INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
YEAR 2001

3 December 2001

List of cases:
No. 10

THE MOX PLANT CASE

(IRELAND *v.* UNITED KINGDOM)

Request for provisional measures

ORDER

Present: *President* CHANDRASEKHARA RAO; *Vice-President* NELSON; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, MENSAH, AKL, ANDERSON, VUKAS, WOLFRUM, TREVES, MARSIT, EIRIKSSON, NDIAYE, JESUS, XU; *Judge* ad hoc SZÉKELY; *Registrar* GAUTIER.

THE TRIBUNAL,

composed as above,

after deliberation,

Having regard to article 290 of the United Nations Convention on the Law of the Sea (hereinafter "the Convention") and articles 21, 25 and 27 of the Statute of the Tribunal (hereinafter "the Statute"),

Having regard to articles 89 and 90 of the Rules of the Tribunal (hereinafter "the Rules"),

Having regard to the fact that Ireland and the United Kingdom of Great Britain and Northern Ireland (hereinafter “the United Kingdom”) have not accepted the same procedure for the settlement of disputes in accordance with article 287 of the Convention and are therefore deemed to have accepted arbitration in accordance with Annex VII to the Convention,

Having regard to the Notification and Statement of Claim submitted by Ireland to the United Kingdom on 25 October 2001 instituting arbitral proceedings as provided for in Annex VII to the Convention "in the dispute concerning the MOX plant, international movements of radioactive materials, and the protection of the marine environment of the Irish Sea",

Having regard to the Request for provisional measures submitted by Ireland to the United Kingdom on 25 October 2001 pending the constitution of an arbitral tribunal under Annex VII to the Convention,

Having regard to the Request submitted by Ireland to the Tribunal on 9 November 2001 for the prescription of provisional measures by the Tribunal in accordance with article 290, paragraph 5, of the Convention,

Makes the following Order:

1. *Whereas* Ireland and the United Kingdom are States Parties to the Convention;

2. *Whereas*, on 9 November 2001, Ireland filed with the Registry of the Tribunal by facsimile a Request for the prescription of provisional measures under article 290, paragraph 5, of the Convention "in the dispute concerning the MOX plant, international movements of radioactive materials, and the protection of the marine environment of the Irish Sea" between Ireland and the United Kingdom;

3. *Whereas* a copy of the Request was sent the same day by the Registrar of the Tribunal to the Secretary of State for Foreign and Commonwealth Affairs, Foreign and Commonwealth Office of the United Kingdom, London, and also in care of the Ambassador of the United Kingdom to Germany on 12 November 2001;

4. *Whereas*, on 9 November 2001, the Registrar was notified of the appointment of Mr. David J. O'Hagan, Chief State Solicitor, as Agent for Ireland, and of the appointment of Mr. Michael Wood, CMG, Legal Adviser to the Foreign and Commonwealth Office, as Agent for the United Kingdom;

5. *Whereas* the original of the Request and documents in support were filed on 12 November 2001, certified copies of which were transmitted on the same day to the Agent of the United Kingdom;

6. *Whereas*, on 12 November 2001, the Agent of Ireland proposed corrections to paragraphs 7 and 8 of the Request and the Agent of the United Kingdom informed the Tribunal, in accordance with article 65, paragraph 4, of the Rules, that he had no objections to these corrections being made;

7. *Whereas*, pursuant to article 90, paragraph 2, of the Rules, the President of the Tribunal, by Order dated 13 November 2001, fixed 19 and 20 November 2001 as the dates for the hearing, notice of which was communicated forthwith to the parties;

8. *Whereas* the Tribunal does not include upon the bench a judge of the nationality of Ireland and Ireland has chosen, pursuant to article 17, paragraph 2, of the Statute, Mr. Alberto Székely of Mexican nationality to sit as judge *ad hoc* in this case;

9. *Whereas,* since no objection to the choice of Mr. Székely as judge *ad hoc* was raised by the United Kingdom, and none appeared to the Tribunal itself, Mr. Székely was admitted to participate in the proceedings as judge *ad hoc* after having made the solemn declaration required under article 9 of the Rules at a public sitting of the Tribunal held on 18 November 2001;

10. *Whereas*, pursuant to the Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea of 18 December 1997, the Secretary-General of the United Nations was notified by the Registrar on 9 November 2001 of the Request, and States Parties to the Convention were notified, in accordance with article 24, paragraph 3, of the Statute, by a note verbale from the Registrar dated 13 November 2001;

11. *Whereas*, on 14 November 2001, the President ascertained the views of the parties regarding the procedure for the hearing in accordance with article 73 of the Rules;

12. *Whereas*, on 15 November 2001, the United Kingdom filed with the Registry by facsimile its Written Response, which was transmitted to the Agent of Ireland on the same day; the original of the Written Response was filed with the Registry on 17 November 2001, a certified copy of which was transmitted by courier to the Agent of Ireland on the same day;

13. *Whereas*, on 16 November 2001, the Agent of the United Kingdom proposed corrections to paragraph 192 of the Written Response and the Agent of Ireland informed the Tribunal, in accordance with article 65, paragraph 4, of the Rules, that he had no objections to these corrections being made;

14. *Whereas*, on 18 November 2001, the Agent of the United Kingdom proposed corrections to paragraph 190 of the Written Response and, in accordance with article 65, paragraph 4, of the Rules, the Agent of Ireland, while expressing no objections to these corrections being made, reserved his position on the contents of the proposed corrections;

15. *Whereas,* in accordance with article 68 of the Rules, the Tribunal held initial deliberations on 18 November 2001 concerning the written pleadings and the conduct of the case;

16. *Whereas* additional documents were submitted on 17, 19 and 20 November 2001 by Ireland, and on 18 and 20 November 2001 by the United Kingdom, copies of which were transmitted in each case to the other party;

17. *Whereas*, on 19 November 2001, the President held consultations with the Agents of the parties in accordance with article 45 of the Rules;

18. *Whereas*, prior to the opening of the hearing, the parties submitted documents pursuant to paragraph 14 of the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal;

19. *Whereas*, pursuant to article 67, paragraph 2, of the Rules, copies of the Request and the Written Response and the documents annexed thereto were made accessible to the public on the date of the opening of the oral proceedings;

20. *Whereas* oral statements were presented at four public sittings held on 19 and 20 November 2001 by the following:

On behalf of Ireland:	Mr. David J. O'Hagan, Chief State Solicitor, *as Agent*, Mr. Michael McDowell SC, Attorney General, Mr. Eoghan Fitzsimons SC, Member of the Irish Bar, Mr. Philippe Sands, Member of the Bar of England and Wales; Professor of International Law, University of London, United Kingdom, Mr. Vaughan Lowe, Member of the Bar of England and Wales; Chichele Professor of Public International Law, University of Oxford, United Kingdom, *as Counsel and Advocates,*
On behalf of the United Kingdom:	Mr. Michael Wood, CMG, Legal Adviser, Foreign and Commonwealth Office, *as Agent*, Lord Goldsmith QC, Attorney General, Mr. Richard Plender QC, Member of the Bar of England and Wales, Mr. Daniel Bethlehem, Member of the Bar of England and Wales; Deputy Director of the Lauterpacht Research Centre for International Law, Cambridge, United Kingdom, Mr. Samuel Wordsworth, Member of the Bar of England and Wales, *as Counsel*;

21. *Whereas* in the course of the oral proceedings a number of documents were displayed on video monitors;

22. *Whereas*, on 20 November 2001, a list of points and issues which the Tribunal would like the parties specially to address was communicated to the Agents;

23. *Whereas*, during the hearing on 20 November 2001, the Agent of Ireland requested that Ireland be permitted to submit a written response to the questions referred to in paragraph 22 and the President acceded to that request;

24. *Whereas*, during the hearing on 20 November 2001, the Agent of the United Kingdom responded orally to the questions referred to in paragraph 22;

25. *Whereas* the Agent of Ireland submitted a written response on 21 November 2001 to the questions referred to in paragraph 22 and additional documentation on 22 and

23 November 2001 and the Agent of the United Kingdom submitted comments on the written response of Ireland on 23 November 2001;

26. *Whereas*, in the Notification and Statement of Claim of 25 October 2001, Ireland requested the arbitral tribunal to be constituted under Annex VII (hereinafter "the Annex VII arbitral tribunal") to adjudge and declare:

1) That the United Kingdom has breached its obligations under Articles 192 and 193 and/or Article 194 and/or Article 207 and/or Articles 211 and 213 of UNCLOS in relation to the authorisation of the MOX plant, including by failing to take the necessary measures to prevent, reduce and control pollution of the marine environment of the Irish Sea from (1) intended discharges of radioactive materials and or wastes from the MOX plant, and/or (2) accidental releases of radioactive materials and/or wastes from the MOX plant and/or international movements associated the MOX plant, and/or (3) releases of radioactive materials and/or wastes from the MOX plant and/or international movements associated the MOX plant with the of resulting from terrorist act;

2) That the United Kingdom has breached its obligations under Articles 192 and 193 and/or Article 194 and/or Article 207 and/or Articles 211 and 213 of UNCLOS in relation to the authorisation of the MOX plant by failing (1) properly or at all to assess the risk of terrorist attack on the MOX plant and international movements of radioactive material associated with the plant, and/or (2) properly or at all to prepare a comprehensive response strategy or plan to prevent, contain and respond to terrorist attack on the MOX plant and international movements of radioactive waste associated with the plant;

3) That the United Kingdom has breached its obligations under Articles 123 and 197 of UNCLOS in relation to the authorisation of the MOX plant, and has failed to cooperate with Ireland in the protection of the marine environment of the Irish Sea *inter alia* by refusing to share information with Ireland and/or refusing to carry out a proper environmental assessment of the impacts on the marine environment of the MOX plant and associated activities and/or proceeding to authorise the operation of the MOX plant whilst proceedings relating to the settlement of a dispute on access to information were still pending;

4) That the United Kingdom has breached its obligations under Article 206 of UNCLOS in relation to the authorisation of the MOX plant, including by

   (a) failing, by its 1993 Environmental Statement, properly and fully to assess the potential effects of the operation of the MOX plant on the marine environment of the Irish Sea; and/or

   (b) failing, since the publication of its 1993 Environmental Statement, to assess the potential effects of the operation of the MOX plant on the marine environment by reference to the factual and legal developments which have arisen since 1993, and in particular since 1998; and/or

(c) failing to assess the potential effects on the marine environment of the Irish Sea of international movements of radioactive materials to be transported to and from the MOX plant; and/or

(d) failing to assess the risk of potential effects on the marine environment of the Irish Sea arising from terrorist act or acts on the MOX plant and/or on international movements of radioactive material to and from the MOX plant.

