

## 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