INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
TRIBUNAL INTERNATIONAL DU DROIT DE LA MER

MINUTES OF PUBLIC SITTINGS

MINUTES OF THE PUBLIC SITTINGS
HELD ON 19 AND 20 NOVEMBER AND 3 DECEMBER 2001

The MOX Plant Case
(Ireland v. *United Kingdom), Provisional Measures*

PROCES-VERBAL DES AUDIENCES PUBLIQUES

PROCÈS-VERBAL DES AUDIENCES PUBLIQUES
DES 19 ET 20 NOVEMBRE ET 3 DECEMBRE 2001

Affaire de l'usine MOX
(Irlande c. Royaume-Uni), mesures conservatoires

For ease of use, in addition to the continuous pagination, this volume also contains, between square brackets at the beginning of each statement, a reference to the pagination of the uncorrected verbatim records.

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En vue de faciliter l’utilisation de l’ouvrage, le présent volume comporte, outre une pagination continue, l’indication, entre crochets, au début de chaque exposé, de la pagination des procès-verbaux non corrigés.

Minutes of the Public Sittings held on 19 and 20 November and 3 December 2001

Procès-verbal des audiences publiques des 19 et 20 novembre et 3 décembre 2001

PUBLIC SITTING HELD ON 19 NOVEMBER 2001, 10.00 A.M.

Tribunal

Present: *President* CHANDRASEKHARA RAO; *Vice-President* NELSON; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, MENSAH, BAMELA ENGO, AKL, ANDERSON, VUKAS, WOLFRUM, TREVES, MARSIT, EIRIKSSON, NDIAYE, JESUS, XU; *Judge* ad hoc SZÉKELY; *Registrar* GAUTIER.

Ireland is represented by:

Mr David J. O'Hagan,
Chief State Solicitor,

as Agent;

Ms Christina Loughlin,

as Co-Agent;

and

Mr Michael McDowell SC,
Attorney General,

Mr Eoghan Fitzsimons SC,
Member of the Irish Bar,

Mr Philippe Sands,
Member of the Bar of England and Wales, Professor of International Law, University of London, United Kingdom,

Mr Vaughan Lowe,
Member of the Bar of England and Wales, Chichele Professor of Public International Law, University of Oxford, United Kingdom,

as Counsel and Advocates;

Ms Caitlín Ní Fhlaitheartaigh,
Advisory Counsel, Office of the Attorney General,

Mr Edmund Carroll,
Advisory Counsel, Office of the Attorney General,

Ms Anjolie Singh,
Member of the Indian Bar, India,

Ms Alison Macdonald,
Member of the Bar of England and Wales, Fellow, All Souls' College, Oxford, United Kingdom,

Ms Anne O'Connell,
Solicitor in the Chief State Solicitor's Office,

as Counsel;

Mr Joe Jacob T.D.,
Minister of State for Public Enterprise,

Mr Martin Brennan,
Director General Energy, Department of Public Enterprise,

Ms Renee Dempsey,
Principal Officer, Department of Public Enterprise,

Mr Frank Maughan,
Administrative Officer, Department of Public Enterprise,

Mr Anthony Colgan,
Radiological Protection Institute of Ireland,

Ms Barbara Rafferty,
Radiological Protection Institute of Ireland,

Mr Frank Barnaby,
Consultant,

Ms Sinéad McSweeney,
Adviser to the Attorney General,

as Advisers.

The United Kingdom is represented by:

Mr Michael Wood, CMG,
Legal Adviser, Foreign and Commonwealth Office,

as Agent;

Ms Jill Barrett,
Legal Adviser, Foreign and Commonwealth Office,

as Deputy Agent;

and

Lord Goldsmith QC,
Attorney General,

Mr Richard Plender QC,
Member of the Bar of England and Wales,

Mr Daniel Bethlehem,
Member of the Bar of England and Wales, Deputy Director of the Lauterpacht Research Centre for International Law, Cambridge,

Mr Samuel Wordsworth,
Member of the Bar of England and Wales,

as Counsel;

Mr Jonathan Cook,
Department of Trade and Industry,

Ms Sara Feijao,
Legal Adviser, Department for Environment, Food and Rural Affairs,

Mr Alistair McGlone,
Legal Adviser, Department for Environment, Food and Rural Affairs,

Mr Brian Oliver,
Department for Environment, Food and Rural Affairs,

Mr Douglas Wilson,
Legal Adviser, Foreign and Commonwealth Office,

as Advisers.