5) That the United Kingdom shall refrain from authorizing or failing to prevent (a) the operation of the MOX plant and/or (b) international movements of radioactive materials into and out of the United Kingdom related to the operation of the MOX plant or any preparatory or other activities associated with the operation of the MOX until such time as (1) there has been carried out a proper assessment of the environmental impact of the operation of the MOX plant as well as related international movements of radioactive materials, and (2) it is demonstrated that the operation of the MOX plant and related international movements of radioactive materials will result in the deliberate discharge of no radioactive materials, including wastes, directly or indirectly into the marine environment of the Irish Sea, and (3) there has been agreed and adopted jointly with Ireland a comprehensive strategy or plan to prevent, contain and respond to terrorist attack on the MOX plant and international movements of radioactive waste associated with the plant;

6) That the United Kingdom pays Ireland's costs of the proceedings;

27. *Whereas* the provisional measures requested by Ireland in the Request to the Tribunal dated 9 November 2001 were as follows:

(1) that the United Kingdom immediately suspend the authorisation of the MOX plant dated 3 October 2001, alternatively take such other measures as are necessary to prevent with immediate effect the operation of the MOX plant;

(2) that the United Kingdom immediately ensure that there are no movements into or out of the waters over which it has sovereignty or exercises sovereign rights of any radioactive substances or materials or wastes which are associated with the operation of, or activities preparatory to the operation of, the MOX plant;

(3) that the United Kingdom ensure that no action of any kind is taken which might aggravate, extend or render more difficult of solution the dispute submitted to the Annex VII tribunal (Ireland hereby agreeing itself to act so as not to aggravate, extend or render more difficult of solution that dispute); and

(4) that the United Kingdom ensure that no action is taken which might prejudice the rights of Ireland in respect of the carrying out of any decision on the merits that the Annex VII tribunal may render (Ireland likewise will take no action of that kind in relation to the United Kingdom);

28. *Whereas* the submissions presented by the United Kingdom in its Written Response read as follows:

[T]he United Kingdom requests the International Tribunal for the Law of the Sea to:

(1) reject Ireland's application for provisional measures;

(2) order Ireland to bear the United Kingdom's costs in these proceedings;

29. *Whereas* Ireland, in its final submissions at the public sitting held on 20 November 2001, requested the prescription by the Tribunal of the following provisional measures:

(1) that the United Kingdom immediately suspend the authorisation of the MOX plant dated 3 October, 2001, alternatively take such other measures as are necessary to prevent with immediate effect the operation of the MOX plant;

(2) that the United Kingdom immediately ensure that there are no movements into or out of the waters over which it has sovereignty or exercises sovereign rights of any radioactive substances or materials or wastes which are associated with the operation of, or activities preparatory to the operation of, the MOX plant;

(3) that the United Kingdom ensure that no action of any kind is taken which might aggravate, extend or render more difficult of solution the dispute submitted to the Annex VII tribunal (Ireland hereby agreeing itself to act so as not to aggravate, extend or render more difficult of solution that dispute); and

(4) that the United Kingdom ensure that no action is taken which might prejudice the rights of Ireland in respect of the carrying out of any decision on the merits that the Annex VII tribunal may render (Ireland likewise will take no action of that kind in relation to the United Kingdom);

30. *Whereas*, at the public sitting held on 20 November 2001, the United Kingdom presented its final submissions as follows:

The United Kingdom requests the International Tribunal for the Law of the Sea to:

(1) reject Ireland's request for provisional measures;

(2) order Ireland to bear the United Kingdom's costs in these proceedings;

31. *Considering* that, in accordance with article 287 of the Convention, Ireland has, on 25 October 2001, instituted proceedings before the Annex VII arbitral tribunal against the United Kingdom "in the dispute concerning the MOX plant, international movements of radioactive materials, and the protection of the marine environment of the Irish Sea";

32. *Considering* that Ireland on 25 October 2001 notified the United Kingdom of the submission of the dispute to the Annex VII arbitral tribunal and of the Request for provisional measures;

33. *Considering* that, on 9 November 2001, after the expiry of the time-limit of two weeks provided for in article 290, paragraph 5, of the Convention, and pending the constitution of the

Annex VII arbitral tribunal, Ireland submitted to the Tribunal a Request for provisional measures;

34. *Considering* that article 290, paragraph 5, of the Convention provides in the relevant part that:

> Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea … may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires;

35. *Considering* that, before prescribing provisional measures under article 290, paragraph 5, of the Convention, the Tribunal must satisfy itself that *prima facie* the Annex VII arbitral tribunal would have jurisdiction;

36. *Considering* that Ireland maintains that the dispute with the United Kingdom concerns the interpretation and application of certain provisions of the Convention, including, in particular, articles 123, 192 to 194, 197, 206, 207, 211, 212 and 213 thereof;

37. *Considering* that Ireland has invoked as the basis of jurisdiction of the Annex VII arbitral tribunal article 288, paragraph 1, of the Convention which reads as follows:

> A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part;

38. *Considering* that the United Kingdom maintains that Ireland is precluded from having recourse to the Annex VII arbitral tribunal in view of article 282 of the Convention which reads as follows:

> 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;

39. *Considering* that the United Kingdom maintains that the matters of which Ireland complains are governed by regional agreements providing for alternative and binding means of resolving disputes and have actually been submitted to such alternative tribunals, or are about to be submitted;

40. *Considering* that the United Kingdom referred to the fact that Ireland has under article 32 of the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (hereinafter "the OSPAR Convention") submitted a dispute between Ireland and the United Kingdom "concerning access to information under article 9 of the OSPAR

Convention in relation to the economic 'justification' of the proposed MOX plant" to an arbitral tribunal (hereinafter "the OSPAR arbitral tribunal");

41. *Considering* that the United Kingdom has further stated that certain aspects of the complaints of Ireland are governed by the Treaty establishing the European Community (hereinafter "the EC Treaty") or the Treaty establishing the European Atomic Energy Community (hereinafter "the Euratom Treaty") and the Directives issued thereunder and that States Parties to those Treaties have agreed to invest the Court of Justice of the European Communities with exclusive jurisdiction to resolve disputes between them concerning alleged failures to comply with such Treaties and Directives;

42. *Considering* that the United Kingdom has also stated that Ireland has made public its intention of initiating separate proceedings in respect of the United Kingdom's alleged breach of obligations arising under the EC Treaty and the Euratom Treaty;

43. *Considering* that the United Kingdom maintains that the main elements of the dispute submitted to the Annex VII arbitral tribunal are governed by the compulsory dispute settlement procedures of the OSPAR Convention or the EC Treaty or the Euratom Treaty;

44. *Considering* that, for the above reasons, the United Kingdom maintains that the Annex VII arbitral tribunal would not have jurisdiction and that, consequently, the Tribunal is not competent to prescribe provisional measures under article 290, paragraph 5, of the Convention;

45. *Considering* that Ireland contends that the dispute concerns the interpretation or application of the Convention and does not concern the interpretation or application of either the OSPAR Convention or the EC Treaty or the Euratom Treaty;

46. *Considering* that Ireland further states that neither the OSPAR arbitral tribunal nor the Court of Justice of the European Communities would have jurisdiction that extends to all of the matters in the dispute before the Annex VII arbitral tribunal;

47. *Considering* that Ireland further maintains that the rights and duties under the Convention, the OSPAR Convention, the EC Treaty and the Euratom Treaty are cumulative, and, as a State Party to all of them, it may rely on any or all of them as it chooses;

48. *Considering* that, in the view of the Tribunal, article 282 of the Convention is concerned with general, regional or bilateral agreements which provide for the settlement of disputes concerning what the Convention refers to as "the interpretation or application of this Convention";

49. *Considering* that the dispute settlement procedures under the OSPAR Convention, the EC Treaty and the Euratom Treaty deal with disputes concerning the interpretation or application of those agreements, and not with disputes arising under the Convention;

50. *Considering* that, even if the OSPAR Convention, the EC Treaty and the Euratom Treaty contain rights or obligations similar to or identical with the rights or obligations set out in the Convention, the rights and obligations under those agreements have a separate existence from those under the Convention;

51. *Considering* also that the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, *inter alia*, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*;

52. *Considering* that the Tribunal is of the opinion that, since the dispute before the Annex VII arbitral tribunal concerns the interpretation or application of the Convention and no other agreement, only the dispute settlement procedures under the Convention are relevant to that dispute;

53. *Considering* that, for the reasons given above, the Tribunal considers that, for the purpose of determining whether the Annex VII arbitral tribunal would have *prima facie* jurisdiction, article 282 of the Convention is not applicable to the dispute submitted to the Annex VII arbitral tribunal;

54. *Considering* that the United Kingdom contends that the requirements of article 283 of the Convention have not been satisfied since, in its view, there has been no exchange of views regarding the settlement of the dispute by negotiation or other peaceful means;

55. *Considering* that article 283 of the Convention reads as follows:

> 1. When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.
>
> 2. The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement;

56. *Considering* that the United Kingdom maintains that the correspondence between Ireland and the United Kingdom did not amount to an exchange of views on the dispute said to arise under the Convention;

57. *Considering* that the United Kingdom contends further that its request for an exchange of views under article 283 of the Convention was not accepted by Ireland;

58. *Considering* that Ireland contends that, in its letter written as early as 30 July 1999, it had drawn the attention of the United Kingdom to the dispute under the Convention and that further exchange of correspondence on the matter took place up to the submission of the dispute to the Annex VII arbitral tribunal;

59. *Considering* that Ireland contends further that it has submitted the dispute to the Annex VII arbitral tribunal only after the United Kingdom failed to indicate its willingness to consider the immediate suspension of the authorization of the MOX plant and a halt to related international transports;

60. *Considering* that, in the view of the Tribunal, a State Party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted;

61. *Considering* that, in the view of the Tribunal, the provisions of the Convention invoked by Ireland appear to afford a basis on which the jurisdiction of the Annex VII arbitral tribunal might be founded;

62. *Considering* that, for the above reasons, the Tribunal finds that the Annex VII arbitral tribunal would *prima facie* have jurisdiction over the dispute;

63. *Considering* that, in accordance with article 290, paragraph 1, of the Convention, the Tribunal may prescribe provisional measures to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment;

64. *Considering* that, according to article 290, paragraph 5, of the Convention, provisional measures may be prescribed pending the constitution of the Annex VII arbitral tribunal if the Tribunal considers that the urgency of the situation so requires in the sense that action prejudicial to the rights of either party or causing serious harm to the marine environment is likely to be taken before the constitution of the Annex VII arbitral tribunal;

65. *Considering* that the Tribunal must, therefore, decide whether provisional measures are required pending the constitution of the Annex VII arbitral tribunal;

66. *Considering* that, in accordance with article 290, paragraph 5, of the Convention, the Annex VII arbitral tribunal, once constituted, may modify, revoke or affirm any provisional measures prescribed by the Tribunal;

67. *Considering* that Ireland contends that its rights under certain provisions of the Convention, in particular articles 123, 192 to 194, 197, 206, 207, 211, 212 and 213 thereof, will be irrevocably violated if the MOX plant commences its operations before the United Kingdom fulfils its duties under the Convention;

68. *Considering* that Ireland contends further that once plutonium is introduced into the MOX plant and it commences operations some discharges into the marine environment will occur with irreversible consequences;

69. *Considering* that Ireland contends further that, if the plant becomes operational, the danger of radioactive leaks and emissions, whether arising from the operation of the plant, or resulting from industrial accidents, terrorist attacks, or other causes, would be greatly magnified;

70. *Considering* that Ireland argues that the commissioning of the plant is, in practical terms, itself a near-irreversible step and it is not possible to return to the position that existed before the commissioning of the MOX plant simply by ceasing to feed plutonium into the system;

71. *Considering* that Ireland argues that the precautionary principle places the burden on the United Kingdom to demonstrate that no harm would arise from discharges and other consequences of the operation of the MOX plant, should it proceed, and that this principle

might usefully inform the assessment by the Tribunal of the urgency of the measures it is required to take in respect of the operation of the MOX plant;

72. *Considering* that the United Kingdom contends that it has adduced evidence to establish that the risk of pollution, if any, from the operation of the MOX plant would be infinitesimally small;

