ANALYZING THE DICHOTOMY BETWEEN LITIGATIONAL AND OPERATIVE APPROACHES IN PUBLIC INTERNATIONAL LAW THROUGH THE OSPAR ARBITRATION (IRELAND V. UNITED KINGDOM)

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INTRODUCTION

This research project follows the arbitration case between United Kingdom (UK) and Ireland regarding the dispute that arose over the MOX plant which was concerned with reusing nuclear fuel and was located in Sellafield, UK.[1] The Mixed Oxide (MOX) plant was built in the 1990s to reprocess spent nuclear fuel from reactors around the world. Ireland had concerns about the environmental impact of the plant and its potential for nuclear contamination in the event of an accident. Under this regulation, the parties can implore an arbitral tribunal to resolve issues related to the understanding of the Convention. Parties have a mechanism to settle their matters related to the application of the convention under its provisions. In 2001, Ireland initiated arbitration proceedings under the OSPAR Convention against the United Kingdom for shutting down the MOX plant which could cause severe harm to aquatic life forms in the Irish Sea. Ireland asserted that the UK had not fulfilled its responsibilities under the Convention to prevent contamination and safeguard the oceanic ecosystem. The arbitration proceedings continued for several years, with both sides presenting evidence and arguments to support their respective positions. The essence of international law requires it to be adjudicated on the basis of its relationship with other laws. This project aims to analyse the aforementioned case and the necessary jurisprudence which led to the final decision. We have tried achieving this outcome by adopting a thoroughly descriptive approach, using various academic papers, case laws and the judgement itself.

FACTS OF THE CASE

A dispute arose between the esteemed nations of UK and Ireland concerning the commission

[1] *Ireland v United Kingdom* [2003] ITLOS 8.

of a mixed oxidized nuclear fuel facility, the MOX facility, in Sellafield, United Kingdom upon the Irish coast line in 1996. British Nuclear Fuels (BNFL) was given the permission to construct MOX plant for reprocessing used fuels in the year 1993. This would be done by mixing separated uranium oxide and plutonium oxide into tiny particles that could then be reused in reactors. This construct was added to the preexisting establishment at Sellafield. The national government sustained the view that the MOX Plant followed all necessary EC and national regulations.

Since the 1950s, Ireland has expressed ongoing concerns about the Sellafield facilities and has frequently raised objections to their use for nuclear activities, according to their statement. The terrifying risk of discharging radioactive and similar substances inside the great Irish Sea was of special concern to Ireland. Such reductions might possibly be connected to the processes at the MOX Plant, other Sellafield facilities, or greater shipping of radioactive material over the Irish Sea that were anticipated to follow. Ireland claimed in its memorial that the Irish Sea was currently among the most highly radioactive contaminated bodies of water on earth as a consequence of the emissions from Sellafield.

In 2001, Ireland finally seeing no other choice, started the process of arbitration against the other state based on the Convention for the Preservation of the Marine Environment of the North-East Atlantic (OSPAR Convention) and the UN Convention on the Law of the Sea (LOS Convention)[2].

The MOX Plant's finances were a major source of disagreement over the project. Ireland had alleged that the project is unprofitable and is unlikely to recoup its 500 million pound construction expenditures, despite promises to the contrary. This was significant because countries are obliged to assess if the advantages of industrial plants like the MOX Plant outweigh the hazards under the Treaty Establishing the European Atomic Energy Community (EURATOM). To achieve a certain standard, the United Kingdom requested two evaluations on the MOX Project, one from the PA Consulting Group in 1997, and another from Arthur D. Little in 2001 (known as the ADL Report). The findings were published after revising and redacting some information.

Ireland expressed their disapproval of the commissioning of the MOX Facility and insisted that the information previously omitted from the reports be disclosed, citing OSPAR Convention's

[2] United Nations Convention on the Law of the Sea 1994.

ninth article. They argued that it was necessary to evaluate the impact of the plant on marine life, and to ensure that the UK had adhered to international conventions and the EURATOM requirements regarding the plant's potential harms to all biotic and abiotic life forms around it. The release of this information was deemed crucial for making an informed decision about whether the financial benefits of the plant justified its potential hazards. Ireland included fourteen informational sections in its memorial, which it stated were as follows: the data that has been denied pertains, among other matters, to sales volumes, sales prices, the plant's longevity, how many individuals will be recruited there, plant's production output, how much goods are delivered to and from the facility, and if MOX's supply agreements with enterprises are in existence.

The United Kingdom rejected the assertion that the information was covered under OSPAR Convention Article 9 in any way whatsoever. The OSPAR Convention's arbitrary tribunal, which had been constituted in pursuance of Article 32(1)[3] of that convention, was tasked with deciding if UK had contravened its "Access to Information" clause, Article 9.