AUDIENCE PUBLIQUE DU 19 NOVEMBRE 2001, 10 H 00

Tribunal

Présents : M. CHANDRASEKHARA RAO, *Président*; M. NELSON, *Vice-Président*; MM. CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, MENSAH, BAMELA ENGO, AKL, ANDERSON, VUKAS, WOLFRUM, TREVES, MARSIT, EIRIKSSON, NDIAYE, JESUS, XU, *juges*; M. SZEKELY, *juge* ad hoc; M. GAUTIER, *Greffier*.

L'Irlande est représentée par :

M. David J. O'Hagan,
Chief State Solicitor,

comme agent;

Mme Christina Loughlin,

comme co-agent;

et

M. Michael McDowell *SC*,
Attorney General,

M. Eoghan Fitzsimons *SC*,
membre du barreau irlandais,

M. Philippe Sands,
membre du barreau d'Angleterre et du Pays de Galles, professeur de droit international à l'Université de Londres, Royaume-Uni,

M. Vaughan Lowe,
membre du barreau d'Angleterre et du Pays de Galles, professeur titulaire de la chaire *Chichele* de droit international public, à l'Université d'Oxford, Royaume-Uni,

comme conseils et avocats;

Mme Caitlín Ní Fhlaitheartaigh,
conseillère, bureau de l*'Attorney General*,

M. Edmund Carroll,
conseiller, bureau de l*'Attorney General*,

Mme Anjolie Singh,
membre du barreau indien, Inde,

Mme Alison Macdonald,
membre du barreau d'Angleterre et du Pays de Galles, *Fellow, All Souls' College*, Oxford, Royaume-Uni,

Mme Anne O'Connell,
Solicitor au bureau du *Chief State Solicitor*

comme conseils;

M. Joe Jacob T.D.,
Secrétaire d'État au Ministère du secteur public,

M. Martin Brennan,
directeur général chargé de l'énergie, Ministère du secteur public,

Mme Renée Dempsey,
fonctionnaire hors classe, Ministère du secteur public,

M. Frank Maughan,
fonctionnaire, Ministère du secteur public,

M. Anthony Colgan,
Institut de protection radiologique de l'Irlande,

Mme Barbara Rafferty,
Institut de protection radiologique de l'Irlande,

M. Frank Barnaby,
consultant,

Mme Sinéad McSweeney,
conseillère de l'*Attorney General*,

comme conseillers;

Le Royaume-Uni est représenté par :

M. Michael Wood, *CMG*,
conseiller juridique, Ministère des affaires étrangères et du Commonwealth,

comme agent:

Mme Jill Barrett,
Conseiller juridique, Ministère des affaires étrangères et du Commonwealth,

comme agent adjoint;

et

Lord Goldsmith *QC*,
Attorney General,

M. Richard Plender *QC*,
Membre du barreau d'Angleterre et du Pays de Galles,

M. Daniel Bethlehem,
Membre du barreau d'Angleterre et du Pays de Galles, Directeur adjoint du Lauterpacht Research Center for International Law (Cambridge),

M. Samuel Wordsworth,
Membre du barreau d'Angleterre et du Pays de Galles,

comme conseils;

M. Jonathan Cook,
Ministère du Commerce et de l'industrie,

Mme Sara Feijao,
Conseiller juridique, Ministère de l'environnement, de l'alimentation et des affaires rurales,

M. Alistair McGlone,
Conseiller juridique, Ministère de l'environnement, de l'alimentation et des affaires rurales,

M. Brian Oliver,
Ministère de l'environnement, de l'alimentation et des affaires rurales,

M. Douglas Wilson,
Conseiller juridique, Ministère des affaires étrangères et du Commonwealth,

comme conseillers.