73. *Considering* that the United Kingdom maintains that the commissioning of the MOX plant on or around 20 December 2001 will not, even arguably, cause serious harm to the marine environment or irreparable prejudice to the rights of Ireland, in the period prior to the constitution of the Annex VII arbitral tribunal or at all;

74. *Considering* that the United Kingdom contends that neither the commissioning of the MOX plant nor the introduction of plutonium into the system is irreversible, although decommissioning would present the operator of the plant with technical and financial difficulties, if Ireland were to be successful in its claim before the Annex VII arbitral tribunal;

75. *Considering* that the United Kingdom argues that Ireland has failed to supply proof that there will be either irreparable damage to the rights of Ireland or serious harm to the marine environment resulting from the operation of the MOX plant and that, on the facts of this case, the precautionary principle has no application;

76. *Considering* that the United Kingdom states that the manufacture of MOX fuel presents negligible security risks and it has in place very extensive security precautions in terms of the protection of the Sellafield site;

77. *Considering* that the United Kingdom states that it hopes to reach agreement with Ireland on the constitution of the Annex VII arbitral tribunal within a short space of time;

78. *Considering* that, at the public sitting held on 20 November 2001, the United Kingdom has stated that "there will be no additional marine transports of radioactive material either to or from Sellafield as a result of the commissioning of the MOX plant";

79. *Considering* that at the same sitting the United Kingdom stated further that "there will be no export of MOX fuel from the plant until summer 2002" and that "t
here is to be no import to the THORP plant of spent nuclear fuel pursuant to contracts for conversion to the MOX plant within that period either" and clarified that the word "summer" should be read as "October";

80. *Considering* that the Tribunal places on record the assurances given by the United Kingdom as specified in paragraphs 78 and 79;

81. *Considering* that, in the circumstances of this case, the Tribunal does not find that the urgency of the situation requires the prescription of the provisional measures requested by Ireland, in the short period before the constitution of the Annex VII arbitral tribunal;

82. *Considering,* however, that the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law and that rights arise therefrom which the Tribunal may consider appropriate to preserve under article 290 of the Convention;

83. *Considering* that, in accordance with article 89, paragraph 5, of the Rules, the Tribunal may prescribe measures different in whole or in part from those requested;

84. *Considering* that, in the view of the Tribunal, prudence and caution require that Ireland and the United Kingdom cooperate in exchanging information concerning risks or effects of the operation of the MOX plant and in devising ways to deal with them, as appropriate;

85. *Considering* that Ireland and the United Kingdom should each ensure that no action is taken which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal;

86. *Considering* that, pursuant to article 95, paragraph 1, of the Rules, each party is required to submit to the Tribunal a report and information on compliance with any provisional measures prescribed;

87. *Considering* that it may be necessary for the Tribunal to request further information from the parties on the implementation of provisional measures and that it is appropriate that the President be authorized to request such information in accordance with article 95, paragraph 2, of the Rules;

88. *Considering* that, in the present case, the Tribunal sees no need to depart from the general rule, as set out in article 34 of its Statute, that each party shall bear its own costs;

89. *For these reasons*,

THE TRIBUNAL,

1. Unanimously,

Prescribes, pending a decision by the Annex VII arbitral tribunal, the following provisional measure under article 290, paragraph 5, of the Convention:

> Ireland and the United Kingdom shall cooperate and shall, for this purpose, enter into consultations forthwith in order to:
>
> (a) exchange further information with regard to possible consequences for the Irish Sea arising out of the commissioning of the MOX plant;
>
> (b) monitor risks or the effects of the operation of the MOX plant for the Irish Sea;
>
> (c) devise, as appropriate, measures to prevent pollution of the marine environment which might result from the operation of the MOX plant.

2. Unanimously,

Decides that Ireland and the United Kingdom shall each submit the initial report referred to in article 95, paragraph 1, of the Rules not later than 17 December 2001, and

authorizes the President of the Tribunal to request such further reports and information as he may consider appropriate after that date.

3. Unanimously,

Decides that each party shall bear its own costs.

Done in English and in French, both texts being authoritative, in the Free and Hanseatic City of Hamburg, this third day of December, two thousand and one, in three copies, one of which will be placed in the archives of the Tribunal and the others transmitted to the Government of Ireland and the Government of the United Kingdom, respectively.

(Signed) P. CHANDRASEKHARA RAO,
President.

(Signed) Philippe GAUTIER,
Registrar.

Judges CAMINOS, YAMAMOTO, PARK, AKL, MARSIT, EIRIKSSON and JESUS append a joint declaration to the Order of the Tribunal.

Vice-President NELSON, *Judges* MENSAH, ANDERSON, WOLFRUM, TREVES, JESUS and *Judge* ad hoc SZÉKELY append separate opinions to the Order of the Tribunal.

JOINT DECLARATION
OF JUDGES CAMINOS, YAMAMOTO, PARK,
AKL, MARSIT, EIRIKSSON AND JESUS

The dispute between Ireland and the United Kingdom as it appears before the Tribunal is characterized by an almost total lack of agreement on the scientific evidence with respect to the possible consequences of the operation of the MOX plant on the marine environment of the Irish Sea.

Under these circumstances of scientific uncertainty, the Tribunal might have been expected to have followed the path it took in the *Southern Bluefin Tuna Cases* to prescribe a measure preserving the existing situation. In its wisdom, it did not do so. It decided, in the circumstances of the case, that, in the short period before the constitution of an arbitral tribunal under Annex VII to the United Nations Convention on the Law of the Sea, the urgency of the situation did not require it to lay down, as binding legal obligations, the measures requested by Ireland.

We have supported this decision. The circumstances of the case which have influenced us in this regard include, first, as for Ireland's request that marine transport associated with the plant cease, that the United Kingdom has made assurances that there would be no such transport in the relevant period. Second, with respect to Ireland's request to prevent the commissioning of the plant, we are influenced by the United Kingdom statement that the commissioning of the plant and the introduction of plutonium into the system is not irreversible.

More importantly, our position is a response to another characteristic of the dispute as presented to the Tribunal, that is, the almost complete lack of cooperation between the Governments of Ireland and the United Kingdom with respect to the environmental impact of the planned operations. It is clear that this state of affairs has its origin in a long-standing dispute with respect to other activities at the Sellafield site, but those activities are not before the Tribunal.

The Tribunal has identified the duty to cooperate as a fundamental principle in the regime of the prevention of pollution of the marine environment under Part XII of the Convention and general international law. Against the background of that duty, we regard the most effective measure that the Tribunal could have adopted was to require the parties to cooperate forthwith. It is not, we trust, an idle hope that the results of the consultations prescribed will include a common understanding of the scientific evidence and a common appreciation of the measures which must be taken with respect to the plant to prevent harm to the marine environment.

(*Signed*) Hugo Caminos
(*Signed*) Soji Yamamoto
(*Signed*) Choon-Ho Park
(*Signed*) Joseph Akl
(*Signed*) Mohamed Mouldi Marsit
(*Signed*) Gudmundur Eiriksson
(*Signed*) José Luis Jesus

SEPARATE OPINION OF VICE-PRESIDENT NELSON

These observations will deal briefly with the role of section 1, in particular article 282, in the scheme of the dispute settlement system contained in Part XV of the Convention.

1. At the outset it is necessary to note that States Parties are free to settle disputes concerning the interpretation or application of this Convention by any peaceful means of their own choice.

Article 280 makes this quite clear. It reads as follows:

> Nothing in this Part impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by *any peaceful means of their own choice*. (Emphasis added)

2. The whole object of section 1 of Part XV of the Convention is to ensure that disputes concerning the interpretation or application of the Convention are settled by peaceful means and not necessarily by the mechanism for dispute settlement embodied in the Convention. That was the intent of the drafters of the Convention. In a memorandum with respect to the negotiating text on this matter President Amerasinghe stated that: "[w]hile imposing the general obligation to exchange views and to settle disputes by peaceful means, these articles give complete freedom to the parties to utilize the method of their choosing, including direct negotiation, good offices, mediation, conciliation, arbitration or judicial settlement" (UN Doc. A/CONF.62/WP.9/ADD.1, *Off. Rec.* V., p. 122). The view was also put forward that "when an agreement existed between parties to a dispute whereby they had assumed an obligation to settle any given dispute by recourse to a particular method, that agreement should have precedence over the procedures agreed upon in the new Convention" (Statement by the Japanese delegation at the 60th plenary, paragraph 55, *ibid.*, p. 27. See too the observations of Argentina at the 59th plenary, paragraph 46, *ibid.*, p. 18, and the *Virginia Commentary* V, p. 26).

3. It is in this context that article 282, which has been the subject-matter of much debate in this case, should be read. It states that:

> 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. (Emphasis added)

4. This provision, in my view, constitutes a hurdle which ought to be crossed before the procedures in section 2 of Part XV can be invoked. It contains certain requirements which must be met before the mandatory procedures in section 2 can be utilised.

5. The requirements are as follows. First, the dispute between the parties must concern the interpretation and application of the Convention on the Law of the Sea. Secondly, the parties must have entered into an agreement - general, regional, bilateral or otherwise - to submit such dispute to a procedure that entails a binding decision. It will be remembered that in the

Southern Bluefin Tuna Award (39 ILM 1359 (2000)) where the companion article 281 was at issue, the Arbitral Tribunal found it necessary to deal with the expression "and the agreement between the parties does not exclude any further procedure" (see article 281, paragraph 1). That Tribunal came to the conclusion "that Article 16 of the 1993 Convention 'exclude[s] any further procedure' within the contemplation of Article 281(1)" – though not expressly (paragraph 59, p. 1390, *ibid*.). Justice Sir Kenneth Keith in his Separate Opinion, relying on the same requirement in article 281, came to a very different conclusion, holding that Article 16 of the Convention for the Conservation of Southern Bluefin Tuna did "not 'exclude' the jurisdiction of this tribunal in respect of disputes arising under UNCLOS" (paragraph 30, p. 1401, *ibid*.).

6. The point being made here is that it is in the requirements contained in articles 281 and 282 that can be found the crucial test whereby there can be any resort to the compulsory procedures embodied in section 2 of Part XV. In other words the bar created by these articles can only be circumvented when the requirements are met.

7. For the reasons given in the Order, I am in agreement with the Tribunal that "for the purpose of determining whether the Annex VII arbitral tribunal would have *prima facie* jurisdiction, article 282 of the Convention is not applicable to the dispute submitted to the Annex VII arbitral tribunal" (paragraph 53). However, I have doubts concerning the reach of paragraph 51, which may well render article 282 or article 281 ineffective.

8. These observations should not be construed as denying the centrality of the dispute settlement procedure in the scheme of the Convention, so eloquently described by President Amerasinghe as being "the pivot upon which the delicate equilibrium of the compromise must be balanced. Otherwise the compromise will disintegrate rapidly and permanently … Effective dispute settlement would also be the guarantee that the substance and intention within the legislative language of the convention will be interpreted both consistently and equitably" (A/CONF.62/WP.9/ADD.1, *Off. Rec.* V, p. 122, also cited by Sir Kenneth Keith in his Separate Opinion).

(*Signed*) Dolliver Nelson

SEPARATE OPINION OF JUDGE MENSAH

I agree with the finding of the Tribunal that, in the circumstances of the present case, the urgency of the situation does not require the prescription of the provisional measures requested by Ireland. On the facts as presented to the Tribunal in this case, I do not find that the requirements for the prescription of provisional measures under article 290, paragraph 5, of the Convention are satisfied in respect of the rights which Ireland claims have been violated by the United Kingdom.

