PERMANENT COURT OF ARBITRATION

Arbitral Tribunal Constituted Pursuant to Article 287, and Article 1 of Annex VII, of the United Nations Convention on the Law of the Sea for the Dispute Concerning the MOX Plant, International Movements of Radioactive Materials, and the Protection of the Marine Environment of the Irish Sea

The MOX Plant Case

IRELAND v. UNITED KINGDOM

ORDER N° 3

SUSPENSION OF PROCEEDINGS ON JURISDICTION AND MERITS, AND REQUEST FOR FURTHER PROVISIONAL MEASURES

Present: JUDGE THOMAS A. MENSAH, PRESIDENT
PROFESSOR JAMES CRAWFORD SC
MAÎTRE. L. YVES FORTIER CC QC
PROFESSOR GERHARD HAFNER
SIR ARTHUR WATTS KCMG QC

24 June 2003

Procedural background

1. On 25 October 2001 Ireland, pursuant to Part XV of the United Nations Convention on the Law of the Sea ("the Convention"), submitted to the United Kingdom a Notification and Statement of Claim 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". On the same date Ireland also submitted to the United Kingdom a Request for provisional measures pending the constitution of an arbitral tribunal under Annex VII to the Convention.

2. In accordance with article 290, paragraph 5, of the Convention, Ireland submitted its Request for provisional measures to the International Tribunal for the Law of the Sea ("ITLOS") on 9 November 2001.

3. On 3 December 2001, ITLOS made an Order (the "ITLOS Order") prescribing a provisional measure under article 290, paragraph 5, of the Convention, "pending a decision by the Annex VII arbitral tribunal" (ITLOS Order, paragraph 89). In making its Order, ITLOS found, as is required by article 290, paragraph 5, "that the Annex VII arbitral tribunal would *prima facie* have jurisdiction over the dispute" (ITLOS Order, paragraph 62).

4. On 21 January 2002, Ireland filed a Notification and Amended Statement of Claim and Grounds on which it is Based.

5. The Annex VII arbitral tribunal ("the Tribunal") was duly constituted in February 2002. The Tribunal, in article 1, paragraph 3, of its Rules of Procedure, appointed the International Bureau of the Permanent Court of Arbitration to serve as the Registry.

6. On 2 July 2002, the Tribunal approved, in its *Order No. 1*, Ireland's Notification and Amended Statement of Claim and Grounds on which it is Based.

7. In its Rules of Procedure, as modified by *Order No. 2* of 10 December 2002 ("the Rules of Procedure"), the Tribunal established the timetable for the submission of written pleadings by the Parties in a Memorial, Counter-Memorial, Reply, and Rejoinder. Those written pleadings were duly filed by the Parties within the time-limits specified by the Tribunal.

8. The Tribunal held hearings at the Peace Palace in The Hague from 10 June 2003 to 21 June 2003. The Parties were represented as follows:

On behalf of Ireland:

Mr. David J. O'Hagan (as Agent)
Mr. Rory Brady SC (Attorney General)
Mr. Eoghan Fitzsimons SC (as Counsel)
Mr. Paul Sreenan SC (as Counsel)
Prof. Philippe Sands QC (as Counsel)
Prof. Vaughan Lowe (as Counsel)

On behalf of the United Kingdom:

Mr. Michael Wood CMG (as Agent)
The Rt. Hon. the Lord Goldsmith QC (Attorney General)
Dr. Richard Plender QC (as Counsel)
Mr. Daniel Bethlehem QC (as Counsel)
Mr. Samuel Wordsworth (as Counsel)

The dispute

9. The dispute brought before the Tribunal by Ireland essentially concerns discharges into the Irish Sea of certain radioactive wastes produced by or as a result of the operation of the MOX plant, which is a new reprocessing plant at Sellafield in the United Kingdom. This reprocessing plant is designed to reprocess spent nuclear fuel into a new fuel (known as mixed oxide fuel, or "MOX") made from a mixture of plutonium dioxide and uranium dioxide. The spent nuclear fuel reprocessed at the MOX plant comes principally from another plant at Sellafield, the Thermal Oxide Reprocessing Plant ("THORP"). The MOX and THORP facilities are operated by British Nuclear Fuels plc ("BNFL"), with the authorisation of the United Kingdom Government. BNFL is a corporation wholly owned by the United Kingdom Government.

