SEPARATE OPINION OF JUDGE MENSAH

I agree with the finding of the Tribunal that, in the circumstances of the present case, the urgency of the situation does not require the prescription of the provisional measures requested by Ireland. On the facts as presented to the Tribunal in this case, I do not find that the requirements for the prescription of provisional measures under article 290, paragraph 5, of the Convention are satisfied in respect of the rights which Ireland claims have been violated by the United Kingdom.

In considering a request for the prescription of provisional measures under article 290, this Tribunal is governed by both paragraphs 1 and 5 of that article. Paragraph 1 sets out the parameters and conditions for the prescription of provisional measures in general. As the article puts it, provisional measures may be prescribed if the court or tribunal to which a request is addressed considers that such measures are "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". The jurisprudence of international judicial bodies makes it clear that provisional measures are essentially exceptional and discretionary in nature, and are only appropriate if the court or tribunal to which a request is addressed is satisfied that two conditions have been met. The first condition is that the court or tribunal must find that the rights of either one or other of the parties might be prejudiced without the prescription of such measures, i.e. if there is a credible possibility that such prejudice of rights might occur. The second condition is that the prejudice of rights would be irreparable in the sense that it would not be possible to restore the injured party materially to the situation that would have prevailed without the infraction complained of, or that the infraction "could not be made good simply by the payment of an indemnity or by compensation or restitution in some other material form" (case concerning the *Denunciation of the Treaty of 2 November 1865 between China and Belgium, P.C.I.J., Series A, No. 8,* p. 7*)*. In the case of a request under article 290 of the Convention provisional measures may also be prescribed to prevent serious harm to the marine environment.

It is not necessary for present purposes to enter into a full discussion of what are the essential elements of the concept of "irreparable prejudice" of rights or even of that of "serious damage to the marine environment". Suffice it to say that a court or tribunal will not prescribe provisional measures unless it is satisfied that some irreversible prejudice of rights or serious harm to the marine environment might occur in the absence of such measures.

But whatever may be the considerations for determining that the prescription of provisional measures is appropriate under paragraph 1 of article 290 of the Convention, it is important to recognize that they are not the only factors that need to be taken into account when dealing with a request for provisional measures under paragraph 5 of article 290. In other words, although the conditions for provisional measures under paragraph 1 are necessary for prescription of measures under paragraph 5, they are not sufficient. This is because the situations dealt with under the two paragraphs are different from each other in two important respects. The first difference arises from the fact that, whereas a request for the prescription of provisional measures under paragraph 1 of article 290 is dealt with by the court or tribunal to which the "dispute has been duly submitted" (and which, therefore, is expected to deal with the substance of the dispute, including as appropriate, questions of jurisdiction, admissibility and merits,) a request for provisional measures under paragraph 5 is considered by a court or tribunal that will not deal with any of the substantive aspects of the dispute, except the relatively simple issue of whether or not there is reason to believe that

prima facie the court or tribunal to which the dispute is to be submitted would have jurisdiction to adjudicate upon the dispute. The second difference is that a court or tribunal dealing with a request for provisional measures under paragraph 1 of article 290 is required to consider measures that are appropriate to preserve rights or prevent harm "pending the final decision" in the case. On the other hand, a court or tribunal considering a request for provisional measures under paragraph 5 of article 290 has power only to prescribe measures pending the constitution of the arbitral tribunal to which the dispute is being submitted, i.e. the Annex VII arbitral tribunal. These are not mere technical differences: they have significant implications not only with regard to the considerations and factors that need to be taken into account by the respective courts or tribunals but also with regard to the approach to be adopted in considering the evidence adduced before them. For example, in dealing with the possibility of prejudice to rights or serious harm to the marine environment, a court or tribunal operating under paragraph 5 of article 290 of the Convention must bear in mind that it is not within its purview to consider, let alone to decide, whether there is the possibility of such prejudice or harm "before a final decision" is reached on the claims and counter-claims of the parties in the dispute. That court or tribunal is only required and empowered to determine whether, on the evidence adduced before it, it is satisfied that there is a reasonable possibility that a prejudice of rights of the parties (or serious damage to the marine environment) might *occur prior to the constitution of the arbitral tribunal to which the substance of the dispute is being submitted.* This difference in the temporal dimension of the competence of the tribunal imposes a measure of constraint on a court or tribunal dealing with a request for provisional measures under article 290, paragraph 5, of the Convention. That constraint applies fully to this Tribunal in the present case.

