ITLOS

MOX Plant Dispute

On 3 December 2001, the International Tribunal for the Law of the Sea delivered its Order[1] in the MOX Plant Case, Provisional Measures (Ireland *v*. United Kingdom).

The dispute stems from the United Kingdom's authorisation to open a new MOX facility in Sellafield. The facility is designed to reprocess spent nuclear fuel into a new fuel, which combines reprocessed plutonium with uranium and is known as mixed oxide fuel, or MOX. The Irish government has pointed out that the plant will contribute to the pollution of the Irish Sea, and emphasised the potential risks involved in the transportation of radioactive material to and from the plant.

By notification dated 25 October 2001, addressed to the United Kingdom, Ireland requested that the dispute

be submitted to an arbitral tribunal to be established under Annex VII of the United Nations Convention on the Law of the Sea.

On 9 November 2001, Ireland submitted a request for the prescription of provisional measures under article 290, paragraph 5, of the Convention to the International Tribunal for the Law of the Sea pending the constitution of the arbitral tribunal.

According to article 290 of the Convention, the Tribunal may prescribe provisional measures if it considers provisional measures appropriate to "preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment." Further, if it considers that *prima facie* the arbitral tribunal, which is to be constituted, would have jurisdiction and that the urgency of the situation so requires.

The Tribunal first examined the United Kingdom's argument, based on article 282 of the Convention, that the Tribunal is not competent to prescribe provisional measures since the main elements of the dispute are governed by regional agreements, including European Treaties, which provide for binding means of resolving disputes.

The Tribunal took the view that the dispute concerns the interpretation and application of the Convention and no other agreement. The United Kingdom also maintained that the requirements of article 283 were not satisfied, since no exchange of views had taken place between the parties before the Case was submitted to the Tribunal. In response to this argument, the Tribunal considered that a State Party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted. It therefore found that the Annex VII arbitral tribunal would *prima facie* have jurisdiction over the dispute.

The Tribunal then considered whether provisional measures are required pending the constitution of the Annex VII arbitral tribunal (according to the provisions of the Convention this should take place in early February 2002). It noted and placed on record the assurances given by the United Kingdom that there will be no additional marine transports of radioactive material either to or from Sellafield as a result of the commissioning of the MOX plant until summer 2002.

The Tribunal noted that, in accordance with article 290, paragraph 5, of the Convention, it may prescribe provisional measures if it considers that the urgency of the situation so requires this. In the circumstances of this case, the Tribunal found that the urgency of the situation did not require the prescription of the provisional measures as requested by Ireland, in the short period before the constitution of the Annex VII arbitral tribunal. "It is the responsibility of the UK if it wants to commission the plant and later run the risk of it being closed down," it said.

However, the Tribunal considered that the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law, and that rights arise therefrom which the Tribunal may consider appropriate to preserve under article 290 of the Convention. In the view of the Tribunal, prudence and caution require that Ireland and the United Kingdom cooperate in exchanging information concerning risks or effects of the operation of the MOX plant and in devising ways to deal with them, as appropriate. For these reasons, the Tribunal prescribed the following provisional measure, pending a decision by the Annex VII arbitral tribunal:

"Ireland and the United Kingdom shall cooperate and shall, for this purpose, enter into consultations forthwith in order to:

(a) exchange further information with regard to possible consequences for the Irish Sea arising out of the commissioning of the MOX plant;
(b) monitor risks or the effects of the operation of the MOX plant for the Irish Sea;
(c) devise, as appropriate, measures to prevent pollution of the marine environment which might result from the operation of the MOX plant."

The Tribunal further decided that, in accordance with article 95, paragraph 1, of the Rules, Ireland and the United Kingdom shall each submit an initial report in compliance with the provisional measures prescribed, not later than 17 December 2001, and authorised the President of the Tribunal to request such further reports and information as he may consider appropriate after that date.

Critics of the plant argue that it could be a target for terrorist attacks and could pollute the Irish Sea with radioactive materials. They also dispute its economic viability because calculations used by British ministers did not include its estimated construction cost of £470 million (• 795.5 million).

A ruling against the plant once plutonium had been introduced would cost taxpayers millions of pounds in clean-up costs. However, Brian Wilson, the UK energy minister, indicated that commissioning would go ahead. The complex was given the go-ahead in October 2001, after a study showed that it would be cheaper to allow it to open than to scrap it, and the project was due to be offcially launched on 20 December 2001.

Dublin is pursuing a second international arbitration process under the OSPAR Convention for the Protection of the Marine Environment of the North-East Atlantic. Critics are also awaiting the result of an appeal from November 2001 against a United Kingdom High Court ruling that backed the government's approval of the plant. (See also report on page 41.) (MJ)

Note:

[1] The text of the Order and the opinions appended thereto is available at www.itlos.org and www.tiddm.org.

0378-777X/01/$12.00 © 2002 IOS Press