In considering a request for the prescription of provisional measures under article 290, this Tribunal is governed by both paragraphs 1 and 5 of that article. Paragraph 1 sets out the parameters and conditions for the prescription of provisional measures in general. As the article puts it, provisional measures may be prescribed if the court or tribunal to which a request is addressed considers that such measures are "appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision". The jurisprudence of international judicial bodies makes it clear that provisional measures are essentially exceptional and discretionary in nature, and are only appropriate if the court or tribunal to which a request is addressed is satisfied that two conditions have been met. The first condition is that the court or tribunal must find that the rights of either one or other of the parties might be prejudiced without the prescription of such measures, i.e. if there is a credible possibility that such prejudice of rights might occur. The second condition is that the prejudice of rights would be irreparable in the sense that it would not be possible to restore the injured party materially to the situation that would have prevailed without the infraction complained of, or that the infraction "could not be made good simply by the payment of an indemnity or by compensation or restitution in some other material form" (case concerning the *Denunciation of the Treaty of 2 November 1865 between China and Belgium, P.C.I.J., Series A, No. 8,* p. 7*)*. In the case of a request under article 290 of the Convention provisional measures may also be prescribed to prevent serious harm to the marine environment.

It is not necessary for present purposes to enter into a full discussion of what are the essential elements of the concept of "irreparable prejudice" of rights or even of that of "serious damage to the marine environment". Suffice it to say that a court or tribunal will not prescribe provisional measures unless it is satisfied that some irreversible prejudice of rights or serious harm to the marine environment might occur in the absence of such measures.

But whatever may be the considerations for determining that the prescription of provisional measures is appropriate under paragraph 1 of article 290 of the Convention, it is important to recognize that they are not the only factors that need to be taken into account when dealing with a request for provisional measures under paragraph 5 of article 290. In other words, although the conditions for provisional measures under paragraph 1 are necessary for prescription of measures under paragraph 5, they are not sufficient. This is because the situations dealt with under the two paragraphs are different from each other in two important respects. The first difference arises from the fact that, whereas a request for the prescription of provisional measures under paragraph 1 of article 290 is dealt with by the court or tribunal to which the "dispute has been duly submitted" (and which, therefore, is expected to deal with the substance of the dispute, including as appropriate, questions of jurisdiction, admissibility and merits,) a request for provisional measures under paragraph 5 is considered by a court or tribunal that will not deal with any of the substantive aspects of the dispute, except the relatively simple issue of whether or not there is reason to believe that

prima facie the court or tribunal to which the dispute is to be submitted would have jurisdiction to adjudicate upon the dispute. The second difference is that a court or tribunal dealing with a request for provisional measures under paragraph 1 of article 290 is required to consider measures that are appropriate to preserve rights or prevent harm "pending the final decision" in the case. On the other hand, a court or tribunal considering a request for provisional measures under paragraph 5 of article 290 has power only to prescribe measures pending the constitution of the arbitral tribunal to which the dispute is being submitted, i.e. the Annex VII arbitral tribunal. These are not mere technical differences: they have significant implications not only with regard to the considerations and factors that need to be taken into account by the respective courts or tribunals but also with regard to the approach to be adopted in considering the evidence adduced before them. For example, in dealing with the possibility of prejudice to rights or serious harm to the marine environment, a court or tribunal operating under paragraph 5 of article 290 of the Convention must bear in mind that it is not within its purview to consider, let alone to decide, whether there is the possibility of such prejudice or harm "before a final decision" is reached on the claims and counter-claims of the parties in the dispute. That court or tribunal is only required and empowered to determine whether, on the evidence adduced before it, it is satisfied that there is a reasonable possibility that a prejudice of rights of the parties (or serious damage to the marine environment) might *occur prior to the constitution of the arbitral tribunal to which the substance of the dispute is being submitted.* This difference in the temporal dimension of the competence of the tribunal imposes a measure of constraint on a court or tribunal dealing with a request for provisional measures under article 290, paragraph 5, of the Convention. That constraint applies fully to this Tribunal in the present case.

This means that the Tribunal should exercise considerable self-discipline to ensure that it does not deal with, or even appear to be dealing with, matters that fall outside its competence. This applies especially to the way in which it reacts to the evidence that may be submitted by the parties regarding the possibility or otherwise of prejudice of rights or harm to the marine environment, especially where, as in the majority of cases, there are wide differences between the estimations of the parties and their experts. In such a situation it is important for the Tribunal to appreciate at all times that it is not for it to determine whether or not there is a potential for prejudice of rights or harm to the marine environment in the abstract, but rather whether there is evidence that potential prejudice or harm might occur in the period covered by its competence, that is to say, in the period pending the constitution of the Annex VII arbitral tribunal. Once again, this is not just a minor point of detail. It has substantive significance for the issue of urgency that is a precondition of the special jurisdiction conferred on the Tribunal by paragraph 5 of article 290 of the Convention. That provision expressly states that provisional measures may be prescribed if "the urgency of the situation so requires". The implication is that the Tribunal is required not only to conclude that there is the possibility of "irreparable prejudice" to the rights of one or other of the parties (or serious damage to the marine environment), but also that this possibility might occur in the period pending the constitution of the Annex VII arbitral tribunal. Thus the Tribunal may find that it is not appropriate to prescribe provisional measures even where there is evidence that some prejudice of rights or harm might occur in the future. This would be so if it concludes that the prejudice or harm is unlikely to materialise prior to the constitution of the arbitral tribunal. It may also refuse to prescribe provisional measures if it finds that some prejudice or harm might occur but that such prejudice or harm would not be irreversible ("irreparable"). In such situations it would be entirely reasonable for the Tribunal to conclude that it is not appropriate for it to prescribe any provisional measures because the urgency of the situation does not require the prescription of such measures in the period for

which it has the competence to act under article 290, paragraph 5. This does not, of course, mean that the prejudice or harm to be prevented must be one whose full effect would necessarily be felt before the constitution of the arbitral tribunal. Far from it. The Tribunal is competent, and indeed is required, to act to prevent prejudice of rights or harm that can reasonably be foreseen, even if the full effects would occur after the constitution of the arbitral tribunal. In any event, it must be made clear that a finding by the Tribunal that the evidence before it does not convince it that irreparable prejudice of rights or harm might occur before the constitution of the arbitral tribunal does not in any way imply that the Tribunal is saying or even suggesting that such prejudice or harm might not occur at any time during the pendency of the dispute. It certainly does not mean that the *Tribunal has found that such damage will not occu*r. It merely means that enough evidence has not been presented to satisfy the Tribunal that it is appropriate to exercise what is universally accepted to be an exceptional and discretionary power. In this case that discretion is to be exercised in respect of a period that is much shorter than would be the case in a request for provisional measures under paragraph 1 of article 290 of the Convention.

These considerations lead me to the view that the Tribunal acted correctly in not concentrating too much attention on the existence or nature of "long-term" potential risks of damage to Ireland or harm to the marine environment as a result of the commissioning of the MOX plant. On that issue, there is a clear and palpable difference of opinion between the parties, and the evidence or lack of evidence is such that reasonable minds can and will probably differ as to the conclusions to be drawn. But, in my view, it was not necessary or even appropriate for this Tribunal to decide on that issue. The Annex VII arbitral tribunal will have ample opportunity (and hopefully fuller and more relevant information) to consider and take a view on the matter; as it is its exclusive competence to do. And, in any case, it is important to note that whatever conclusion the Tribunal might have reached on the matter could be modified or rejected by that arbitral tribunal. In the present case, all that was required of the Tribunal was to consider whether any rights of Ireland or the United Kingdom or any threat of serious harm to the marine environment needed protection in the period prior to the composition of the Annex VII arbitral tribunal. On that point, I agree with the conclusion that the evidence before the Tribunal does not suffice to show either that irreversible prejudice might occur to any rights of Ireland or that serious harm to the marine environment might occur, solely as a result of the commissioning of the MOX plant, *in the period between now and the constitution of the Annex VII arbitral tribunal.* In coming to this conclusion I have taken into account the information that the constitution of the Annex VII arbitral tribunal is expected to be completed before the beginning of the spring of 2002, as well as the commitment made by the United Kingdom that there will be no maritime transport of radioactive material before the summer of 2002 (paragraphs 78 and 79 of the Order).

I note that Ireland has submitted that the "inevitability of irreparable prejudice to the right of Ireland to insist upon these preconditions to the commissioning of the plant, if the plant is commissioned before a ruling on the merits of its claim, is obvious" (paragraph 148 of the Request for provisional measures). I do not consider that this submission is valid. This Tribunal is not competent to prescribe provisional measures to prevent irreparable prejudice "before a ruling on the merits" of the Irish claim. It can only act if it is satisfied that there might be irreparable prejudice *before the constitution of the Annex VII arbitral tribunal.* This requirement applies both to the "procedural rights" to which Ireland refers in its claim, such as rights under articles 123, 197, 206 and 207, as well as the "substantive rights", such as those in articles 192 and 194.

As far as the substantive right of Ireland not to have its marine environment polluted as a result of the commissioning and operation of the MOX plant is concerned, the evidence presented is, in my view, not sufficient to show that the commissioning of the MOX plant on 20 December would, in itself, result in irreparable damage to Ireland before the constitution of the Annex VII arbitral tribunal. Both parties appear to agree in their submissions, that neither the authorization of the MOX plant nor its commissioning is technically irreversible. Indeed, the evidence suggests that it is the United Kingdom that runs a greater risk if it goes ahead with commissioning and is later ordered by the Annex VII arbitral tribunal to take other action in connection with the commissioning or operation of the plant.

But, while I share the Tribunal's conclusion that, in the circumstances of this case, the urgency of the situation does not require the prescription of the provisional measures requested by Ireland, I would have felt more comfortable if the Tribunal had indicated in clear and specific terms the reason for this conclusion. As I see it, the reason is that it is not reasonable to believe that any pollution of Ireland's marine environment might occur in the period between the issue of the Order of this Tribunal and the constitution of the Annex VII arbitral tribunal, sometime before the spring of 2002.

With regard to the "procedural rights" (cooperation and consultation) which Ireland claims have been violated by the United Kingdom, I agree with the Tribunal that some at least of these are "rights" that may "be appropriate for protection" by provisional measures under article 290 of the Convention (paragraph 82 of the Order). However, I do not find that any irreparable prejudice to Ireland has occurred or might occur before the constitution of the arbitral tribunal. In my view none of the violations of the procedural rights arising from the duty to cooperate or to consult or to undertake appropriate environmental assessments are "irreversible" in the sense that they cannot effectively be enforced against the United Kingdom by decision of the Annex VII arbitral tribunal, if the arbitral tribunal were to conclude that any such violations have in fact occurred. For example, it would be within the competence of the Annex VII arbitral tribunal to order the United Kingdom either to decommission the MOX plant altogether or to go back to the drawing board and take action to comply with any applicable procedural requirements that the arbitral tribunal finds should have been followed before giving final authorization for the MOX plant. Thus, in my view, the violations of the "procedural rights" about which Ireland complains are capable of being made good by reparations that the arbitral tribunal may consider appropriate. I regret that the Tribunal did not consider it necessary to deal explicitly and directly with this aspect of the matter.

(*Signed*) Thomas A. Mensah

SEPARATE OPINION OF JUDGE ANDERSON

I have voted in favour of the Order because I concur fully with the reasoning of the Tribunal on the main substantive issues. In particular, I endorse the clear conclusion in paragraph 81 of the Order that

> in the circumstances of this case, the Tribunal does not find that the urgency of the situation requires the prescription of the provisional measures requested by Ireland, in the short period before the constitution of the Annex VII arbitral tribunal.

