ As Advocate General Mischo pointed out, although the Berne Convention does not fall wholly within the competence of the Community, that Convention is indivisible and a State cannot adhere to it in part. Therefore, by the same token, the Community law obligation to adhere to the Berne Convention is indivisible.³²

by France which are the subject-matter of the action fall within the scope of Community law'.³³ The Court, noting that the subject-matter of the Convention and the Protocol coincided 'in very large measure' with the subject-matter of various Community legislative acts, concluded that there was 'a Community interest in compliance by both the Community and its Member States with the commitments entered into [under the Convention and the Protocol]'.³⁴ The Court subsequently held that it had jurisdiction, despite the fact that the infringement proceedings concerned discharges of fresh water and sediments into the marine environment, a matter which had not yet been the subject of internal Community legislation.³⁵

31. *Commission v France*, on the other hand, did not concern an obligation to adhere to an international agreement. It concerned infringement proceedings brought against France for having failed to fulfil its obligations under certain provisions of the Convention for the Protection of the Mediterranean Sea against pollution, and of a Protocol to that Convention. The Court considered that '[s]ince Treaty infringement proceedings can relate only to a failure to comply with obligations arising from Community law, it must be examined ... whether the obligations owed

32. Like the present case, *Commission v France* concerned an international agreement that had been jointly entered into by the Community and its Member States. Moreover, in *Commission v France* the defendant Member State also argued that the Court did not have jurisdiction as to the obligations in question, because they did not come within the scope of the Community's external competence. The Court rejected that claim. It construed the scope of its jurisdiction in light of the interest of

30 — *Commission v Ireland*, cited above, paragraph 16.

31 — See, in particular, paragraphs 19 and 23 of the judgment.

32 — Opinion of Advocate General Mischo in *Commission v Ireland*, at point 52.

33 — *Commission v France*, cited above, paragraph 23.

34 — Paragraph 29 of the judgment.

35 — Paragraphs 30 and 31 of the judgment. See also the preliminary ruling of the Court in Case C-213/03 *Pêcheurs de l'étang de Berre* [2004] ECR I-7357, concerning the same Convention. The Court, without expressly examining its jurisdiction regarding provisions of the Convention and the Protocol, delivered a ruling on the questions of the national court.

protecting the integrity of the existing Community legal framework.

as it relied on a legal basis which provides for external competence, exercised this competence both in fields where it is exclusive and where it is non-exclusive.³⁸ The Community has thus assumed international obligations in these fields, which accordingly come within the Court's jurisdiction as obligations arising from Community law.³⁹

33. The Court's observation, in paragraph 27 of the judgment, that the provisions under discussion came within 'a field which falls *in large measure* within Community competence',³⁶ can easily be misunderstood as suggesting that the Court gave judgment in infringement proceedings in respect of obligations arising outside the scope of Community law. Of course, this cannot be the case.³⁷ My reading of the judgment is that the Court considered that in the field of discharges of fresh water and sediments into the marine environment, the Community, by concluding the agreement, had exercised its non-exclusive competence. In other words, the conclusion of an international agreement can itself be a form of exercising a non-exclusive competence of the Community, independently of the previous adoption of Community internal legislation. As in the present case, that means that when concluding the agreement, the Community, in so far

34. Contrary to Ireland's contention, the Declaration 'concerning the competence of the European Community with regard to matters governed by the Convention' does not lead to a different conclusion.

35. Under the heading 'Matters for which the Community shares competence with its Member States', the Declaration states:

'With regard to the provisions on maritime transport, safety of shipping and the prevention of marine pollution ... 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

36 — Emphasis added.

