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]

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

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 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.

[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.

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

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

[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."

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.

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]

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

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.

[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.

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 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.