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"[14] and may be interpreted differently[15] (paragraphs 50–51). This interpretation would seem to correspond to the preparatory work for article 282.[16]

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

[14]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.

[15]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.

[16]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).

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 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