10. It is apparent from the nature of operations carried out at the MOX and THORP facilities that they involve quantities of radioactive substances. Sellafield, where the MOX and THORP facilities are located, is on the west coast of Cumbria in the United Kingdom, facing onto the Irish Sea. The United Kingdom forms the eastern and part of the western coast of the Irish Sea, and Ireland forms the rest of that western coast. In the present context, both States clearly have an interest in what happens in the Irish Sea, which is a semi-enclosed sea within the meaning of article 122 of the Convention.

11. In its Notification and Amended Statement of Claim, Ireland asserts that, in respect of the establishment and prospective operation of the MOX plant, there is a risk of harm arising from discharges of radioactive wastes. By the amendment to its Statement of Claim, Ireland made it clear "that Ireland's claim is not confined to the immediate consequences arising directly from the MOX plant alone, considered in isolation from the rest of the Sellafield complex, but extends to all the consequences that flow from the establishment and operation of the MOX plant, including the consequences flowing from the increased activity at the THORP plant that is supported by the MOX plant." Ireland also maintains that there are risks arising from transport of radioactive material through the Irish Sea to and from the facilities, and from the storage of such material at those facilities.

12. Ireland considers that, in the circumstances, the Convention imposes on the United Kingdom obligations concerning the protection of the marine environment; the prevention and control of pollution, and co-operation between the two States; and that it gives Ireland corresponding rights. Ireland contends that the United Kingdom is in breach of the obligations under various articles of the Convention (including articles 123, 192, 193, 194, 197, 206, 207, 211, and 213), and Ireland accordingly seeks from the Tribunal appropriate remedies against the United Kingdom.

13. For its part, the United Kingdom raises various questions relating to the jurisdiction of the Tribunal to hear and determine the merits of the dispute submitted to it by Ireland. In any event, on their merits the United Kingdom rejects Ireland's allegations that the United Kingdom is in breach of any obligations under the Convention.

The Tribunal's jurisdiction to decide the merits

14. As noted above, ITLOS found, in its Order, that "the Annex VII Tribunal would *prima facie* have jurisdiction over the dispute" (ITLOS Order, paragraph 62). The Tribunal sees no reason to disagree with the finding that *prima facie* it has jurisdiction. Ireland and the United Kingdom are both parties to the Convention; the arbitral tribunal has been duly constituted in accordance with Part XV of the Convention and Annex VII to the Convention; it is apparent that Ireland has presented its claims on the basis of various provisions of the Convention; the Parties agree that there is a dispute concerning the MOX plant; that dispute clearly concerns the interpretation and application of the Convention (in that the Parties have adopted different legal positions on that matter); and there is nothing which manifestly and in terms excludes the Tribunal's jurisdiction.

15. However, before proceeding to any final decision on the merits, the Tribunal must satisfy itself that it has jurisdiction in a definitive sense. Moreover, even to proceed to hear argument on the merits of the dispute brought before it, the Tribunal needs to be satisfied at least that there are no substantial doubts as to its jurisdiction.

16. The United Kingdom raises objections to the jurisdiction of the Tribunal, which fall into two categories. First, the United Kingdom raises a number of questions of jurisdiction and admissibility in respect of the Convention itself and other international agreements and instruments invoked by Ireland. The Tribunal will refer to these as the international law issues. Second, certain objections are raised relating to the position of the Parties under the law of the European Communities. The Tribunal will refer to these as the European Community law issues.

17. The Tribunal considers that none of the issues raised casts doubt on its *prima facie* jurisdiction.

18. With regard to the international law issues raised by the United Kingdom, there has clearly been an exchange of views between the Parties, as required under article 283 of the Convention, and the United Kingdom does not now contest this. It is true that the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic ("the OSPAR Convention") is relevant to some at least of the questions in issue

between the Parties, but the Tribunal does not consider that this alters the character of the dispute as one essentially involving the interpretation and application of the Convention. Furthermore, the Tribunal is not persuaded that the OSPAR Convention substantially covers the field of the present dispute so as to trigger the application of articles 281 or 282 of the Convention.

19. The Parties discussed at some length the question of the scope of Ireland's claims, in particular its claims arising under other treaties (e.g. the OSPAR Convention) or instruments (e.g. the Sintra Ministerial Statement, adopted at a meeting of the OSPAR Commission on 23 July 1998), having regard to articles 288 and 293 of the Convention. The Tribunal agrees with the United Kingdom that there is a cardinal distinction between the scope of its jurisdiction under article 288, paragraph 1, of the Convention, on the one hand, and the law to be applied by the Tribunal under article 293 of the Convention, on the other hand. It also agrees that, to the extent that any aspects of Ireland's claims arise directly under legal instruments other than the Convention, such claims may be inadmissible. However, the Tribunal does not agree that Ireland has failed to state and plead a case arising substantially under the Convention.