UK addressed Ireland's affirmations as inoperative. According to them sub-clause one of article nine did not give any nation or individual an automatic right to access information, and that the requested documents did not fall under Article 9(2). They also claimed that even if Ireland's arguments were valid, they could still refuse to release the information on the grounds of commercial confidentiality.

ISSUES

The following questions were submitted for arbitral proceedings:

(i) Does the OSPAR Convention's Article 9(1) oblige a contracting party to reveal or develop a process for releasing "data" as stated by Article 9(2)?
(ii) If the information that Ireland requested falls under the definition of "data" as per OSPAR Convention's ninth article?
(iii) If the specifics asked for by Ireland is defined similarly as the term "data" is in the ninth article of the aforementioned convention and if so, whether the UK infringed subclause three of the ninth article of the same convention by not publishing all the information?

[3] OSPAR Convention 1998, a 32.

RATIO DECIDENDI

The OSPAR Convention itself was the sole piece of law that can be applied, as per the tribunal's first main findings. Ireland's proposition to consider other sources while judging UK's actions was rejected by the tribunal. Most of the tribunal also rejected Ireland's claim that, when interpreting the OSPAR Convention, they were required to consider customary laws and emerging international jurisprudence, even if both parties did not explicitly agree to it. A tribunal constituted in line with the OSPAR Convention is governed by the laws. However, it must truly be customary international law. This is not meant to imply that the tribunal could not use contemporary customary international law. The final conclusion was arrived at with a referendum of 2 to 1 in favor of the fact that the particulars requested by the country of Ireland did not fall under the ambit of Article number 9. Therefore, they determined that UK's decision to not provide the data would not be a violation of that provision. However, the tribunal dismissed UK's assertion that subclause one of the ninth article failed to grant Ireland an immediate right to information and that, rather, it only obligated the creation of "a national regulatory system dealing with the release of data." Given that such a national setup already persisted in the United Kingdom, the tribunal was not Ireland's ideal solution for recourse.

Ireland contended that OSPAR's Article 9(2) did not state that the data demanded be directly linked to acts that resulted in a detrimental effect on the coastal zone. None of the fourteen groups of data that had been excluded from the reports, all of which could not be accurately described as details about the condition of the maritime space, which according to the Tribunal was pertinent to the application of Article 9(2). it was held that Ireland was unable to demonstrate that the hidden material it was seeking, came under the ambit of OSPAR Convention Article 9(2). Ireland's assertion of the United Kingdom contravening sub-clause three of article nine of the OSPAR Convention was found unsubstantiated.

A dissenting opinion on the law relevant to the OSPAR Convention's reading, the scope of subclause two of article nine, as well as the burden of proof was given by Judge Gavan Griffith, the tribunal's Irish nominee. He argued that in interpreting and executing OSPAR Convention Article 9(2), the Aarhus Convention, to which neither Ireland nor UK were signatories, offered "both normative and evidential significance". Furthermore, he claimed that certain EC measures remained essential to the understanding of Article 9(2) because they served as illustrative of global practice.

JURISPRUDENTIAL ASPECTS OF THE CASE

The law as provided in various rules and statutes has to be analyzed to form a framework of the existing and emerging jurisprudence in relation to this case. This can be done by interpreting the submissions of each party, the views of their representatives, academic evaluators, and the final decision of the arbitrators.

Both parties were in agreement with the OSPAR Convention being the principal governing regulation of the arbitration. The Vienna Convention on the Law of Treaties (VCLT) was also relied upon according to the 2nd Article of the OSPAR convention[4] and as a general guide, even though Ireland was not a party to it at the time. Articles 31[5] and 32[6] of the VCLT were pertinent which advocated the presence of good faith and contextual sense while judging a treaty and using ensuing practices, agreements, and other relevant laws to support the decision. Deviation from these was allowed in Article 32 if the result is vague or unreasonable.

Beyond the conventions, Ireland pinned its hopes on the Sinatra Ministerial Statement of 1988. This was a ministerial meeting of the OSPAR Convention at Sintra, Portugal which aimed to propagate the safety of the aquatic habitat in the North-East Atlantic region[7]. It agreed to help reduce pollution in the maritime area from radiation via considerate ejections of radioactive pollutants and emissions after concerns expressed by various states about the gradual escalation from the Sellafield area. Ireland's argument to consider this declaration obligatory in the United Kingdom arose from the *Nuclear Tests*[8] case. In this case, nuclear tests were organized in a series by France in the neighbouring region of South Pacific sea. New Zealand and Australia bought action to cease this immediately due to the negative fallout on their regions and on the basis of statements made by the French government to stop testing. The primary problem which came up was if public unilateral declarations made by the state have a binding legal effect and if yes what is the scope of these. It was held that if these affirmations were reinforced by an determination to be restrained, they may become mandatory:

It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind

[4] OSPAR Convention 1998, a 2.
[5] Vienna Convention on the Law of Treaties 1969, a 31.
[6] Vienna Convention on the Law of Treaties 1969, a 32.
[7] Ministerial Meeting of the OSPAR Commission 1998.
[8] *Nuclear Tests (Australia & New Zealand v France)* [1974] ICJ Rep 457.

may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made with the context of international negotiations, is binding.