37 — As the Court said in paragraph 23 of its judgment, infringement proceedings 'can relate only to a failure to comply with obligations arising from Community law'; the Court accordingly examined 'whether the obligations owed by France which are the subject-matter of the action fall within the scope of Community law'. Certainly, it is possible, especially in the context of mixed agreements, that a failure of a Member State to comply with an obligation which arises from the agreement, but falls outside the scope of Community competence, will jeopardise the attainment of Community objectives and impair the Community's interests. In those situations, the Court does have jurisdiction to give a judgment in infringement proceedings. However, the infringement proceedings cannot be brought directly on account of a failure to fulfil the obligations arising from the mixed agreement. Instead, the proceedings must be brought on account of a failure to fulfil the Community obligation arising from Article 10 EC. See also Hillion, C., *The evolving system of European Union external relations as evidenced in the EU Partnerships with Russia and Ukraine*, thesis, Leyden 2005, p. 130.

38 — The Convention for the Protection of the Mediterranean Sea and the Protocol on pollution from land-based sources were adopted by, respectively, Council Decision 77/585/EEC of 25 July 1977 and Council Decision 83/101/EEC of 28 February 1983, both on the basis of Article 235 of the EC Treaty (now Article 308 EC).

39 — *Dior and Others*, paragraph 33. See also above at point 22.

the Community. When Community rules exist but are not affected, in particular in cases of Community provisions establishing only minimum standards, the Member States have competence, without prejudice to the competence of the Community to act in this field. Otherwise competence rests with the Member States.

A list of relevant Community rules appears in the Appendix. The extent of Community competence ensuing from these acts must be assessed by reference to the precise provisions of each measure, and in particular, the extent to which these provisions establish common rules.'

36. In my understanding, this wording attempts to reflect the case-law of the Court of Justice, in particular *ERTA* and Opinion 2/91. The resulting text may suffer from a lack of clarity and elegance, but it does not provide authority for the view that the Community merely exercised its exclusive external competence in the area of protection of the marine environment.

37. The Commission is therefore right to maintain that Ireland has invoked provisions of Unclos that have become part of Community law, and hence subject to the Court's jurisdiction.

38. Ireland contends that insisting on the exclusivity of the Court's jurisdiction in matters covered by Unclos would deprive Ireland of an adequate remedy under that Convention.

39. I do not agree. Reference must again be made to the procedure provided for by Article 227 EC and to the possibility of requesting interim measures pursuant to Article 243 EC. In addition, it is worth noting that Article 282 Unclos expressly authorises forms of settlement other than those provided for by Unclos.⁴⁰ What is more, even if confronted with genuine difficulties, Member States are not allowed to act outside the Community context simply because they consider that such a course of action would be more appropriate.⁴¹

40. By way of subsidiary argument, Ireland submits that, if the provisions of Unclos had become incorporated into Community law, then the same would hold for the provisions

40 — Article 282 Unclos, which is headed 'Obligations under general or bilateral agreements', provides: 'If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.'

41 — See, by analogy, Case 232/78 *Commission v France* [1979] ECR 2729, paragraphs 7 to 9.

of Unclos regarding dispute settlement. The methods of settlement provided for under Unclos would consequently have become methods of settlement provided for in 'this Treaty', within the meaning of Article 292 EC.

43. Since Euratom is not a party to Unclos, the above reasoning cannot lead to the same finding in respect of Article 193 EA. In order to assess the claim that Ireland has failed to fulfil its obligations under Article 193 EA, it is necessary to consider the second complaint presented by the Commission.

41. I do not share the view that the Unclos dispute settlement regime has become incorporated into, and has thus altered, the Community's own judicial system. Article 292 EC stands in the way of a conferral of the Court's exclusive jurisdiction, by way of international agreement, to another court or tribunal.⁴² It is not possible therefore, that the conclusion of Unclos has resulted in a transfer of the Court's jurisdiction to settle disputes between the Community's Member States concerning the interpretation or application of Community law to a jurisdiction established under Unclos.

42. For these reasons, I propose that the Court declare that, by submitting the dispute with the United Kingdom concerning a MOX Plant before an Arbitral Tribunal established under Annex VII of Unclos, Ireland has failed to fulfil its obligations under Article 292 EC.