This means that the Tribunal should exercise considerable self-discipline to ensure that it does not deal with, or even appear to be dealing with, matters that fall outside its competence. This applies especially to the way in which it reacts to the evidence that may be submitted by the parties regarding the possibility or otherwise of prejudice of rights or harm to the marine environment, especially where, as in the majority of cases, there are wide differences between the estimations of the parties and their experts. In such a situation it is important for the Tribunal to appreciate at all times that it is not for it to determine whether or not there is a potential for prejudice of rights or harm to the marine environment in the abstract, but rather whether there is evidence that potential prejudice or harm might occur in the period covered by its competence, that is to say, in the period pending the constitution of the Annex VII arbitral tribunal. Once again, this is not just a minor point of detail. It has substantive significance for the issue of urgency that is a precondition of the special jurisdiction conferred on the Tribunal by paragraph 5 of article 290 of the Convention. That provision expressly states that provisional measures may be prescribed if "the urgency of the situation so requires". The implication is that the Tribunal is required not only to conclude that there is the possibility of "irreparable prejudice" to the rights of one or other of the parties (or serious damage to the marine environment), but also that this possibility might occur in the period pending the constitution of the Annex VII arbitral tribunal. Thus the Tribunal may find that it is not appropriate to prescribe provisional measures even where there is evidence that some prejudice of rights or harm might occur in the future. This would be so if it concludes that the prejudice or harm is unlikely to materialise prior to the constitution of the arbitral tribunal. It may also refuse to prescribe provisional measures if it finds that some prejudice or harm might occur but that such prejudice or harm would not be irreversible ("irreparable"). In such situations it would be entirely reasonable for the Tribunal to conclude that it is not appropriate for it to prescribe any provisional measures because the urgency of the situation does not require the prescription of such measures in the period for

which it has the competence to act under article 290, paragraph 5. This does not, of course, mean that the prejudice or harm to be prevented must be one whose full effect would necessarily be felt before the constitution of the arbitral tribunal. Far from it. The Tribunal is competent, and indeed is required, to act to prevent prejudice of rights or harm that can reasonably be foreseen, even if the full effects would occur after the constitution of the arbitral tribunal. In any event, it must be made clear that a finding by the Tribunal that the evidence before it does not convince it that irreparable prejudice of rights or harm might occur before the constitution of the arbitral tribunal does not in any way imply that the Tribunal is saying or even suggesting that such prejudice or harm might not occur at any time during the pendency of the dispute. It certainly does not mean that the *Tribunal has found that such damage will not occu*r. It merely means that enough evidence has not been presented to satisfy the Tribunal that it is appropriate to exercise what is universally accepted to be an exceptional and discretionary power. In this case that discretion is to be exercised in respect of a period that is much shorter than would be the case in a request for provisional measures under paragraph 1 of article 290 of the Convention.