20. With regard to the European Community law issues, however, certain problems have become apparent to the Tribunal in respect of some important and interrelated areas of European Community law as they appear to affect the dispute between the Parties before this Tribunal. These areas concern in particular:

(i) the standing of Ireland to institute proceedings before this Tribunal in reliance upon the Convention rights which it invokes;

(ii) the standing of the United Kingdom to respond to such proceedings;

(iii) the division of competences between the European Community (of which both Ireland and the United Kingdom are Member States) and its Member States in respect of the Convention, particularly in the light of the declarations made by the Parties and the European Community pursuant to article 5 of Annex IX to the Convention;[1]

[1] For the declaration texts, *see* http://www.un.org/Depts/los/convention_agreement/convention_declarations.htm

(iv) the extent to which provisions and instruments invoked by the Parties may properly be relied upon before this Tribunal; and

(v) the matters which, by agreement of the Parties, are subject to the exclusive jurisdiction of the European Court of Justice under European Community law.

21. These problems have become more acute following a Written Answer given by the Commission of the European Communities ("the European Commission") in the European Parliament on 15 May 2003, after the closure of the written pleadings in the present case.[2] This Written Answer was brought to the Tribunal's attention on 5 June 2003, only five days before the commencement of the hearings. The Tribunal notes that the European Commission has indicated in its Written Answer that it is examining the question whether to institute proceedings under article 226 of the European Community Treaty. In these circumstances, there is a real possibility that the European Court of Justice may be seised of the question whether the provisions of the Convention on which Ireland relies are matters in relation to which competence has been transferred to the European Community and, indeed, whether the exclusive jurisdiction of the European Court of Justice, with regard to Ireland and the United Kingdom as Member States of the European Community, extends to the interpretation and application of the Convention as such and in its entirety.

22. While neither the United Kingdom nor Ireland sought to sustain the view that the interpretation of the Convention in its entirely fell within the exclusive competence of the European Court of Justice as between Member States of the European Union, it cannot be said with certainty that this view would be rejected by the European Court of Justice. The Parties agreed in argument that, if this view were to be sustained, it would preclude the jurisdiction of the present Tribunal entirely, by virtue of article 282 of the Convention.

23. In these circumstances, the determination of the Tribunal's jurisdiction, particularly in the light of articles 281 and 282 of the Convention, and the identification of the treaty provisions and other rules of international law which the Tribunal could apply to the

[2] The European Parliament Plenary Session, Oral question by Proinsias De Rossa (H-0256/03), Sitting of Thursday, 15 May 2003.

dispute brought before it by Ireland, are crucially dependent upon the resolution of the problems referred to above.

24. The Tribunal recognizes that the problems referred to above relate to matters which essentially concern the internal operation of a separate legal order (namely the legal order of the European Communities) to which both of the Parties to the present proceedings are subject and which, in the circumstances referred to in paragraph 21 above, are to be determined within the institutional framework of the European Communities. The European Community law issues are still to be resolved, and there is a risk of considerable further delay.

25. Despite this risk, the fact remains that, until these issues are definitively resolved, there remain substantial doubts whether the jurisdiction of the Tribunal can be firmly established in respect of all or any of the claims in the dispute.

26. Although it is possible that the Tribunal might conclude from the arguments of the Parties that at least certain provisions of the Convention do not fall within the exclusive jurisdiction and competence of the European Communities in the present case, it would still not be appropriate for the Tribunal to proceed with hearings on the merits in respect of any such provisions. For one thing, it is not at all clear at this stage that the Parties are able to identify with any certainty what such provisions might be; and the Tribunal is in no better position. For another, there is no certainty that any such provisions would in fact give rise to a self-contained and distinct dispute capable of being resolved by the Tribunal. Finally, the Tribunal notes that, whatever the Parties may agree in these proceedings as to the scope and effects of European Community law applicable in the present dispute, the question is ultimately not for them to decide but is rather to be decided within the institutions of the European Communities, and particularly by the European Court of Justice.