Opening of the Oral Proceedings
[PV.01/06, E, p. 5–7]

The President:
On 9 November 2001 a Request for the prescription of provisional measures, pending the constitution of an arbitral tribunal to be established under Annex VII of the United Nations Convention on the Law of the Sea in the dispute concerning the MOX plant, located at Sellafield, Cumbria, the international movement of radioactive materials, and the protection of the marine environment of the Irish Sea, was submitted to the Tribunal by Ireland against the United Kingdom under article 290, paragraph 5, of the United Nations Convention on the Law of the Sea.

This public sitting is being held to hear the parties present their arguments in the *MOX Plant Case*. I call on the Registrar to read out the submissions of Ireland as contained in its Request.

The Registrar:
The Applicant requests the Tribunal to prescribe the following provisional measures:

(1) that the United Kingdom immediately suspend the authorisation of the MOX plant dated 3 October 2001, alternatively take such other measures as are necessary to prevent with immediate effect the operation of the MOX plant;
(2) that the United Kingdom immediately ensure that there are no movements into or out of the waters over which it has sovereignty or exercises sovereign rights of any radioactive substances or materials or wastes which are associated with the operation of, or activities preparatory to the operation of, the MOX plant;
(3) that the United Kingdom ensure that no action of any kind is taken which might aggravate, extend or render more difficult of solution the dispute submitted to the Annex VII tribunal (Ireland hereby agreeing itself to act so as not to aggravate, extend or render more difficult of solution that dispute); and
(4) that the United Kingdom ensure that no action is taken which might prejudice the rights of Ireland in respect of the carrying out of any decision on the merits that the Annex VII tribunal may render (Ireland likewise will take no action of that kind in relation to the United Kingdom).

The President:
On 9 November 2001 a copy of the Request was transmitted to the Government of the United Kingdom. By Order of 13 November 2001, 19 and 20 November 2001 were fixed as the dates for the hearing of the case. On 15 November 2001 the United Kingdom filed its written observations regarding the Request of Ireland. I now call on the Registrar to read out the submissions of the Government of the United Kingdom.

The Registrar:
The Respondent requests the Tribunal to:

(1) reject Ireland's application for provisional measures;

(2) order Ireland to bear the United Kingdom's costs in these proceedings.

The President:
In accordance with the Rules of the Tribunal, copies of the Request and the written observations are being made accessible to the public as of today. The Tribunal notes the presence in court of Mr David O'Hagan, the Agent of Ireland, and Mr Michael Wood, Agent of the United Kingdom. I now call on the Agent of the Applicant to note the representation of Ireland.

Mr O'Hagan:
Mr President, Mr Vice-President and distinguished Members of the Tribunal, it is my privilege as the Agent of Ireland to open this presentation by introducing those representing Ireland. Before I do so, I also wish to acknowledge our counterparts representing the Government of the United Kingdom.

First, the Attorney General of Ireland, Mr Michael McDowell SC, will speak. As you know, Mr President, the Attorney General is the pre-eminent legal officer in Ireland and under the Irish Constitution is the legal adviser to government. He advises government departments and attends government meetings. He will provide an overview of the case setting out the reasons why Ireland attaches such great importance to the protection of the marine environment of the Irish Sea and its rights in relation to cooperation and environmental assessment. He will also outline the importance of the Law of the Sea Convention and this Tribunal in securing these objectives.

After the Attorney General has addressed the Tribunal, Mr Eoghan Fitzsimons, Member of the Irish Inner Bar, will provide an overview of the dispute and set out the essential factual background for the dispute before the Tribunal. The aim of Mr Fitzsimons' presentation will be to demonstrate the basis of Ireland's concerns about the proposed operation of the MOX plant and international movements of radioactive materials associated with the plant, and also the fact that these concerns are widely shared by other States.