However, I consider that the Order goes too far in two respects (namely, jurisdiction and the dispositif), and not far enough in its findings regarding two other issues (namely, the preservation of rights and the prevention of serious harm to the marine environment). In accordance with article 8, paragraph 6, of the Resolution on the Internal Judicial Practice of the Tribunal, this separate opinion concentrates on these four points of difference with the Order.

1. Jurisdiction

In regard to the question of jurisdiction, the role of the Tribunal in cases under article 290, paragraph 5, is rather unusual: the Tribunal has to form a view on the question of *another* tribunal's jurisdiction. The standard of appreciation is simply that of a *prima facie* case, without prejudice to the decision of the other tribunal once it has been constituted. It may be recalled that the *prima facie* test, in relation to the similar question of interim measures under article 41 of the Statute of the International Court of Justice, was explained many years ago by Judge Lauterpacht in the following terms:

> The Court may properly act under the terms of article 41 provided that there is in existence an instrument … which *prima facie* confers jurisdiction upon the Court and which incorporates no reservations obviously excluding its jurisdiction.[1]

In applying the second part of this test, Judge Lauterpacht treated as obviously excluding the Court's jurisdiction a reservation by the Respondent in that case which he regarded as invalid but which had not been found by the Court to be invalid. He applied the *prima facie* test to both the rule and the qualification.

Applying this approach to the present case, the rule in article 286 is clear, but there exists a qualification by virtue of the cross-reference to section 1, which includes articles 282 and 283.

The question of the possible application of article 282 to the procedures for dispute settlement contained in the OSPAR Convention and the EC Treaties involves the resolution of complex issues of fact and law upon which the parties submitted different arguments. Similarly, the correspondence between the two Governments displays something of a mutual lack of comprehension and was interpreted differently in regard to article 283 by the parties before the Tribunal.

On the basis of the limited materials before it, the Tribunal has to take a *prima facie* view of the question of the arbitral tribunal's jurisdiction. Applying the test of Judge

[1] *Interhandel* case, *I.C.J. Reports 1957*, p. 105, at pp. 118-119.

Lauterpacht, the question is whether article 282 amounts to a qualification "obviously excluding" the jurisdiction of the arbitral tribunal. The same question arises in regard to article 283. The Tribunal has given a negative answer to both these questions. Nonetheless, I retain doubts, on the basis of the factual materials presented, about some of the reasoning, notably that contained in paragraphs 52 and 60 of the Order, and thus the conclusions in paragraphs 61 and 62.

2. The Disposal of the Case

In my opinion, the correct disposal of the case would have been to decline to accede to the requests of the Applicant, whilst encouraging, in the reasoning leading up to the dispositif, further contacts between the parties on matters of immediate concern to the Applicant, including information on security precautions. Such a disposal of the case would have followed, broadly, the approach adopted by the International Court of Justice in the *Great Belt* case, where the dispositif reads:

> *Finds* that the circumstances, as they now present themselves to the Court, are not such as to require the exercise of its power under article 41 of the Statute to indicate provisional measures.[2]

In its reasoning, the Court had earlier indicated that "any negotiation between the Parties … is to be welcomed".[3] In my opinion, such a disposal of the Application would have been more appropriate in the present instance than the prescription under article 290 of the measures contained in points 1 and 2 of the dispositif. The type of broad consultation prescribed in point 1(a), whilst valuable in itself, goes beyond the scope of articles 123 and 197 of the Convention, being based also on duties to cooperate under general international law, as indeed is expressly noted in paragraph 82 of the Order. (The situation is similar to that identified by the International Court of Justice in the *Nicaragua* case, where it stated that:

> Principles such as those of the non-use of force … and the freedom of navigation, continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated.[4]

The situation is also analogous to that described in paragraph 50 of the present Order). In particular, the matters identified in paragraph 84 for consultations relate more to broad duties under customary law than to subjects falling within the scope of articles 123 and 197. Subjects of that nature are more suited to a call for normal diplomatic exchanges than to inclusion in a formal measure prescribed under article 290. Turning to the specific measures prescribed in paragraphs 1(b) and (c), they both appear to me to be fully covered by existing arrangements, including those under Euratom. Accordingly, I retain doubts as to whether these measures under article 290 are appropriate to preserve the rights under the Convention claimed by the Applicant before the arbitral tribunal, whilst accepting there is scope for closer bilateral contacts between the parties.

I turn now to points on which I would have gone further than is indicated in the terms of the Order.

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[2] *I.C.J. Reports 1991*, p. 12, at p. 20, paragraph 38.
[3] *Ibid*., paragraph 35.
[4] *I.C.J. Reports 1984*, p. 392, at p. 424.

3. The First Request of the Applicant (paragraphs 65 to 74 of the Order)

In its principal submission, the Applicant sought the equivalent of an injunction restraining *pendente lite* the Respondent from allowing the MOX plant to commence operations and production on 20 December 2001 – a request which the Tribunal clearly did not accept. It is common ground that the plant is situated on the territory of the United Kingdom and thus under the sovereignty of the United Kingdom. In the terms of the draft articles on Prevention of Transboundary Harm from Hazardous Activities recently adopted by the International Law Commission, the plant will conduct "activities not prohibited by international law".[5] In the terms of the Convention on the Law of the Sea, the plant falls to be considered in the context of article 193, which reads:

> States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.

The operation of the plant involves a dry process, but, as an indirect result of normal cleaning work, it is expected to result in the introduction of some very small amounts of liquid and gaseous substances and energy into the marine environment of the Irish Sea by two pathways: first, via an outfall structure, within the meaning of article 207, and secondly via the atmosphere, to which article 212 applies.

The question before the Tribunal was whether there would be irreparable harm to any of the rights claimed by the Applicant under articles 123, 192 to 194, 197, 206, 207, 211, 212 and 213 arising from alleged breaches of its duties under those articles by the Respondent. These rights were categorised, in broad terms, as the right to ensure that the Irish Sea will not be subject to additional radioactive pollution; procedural rights to have the Respondent prepare proper environmental impact statements; and the right to cooperation and coordination over the protection of the Irish Sea as a semi-enclosed sea.[6] As regards the first category, in view of the small scale of the introductions from the MOX plant and its distance of over 100 miles from Ireland, it is not clear to me that there will be irreparable prejudice to any rights of the Applicant or "serious harm to the marine environment" for the purposes of article 290, paragraph 5, especially recalling the short period of time before the constitution of the arbitral tribunal. Turning to the second category, in view of the existence not only of a national environmental impact statement and a study prepared for the EC Commission, but also the positive formal opinion issued by the EC Commission after a review by independent experts (on which both parties relied, albeit in different ways), it is not clear to me that any procedural rights claimed by the Applicant suffered irreparable prejudice.

As regards the third category, cooperation and consultation, in regard to which the Applicant relied upon article 123, I would add the following. It is common ground that the Irish Sea satisfies the definition of a "semi-enclosed sea" contained in article 122 of the Convention. Article 123 calls for the coordination, by States bordering a semi-enclosed sea, of the implementation of rights and duties with respect to the protection and preservation of the marine environment.

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[5] Draft article 1, in Report of the ILC (2001), paragraph 97. According to draft article 3, "The State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof."

[6] ITLOS/PV.01/06, p. 28.

As regards the condition of the Irish Sea, the Applicant contended that "as a result of radioactive pollution from Sellafield, the Irish Sea is amongst the most radioactively polluted seas in the world".[7] The current status of the Irish Sea was described in a recently published study, undertaken by a member of a marine laboratory in the Isle of Man in the centre of the Irish Sea, in the following terms:

> There are several anthropogenic inputs which are of concern and require continued monitoring - sewage, heavy metals, organic compounds and radionuclides. None currently have widespread severe impact, and most inputs are being reduced. The overall prognosis for the Irish Sea is one of cautious optimism.[8]

The Tribunal was not called upon to make findings on these issues, having regard to the urgent and limited nature of these proceedings.

Turning to the content of article 123, it can be viewed in many ways as a particular application to the law of the sea of the general duty of States to cooperate, as laid down in Article 2 of the Charter of the UN, as well as wider duties of *voisinage*. Article 123 was cast in weak terms ("should" / "shall endeavour") in order to safeguard the worldwide application of the Convention's provisions and its unified character.[9] Article 123 provides a choice: States bordering a semi-enclosed sea are to endeavour to coordinate their actions in certain matters (in simple terms, fisheries management, environmental protection and marine scientific research) either "directly or through an appropriate regional organization". In other words, article 123 does not require cooperation to be at the bilateral level so long as there is cooperation through an appropriate regional body. (One of the seas in mind during the Law of the Sea Conference was the Mediterranean Sea, where some coastal States did not enjoy mutual recognition or maintain diplomatic relations.) In other words, there does not have to be a bilateral "Irish Sea Conference" along the lines of the North Sea Conferences[10] in order to secure compliance with article 123. Provided appropriate regional bodies exist, the necessary coordination can be achieved through them. In the case of the Irish Sea, the management of living resources is coordinated by means of the common fisheries policy of the EC; environmental protection, including the monitoring of the level of nuclear radiation, is coordinated through Euratom, the EC and OSPAR; and research into the scientific qualities of the waters and the status of the living resources is coordinated through the International Council for the Exploration of the Sea,[11] as well as through EC programmes. In my opinion, since the appropriate bodies do exist in regard to the Irish Sea and there is extensive, if not full, coordination through such bodies and since, moreover, there clearly have been some bilateral contacts between the parties at ministerial level in regard to the Irish Sea, there is little to be examined in the Applicant's claims under article 123.

On these points, therefore, the Order could have gone further, in my opinion, and reached conclusions upon the questions of preserving rights claimed by the Applicant and of "serious harm to the marine environment", within the meaning of article 290. In particular, I

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[7] Request for provisional measures, paragraph 10, citing the "STOA Report".
[8] R.G. Hartnoll, "The Irish Sea", in C.R.C. Sheppard (ed.), *Seas at the Millennium: An Environmental Evaluation* (2000), Vol. I, Preface to Chapter 6.
[9] An account of the discussions on what became article 123 is to be found in the *Virginia Commentary*: see Nandan and Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982, A Commentary*, Volume III, at pp. 356ff.
[10] Information is posted on <http://www.dep.no/md/nsc/ >.
[11] The Irish Sea is ICES Statistical Area VIIa.

would have been prepared to support findings that it had not been shown that any irreparable prejudice would be caused to the rights claimed by the Applicant, nor that serious harm to the marine environment would occur, before the constitution of the arbitral tribunal under Annex VII.

4. The Second Request of the Applicant (Paragraphs 78 to 80 of the Order)

In view of paragraph 80 of the Order, the Tribunal was not called upon to examine the implications of the Applicant's second request. The request, had it been granted in the wide terms proposed, would appear to have required the Respondent to prohibit every vessel flying its flag and carrying radioactive substances, materials or wastes associated with the MOX plant from sailing in the internal and territorial waters of the United Kingdom, as well as in the waters beyond the territorial sea over which it exercises jurisdiction in accordance with Part XII of the Convention, towards the maritime boundary with Ireland in the centre of the Irish Sea.[12] The request would also appear to have required the Respondent to prohibit foreign-flagged vessels[13] carrying such substances, etc., from exercising rights of passage and navigation through waters under the sovereignty or jurisdiction of the United Kingdom. Such rights of third states are clearly provided for in the Convention: in particular, articles 17, 22, paragraph 2, 23 and 58 are relevant. Had it been necessary for the Tribunal to examine this very broad request, some much wider issues would have been raised.