27. The Tribunal observes that the resolution of the essentially internal problems within the European Community legal order may involve decisions that are final and binding. The Tribunal further observes that its decision, including a decision on jurisdiction, will be

final and binding on the Parties by virtue of article 296 of the Convention and article 11 of Annex VII to the Convention.

28. In the circumstances, and bearing in mind considerations of mutual respect and comity which should prevail between judicial institutions both of which may be called upon to determine rights and obligations as between two States, the Tribunal considers that it would be inappropriate for it to proceed further with hearing the Parties on the merits of the dispute in the absence of a resolution of the problems referred to. Moreover, a procedure that might result in two conflicting decisions on the same issue would not be helpful to the resolution of the dispute between the Parties.

Suspension of further proceedings on jurisdiction and merits

29. For these reasons, the Tribunal has decided, in exercise of its powers under article 8 of the Rules of Procedure, that further proceedings on jurisdiction and the merits in this arbitration will be suspended.

30. The Tribunal nevertheless remains seised of the dispute. Unless otherwise agreed or decided, the Tribunal will resume its proceedings not later than 1 December 2003. The Tribunal hopes that it will at that time have a clearer picture of the position regarding European Community law and possible proceedings thereunder insofar as they appertain to the present dispute.

Ireland's request for further provisional measures

31. In announcing its decision to suspend further proceedings in the case, the Tribunal stated its willingness, in the circumstances now prevailing, to consider the possibility of prescribing provisional measures if either Party considers that such measures are necessary to preserve the respective rights of the Parties or to prevent serious harm to the marine environment.

32. By communication dated 16 June 2003, Ireland submitted to the Tribunal a Request for Further Provisional Measures ("the Request") pursuant to article 290 of the Convention "to preserve Ireland's rights under UNCLOS and to prevent harm to the marine environment."

33. The provisional measures requested by Ireland are as follows:

(A) <u>Discharges</u>

(i) The United Kingdom shall ensure that there are no liquid waste discharges from the MOX Plant at Sellafield into the Irish Sea.

(ii) The United Kingdom shall ensure that annual aerial waste discharges of radionuclides from MOX, and annual aerial and liquid waste discharges of radionuclides from THORP, do not exceed 2002 levels.

(B) <u>Co-operation</u> (Note: the following is on a confidential basis)

(i) In the event of any proposal for additional reprocessing at THORP or manufacturing at MOX, (by reference to existing binding contractual commitments), the United Kingdom will notify Ireland, provide Ireland with full information in relation to the proposal and consult with, and consider and respond to issues raised by, Ireland.

(ii) The United Kingdom will inform the Irish Government as soon as possible of the precise date and time at which it is expected that any vessel carrying radioactive substances to or from the MOX or THORP Plant or to a storage facility with the possibility of subsequent reprocessing or manufacture in THORP or MOX will arrive within Ireland's Pollution Response Zone, SAR Zone or within the Irish Sea, and shall inform Ireland on a daily basis as to the intended route and progress of such vessel.

(iii) The United Kingdom shall ensure that Ireland is promptly provided with:

a. Monthly information as to the quantity (in becquerels) of specific radionuclide discharges in the form of liquid and aerial waste discharges arising from the MOX Plant and separately from the THORP Plant, and the flow sheets relating to environmental discharges liquid and aerial referred to at paragraphs 118 and 124 of Mr Clarke's first statement;

b. Monthly information as to the volume of waste in the HAST tanks and the volume vitrified during the previous month;

c. All research studies carried out or funded in whole or in part by or on behalf of the United Kingdom government or any of its agencies or BNFL into the effect of liquid or aerial discharges, from the MOX or THORP Plant, upon the Irish Sea, its environment or biota;

d. Full details of any reportable accidents or incidents at the MOX or THORP Plant or associated facilities, that will be the subject of a report to the United Kingdom's Health and Safety Executive (or any other public body with responsibility for health and safety at the Sellafield site);

e. Access to, and the right and facility to make a copy of Continued Operation Safety Reports (including the Probabilistic Risk Assessments) and associated documents relating to the Sellafield site;

f. The results of reappraisals since 11 September 2001 of the risks to the MOX Plant and THORP and associated facilities such as the HAST tanks, and of the measures taken to counter any change since 11 September 2001 in the level of the perceived threat.

(iv) The United Kingdom shall co-operate and co-ordinate with Ireland in respect of emergency planning and preparedness in respect of risks arising out of reprocessing, MOX fuel manufacture and storage of radioactive materials including providing Ireland with such information as is necessary to take appropriate response measures.