Philippe Sands, Professor of International Law at the University of London, will then address the Tribunal. He will set out the rights Ireland has under the 1982 Convention which, Ireland says, will be violated by the bringing into operation of the MOX plant and the consequential international movements of radioactive materials in and around the Irish Sea. He will assert that the United Kingdom's intended authorization of the MOX plant is prima facie contrary to Ireland's rights under the 1982 Convention. Those rights are substantive – Ireland's right not to be subject to further radioactive pollution of the Irish Sea – and procedural: the right to ensure that the United Kingdom carries out a suitable and up-to-date assessment of the environmental impacts of the MOX plant and international shipments, and the right to have the United Kingdom cooperate in taking steps to protect the Irish Sea.

Professor Vaughan Lowe, Chichele Professor of International Law at the University of Oxford, will follow. He will assert that the Annex VII arbitral tribunal has prima facie jurisdiction and that the provisional measures Ireland is requesting are necessary by reason of the situation of urgency which exists to protect Ireland's rights under the 19[8]2 Convention and to prevent serious harm to the marine environment of the Irish Sea.

Mr President, Members of the Tribunal, with your permission I now pass to the Attorney General of Ireland.

The President:
Before the honourable Attorney General takes the floor, I now call on the Agent of the United Kingdom to introduce his delegation. I request the Agent of the Respondent to note the representation of the United Kingdom.

Mr Wood:
Thank you,. Mr President. Mr President, Members of the Tribunal, I appear as Agent for the United Kingdom in this case, the first case before the Tribunal to involve the United Kingdom. On a personal note, may I say that it is a privilege to be here before this Tribunal, which has a central role in the modern law of the sea? I have followed closely the establishment of the Tribunal at the Law of the Sea Conference, at Meetings of States Parties, and at the inauguration of this fine building.

Mr President, I shall limit myself at this stage to introducing the United Kingdom's team. We shall describe the structure of our statement at the beginning of that statement this afternoon. Our team is led by Lord Goldsmith QC, the Attorney General. He is assisted as Counsel by Richard Plender QC, by Daniel Bethlehem and by Samuel Wordsworth. Also on our team are Alistair McGlone and Sara Feijao, Legal Advisers at the Department for Environment, Food and Rural Affairs; Brian Oliver, an official in the same department, and Jonathan Cook, an official at the Department of Trade and Industry. Finally, there are my three colleagues from the Foreign and Commonwealth Office: Olivia Richmond is secretary to our delegation; Jill Barrett, who is the Deputy Agent, and Douglas Wilson are both Legal Advisers at the Foreign and Commonwealth Office. Thank you, Mr President.

The President:
I now request the Attorney General of Ireland to begin his statement.

Argument of Ireland

STATEMENT OF MR McDOWELL
COUNSEL OF IRELAND
[PV.01/06, E, p. 7–16]

Mr McDowell:
Mr President, Mr Vice-President, Members of the Tribunal, as Attorney General of Ireland it is an honour to appear before this Tribunal. This Request for provisional measures raises issues of international law which are central to the scheme of the 1982 United Nations Convention on the Law of the Sea, to which Ireland became a party on 21 June 1996. Ireland is, of course, fully committed to the entire package which the Convention provides for. It must be said, however, that as an island nation our relationship to the sea is of great importance and we count on the fullest possible protection and preservation of the marine environment of the Irish Sea. Therefore, we attach great significance to Parts IX and XII of the Convention and have full confidence that this Tribunal will take all necessary steps to preserve our rights under the Convention pending the establishment of the arbitral tribunal which we called for on 25 October last.

Mr President, as a smaller State, Ireland naturally depends in the ultimate on the maintenance and vindication of its rights under international law. Larger and more powerful States may, perhaps, have greater leverage through persuasion, bargaining and the diplomatic process. This Tribunal, I ask to note, that the Irish Constitution was adopted by the Irish people in a far less auspicious climate for international law in 1937 which commits Ireland unequivocally to the international rule of law. Article 29 of the Irish Constitution, which is frequently invoked before the Irish courts and is frequently relied upon by those courts to control the Irish State in general and the Irish Government in particular – sometimes in relation to maritime disputes such as in *ACT Shipping v Minister for Finance*[*] – provides as follows: (1) Ireland affirms its devotion to the ideal of peace and friendly cooperation amongst nations founded on international justice and morality; (2) Ireland affirms its adherence to the principle of the pacific settlement of international disputes by international arbitration or judicial determination; (3) Ireland accepts the generally recognized principles of international law as its rule of conduct in relations with other States.