IV — Ireland's reliance on Community law before the Arbitral Tribunal

44. According to the Commission, Ireland has acted in breach of its obligations under Articles 292 EC and 193 EA by submitting instruments of Community law to the interpretation and application of a non-Community tribunal. The United Kingdom supports this view. The Commission and the United Kingdom note that, in its submissions to the Arbitral Tribunal, Ireland mentions Directives 85/337/EEC,⁴³ 90/313/

42 — Opinion 1/91, cited above, paragraph 35.

43 — Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5). The Directive was later amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 (OJ 1997 L 156, p. 17).

EEC,⁴⁴ 80/836/Euratom,⁴⁵ 92/3/Euratom⁴⁶ and 96/29/Euratom,⁴⁷ as well as provisions in the OSPAR Convention.⁴⁸

46. In my view, this argument cannot be upheld.

45. Ireland contends that it did not ask the Tribunal to apply Community law, but that it merely referred to the directives as an aid to interpretation of Unclos obligations. It points out that it solemnly undertook, in a letter to the Commission of 16 September 2003, that it will continue to refer to instruments of Community law, only for the purposes of aiding the interpretation of Unclos and that it will not invite the Unclos tribunal to investigate whether the United Kingdom is in breach of any rule or instrument of Community law. Ireland maintains that it has not acted in breach of its obligations under Article 292 EC, nor under Article 193 EA, since it is making no complaint that the United Kingdom has violated any obligation under Community law.

47. It follows from Ireland's submissions to the Arbitral Tribunal that the references to instruments of Community law were made in light of Article 293(1) Unclos. Pursuant to that provision the Arbitral Tribunal 'shall apply this Convention and other rules of international law not incompatible with this Convention'.

48. In paragraph 3 of its Statement of Claim of 25 October 2001, Ireland indicates that 'the arbitral tribunal will also be asked to take into account, as appropriate, the provisions of other international instruments, including international conventions and European Community laws'. In paragraph 34 of its Statement of Claim, Ireland refers to Article 293(1) Unclos and argues that 'the provisions of Unclos fall to be construed by reference to other international rules which are binding on the United Kingdom, including the 1992 OSPAR Convention for the Protection of the Marine Environment of the North-East Atlantic, Directive 85/337/EEC and Directives 80/836/Euratom and 96/239/Euratom'.

44 — Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment (OJ 1990 L 158, p. 56).

45 — Council Directive 80/836/Euratom of 15 July 1980 amending the Directives laying down the basic safety standards for the health protection of the general public and workers against the dangers of ionising radiation (OJ 1980 L 246, p. 1).

46 — Council Directive 92/3/Euratom of 3 February 1992 on the supervision and control of shipments of radioactive waste between Member States and into and out of the Community (OJ 1992 L 35, p. 24).

47 — Council Directive 96/29/Euratom of 13 May 1996 laying down basic safety standards for the protection of the health of workers and the general public against the dangers arising from ionizing radiation (OJ 1996, L 159, p. 1).

48 — Convention for the Protection of the Marine Environment of the North-East Atlantic; concluded on behalf of the Communities by Council Decision 98/249/EC of 7 October 1997 (OJ 1998 L 104, p. 1).

49. Furthermore, in the Memorial which Ireland submitted to the Unclos tribunal, Ireland argues that 'the rules of international

law which the Annex VII Tribunal is called upon to apply ... are to be found *both* in the relevant provisions of Unclos *and* in "other rules of international law which are not incompatible" with the Convention'.⁴⁹ Ireland further states that 'in these two ways — by the interpretation of general Unclos provisions in light of the wider body of international law, and by the direction to apply other international rules, standards and practices — Unclos assumes an integrating function, bringing together conventional and customary norms, and regional and global norms'.⁵⁰