(*Signed*) David Anderson

[12] As to which, see Report 9-5 in Charney and Alexander (eds.), *International Maritime Boundaries* (1993), Vol. II, p. 1767.

[13] Including, seemingly, even vessels which complied fully with internationally agreed standards applicable to such vessels, notably the INF Code under the SOLAS Convention.

SEPARATE OPINION OF JUDGE WOLFRUM

I concur fully with paragraph 89 as well as with the reasoning of the Order in general. The following observations are meant to add to the reasoning or to emphasise certain elements therein.

Article 282 of the Convention

The United Kingdom challenges the jurisdiction of the arbitral tribunal to be established under Annex VII of the Convention by invoking article 282 of the Convention. The United Kingdom argues that parts of the case could have been brought or, in fact, had already been brought before different procedures for the settlement of disputes. Since such procedures as the one provided for in the OSPAR Convention or the Court of Justice of the European Communities would entail binding decisions, they would take precedence over the dispute settlement system as provided for in Part XV, section 2, of the Convention. This does not sufficiently take into consideration either the wording of article 282 of the Convention, the context in which it has to be read, or the objective pursued by Part XV of the Convention. The dispute settlement system under the OSPAR Convention is designed to settle disputes concerning the interpretation and application of that Convention and not concerning the Convention on the Law of the Sea. Article 220 of the EC Treaty empowers the Court of Justice of the European Communities to "… ensure that in the interpretation and application of this Treaty the law is observed …". This provision has to be read together with article 292 of the EC Treaty, according to which "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." This does not suggest that the Court of Justice of the European Communities will decide on disputes concerning the interpretation and application of the Convention.

It is well known in international law and practice that more than one treaty may bear upon a particular dispute. The development of a plurality of international norms covering the same topic or right is a reality. There is frequently a parallelism of treaties, both in their substantive content and in their provisions for settlement of disputes arising thereunder. However, a dispute under one agreement, such as the OSPAR Convention does not become a dispute under the Convention on the Law of the Sea by the mere fact that both instruments cover the issue. If the OSPAR Convention, the Euratom Treaty or the EC Treaty were to set out rights and obligations similar or even identical to those of the Convention on the Law of the Sea, these would still arise from rules having a separate existence from those of the Convention on the Law of the Sea.

The Tribunal alludes to this point, albeit only indirectly, in paragraph 51. It emphasises that, without expressly mentioning it, the application of rules of the Vienna Convention on the Law of Treaties on the interpretation of international treaties may not yield the same results in respect of such provisions. This is due to the fact that, in interpreting such provisions, the different contexts, objectives, subsequent practice of parties and *travaux préparatoires* are to be taken into account. The Judgment of the European Court of Human Rights concerning preliminary objections in the *Loizidou* case exemplifies this clearly. Also the Court of Justice of the European Communities has already stated in its Judgment of 26 October 1982 (*Hauptzollamt Mainz* v. *C A Kupferberg & Cie. KG*, paragraph 29) that provisions in an international agreement and in the EC Treaty having the same object, nevertheless, have to be "… considered and interpreted in their own context …".

The Tribunal could have stated further that Part XV is meant to primarily vest the institutions referred to in article 287 of the Convention with the function to decide disputes on the interpretation and the application of the Convention unless parties to a dispute have agreed otherwise. If the objective of Part XV of the Convention is taken into account, such agreement among the parties to a conflict cannot be presumed. An intention to entrust the settlement of disputes concerning the interpretation and application of the Convention to other institutions must be expressed explicitly in respective agreements.

The interpretation of article 282 of the Convention outlined here does not render this provision devoid of substance. The possibility exists that States Parties agree on a system for the settlement of disputes under the Convention different from that envisaged in Part XV, section 2, of the Convention.

Article 290 of the Convention

Under article 290, paragraph 5, of the Convention the Tribunal was called upon to establish whether the urgency of the situation required the prescription of provisional measures. This provision has to be read in conjunction with article 290, paragraph 1, of the Convention. According to the latter provisional measures may serve two different purposes, namely either "to preserve the respective rights of the parties" or "to prevent serious harm to the marine environment". When interpreting the notion "to preserve the respective rights of the parties", account has to be taken of the fact that two different types of provisional measures have to be distinguished: one dealing with a future event and its consequences and the other where the event in question has already occurred. In the former case it is necessary to assess future developments. Such future developments do not have to be certain: probability is sufficient. The Tribunal was faced with the first alternative. Accordingly article 290, paragraph 1, of the Convention made it possible, in principle, to establish, whether the commissioning of the MOX plant might jeopardise the rights of Ireland to an extent that provisional measures would be necessary.

Ireland has invoked the violation of several obligations under the Convention on the Law of the Sea by the United Kingdom. It has referred to two different rights which have allegedly been violated by the United Kingdom. First, the rights whereby the waters under the jurisdiction of Ireland must not be polluted by the introduction of radioactive material. These rights have been referred to as substantive ones. Second, Ireland claims its right to be informed on the possible impact of the MOX plant has been violated, as well as its rights concerning cooperation with the United Kingdom on the protection of the marine environment of the Irish Sea.

The Order, however, satisfies itself by stating in paragraph 81 that the urgency of the situation does not require the prescription of the provisional measures requested by Ireland. This is justified by a reference to the short period before the Annex VII arbitral tribunal is constituted. I agree that there was no urgency in this sense and therefore the request of Ireland had to be declined. Nevertheless, I would have found it preferable if the Order had indicated that, given the circumstances of the case, it would not have been within the mandate of the Tribunal concerning the prescription of provisional measures either for the protection of substantive rights invoked by Ireland or for the prevention of serious harm to the marine environment.

Ireland invokes, amongst others, article 194, paragraph 2, of the Convention. According to this provision, which also reflects customary international law, States are under an obligation to ensure that activities under their jurisdiction or control are conducted so as not to cause damage by pollution to other States and their environment. The notion of pollution is defined in article 1, paragraph 1(4), of the Convention. Such a definition contains two elements, namely the introduction of substances or energy – and radioactivity in the form of dust or otherwise qualifies as such – and that such introduction is likely to result in such deleterious effects as harm to living resources and marine life, etc. Both parties disagree on the potential impact of the MOX plant for the marine environment of the Irish Sea and on its present radioactive pollution.

It is still a matter of discussion whether the precautionary principle or the precautionary approach in international environmental law has become part of customary international law. The Tribunal did not speak of the precautionary principle or approach in its Order in the *Southern Bluefin Tuna Cases*. Note should be taken of the fact, though, that the precautionary principle is part of the OSPAR Convention.

This principle or approach applied in international environmental law reflects the necessity of making environment-related decisions in the face of scientific uncertainty about the potential future harm of a particular activity. There is no general agreement as to the consequences which flow from the implementation of this principle other than the fact that the burden of proof concerning the possible impact of a given activity is reversed. A State interested in undertaking or continuing a particular activity has to prove that such activities will not result in any harm, rather than the other side having to prove that it will result in harm.

Nevertheless, Ireland could not, for several reasons, rely on the precautionary principle or approach in this case, even it were to be accepted that it is part of customary international law. If the Tribunal had prescribed provisional measures for the preservation of the marine environment under the jurisdiction of Ireland, it could have done so only after a summary assessment of the radioactivity of the Irish Sea, the potential impact the MOX plant might have and whether such impact prejudiced the rights of Ireland. This, however, is an issue to be dealt with under the merits by the Annex VII arbitral tribunal. It should not be forgotten that provisional measures should not anticipate a judgment on the merits. This basic limitation on the prescription of provisional measures - emphasised by the International Court of Justice – finds its justification in the exceptional nature of provisional measures. Such limitation cannot be overruled by invoking the precautionary principle. Apart from that, the approach advanced by Ireland would have for result that the granting of provisional measures becomes automatic when an applicant argues with some plausibility that its rights may be prejudiced or that there was serious risk to the marine environment. This cannot be the function of provisional measures, in particular since their prescription has to take into consideration the rights of all parties to the dispute. For the same reason it would not have been in conformity with the limited jurisdiction the Tribunal has in prescribing provisional measures if it had evaluated the documentary evidence submitted by both parties.

Ireland cannot rely on the reasoning of the Order in the *Southern Bluefin Tuna Cases*. The situation there was quite different. The parties had agreed that the tuna stock was at its "… historically lowest levels …". The Tribunal only stated that the parties should "… act with prudence and caution …" to ensure that effective conservation measures are taken to prevent serious harm. Here the Tribunal was in fact being asked to qualify the possible

introduction of radioactity as "deleterious", without being able to assess evidence about the situation prevailing in the Irish Sea. In my view there was, under the present circumstances, no room for applying the precautionary principle to the prescription of provisional measures for the preservation of the substantive rights of Ireland or the protection of the marine environment.

Ireland argues, as already indicated, that its procedural rights (rights concerning information and cooperation) have been violated and will be prejudiced if the MOX plant is commissioned. The obligation to cooperate with other States whose interests may be affected is a *Grundnorm* of Part XII of the Convention, as of customary international law for the protection of the environment.

In general it has to be taken into consideration, though, that the provisions of the Convention on the Law of the Sea formulate obligations rather than rights. Is it possible to argue that obligations of States Parties under a multilateral treaty create, as a corollary, rights for every other individual State Party? This is correct in bilateral relations. It would, however, be a simplification to say so in multilateral relations, such as those established by the Convention on the Law of the Sea. Some guidance may be drawn in this respect from the most recent draft of the International Law Commission on State responsibility. This draft distinguishes between obligations *vis-à-vis* another State in bilateral relations and obligations towards States Parties to a multilateral agreement. However, one may assume that Ireland at least has a legally protected interest in the United Kingdom's living up to its obligations to cooperate in the protection of the marine environment of the Irish Sea.

Nothing has been invoked by Ireland that suggests before the establishment of the Annex VII arbitral tribunal the suspension of the authorisation of the MOX plant or the prevention of its operation except the risks the United Kingdom encounters by commissioning the plant as scheduled. However, it is for the United Kingdom to decide whether it will face such risk.

I fully endorse, however, paragraphs 82 to 84 of the Order, considering that the obligation to cooperate is the overriding principle of international environmental law, in particular when the interests of neighbouring States are at stake. The duty to cooperate denotes an important shift in the general orientation of the international legal order. It balances the principle of sovereignty of States and thus ensures that community interests are taken into account *vis-à-vis* individualistic State interests. It is a matter of prudence and caution as well as in keeping with the overriding nature of the obligation to co-operate that the parties should engage therein as prescribed in paragraph 89 of the Order.

(*Signed*) Rüdiger Wolfrum

SEPARATE OPINION OF JUDGE TREVES

1. While I agree with the decision and with its reasons, I wish to clarify certain aspects which, in my opinion, require to be seen in a broader perspective.