That is the 1937 text of the Irish Constitution. But as recently as 1998, the Irish people expressly amended the Constitution to provide that extra-territorial jurisdiction could only be exercised by the Irish State in accordance with generally accepted principles of international law.

If, as is the case, the Irish State is internally constitutionally bound to abide by those principles, I feel confident in saying to this Tribunal that we are as entitled as any, and in particular as larger, more powerful States, to invoke and rely upon principles of international law and not to be brushed aside or ignored in the pursuit of dubious and quite artificial economic self-interest when our rights under international law are endangered or are violated.

Over the years the Government and the people of Ireland have become increasingly concerned about the radioactive pollution of the Irish Sea. My colleague, Mr Fitzsimons, will address this in more detail but for the Government which I serve, two incontrovertible facts are of particular significance. The first is that the Irish Sea is amongst the most radioactively polluted seas in the world. The second is that the main source of that radioactive pollution is the United Kingdom and that the overwhelming majority of that pollution comes from the

[*] Note by the Registry: Reference given in the written text of the statement: *1995 3 IR 406*.

Sellafield site on the coast of the Irish Sea where the MOX plant is intended to be brought into operation.

The Irish Government is gravely concerned about the proposed MOX plant and its implications, either direct or indirect, for the Irish Sea. If commissioned, it will contribute its own additional discharges and will intensify nuclear activities through the adjoining THORP plant next to the Irish Sea. These are activities from which Ireland, needless to say, derives no benefit, direct or indirect, but for which Ireland would undoubtedly carry the risk and pay the cost when its rights under international law are infringed.

In its Statement in Response the United Kingdom Government makes what we consider to be unsubstantiated assertions about the economic consequences for MOX's developer – BNFL, British Nuclear Fuels Limited – if you order provisional measures. We, too, could give you figures about the potential consequences for the Irish water-related tourist and fisheries industry from the MOX plant and from Sellafield. But we do not believe that these figures are relevant for present purposes. In any event, the MOX plant is planned to last 20 years or perhaps more and we do not know exactly how long because the United Kingdom will not tell us. MOX will certainly contribute to the further contamination of the Irish Sea, but the Irish Government do not know by how much or with what substances because again the United Kingdom will not share with us detailed information on those issues. MOX will lead to more international transports of radioactive substances but again we do not know how many or how frequently because the United Kingdom Government will not tell us. It will expose us to the risks of accidents, from the plant and from nuclear transports. We also believe that MOX will expose us to the even greater risk arising out of terrorist-type attacks, a type of threat which the Director-General of the International Atomic Energy Agency now describes, and I quote his language, as a "clear and present danger". In due course Mr Fitzsimons will address those matters in greater detail.

Mr President, Members of the Tribunal, that is the background that made Ireland feel obliged to initiate international legal proceedings under the Convention. It is not a decision which we have taken lightly, but since 1994 we have taken all possible reasonable steps to engage with the United Kingdom during the stages of the authorization of the proposed MOX plant at Sellafield. In that year, 1994, we submitted our detailed views on the Environmental Statement which was prepared by British Nuclear Fuels Limited in 1993. In that submission we set out our views on the manifest inadequacies of the 1993 Statement in terms of its substantive content. We received no response. Subsequently, from 1999, we raised concerns about serious procedural infractions, namely the failure to review the Environmental Statement by reference to the many new factual and legal developments which had arisen since the Statement was prepared in 1993. That too received no response. Indeed I have to say such has been the pattern throughout the last eight years that we have received a positive response to none of our efforts to obtain information or assurances. For more than eight years it was not thought necessary to ask us to clarify or explain our position until the day before we initiated our Annex VII arbitration proceedings, when the United Kingdom Government for the first time reacted substantively to any of our communications.