[the other rules of international law] which the present Tribunal is directed to apply to the case before it by Article 293(1) of Unclos'.⁵¹ In its Reply, Ireland states that 'in claims relating to the marine environment which involve contravention of certain international rules and standards established through a competent international organisation or diplomatic conference', the Arbitral Tribunal 'must consider, and apply, those international rules and standards'.⁵²

50. At point 6.19 of its Memorial, Ireland remarks that relevant Community rules are referred to not because the Tribunal is being asked to apply them per se, but 'because they show how general obligations in Unclos are to be interpreted and applied'. Nevertheless, throughout its ensuing submissions to the Arbitral Tribunal, Ireland makes numerous references to Community rules in connection with Article 293(1) Unclos. For instance, in the part of Ireland's Memorial concerning the obligation to conduct a proper environmental impact assessment, under the heading 'The Source of the Legal Obligations', Ireland refers, among other instruments, to Directive 85/337 and maintains that '[t]hese instruments are relevant as a guide to the interpretation of the duties imposed by Article 206 of Unclos and as instances of

51. In light of these submissions, I fail to see that Ireland does not claim that the United Kingdom has violated any obligation under Community law.⁵³ In any event, Ireland requests the Tribunal to hold that the United Kingdom has breached obligations under Unclos which, on Ireland's own interpretation of Unclos, coincide with obligations

51 — Memorial of Ireland, at point 7.6.

52 — Reply of Ireland, at point 5.14. See also at point 5.36: 'It is the task of an Annex VII Tribunal to determine on objective grounds the extent of a State's obligations under Unclos. That determination necessarily requires it to assess whether or not a State has, for example, taken the measures necessary to implement applicable international rules and standards to which Unclos makes a *renvoi*. By becoming a party to Unclos, the United Kingdom has given its consent to the Annex VII Tribunal to make that determination.'

53 — As indeed one of the Members of the Arbitral Tribunals also remarked. See: *The Mox Plant Case*, Proceedings Day Two, page 44 *in fine* (question of Sir Arthur Watts KCMG QC to Prof Vaughan Lowe, appearing as Counsel for Ireland).

49 — Point 6.1 of the Memorial of Ireland. Emphasis in original.

50 — At point 6.7 of the Memorial of Ireland.

under Community law. To that effect, Ireland invites the Tribunal to give an interpretation of the United Kingdom's obligations under EC and Euratom law.⁵⁴

abstain from any measure which could jeopardise the attainment of the objectives of this Treaty'. The Commission puts forward two arguments.

52. In view of the foregoing, it must be held that Ireland has failed to fulfil its obligations under Articles 292 EC and 193 EA, by submitting a dispute concerning the interpretation and application of the EC Treaty and the Euratom Treaty to settlement by an arbitral tribunal established under Annex VII of Unclos.

54. First, the Commission argues that, in the context of mixed agreements, Member States are under a duty of cooperation by virtue of Article 10(2) EC. According to the Commission, Ireland acted in breach of this duty by instituting dispute settlement proceedings on account of provisions which fall within the competence of the Community; such an action is liable to create confusion among third countries about the external representation and internal cohesion of the Community as a contracting party, and is highly damaging to the effectiveness and coherence of the Community's external action.

V — The duty of cooperation

53. The Commission contends that, as well as having failed to fulfil its obligations under Articles 292 EC and 193 EA, Ireland has infringed Articles 10(2) EC and 192(2) EA. Both provisions say that Member States 'shall

55. I do not consider it necessary for the Court to address this issue. The object of the Commission's complaint is essentially the same as the object of the complaint under Article 292 EC. In my view, Article 292 EC constitutes a specific manifestation of the general principle of loyalty enshrined in Article 10(2) EC.⁵⁵ The assessment under Article 292 EC therefore suffices.

⁵⁴ — See, for example, Ireland's submissions relating to the United Kingdom's obligations under Directive 85/337 in the Memorial of Ireland at points 7.28, 8.102 and 8.114.