2. In rejecting the contention that article 282 was applicable in order to exclude *prima facie* the jurisdiction of the Annex VII arbitral tribunal, the Tribunal ruled out that the general, regional or bilateral agreements mentioned in that article could be agreements providing for submission to binding adjudication, at the request of a party, of a dispute concerning the interpretation or application of the provisions of these agreements, even where such provisions set out rights and obligations identical or similar to those set out in the Convention. I concur with the reasons given, which draw from the literal formulation of article 282, and from the consideration that even identical provisions in different treaties have a "separate existence"[1] and may be interpreted differently[2] (paragraphs 50-51). This interpretation would seem to correspond to the preparatory work for article 282.[3]

3. Consequently, an agreement providing for settlement of disputes at the request of one party by a court or tribunal whose decision is binding is not one of the "agreements" mentioned in article 282 whenever the disputes envisaged therein are those concerning the interpretation or application of the substantive provisions of the agreement and not of the Convention, even in case they set out obligations overlapping with those set out in the Convention. The agreements to which article 282 refers are the general, regional or bilateral ones concerning disputes definined as encompassing disputes concerning the interpretation or application of the Convention, be they agreements for the settlement of disputes specifically mentioned as relating to the interpretation or application of the Convention, agreements for the settlement of disputes in general (including the acceptance, by both parties, without relevant reservations, of the optional clause of Article 36, paragraph 2, of the Statute of the International Court of Justice), and agreements for the settlement of categories of disputes defined so that they may include those concerning the interpretation or application of the Convention (such as, for instance, disputes concerning maritime navigation).

4. The interpretation of article 282 adopted by the Tribunal also seems justified in light of the function of this provision in the context of Part XV of the Convention. While other provisions of section 1 (such as, in particular, articles 281 and 283) set out obstacles to the possibility of resorting to compulsory adjudication in general, article 282 expresses a preference between different means of compulsory adjudication that would otherwise be

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[1] This expression was used in a similar context by the International Court of Justice in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, paragraph 178.

[2] See the pertinent remarks of the European Court of Human Rights in its Judgment concerning preliminary objections in the *Loizidou* case, 23 February 1995*, International Law Reports*, Vol. 103, p. 622 ff., espec. paragraphs 82-85.

[3] Agreements concerning compulsory settlement of disputes in general seem to have been the main object of consideration. In his memorandum of 31 March 1976 explaining Part IV of the Single Negotiating Text (the first draft of the future Part XV of the Convention), President Amerasinghe, in examining article 3, the predecessor of article 282, mentions agreements in which parties "would assume the obligation to settle *any dispute* by resorting to arbitration or judicial settlement" (*Third United Nations Conference on the Law of the Sea, Official Records,* V, p. 123, emphasis added). The intervention in the general debate by the Japanese representative mentions agreements "between parties to a dispute whereby they had assumed an obligation to settle *any given dispute* by recourse to a particular method" (*ibid.,* p. 27, emphasis added).

applicable. In interpreting article 282, such preference must be balanced not by the general idea that limitations to sovereignty cannot be presumed or that States may not be presumed to accept submission to adjudication without their consent, which may be relevant in interpreting articles 281 and 283, but by the general freedom of States to utilise whichever means of compulsory adjudication are available under treaties in force for them. A broad interpretation such as that rejected by the Tribunal would not give sufficient consideration to such freedom. It may be added that, although implicitly, in the *Southern Bluefin Tuna Cases* the Tribunal has already oriented itself in favor of restraint in the application of article 282. In those cases (although perhaps some of the reservations made could have been relevant) the three States parties to the dispute had made a declaration of acceptance of the compulsory jurisdiction of the International Court of Justice according to article 36, paragraph 2, of the Statute. This fact was not considered by the Tribunal to make it necessary to raise *ex officio* the question of the possible applicability of article 282 or to mention it in its Order.

5. It seems also useful to underline that while article 282 can be seen as a mechanism for avoiding that situations of litispendence arise, it is not a rule providing for the consequences of litispendence. It leaves completely open the question as to whether, in case a dispute concerning the interpretation of provisions of a treaty other than the Convention but equivalent or similar to provisions of the Convention has been submitted to a court or tribunal competent under the provisions of such a treaty, the dispute settlement bodies competent under the Convention would consider it fit to hear a dispute concerning equivalent or similar provisions of the Convention. The existence and content of a customary law rule or of a general principle concerning the consequences of litispendence, as well as considerations of economy of legal activity and of comity between courts and tribunals, might be discussed in such a situation.

6. In the circumstances of the present case, it may be further observed that the application of article 282 in order to conclude that *prima facie* the Annex VII arbitral tribunal lacked jurisdiction would have had the consequence that a dispute concerning the application or interpretation of the Convention would have been left to be considered in separate parts by different courts or tribunals, and taken away from the only tribunal competent to deal with it in its entirety. It may be argued that such a consequence would have been incompatible with the very purpose of article 282, seen in the context of Part XV of the Convention.

7. It is regrettable that the Tribunal has not been more explicit in giving the reasons for deciding not to prescribe the measures requested by Ireland, in particular the measure concerning the suspension of the authorisation of the MOX plant or the prevention with immediate effect of its operation. Paragraph 81 mentions the lack of urgency "in the short period before the constitution of the Annex VII arbitral tribunal". From the fact that, according to the reasons given for the measure prescribed, justification for such a measure lies in the need to preserve rights arising from the general duty of cooperation in the prevention of pollution, it would seem that the Tribunal drew a distinction between the substantive right invoked by Ireland not to be polluted or exposed to a risk of pollution because of the commissioning of the MOX plant and rights of a procedural character relating to cooperation and information. While the Tribunal did not find the requirement of urgency to be satisfied as far as the former right was concerned, it implicitly considered it to be satisfied as regards the latter rights.

8. Resort to precautionary considerations is not mentioned in the Order as regards the preservation of substantive rights. In underlining, however, the lack of urgency in the short time before the constitution of the Annex VII arbitral tribunal, the Order may be read, although it

could be wished that it had been more explicit, as indicating that the scientific arguments brought by the parties did not focus precisely enough on whether the commissioning of the MOX plant could produce a significant increase, or the risk of a significant increase, in radioactivity in the Irish Sea during the few months before the Annex VII arbitral tribunal could be seized of a request concerning provisional measures. Scientific evidence linking risks to the marine environment specifically to the commissioning of the MOX plant within the relevant time-frame was not substantial and focused enough to permit discussion of whether or not such evidence was conclusive as to the causal relationship between the activity envisaged and the risk to the marine environment.

9. Prudence and caution were nonetheless mentioned in paragraph 84 as requiring the cooperation and exchange of information which are the content of the measure prescribed by the Tribunal. It may be discussed whether a precautionary approach is appropriate as regards the preservation of procedural rights. It may be argued that compliance with procedural rights, relating to cooperation, exchange of information, etc., is relevant for complying with the general obligation of due diligence when engaging in activities which might have an impact on the environment.

10. The process of cooperation in which the parties are to engage in implementing the Order should have the further result of avoiding the aggravation or the extension of the dispute and of bringing what divides the parties into sharper focus before the Annex VII arbitral tribunal meets.

(*Signed*) Tullio Treves

SEPARATE OPINION OF JUDGE JESUS

1. Though I share the conclusions reached by the Tribunal in this case, including the finding that the Annex VII tribunal has *prima facie* jurisdiction to entertain the dispute, I do not agree with the reasoning sustained and the interpretation given by paragraphs 48 to 53 of the Order in respect of the application of article 282 of the Law of the Sea Convention, on the relationship between that Convention and the OSPAR Convention.

2. The interpretation made seems to be too narrow, to the point of precluding the possibility that in some cases the choice of procedure under article 282 might be applicable.

3. It is precisely because the parallelism of treaties is a frequent device used by States in regulating their different interests, establishing including the parallelism of procedures for the settlement of disputes that may arise, that article 282 was inserted in the Law of the Sea Convention to indicate which procedure should prevail in case there is a situation of competing settlement procedures between the Law of the Sea Convention and an agreement of a general, regional or bilateral nature.

4. The OSPAR Convention is one of such regional agreements referred to in article 282. The issue here was therefore for the Tribunal to determine whether the procedure indicated in the OSPAR Convention should prevail over the procedures of the Law of the Sea Convention, as claimed by the United Kingdom.

5. Though I share the view that, in the instant case, the OSPAR Convention does not fall within the purview of article 282, I do not share the reasoning sustained by the Order to reach that conclusion.

6. My view is that the OSPAR Convention does not apply in this case because, as can be seen abundantly from the proceedings, the issues covered by that regional Convention and the claims made by Ireland before the OSPAR arbitral tribunal are different from and narrower than those brought before the Annex VII arbitral tribunal of the Law of the Sea Convention.

7. These are in fact different disputes and, therefore, article 282 does not apply to this case.

8. If, on the contrary, the Tribunal were to be convinced that we were before exactly the same dispute, arising under the two Conventions, then article 282 would have the OSPAR Convention procedure prevailing over the Law of the Sea Convention procedures.

9. The Order, in this respect, seems to have an interpretation that in practice has the effect of denying the implementation of article 282. This is a view that I do not share.

(*Signed*) José Luis Jesus

SEPARATE OPINION OF JUDGE *AD HOC* SZÉKELY

1. I disagreed with the decision of the Tribunal not to grant the provisional measures requested by Ireland, but did not vote against the Order only to make possible, in the particularly difficult circumstances of the deliberations, at least the adoption of the alternative provisional measures that the Tribunal did in the end wish to prescribe in the Order, in accordance with article 89, paragraph 5, of its Rules.

2. The fact that the Tribunal, in the end, did not choose to invoke expressly the proposition that it should deny the requested measures, on the basis that it was not satisfied that irreparable prejudice would be caused to the right of Ireland to be protected against pollution of its marine environment or that serious harm to the marine environment would occur before the constitution of the Annex VII arbitral tribunal, was an important consideration to support at least the Tribunal´s own alternative provisional measures, particularly in view of their own inherent contradictions.

3. The very contradictions inherent in the alternative provisional measures that the Tribunal did prescribe, with the fact that it denied those requested by Ireland, was indeed another paramount consideration that encouraged me to support them, precisely because such contradictions somehow rescued and validated at least some of the important arguments advanced by Ireland for the measures it had requested, and which I myself found largely appropriate, for the reasons that I shall state below. The Declaration made by Judges Caminos, Yamamoto, Park, Akl, Marsit, Eiriksson and Jesus, closer as it seemed to my position, was equally instrumental in persuading me to support the alternative provisional measures ordered by the Tribunal.

4. Given that the Tribunal decided, in paragraph 81 of its Order (with which I could not agree), that "in the circumstances of this case, the Tribunal does not find that the urgency of the situation requires the prescription of the provisional measures requested by Ireland, in the short period before the constitution of the Annex VII arbitral tribunal" (particularly the Irish request to order the suspension of the commissioning of the MOX plant or, alternatively, the taking of immediate measures to prevent its operation), then:

(a) there had to be a reason why, if the admitted urgency was regarded as insufficient, the Tribunal still found it necessary and appropriate, in operative paragraph 1, to order Ireland and the United Kingdom to enter into consultations "forthwith" and, in operative paragraph 2, to each submit an initial report of their compliance with that provisional measure by 17 December 2001, that is, within just two weeks of the date of the Order and three short days before the critical event whose suspension it declined to order, that is, the projected commissioning of the MOX plant on 20 December 2001;

(b) there also had to be some reason why, despite its recognition that there was some degree of urgency in the case, but which evidently it did not consider sufficient to grant the provisional measures sought by Ireland, the Tribunal still ordered Ireland and the United Kingdom, in subparagraph (a) of operative paragraph 1, to consult forthwith in order to "exchange further information with regard to possible consequences for the Irish Sea arising out of the commissioning of the MOX plant" and, once again, in operative paragraph 2, to submit an initial report on the results of that exchange of information by 17 December 2001, that is, within just two weeks of the date of the Order and three short

days before the critical event whose suspension it declined to order, that is, the projected commissioning of the MOX plant on 20 December 2001;

(c) otherwise, what sense could such an order have, if that critical date was regarded by the Tribunal as not requiring the provisional measures requested by Ireland?

