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