

**PART III:**

**THE RELIEF SOUGHT**



## CHAPTER 10

### THE ROLE OF THE TRIBUNAL AND THE RELIEF SOUGHT BY IRELAND

10.1. The Tribunal has two distinct functions in the present case. One is to make a determination as to compliance by the United Kingdom with its UNCLOS obligations. That relates to paragraphs 1-4 of the Statement of Relief Sought. The other function is to decide upon Ireland's application for an Order in the terms of paragraph 5 of the Statement of Relief Sought, which reads as follows:

“That the United Kingdom shall refrain from authorizing or failing to prevent (a) the operation of the MOX plant and/or (b) international movements of radioactive materials into and out of the United Kingdom related to the operation of the MOX plant or any preparatory or other activities associated with the operation of the MOX plant, in particular the reprocessing of spent fuel at the THORP plant for the purposes of the operation of the MOX plant, until such time as (1) there has been carried out a proper assessment of the environmental consequences arising directly or indirectly from impact of the operation of the MOX plant and associated facilities as well as related international movements of radioactive materials, and (2) it is demonstrated that the operation of the MOX plant and associated facilities and related international movements of radioactive materials will result in the deliberate discharge of no radioactive materials, including wastes, directly or indirectly into the marine environment of the Irish Sea, and (3) there has been agreed and adopted jointly with Ireland a comprehensive strategy or plan to prevent, contain and respond to terrorist attack on the MOX plant and associated facilities and international movements of radioactive waste associated with the plant”

10.2. The nature of the United Kingdom's obligations is relevant to both functions. The UNCLOS imposes procedural obligations upon States. As has been explained in chapters 7, 8 and 9, those obligations include, in the present case, the obligations upon the United Kingdom to carry out a proper and complete environmental impact assessment, to engage in consultations with Ireland over the planned development of the Sellafield site consequent upon the MOX authorisation (and over the associated shipments), and to take all the steps required by UNCLOS to prevent pollution of the Irish Sea.

10.3. The environmental impact assessment, and the consultations in so far as they relate to planned activities, can only be carried out in advance of the activities to which they relate. If they are not carried out in advance, they have no use. They cannot amount to “a genuine invitation, extended with a receptive mind, to give advice.”<sup>127</sup> .

10.4. The United Kingdom's refusal to fulfil its obligations prior to the commissioning of the MOX plant amount to an abrogation of those obligations.

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<sup>127</sup> See paragraph 8.78.

10.5. Procedural obligations are important. They are key elements in the legal regimes applied not only in environmental matters, but also in other contexts such as military and security co-operation, non-proliferation and arms control. States are not free to abandon those obligations, even if they believe that the abandonment will cause no significant physical or economic harm and even if they are correct in that belief. Nor is compensation in the event of a breach of the procedural obligation an adequate substitute. States may not buy their way out of their procedural obligations.

### THE RETROSPECTIVE DETERMINATIONS

10.6. While the likelihood of material harm might be relevant to decisions on the availability of provisional measures, it cannot have that effect in the present context. If, as Ireland submits, the United Kingdom has violated its procedural obligations by proceeding to authorise and operate the MOX plant prior to the fulfilment of its procedural obligations, the extent to which Ireland has already suffered material harm is of no relevance. The procedural obligation was either fulfilled, or it was not.

10.7. This was clearly recognised by the *Lac Lanoux* tribunal, which stated that “sanctions can be applied in the event, for example, of an unjustified breaking off of the discussions, abnormal delays, disregard of the agreed procedures, systematic refusals to take into consideration adverse proposals or interests, and, more generally, in cases of violation of the rules of good faith.”<sup>128</sup> The finding of a breach flows immediately from the failure to fulfil the procedural obligation.

10.8. Accordingly, the Tribunal has the straightforward task of determining whether the United Kingdom’s conduct did or did not fulfil its obligations under the UNCLOS. It is Ireland’s submission that the United Kingdom did not fulfil those obligations. That has been explained above, in chapters 7, 8 and 9.

10.9. That submission is, it must be emphasised, not directed at the obtaining of something in the nature of a reprimand of the United Kingdom. The request for a declaration that the United Kingdom did not fully comply with its obligations is to be seen primarily in the context of the future, not of the past. It is aimed at securing, by the most effective means, an indication of how the United Kingdom might approach the fulfilment of its obligations in the future.

10.10. It is plainly not appropriate, or perhaps even possible, for an UNCLOS Annex VII Tribunal to make technical judgments as to what specific scientific information should or should not be passed to Ireland in the future. It is very difficult to anticipate, except in the most general of terms, the kinds of information that might be needed. Nor can it easily address the underlying practical basis of co-operation, which is as much a matter of attitude as it is of actions.

10.11. Ireland believes, however, that the current failures of assessment and co-operation flow in large measure from different perceptions of the nature and scope of Ireland’s entitlements to information and to co-operation from the United Kingdom. British officials, following the guidelines set by the British Government, release to Ireland only certain categories of information – essentially, that which is publicly available to all. The creation

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<sup>128</sup> 24 *ILR* p 101 at p 128; reprinted in vol 3(1), Annex 80, p 489 at p 516.

of a framework for co-operation itself is not a major problem. Ireland believes that, were there to be agreement on the information to which Ireland is entitled, the necessary co-operation could be secured relatively easily.