UK's allegiance with respect to recycling used substance at a different location does not conclusively create the same for Sellafield. The more general rules were advisory. So, this was striked.

Another view was taken in context with regional legal systems (OSPAR Convention's ninth article)[9]. It was accepted by Ireland that the applicable system here was English law with the main emphasis on the report prepared by PA Consulting Group in 1992. This report was created after the UK had requested various firms to assess the disadvantages and advantages of the MOX plant when Ireland first objected to this issue. The predetermined right of Ireland to claim knowledge with respect to this created a domestic regulatory framework and this disposition existed in the system of the United Kingdom, not at a global level[10]. So, a remedy under this title could not be raised in an international tribunal

Ireland also relied on the Rio Declaration (Principle 10) and 1998 'Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters' (Aarhus Convention). The UK presented that the Aarhus convention had not been sanctioned by either country and that the Rio Declaration could not be called a treaty. Hence, Ireland established the principle of *in statu nascendi* to incorporate principles that had not yet gained recognition under sources of international law (like customs) but will possibly be in coming time; be recognized as *lex lata*. This principle was taken from the *Gabcikovo-Nagymaros*[11] *case* which included Hungary and Slovakia. According to the facts of the case a joint project was agreed upon between the two countries in the Budapest treaty which visualized a cross-border dam system. Czech started the work in its territory but Hungary stopped due to the belief that Czech had assumed unlawful, arbitrary control of the operation and river. the matter could not be resolved, leading to the termination of the treaty. This was

[9] OSPAR Convention 1998, a 9.
[10] Ted L. McDorman, 'OSPAR Convention - Access to Information - Environmental Information -Interpretation of Treaties' (2004) 98 Am. J. Int'l L. 330.
[11] *Gabčikovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7.

found to be true by the arbiters and it was held that the joint operation must be restored since Hungary had been deprived of its rights to an equitable portion of a shared resource. However, Ireland was arguing under the assumption that states have an innate right to apply laws *in statu nascendi* which was not true. In the aforementioned case, the court had not meant to imply that new law means provisions that have not yet been legalized. It meant to insinuate that new law can be found in a great number of instruments[12]. Parties may use guidelines that are not *lex lata* in its resolution if they have been accepted and are soon to become a valid source, as instructed to international tribunals. This notion was also rejected since the tribunal had been authorized to take inspiration from current norms but only so far as it is consistent with the VCLT. In this case, the committee cannot apply this concept since it had not been sanctioned to pertain '*evolving'* international law. "Good faith" as advocated by the VCLT is an essential component and entitles nation-states to apply those principles which they have agreed to only. The Aarhus Convention was rejected on these grounds.

The final decision did not interpret the OSPAR convention in association with rules of international and regional law which created widespread confusion. Due to the absence of a specific, codified rule book in international law, judgments are usually examined with relevant principles internationally and municipally, which was absent in this case, casting a shadow on the very spirit. As inferred from the above paragraphs, Ireland's plea to include other sources than the OSPAR convention was rejected on every count.

CONCLUSION

The OSPAR arbitration case is an example of the triumph of the lawsuit related method and its legally indissoluble commitments over the operative approach. This isn't astonishing considering the fact that litigation on such a widespread level arises only with the consent of the parties, the tribunals are more motivated to act within the restrictions defined by the contract which led to it and what they agree are compulsory obligations. Evolving practice and context are left at the backstage, as they were in this case. This has led to criticism about Ireland's obvious disadvantageous position. It is very likely that the award won't garner a lot of support around the world due to its strict and narrow approach. However, the tribunal successfully reached a solution which will encourage more nation-states to approach the tribunal for resolving issues. None of this is to suggest what is wrong or right but rather that hard law holds

[12] Freya Baetens, 'Muddling the Waters of Treaty Interpretation? Relevant Rules of International Law in the MOX Plant OSPAR Arbitration and EC – Bio-tech Case' (2008) 77 Nordic Journal of International Law 197.

more water than circumstantial law in international environment litigation. This generalized inference is what we have tried to portray through our thorough examination of the case.

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