Separately, from 1997 onwards, we submitted our views on the inadequacy of the procedure whereby the United Kingdom Government sought to assess whether the MOX plant was justified. We were especially concerned at a proposal to write off the entire cost of construction of the MOX plant – which was £470 million – and to exclude that capital cost from the assessment of its economic viability or justification. We were also very concerned about the failure to take into account environmental costs such as the further pollution of the Irish Sea or the costs of transport. Our views elicited, yet again, no substantial response or else were ignored entirely. When it became apparent that the Government of the United Kingdom was unwilling to share information with the Government which I serve, we made

requests under the international freedom of information laws and again the information was refused outright, and again, we contend, without proper explanation.

In 1999 we wrote to the United Kingdom setting out our concerns in considerable detail. In our letter of 23 December 1999 – nearly two years ago – we put the United Kingdom Government on notice that if it authorized the MOX plant it would be in violation of the 1982 Convention and we reserved our right to bring proceedings. We pointed out at that time in particular the failure to review the Environmental Statement and, secondly, to take into account the material changes in international law which had occurred since 1993, including the entry into force of the Law of the Sea Convention, and also the United Kingdom's intervening commitments, which we say have legal force, to take steps to reduce concentrations of artificial radionuclides in the Irish Sea to "close to zero" by the year 2020.

Again, I regret to tell you, Mr President, those representations received no response. The record plainly shows that by December 1999 the United Kingdom Government was on notice that authorization of the MOX plant exposed it to the risk of these proceedings. All the correspondence has been provided to this Tribunal. The letters, we say, speak for themselves, Mr President. The United Kingdom chose to ignore our concerns.

We also made very clear our concerns about the United Kingdom's secrecy about the MOX plant. By 1999 we had still been provided with no information on material matters, including the following: the number of shipments of spent fuel into the Irish Sea envisaged at the MOX plant; the quantity and types of discharges of radioactive wastes from the MOX plant into the Irish Sea; the number of years the MOX plant would operate for and the number of shipments transporting MOX fuel to Japan and to other countries.

Despite Ireland's repeated requests we have never been provided with that information. We have repeatedly asked for the information, which we assume to be included in the PA Consultants' Report and the Arthur D. Little Report, without success. So in June of this year we brought proceedings under an arbitral tribunal, constituted under Article 32 of the OSPAR Convention, to obtain some of that information. At the same time we invited the United Kingdom to give an undertaking that there would be no authorization of the MOX plant pending the outcome of the arbitration proceedings. Our expectation, Mr President, was that as a friendly nation and State, our request would be complied with, but it came as a great surprise and disappointment when, within three months after we sought that confirmation, the United Kingdom refused to provide us with the assurance we sought or even to offer to engage us in discussions. With that refusal it became completely plain to see that the United Kingdom was essentially uninterested in our views and interests, was not willing to take them into account, saw no need for cooperation and was intent on authorizing the plant according to the environmental standards and legal conditions which applied in the early 1990s.

Mr President, by the time we received confirmation from the United Kingdom that it wished in effect to proceed to authorization, the terrible terrorist events of 11 September of this year had occurred. Mr President, I would be appearing before you today even if those terrible events had not occurred, but against that tragic development we find it difficult to understand how the United Kingdom could proceed to authorize new international movements of MOX and radioactive materials, and to expose Ireland to new international risks, without even the courtesy of discussing the details of these movements with Ireland. In our view that approach is hardly consistent with the precautionary principle and it is, we respectfully submit to this Tribunal, not consistent with the United Kingdom's obligations under the 1982 Convention. We were dismayed by the decision to proceed to the authorization of the MOX plant that was taken on 3 October 2001, especially in the shadow of the events in New York and Washington and two days after we had assumed the Presidency of the UN Security Council. I feel bound to share with you the sense of disappointment the Irish Government felt at the discourtesy that such a decision should be

taken two days before a scheduled meeting between the parties on procedural aspects of the OSPAR Convention.