⁵⁵ — See point 10 above.

56. The Commission also puts forward a second argument for considering that Ireland has breached the duty of cooperation. It contends that, by virtue of Articles 10 EC and 192 EA, Ireland should have informed and consulted with the competent Community institutions before initiating dispute settlement proceedings under Unclos.

57. On this point I agree with the Commission. Articles 10 EC and 192 EA impose a mutual duty of sincere cooperation on the Community institutions and its Member States.⁵⁶ This duty is particularly important in the area of external relations,⁵⁷ and applies *a fortiori* in a context where the Community and the Member States have together entered into obligations with third countries.⁵⁸

58. The duty of cooperation may in certain situations entail an obligation for Member

States to consult with the Commission in order to avoid the risk of infringing Community rules or obstructing Community policies.⁵⁹ To my mind, Ireland was under such an obligation in the circumstances of the present case. Ireland decided to litigate against another Member State, under an international agreement to which the European Community is a party, and concerning a matter which possibly came within the exclusive jurisdiction of the Court. As the Commission rightly points out, consultations could have been useful in order to clarify the extent to which the dispute concerned Community law. Moreover, it would have provided an opportunity for an exchange of views on whether infringement proceedings could be instituted against the Member State allegedly in violation of the international agreement. However, Ireland did not seek to obtain the Commission's views until after it had initiated dispute settlement proceedings.

59. On those grounds, I am of the opinion that Ireland has failed to fulfil its obligations under Articles 10 EC and 192 EA.

56 — See, for example, Case 230/81 *Luxembourg v Parliament* [1983] ECR 255, paragraph 37; Joined Cases C-36/97 and C-37/97 *Kellinghusen and Kelsen* [1998] ECR I-6337, paragraph 30; Case C-344/01 *Commission v Germany* [2004] ECR I-2081, paragraph 79; and Case C-82/03 *Commission v Italy* [2004] ECR I-6635, paragraph 15.

57 — See, for example, *ERTA*, cited above, paragraphs 21 and 22; Joined Cases 3/76, 4/76 and 6/76 *Kramer* [1976] ECR 1279, paragraphs 42 to 45; Ruling 1/78 of 14 November 1978 [1978] ECR 2151, paragraph 33; *Kupferberg*, cited above, paragraph 13; and Case C-266/03 *Commission v Luxembourg* [2005] ECR I-4805, paragraphs 57 to 66.

58 — To that effect: Opinion 2/91, cited above, paragraph 36; Opinion 1/94 of 15 November 1994 [1994] ECR I-5267, paragraph 108; Case C-25/94 *Commission v Council* [1996] ECR I-1469, paragraph 48.

59 — See, for instances where the Court held that Article 10 EC entailed a duty to undertake consultations with the Commission: *France v United Kingdom*, cited above, paragraphs 8 and 9; Case 804/79 *Commission v United Kingdom* [1981] ECR 1045, paragraph 31; Case 186/85 *Commission v Belgium* [1987] ECR 2029, paragraph 40; Case C-266/03 *Commission v Luxembourg*, cited above, paragraphs 61 to 66; and Case C-433/03 *Commission v Germany* [2005] ECR I-6985, paragraphs 68 to 73.

VI — On the costs

cessful party in these proceedings, be ordered to pay the costs in accordance with Article 69(2) of the Rules of Procedure.

60. Since the Commission has applied for costs, I propose that Ireland, as the unsuc-

VII — Conclusion

61. I propose that the Court:

- declare that, by instituting dispute settlement proceedings against the United Kingdom concerning the MOX Plant located at Sellafield, Ireland has failed to fulfil its obligations under Articles 292 EC and 193 EA;
- declare that, by instituting said proceedings without previously consulting the Commission, Ireland has failed to fulfil its obligations under Articles 10 EC and 192 EA;
- order Ireland to pay the costs.