(v) The United Kingdom shall co-operate with Ireland in arranging trilateral liaison between the Irish Coastguard, BNFL/PNTL and the United Kingdom's Maritime and Coastguard Agency in respect of all shipments of radioactive materials to or from the MOX and/or THORP Plants.

(C) Assessment

The United Kingdom shall ensure that no steps or decisions are taken or implemented which might preclude full effect being given to the results of any environmental assessment which the Tribunal may order to be carried out in accordance with Article 206 of UNCLOS in respect of the MOX Plant and/or THORP.

(D) Other Relief

(i) Further and other relief;

(ii) Liberty to apply.

The Tribunal understands that, by the Note in parenthesis to Section (B) of its Request, Ireland intended to indicate that any information provided by the United Kingdom in response to provisional measures would be treated as confidential.

34. In its Request, Ireland states that "the circumstances justifying this request include the likely duration of the suspension of the hearing and the real possibility of proceedings before the European Court of Justice, and the conduct of the United Kingdom as outlined in the pleadings."

The Tribunal's competence with regard to provisional measures and the applicable rules

35. The question of provisional measures under the Convention is governed by article 290, which provides:

Article 290
Provisional Measures

1. If a dispute has been duly submitted to a court or tribunal which considers that *prima facie* it has jurisdiction under this Part or Part XI, section 5, the court or tribunal may prescribe any provisional measures which it considers 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.

2. Provisional measures may be modified or revoked as soon as the circumstances justifying them have changed or ceased to exist.

> 3. Provisional measures may be prescribed, modified or revoked under this article only at the request of a party to the dispute and after the parties have been given an opportunity to be heard.
>
> 4. The court or tribunal shall forthwith give notice to the parties to the dispute, and to such other States Parties as it considers appropriate, of the prescription, modification or revocation of provisional measures.
>
> 5. 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 or, with respect to activities in the Area, the Seabed Disputes Chamber, 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. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4.
>
> 6. The parties to the dispute shall comply promptly with any provisional measures prescribed under this article.

36. As already stated, by its Order, ITLOS, acting pursuant to article 290, paragraph 5, of the Convention, prescribed a provisional measure, "pending a decision by the Annex VII arbitral tribunal." (ITLOS Order, paragraph 89)

37. The provisional measure prescribed by ITLOS was:

> 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.

38. In prescribing a provisional measure, ITLOS stated that it "did 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" (ITLOS Order, paragraph 81).

39. Although a provisional measure was prescribed by ITLOS, Ireland's request for additional provisional measures is the first such request to this Tribunal. Hence, the Tribunal's competence to prescribe provisional measures is contained in article 290,

paragraph 1, of the Convention, and is subject to the provisions of paragraphs 2 to 4 of that article.

40. To the extent this may be relevant, the Tribunal considers that there has been a change in the circumstances in which ITLOS prescribed its provisional measure. First, this Tribunal has now been constituted. Furthermore, following the suspension of the proceedings, the time that will elapse before the Tribunal can reach a decision on the merits is likely to be greater than was to be expected when ITLOS made its Order. In the view of the Tribunal, the longer delay in reaching a final decision on the merits of the dispute constitutes a change in the circumstances that would, if necessary, warrant modification of the provisional measure prescribed by ITLOS in accordance with article 290, paragraph 5, of the Convention.

41. For the reasons previously explained, the Tribunal considers that *prima facie* it has jurisdiction over the dispute, which has been duly submitted to it by Ireland in accordance with Part XV of the Convention. Accordingly, pursuant to article 290, paragraph 1, of the Convention, the Tribunal may prescribe "any provisional measures which it considers appropriate in 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." Although the language of article 290 is not in all respects identical to that of article 41 of the Statute of the International Court of Justice, the Tribunal considers that it should have regard to the law and practice of that Court, as well as to the law and practice of ITLOS, in considering provisional measures. Furthermore it considers that Ireland, as the Party requesting provisional measures, bears the burden of establishing that the circumstances are such as to justify the measures sought.

42. In considering the Request, the Tribunal is governed by the terms of article 290 of the Convention, the relevant provisions of Annex VII and its Rules of Procedure. Article 1, paragraph 2, of the Rules of Procedure provides that "to the extent that any question of procedure is not expressly governed by these Rules or by Annex VII to the Convention or other provisions of the Convention, and the Parties have not otherwise agreed, the question shall be decided by the Tribunal after consulting the Parties." In fact there are

no provisions in Annex VII, or in the Rules of Procedure, expressly governing applications for the prescription of provisional measures.