What is this case about? First and foremost it is about protecting the Irish Sea from any further pollution by radioactive substances. For more than 40 years now the United Kingdom has authorized discharges of radioactive wastes into the Irish Sea and into the environment. As I said earlier, Mr President, it remains amongst the most radioactively contaminated seas in the world. However, the situation is changing, I have to acknowledge. The United Kingdom has recognized the urgent need to clean up the Irish Sea and has also recognized that it is no longer acceptable to use our share of semi-enclosed sea to dispose of nuclear waste. In 1992 the United Kingdom finally undertook to prohibit dumping from vessels of any radioactive wastes into the Irish Sea and in 1997, as I said, the United Kingdom Government refused to authorize the construction of a facility to assess the prospects for storage of radioactive wastes in cavern-type bunkers to be built under the Irish Sea.

Now that decision of 1997, Mr President, is very instructive indeed. In the mid-1990s, a company partly owned by British Nuclear Fuels Limited – which is called NIREX – proposed to construct a rock characterization facility to examine the possibility of storing nuclear waste under the Irish Sea. Unlike the MOX plant, the NIREX proposal did not envisage direct radioactive discharges into the Irish Sea. Nevertheless, as you can imagine, Ireland was most concerned about the risk of discharges arising by accident or other act from such a facility. My office, the Attorney General's office, then instructed Professor Lauterpacht and Professor Sands to prepare detailed legal submissions and to attend, on behalf of Ireland, a Planning Inquiry which took place in Cumbria on the NIREX proposal. The Irish Government was much fortified by the robust decision of the Planning Inspector in 1996 to recommend to the Secretary of State that NIREX's planning application be rejected. It was rejected, and among other reasons on account of the inadequacies of the Environmental Impact Statement and the failure to take into account the risk of harm to the Irish Sea from unintended discharges. I am sure I do not have to remind this Tribunal that these are two of Ireland's main concerns in relation to this present proposal, the MOX plant. The UK Planning Inspector's decision was upheld in March 1997 by the former UK Secretary of State for the Environment, Mr John Gummer MP. The planning application was rejected. In reaching his decision Mr Gummer stated that he agreed, and I quote, "that the people of Ireland have a legitimate interest in any proposal for a repository for radioactive waste near the Irish Sea coast" and he also said that he "was acutely aware of the Government's obligations to other States which are set out in international obligations in respect of the sea and the environment more generally". I ask this Tribunal to compare that attitude demonstrated then in relation to that undersea storage proposal to the approach now being taken by the British Government.

Following the NIREX decision we naturally hoped and expected that the United Kingdom would, in future, take far greater account of what were described by them as our "legitimate interests" and to do more to protect the valuable resource, the Irish Sea, which we share. The following year, in 1998, we naturally welcomed the decision by the United Kingdom Government to accept the obligation to reduce concentrations of radioactive substances in the Irish Sea to "close to zero" by the year 2020. We welcomed a commitment which necessarily demands dramatic reductions of radioactive discharges into the Irish Sea. We say that against that undertaking, which we regard as internationally binding in law, made in 1998, the decision to authorize discharges from the MOX plant into the Irish Sea is simply flatly inconsistent with the 1982 Convention.

We also say that Ireland has rights under the 1982 Convention which would be violated by the authorization of the MOX plant. Professor Sands will develop and elaborate

this aspect later on this morning. I want to underscore my Government's commitments to these rights. First and foremost we have the right not to be subject to further radioactive pollution. That right arises under articles 192, 194, 207 and 212 of the 1982 Convention. We have the right to require the United Kingdom to respect fully its obligations to prevent pollution by radionuclides "to the fullest possible extent", taking "all necessary measures" and using "best practicable means". That right is violated by the authorized discharges from the MOX plant and this, of course, then carries with it the risk of releases resulting from accidents or terrorist acts.