These considerations lead me to the view that the Tribunal acted correctly in not concentrating too much attention on the existence or nature of "long-term" potential risks of damage to Ireland or harm to the marine environment as a result of the commissioning of the MOX plant. On that issue, there is a clear and palpable difference of opinion between the parties, and the evidence or lack of evidence is such that reasonable minds can and will probably differ as to the conclusions to be drawn. But, in my view, it was not necessary or even appropriate for this Tribunal to decide on that issue. The Annex VII arbitral tribunal will have ample opportunity (and hopefully fuller and more relevant information) to consider and take a view on the matter; as it is its exclusive competence to do. And, in any case, it is important to note that whatever conclusion the Tribunal might have reached on the matter could be modified or rejected by that arbitral tribunal. In the present case, all that was required of the Tribunal was to consider whether any rights of Ireland or the United Kingdom or any threat of serious harm to the marine environment needed protection in the period prior to the composition of the Annex VII arbitral tribunal. On that point, I agree with the conclusion that the evidence before the Tribunal does not suffice to show either that irreversible prejudice might occur to any rights of Ireland or that serious harm to the marine environment might occur, solely as a result of the commissioning of the MOX plant, *in the period between now and the constitution of the Annex VII arbitral tribunal.* In coming to this conclusion I have taken into account the information that the constitution of the Annex VII arbitral tribunal is expected to be completed before the beginning of the spring of 2002, as well as the commitment made by the United Kingdom that there will be no maritime transport of radioactive material before the summer of 2002 (paragraphs 78 and 79 of the Order).

I note that Ireland has submitted that the "inevitability of irreparable prejudice to the right of Ireland to insist upon these preconditions to the commissioning of the plant, if the plant is commissioned before a ruling on the merits of its claim, is obvious" (paragraph 148 of the Request for provisional measures). I do not consider that this submission is valid. This Tribunal is not competent to prescribe provisional measures to prevent irreparable prejudice "before a ruling on the merits" of the Irish claim. It can only act if it is satisfied that there might be irreparable prejudice *before the constitution of the Annex VII arbitral tribunal.* This requirement applies both to the "procedural rights" to which Ireland refers in its claim, such as rights under articles 123, 197, 206 and 207, as well as the "substantive rights", such as those in articles 192 and 194.

As far as the substantive right of Ireland not to have its marine environment polluted as a result of the commissioning and operation of the MOX plant is concerned, the evidence presented is, in my view, not sufficient to show that the commissioning of the MOX plant on 20 December would, in itself, result in irreparable damage to Ireland before the constitution of the Annex VII arbitral tribunal. Both parties appear to agree in their submissions, that neither the authorization of the MOX plant nor its commissioning is technically irreversible. Indeed, the evidence suggests that it is the United Kingdom that runs a greater risk if it goes ahead with commissioning and is later ordered by the Annex VII arbitral tribunal to take other action in connection with the commissioning or operation of the plant.

But, while I share the Tribunal's conclusion that, in the circumstances of this case, the urgency of the situation does not require the prescription of the provisional measures requested by Ireland, I would have felt more comfortable if the Tribunal had indicated in clear and specific terms the reason for this conclusion. As I see it, the reason is that it is not reasonable to believe that any pollution of Ireland's marine environment might occur in the period between the issue of the Order of this Tribunal and the constitution of the Annex VII arbitral tribunal, sometime before the spring of 2002.

With regard to the "procedural rights" (cooperation and consultation) which Ireland claims have been violated by the United Kingdom, I agree with the Tribunal that some at least of these are "rights" that may "be appropriate for protection" by provisional measures under article 290 of the Convention (paragraph 82 of the Order). However, I do not find that any irreparable prejudice to Ireland has occurred or might occur before the constitution of the arbitral tribunal. In my view none of the violations of the procedural rights arising from the duty to cooperate or to consult or to undertake appropriate environmental assessments are "irreversible" in the sense that they cannot effectively be enforced against the United Kingdom by decision of the Annex VII arbitral tribunal, if the arbitral tribunal were to conclude that any such violations have in fact occurred. For example, it would be within the competence of the Annex VII arbitral tribunal to order the United Kingdom either to decommission the MOX plant altogether or to go back to the drawing board and take action to comply with any applicable procedural requirements that the arbitral tribunal finds should have been followed before giving final authorization for the MOX plant. Thus, in my view, the violations of the "procedural rights" about which Ireland complains are capable of being made good by reparations that the arbitral tribunal may consider appropriate. I regret that the Tribunal did not consider it necessary to deal explicitly and directly with this aspect of the matter.

(*Signed*) Thomas A. Mensah