43. In that connection, the Tribunal notes that according to article 89, paragraph 5, of the ITLOS Rules of Procedure, it is open to ITLOS to prescribe measures different in whole or in part from those requested. A similar provision is contained in article 75, paragraph 2, of the Rules of Court of the International Court of Justice. The Tribunal, having drawn these provisions to the attention of the Parties without comment from either, considers that it is also competent to prescribe provisional measures other than those sought by any Party.

The position of the Parties on the provisional measures requested

44. In accordance with article 290, paragraph 3, of the Convention, both Parties made extensive submissions concerning the Request, in hearings on 17, 18, 20 and 21 June 2003.

45. Ireland argues that discharges from the MOX plant (as well as increased discharges from THORP resulting from the operation of the MOX plant), particularly because of their radioactive character and the very long half-life of many of the radionuclides involved, not only constitute serious harm to the marine environment of the Irish Sea, but also cause an irreparable prejudice to Ireland's claimed right that the Irish Sea not be polluted. Moreover, Ireland argues that the United Kingdom's failure to consult and co-operate fully and effectively with Ireland constitutes irreparable prejudice to Ireland's claimed right to such consultation and co-operation. In this regard Ireland drew attention to what it sees as a number of specific failures by the United Kingdom to provide it, on appropriate terms, with information relating to the operation of the MOX plant and of related facilities and of shipments to the plant, and generally to consult with Ireland on an intergovernmental basis, within the framework of Article 123 of the Convention, as a co-riparian of the Irish Sea. Furthermore, Ireland contends that it has a right to require the United Kingdom to undertake a proper environmental assessment, in accordance with article 206 of the Convention, in respect of any steps or decisions taken or implemented in relation to the MOX plant and THORP.

46. The United Kingdom argues that any radioactive discharges from the MOX plant into the Irish Sea are "infinitesimally small" and do not constitute or threaten serious harm to that marine environment. It maintains that it had consulted and co-operated as fully and effectively as it was required to do, and in particular that it had fully complied with the ITLOS Order. It denies that the discharges from the MOX plant produce irreparable—or indeed any—prejudice to Ireland's claimed rights. It also argues that compliance with some of the measures sought would in effect result in the closing down of the MOX plant at least for some months, and that this would cause serious prejudice to the United Kingdom and BNFL in the event that Ireland's claims were not upheld on the merits. In its view, there has been no change of circumstances since the making of the ITLOS Order, and there is therefore no basis for modifying or supplementing that Order.

47. In a letter to the Agent of Ireland dated 13 June 2003 (which was copied to the Tribunal) the Agent of the United Kingdom, stated that "there are no current proposals for new contracts for reprocessing at THORP or for the modification of existing contracts so as to reprocess further materials. No decision to authorize further reprocessing at THORP would be taken without consultation in which Ireland would be invited to participate." The Agent of the United Kingdom also made certain statements, on a confidential basis, relating to shipments of MOX fuel.

48. In oral argument, the Attorney-General for the United Kingdom also drew attention to the United Kingdom's earlier offer to engage in a general review with Ireland of the mechanisms for intergovernmental co-operation in respect of the concerns of Ireland as to the Sellafield plant, including those parts of it comprised in the present dispute.

49. The Tribunal notes, and places on record, the statements made on behalf of the United Kingdom, which are referred to in paragraphs 47 and 48 above.

50. On the final day of oral argument on its Request, Ireland tabled a revised text of paragraph (C) of the Request, in the following terms:

> The Governments of the United Kingdom and Ireland should each of them ensure that no action of any kind is taken which might prejudice the rights of the other Party in respect of the carrying out of whatever decision the Tribunal may render in the case, including in relation to Article 206 UNCLOS.

51. For its part the United Kingdom, while denying the need for any further provisional measures, seeks from the Tribunal a direction that Ireland "take all steps within its power to expedite the resolution of" the outstanding questions under European Community law, and to inform it, and the Tribunal, of developments.

The Tribunal's conclusions on provisional measures

52. As noted already, the Tribunal may only prescribe provisional measures if these are appropriate, in the prevailing circumstances and in the light of the information available, "to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment." Furthermore, the relevant period for this purpose is the period "pending the final decision." Harm which may be caused thereafter is a matter to be considered in the context of the case on the merits.