10.12. The most efficient and effective way in which the Tribunal can assist the Parties to understand and agree upon the scope of the United Kingdom's duties is for it to examine the concrete details of the past dealings between the two States and to focus upon the deficiencies that the record evidences. Characterisation by the Tribunal of specific episodes and instances of non-fulfilment of UNCLOS duties will constitute a clear indication of the nature and extent of those duties. It is to this end that Ireland has applied for a declaration in respect of past breaches of the Convention.

### **THE PROSPECTIVE ORDER**

10.13. As far as the prospective Order sought in paragraph 5 of the Statement of Relief Sought is concerned, the request in paragraph 5 identifies three conditions that must be met before the authorization and operation of the MOX plant and associated facilities and associated shipments: i) completion of an adequate environmental impact assessment; ii) demonstration that there will be no deliberate discharges of radioactive materials into the Irish Sea; and iii) agreement with Ireland upon a plan to prevent, contain and respond to terrorist attack on the MOX plant and associated facilities or associated shipments.

10.14. Ireland considers that those preconditions are the minimum essential procedural safeguards stipulated by the UNCLOS in order to protect and preserve the marine environment, and other interests of Ireland as a coastal State. That is why a specific Order is sought in relation to them.

### **THE RELIEF SOUGHT**

10.15. For these reasons, Ireland requests the arbitral tribunal to order and declare:

- 1) That the United Kingdom has breached its obligations under Articles 192 and 193 and/or Article 194 and/or Article 207 and/or Articles 211 and 213 of UNCLOS in relation to the authorisation of the MOX plant, including by failing to take the necessary measures to prevent, reduce and control pollution of the marine environment of the Irish Sea from (1) intended discharges of radioactive materials and or wastes from the MOX plant and additional discharges from the THORP plant arising as a consequence of the operation of the MOX plant, and/or (2) accidental releases of radioactive materials and/or wastes from the MOX and THORP plants and/or international movements associated with the MOX and THORP plants, and/or (3) releases of radioactive materials and/or wastes from the MOX and THORP plants and/or international movements associated with the MOX and THORP plants resulting from terrorist act;
- 2) That the United Kingdom has breached its obligations under Articles 192 and 193 and/or Article 194 and/or Article 207 and/or Articles 211 and 213 of UNCLOS in relation to the authorisation of the MOX plant by failing (1) properly or at all to assess the risk of terrorist attack on the MOX plant and

associated facilities on the Sellafield site or on international movements of radioactive material associated directly or indirectly with the MOX plant, and/or (2) properly or at all to prepare a comprehensive response strategy or plan to prevent, contain and respond to terrorist attack on the MOX plant and associated facilities on the Sellafield site or on international movements of radioactive waste associated with the plant;

- 3) That the United Kingdom has breached its obligations under Articles 123 and 197 of UNCLOS in relation to the authorisation of the MOX plant, and has failed to co-operate with Ireland in the protection of the marine environment of the Irish Sea *inter alia* by refusing to share information with Ireland and/or refusing to carry out a proper environmental assessment of the direct and indirect impacts on the marine environment of the MOX plant and associated activities and/or proceeding to authorise the operation of the MOX plant whilst proceedings relating to the settlement of a dispute on access to information were still pending;
- 4) That the United Kingdom has breached its obligations under Article 206 of UNCLOS in relation to the authorisation of the MOX plant, including by
  - a) failing, by its 1993 Environmental Statement, properly and fully to assess the direct and indirect potential effects of the operation of the MOX plant and associated facilities on the marine environment of the Irish Sea; and/or
  - b) failing, since the publication of its 1993 Environmental Statement, to assess the direct and indirect potential effects of the operation of the MOX plant and associated facilities on the marine environment by reference to the factual and legal developments which have arisen since 1993, and in particular since 1998; and/or
  - c) failing to assess the potential effects on the marine environment of the Irish Sea of international movements of radioactive materials to be transported to and from Sellafield and relating directly or indirectly to the operation of the MOX plant; and/or
  - d) failing to assess the risk of potential effects on the marine environment of the Irish Sea arising from terrorist act or acts on the MOX plant and associated facilities or on international movements of radioactive material associated directly and indirectly with the operation of the MOX plant.
- 5) That the United Kingdom shall refrain from authorizing or failing to prevent (a) the operation of the MOX plant and/or (b) international movements of radioactive materials into and out of the United Kingdom related to the operation of the MOX plant or any preparatory or other activities associated with the operation of the MOX plant, in particular the reprocessing of spent fuel at the THORP plant for the purposes of the operation of the MOX plant, until such time as (1) there has been carried out a proper assessment of the environmental consequences arising directly or indirectly from the operation of the MOX plant and associated facilities as well as related international movements of radioactive materials, and (2) it is demonstrated that the operation of the MOX plant and associated facilities and related international movements of radioactive materials will result in the deliberate discharge of no radioactive materials, including wastes, directly or indirectly into the marine environment of the Irish Sea, and (3) there has been agreed and adopted jointly with Ireland a comprehensive strategy or plan to prevent, contain and respond to terrorist attack on the MOX plant and associated

facilities and international movements of radioactive waste associated with the plant;

6) That the United Kingdom pays Ireland's costs of the proceedings.

10.16. As provided by Paragraph 42 of its Statement of Claim, Ireland reserves the right to supplement and/or amend its Claim and the relief sought as necessary and to make such other requests from the Arbitral Tribunal as may be necessary to preserve its rights under UNCLOS.



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