(d) additionally, does not that alternative provisional measure necessarily imply that it was appropriate to order the United Kingdom to give Ireland a still timely opportunity (that it had previously denied, as the Tribunal recognized in paragraph 61 of the *Considerata*) to have the Irish views fully considered before actually proceeding to the commissioning of the plant?

(e) did not such alternative provisional measure at the same time imply that it was appropriate to order the United Kingdom to have an opportunity to reconsider, in a still timely fashion and in the light of the results of the ordered consultations and exchange of information, the advisability of going ahead with the date planned for the commissioning of the plant?

(f) what else then would be the purpose of ordering forthwith such consultations and exchange of information, within an immediate and short time span calculated to commence and conclude immediately before the critical event scheduled for 20 December, if not as a sort of recognition that the said critical event could, in the absence of such consultations and exchange of information, have the effect that Ireland was trying to prevent by requesting the suspension of the authorisation to commission the MOX plant?

(g) and, in the absence of the measures requested by Ireland, how would the United Kingdom, in the light of such prescribed alternative provisional measures, have to read paragraphs 82, 84 and 85 of the *Considerata*, despite the fact that they were not incorporated, as I certainly would have preferred, in the operative part of the Order?

(h) similarly, in the absence of the measures requested by Ireland, could the United Kingdom, after the Order and in the light of paragraph 82, proceed in total disregard of its duty to cooperate with Ireland (which the Tribunal recognizes as a fundamental principle in the prevention of pollution of the marine environment) and of the Irish rights that "arise therefrom", which the Tribunal may "consider appropriate to preserve under article 290 of the Convention", without engaging in perilous risks and potential liabilities and responsibilities?

(i) in the absence of the measures requested by Ireland, could the United Kingdom, after the Order and in the light of paragraph 84, proceed in total disregard of the "prudence and caution" that the Tribunal required of both the United Kingdom and Ireland, not only to exchange "information concerning risks or effects of the operation of the MOX plant" but also in "devising ways to deal" with those risks and effects, again, without engaging in perilous risks and potential liabilities and responsibilities?

(j) in the absence of the measures requested by Ireland, could the United Kingdom, after the Order and in the light of paragraph 85, proceed to take action "which might aggravate or extend the dispute" without incurring the said risks?

5. Although in my view it would have been infinitely more appropriate for the Tribunal to apply the Convention and prescribe the measures requested by Ireland, the said positive contradictions, the modest although cumulative positive effects of those alternative measures ordered, and my own equally positive answers to the above questions pertaining to the contradictory effects of the alternative measures that the Tribunal was willing to prescribe, led me, albeit reluctantly, to support them.

6. Again, in the circumstances of the deliberations and in view of the effect of my own position in them, the option of dissenting would have meant the adoption of those alternative measures on a basis (stated above) that I and, eventually, other convinced judges, could have found totally unacceptable.

7. I was particularly concerned during the deliberations about the insensitivity and incomprehension of the Tribunal towards the evidence submitted by Ireland, which finally led it to deny, in paragraph 81 of the *Considerata*, the provisional measures that Ireland had requested.

8. In my view, the Tribunal never really appreciated, neither fully nor adequately, Ireland´s reiterated central argument against the commissioning and operation of the MOX plant as an addition to the Sellafield complex, which demanded appreciating its effects together with those of the added complex.

9. Instead, the Tribunal sought to decide on the requested provisional measures by looking at the MOX plant in isolation from the rest of the industrial complex to which it is meant to be integrated.

10. In paragraph 5 of Part 1 of its Request for provisional measures (p. 4), Ireland advanced the key concept that the MOX plant "will further intensify nuclear activities in the coast of the Irish Sea", an argument shared, for instance, by Norway, while expressing its regret at the decision to authorize the plant (see paragraph 13 of the Request, p. 8). Ireland consistently reiterated this concept in the hearings.

11. This argument, in turn, necessarily brought to the forefront of the case the lamentable record of the past performance of the Sellafield complex, plagued as it has been by several accidents (as stated in paragraph 15 of the Request, on p. 9), or the documented lack of a "proper safety culture" alluded to in the Report of the United Kingdom Nuclear Installations Inspectorate (quoted in paragraph 16 of the Request, pp. 9-10), a matter which was equally disregarded by the Tribunal, even when it was an important indicator of the risks involved not only in the potential commissioning and operation of the new integrated plant, but also in not granting the requested provisional measures.

12. I was particularly concerned that the Tribunal refused, despite the evidence, to properly apply the law when it came to article 206 of the Convention, a provision crucial for determining the viability of the requested provisional measures.

13. A mere reading of the surprisingly empty and superficial 1993 Environmental Impact Statement is sufficient to fully support the Irish allegations, in the sense that the Statement is totally inadequate by any standard.

14. This Irish argument alone should have been sufficient for the Tribunal to take a positive stand on the requested provisional measures, since the environmental impact assessment is a central tool of the international law of prevention.

15. Regrettably, the Tribunal failed to realize and accept that the 1993 Statement contains exclusively the unilateral assertions of, precisely, the proponent of the projected plant; that such assertions (invariably limited to simply alleging that there would be no environmental impacts whatsoever) failed to be backed by the most elementary appropriate scientific or technical support; that none of those assertions had been independently validated (since BNFL is a public limited company whose shares are all held by the United Kingdom Secretary of State for Trade and Industry and by the Treasury Solicitor); that the EIS was totally partial and incomplete in all respects (since it did not include a specific assessment of impacts on the marine environment, of impacts resulting from discharges or from the transport and international movements of radioactive materials, that is, the very activities that were the subject of the requested provisional measures); and, above all, that since no potential impacts were admitted or identified in the Statement, neither it, nor the authorization to go ahead with the plant, included any measures to prevent, mitigate, reduce or control any potential environmental impacts (see paragraphs 22, 55 and 82-94 of Ireland's Request, at pp.12, 27 and 37-43).

16. The Tribunal did not lend any weight to the consequences of such dramatic failures, which meant that the United Kingdom did not comply with its obligations under article 206 of the Law of the Sea Convention, compliance to which Ireland had a specific substantial right (in addition to the fact that, by failing to provide Ireland with all the necessary reports and documentation surrounding the EIS, the United Kingdom equally failed to comply with its obligations under articles 204 and 205).

17. Consequently, the United Kingdom did not comply either with its obligations of prevention under articles 102, 103, 194 and 207 of the Convention, compliance, again, to which Ireland was entitled as a substantial, and not merely correlative, procedural right. This failure of the Tribunal explains in large measure why it decided not to grant Ireland the provisional measures it requested. The Tribunal resisted admitting that the above contraventions would involve irreparable prejudice to Ireland's rights if the plant were to be commissioned without a previous adequate environmental impact assessment.

18. As surprising as the above is the conclusion reached by the Tribunal, without any basis in law or in science, to give the United Kingdom, and not Ireland, the benefit of the doubt about the risk of harm alleged by Ireland. The Tribunal in the end acted on the United Kingdom allegation "that the risk of pollution, if any, from the operation of the MOX plant would be infinitesimally small" (paragraph 72 of the Order's *Considerata*), even when the United Kingdom did not adduce any sort of evidence to substantiate and support such a radical allegation.

19. The Tribunal did the same regarding the allegations of the United Kingdom in the sense that "the commissioning of the MOX plant on or around 20 December 2001 [would] not, even arguably, cause serious harm to the marine environment or irreparable prejudice to the rights of Ireland" (see paragraph 73), that "neither the commissioning of the MOX plant nor the introduction of plutonium into the system [was] irreversible" (see paragraph 74), and that "the manufacture of MOX fuel present[ed] negligible security risks" (see paragraph 76).

20. On what legal or scientific basis the Tribunal chose to accept such unilateral and unproven allegations is nowhere to be found in the Order and, consequently, the Tribunal failed to comply with article 30, paragraph 1, of its Statute, which mandates that a judgement "shall state the reasons on which it is based", and with article 125, paragraph 1(i), of its Rules, which provides that a judgment shall contain "the reasons of law on which it is based".

21. I strongly believe that I should share here my overwhelming concern throughout the deliberations, in the sense that the Tribunal often seemed more preoccupied with the theoretical and academic fulfilment of the merely technical elements of the Convention's provisions on jurisdictional and provisional measures requirements than with making a precise sustained effort to embark on a detailed exercise of matching those required elements against the documentary evidence offered by the parties to the dispute (which in my view barely received scant attention). I should respectfully add that, at times, the Tribunal resembled more a diplomatic exercise than a judicial one, an impression already identified in the past by another Judge *ad hoc* in regard to this Tribunal. (In his Separate Opinion on the Tribunal's Order in the *Southern Bluefin Tuna Cases*, Judge *ad hoc* Shearer, while voting in favour, said that it seemed to him "… that the Tribunal, in its prescription of measures in this case, has behaved less as a court of law and more as an agency of diplomacy. While diplomacy, and a disposition to assist the parties in resolving their dispute amicably, have their proper place in the judicial settlement of international disputes, the Tribunal should not shrink from the consequences of proven facts".)

22. In any case, since the Tribunal was not provided with legal and scientific support for the allegations of the United Kingdom and, since it was obviously not impressed by the evidence provided by Ireland to support its own allegations, it should have been responsive, in the face of such uncertainty, to the Irish demands regarding the application of the precautionary principle (see paragraphs 96 to 101 of the Request, pp. 43-46). It is regrettable that it did not do so, since had it done so this would have led to the granting of the provisional measure requested by Ireland regarding the suspension of the commissioning of the plant.

23. Still, despite such reluctance of the Tribunal (and to add further to the already identified contradictions inherent in the Order), the Tribunal turned around in the provisional measure it did decide to prescribe (in paragraph 1(c) of the operative part of the Order) and ordered Ireland and the United Kingdom to enter into consultations forthwith in order to "devise, as appropriate, measures to prevent pollution of the marine environment which might result from the operation of the MOX plant", an order which is truly striking after the Tribunal had chosen to believe that no such pollution would be forthcoming. Or was it referring to measures to prevent the negligible and infinitesimally small pollution admitted by the United Kingdom? The Tribunal arrived late to the implementation of the Convention's prevention obligations but, at least in part, it finally did and, contradictory as it was with its denial of the requested provisional measures, such arrival had to be endorsed.

24. It does not appear that such a contradiction was a new situation for the Tribunal. Again, in his Separate Opinion on the Tribunal's Order in the *Southern Bluefin Tuna Cases*, Judge *ad hoc* Shearer wrote: "The Tribunal has not found it necessary to enter into a discussion of the precautionary principle/approach. However, I believe that the measures ordered by the Tribunal are rightly based upon considerations deriving from a precautionary approach". I fully share the same opinion regarding the Tribunal's alternative provisional measures that it ordered in this case.

25. In the end Ireland, by bringing the case to this Tribunal, persuaded the United Kingdom to yield on the question of the transport of radioactive materials (by assuming at least a temporal commitment before the Tribunal, that was placed on record). Additionally, the Tribunal issued an order that implies a good number of obligations, mostly for the United Kingdom, which, if faithfully executed, could still provide an opportunity for the preservation of Irish rights protected by the Convention, with the positive effect for both parties to the dispute that sufficient room will be left for the arbitral tribunal to work efficiently on the merits.

(*Signed*) Alberto Székely