A. Serious harm to the marine environment

53. For the purposes of provisional measures, the Convention clearly identifies the prevention of serious harm to the marine environment as a special consideration, and it is appropriate to deal with that first.

54. As the Tribunal has already noted, the liquid wastes discharged from the MOX plant into the Irish Sea contain small quantities of radionuclides, some of which (e.g. Cs-137 and Pu-241) have an extremely long half-life. The wastes in question arise not as a direct by-product of reprocessing of spent nuclear fuels, but from ancillary activities such as the cleaning of the plant and sanitary operations. The Attorney-General for Ireland, in opening the case, accepted that ". . . the level of discharges from the MOX plant . . . is not of a significant magnitude . . . ."

55. Under article 290, paragraph 1, any harm caused, or likely to be caused, to the marine environment must be "serious" before the Tribunal's power to prescribe provisional measures on that basis arises. In the present state of the evidence, the Tribunal does not consider that Ireland has established that any harm which may be caused to the marine environment by virtue of the operation of the MOX plant, pending the determination of this case on the merits, meets this threshold test.

B. Protection of the rights of the Parties

56. Ireland also argues that provisional measures were necessary to protect its rights under the Convention (a) in respect of discharges into the Irish Sea with potential effects on Irish waters, (b) in respect of co-operation with the United Kingdom to minimize harm to the marine environment and (c) in respect of its claimed right that, the potential effects of the MOX plant not having been adequately assessed, either in themselves or in terms of increased discharges resulting from THORP, it was a violation of Ireland's rights in particular under article 206 of the Convention for the discharges to continue, even in the period before the final decision.

57. The United Kingdom, in opposing these measures, notes that some of them at least are capable of having a serious impact on its own rights, in particular to the continued lawful operation of the MOX plant in the period pending a final decision, and it stresses that the rights or interests of both parties have to be taken into account in any decision on provisional measures. The United Kingdom points out that the MOX plant and related facilities have been approved under a stringent regulatory regime established and operated with full regard to the applicable regional and international norms.

58. International judicial practice confirms that a general requirement for the prescription of provisional measures to protect the rights of the Parties is that there needs to be a showing both of urgency and of irreparable harm to the claimed rights (see, e.g. the Order of 17 June 2003 of the International Court of Justice in the *Case concerning Certain Criminal Proceedings in France (Republic of the Congo v. France)*, paragraphs 34-35).

59. The Tribunal notes that ITLOS was requested by way of provisional measures to order that the MOX plant not be approved or commissioned. This ITLOS declined to do, although it did prescribe a different provisional measure focusing on improved co-operation between the Parties and the provision of information.

60. The Tribunal further notes that in the period since it was constituted, Ireland could have sought a modification of the ITLOS Order if it had been dissatisfied with its operation, or

it could have sought additional provisional measures if evidence available to it had indicated an urgent need for them in terms of the criteria in article 290, paragraph 1.

61. Turning first to the question of discharges (paragraph (A) of the Request), the Tribunal has before it a much greater volume of written material than ITLOS had at the time of its Order. But the Tribunal does not consider that this material leads it to reach any different conclusion as to the question of discharges from the MOX plant, so far as concerns the period prior to the decision on the merits. In this respect it notes in particular the statement made by the Agent for the United Kingdom, which the Tribunal has set out in paragraph 47 above, that "that there are no current proposals for new contracts for reprocessing at THORP or for the modification of existing contracts so as to reprocess further materials." There is thus no clear indication at this stage that there will be additional discharges from THORP arising by reason of the MOX plant and falling within the scope of the present proceedings.

62. For these reasons, the Tribunal is not satisfied that in the present circumstances there is an urgent and serious risk of irreparable harm to Ireland's claimed rights, which would justify it in prescribing provisional measures relating to discharges from the MOX plant.

63. As to the question of assessment (paragraph (C) of the Request), the Tribunal notes that this is presented as a key part of Ireland's case on the merits. In this respect, Ireland emphasised the provisions of article 206 of the Convention. The Tribunal would also draw attention to article 204, paragraph 2. But the Tribunal does not believe that any provisional measure is justified at this stage, in advance of the Tribunal's eventual consideration of the merits, even assuming that the issue of assessment does indeed fall definitively within the Tribunal's jurisdiction. In this context the Tribunal does not consider that paragraph (C) of the Request, in either of its versions, would give any clear guidance to the United Kingdom of what conduct is required of it pending a final decision.

64. Turning to the question of co-operation between the Parties in relation to the preservation of the marine environment of the Irish Sea (paragraph (B) of the Request), the Tribunal first observes that this matter was dealt with, to some extent at least, in the ITLOS Order.

Both Parties accept that that Order remains in force and is binding upon them. Moreover Ireland does not seek any modification of the ITLOS Order as such, as distinct from an order requiring further measures of co-operation and exchange of information.

65. The ITLOS Order requires the Parties to co-operate and to enter into consultations forthwith for the purposes specified in the ITLOS Order. In its Reply Ireland acknowledged that since the ITLOS Order, there had been some improvement in the processes of co-operation and the provision of information; but it pointed to a number of continuing difficulties. The United Kingdom provided detailed responses to individual points raised by Ireland.

66. The Tribunal does not need at this stage to resolve the factual issues in dispute between the Parties as to the adequacy and timeliness of the disclosure of certain information and as to the character and extent of co-operation. It is satisfied that since December 2001, there has been an increased measure of co-operation and consultation, as required by the ITLOS Order. On the other hand, the Tribunal is concerned that such co-operation and consultation may not always have been as timely or effective as it could have been. In particular, problems have sometimes arisen, both before and since the ITLOS Order, from the absence of secure arrangements, at a suitable inter-governmental level, for coordination of all of the various agencies and bodies involved. The United Kingdom's offer, referred to in paragraph 48 above, to review with Ireland the whole system of intergovernmental notification and co-operation in this context should once again be recalled.

67. The Tribunal, accordingly, recommends that the Parties should seek to establish arrangements of the kind referred to in the previous paragraph, and to undertake the review of the intergovernmental system referred to in that paragraph.

Other matters

68. The Tribunal notes also that it is consistent with the practice of ITLOS that each Party should submit reports and information on compliance with the Tribunal's Order below.

69. In addition, the Tribunal urges both Ireland and the United Kingdom, jointly and separately, to take appropriate steps to expedite the resolution of the outstanding questions of European Community law. In this connection, the Tribunal draws the attention of the Parties to the provisions of article 5, paragraph 5, and article 6, paragraph 2, of Annex IX to the Convention.

70. In making its Request, Ireland did not include any request for costs. The United Kingdom for its part submitted that the Tribunal, in rejecting the Request, should order that Ireland pay the United Kingdom's costs of these proceedings. The Tribunal considers that no order as to costs is appropriate at this stage. In the light of articles 16 and 17 of its Rules of Procedure, the Tribunal reserves until its final Award any decision as to the costs of the Parties and the expenses of the Tribunal.

The Tribunal's Order

For the foregoing reasons

THE TRIBUNAL, unanimously, pursuant to articles 1 and 8 of its Rules of Procedure and article 290 of the Convention, makes the following Order:

1. Decides that further proceedings in the case are suspended until not later than 1 December 2003;
2. Affirms the provisional measure prescribed by ITLOS in its Order of 3 December 2001;
3. Rejects Ireland's Request for Provisional Measures in so far as concerns paragraphs (A) and (C) of the Request;
4. Decides, insofar as concerns paragraph (B) of the Request, having regard to the considerations referred to in paragraphs 64 to 67 above, that no further order is required as to co-operation and the provision of information at this stage;
5. Calls on the Parties, pending the final decision of the Tribunal, to ensure that no action is taken by either Party which might aggravate or extend the dispute submitted to the Tribunal;
6. Requests the Parties to take such steps as are open to them separately or jointly to expedite the resolution of the outstanding issues within the institutional framework of the European Communities; and to notify the Tribunal and each other of all relevant developments;

7. Decides,

   (a) that no later than 12 September 2003, Ireland and the United Kingdom shall each submit to the Tribunal and to the other Party an initial report and information on compliance with the provisional measure affirmed, and the recommendations made in paragraph 67 above, by the Tribunal in the present Order;

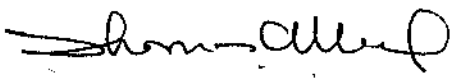
   (b) that subject to any further order of the Tribunal, not later than 17 November 2003, a further report and information on compliance shall be submitted; and

   (c) to keep under review the possible need for further measures in this connection; and

8. Instructs the Registrar to provide a copy of this Order to the European Commission.

Done at The Hague this twenty-fourth day of June two thousand and three.

Signed:



Thomas A. Mensah
President

Anne Joyce
Registrar