I would also like to make clear that the authorization of MOX will support the continued operation of and more discharges from the THORP plant at the Sellafield site. These consequential discharges, the indirect effects of the MOX plant, have never been assessed in the context of the MOX authorization even though the UK Government has recognized the economic connection between MOX and THORP. The implications of the MOX project for the THORP plant are an important element of Ireland's concerns. In this regard we note the call – and this is of some significance we say – on 13 November of this year, in the shadow of these proceedings, by British Energy, a major nuclear power generator in the United Kingdom, who asked that reprocessing at Sellafield be brought to an end and instead the cheaper, and more environmentally benign option of long-term storage be used. You will find that submission at Annex 3, page 14, of our documentation. We welcome that contribution from British Energy and the proposed approach, which would dramatically reduce discharges into the Irish Sea, if it were heeded.

Reducing such discharges is, in Ireland's eyes, our substantive right, and it is a matter of fundamental importance to everyone in Ireland. We also have equally important procedural rights. These are, firstly, the right to enjoy the cooperation of the United Kingdom and the coordination of our respective activities, and, secondly, the right to require the United Kingdom to carry out a proper environmental assessment of the impact of the MOX plants.

The duty to cooperate is of fundamental importance. It is not merely some rhetorical politeness, some high-minded aspiration inserted for decoration in the Convention. Generally we enjoy good relations with the United Kingdom and we wish that to continue. We are also aware, and we are grateful to the other party for this, that in the conduct of these proceedings before the International Tribunal we have benefited from their cooperation, in these proceedings at any rate, to the fullest degree. That has meant sharing information, listening to each other's views, and modifying our positions accordingly. We are deeply concerned that the same level of cooperation has not been extended to us in relation to the protection of the Irish Sea from the consequences, whether direct or indirect, of the MOX plant. As I say, cooperation is not a mere courtesy; it is an obligation under articles 123 and 197 of the Convention. Even if the United Kingdom considers those provisions to be practically meaningless, we do not, and as a smaller State we attach great importance to the right to cooperation set forth in those articles of the Convention.

We say that the right to cooperation entitles us to expect that the United Kingdom will provide us with pertinent information, will respond to our reasonable requests for such information where it has not been forthcoming, and – and I stress this is of the utmost importance – will at least take into account our views in proceeding to make its decisions. The failure to provide information is abundantly clear, as is the refusal to respond to our requests. The United Kingdom Government has not even been willing to provide us with information on when the MOX plant will become operational and it has now more or less admitted, as appears from Secretary of State Beckett's letter of 24 October, that it has not really taken our interests into account either.

We attach equal importance to our rights under article 206 of the Convention. We find it astonishing that the United Kingdom can claim in its response that article 206 is not

applicable to the MOX plant because there are no grounds for concern about its environmental effects. That claim underlines our concern that scant regard is being paid by the United Kingdom to its obligations under the Convention, to our interests and to the environment of the Irish Sea.

Mr President, Members of the Tribunal, this case concerns a dispute between Ireland and the United Kingdom relating to the interpretation and application of the 1982 Convention. It is, as I have said, about Ireland's rights to cooperation, environmental assessment and the prevention of pollution. It is also the fact that article 293 of the Convention mandates this Tribunal to apply other relevant rules of international law not incompatible with the Convention.

There is one other relevant rule of international law which we say is particularly relevant, and that is the precautionary principle. The precautionary principle is recognized as a rule of customary international law and is binding upon Ireland, just as it is on the United Kingdom. We welcome the fact that the United Kingdom does not challenge the customary international law status of the principle, but, unlike the United Kingdom, we say that that it is of singular importance for the provisional measures aspect of this case because it is applicable to the interpretation of each and every provision of the 1982 Convention upon which Ireland relies.

Precaution directs the decision-maker, and in this case we respectfully submit it also directs this Tribunal, to exercise prudence and caution in the face of uncertainty. We say that in this case it places the burden on the United Kingdom to demonstrate that no harm will arise from discharges and other consequences of the operation of the MOX plant, should it proceed. We say it cannot so demonstrate. We also say that the precautionary principle informs the conditions under which the Tribunal must approach the questions of urgency and *prima facie* jurisdiction. This case, we say, is a classic example of the type of situation in which uncertainty mandates the invocation and granting of provisional measures.

It is appropriate to say what this dispute is not about. First, it is not about normal industrial activity and tolerable and predictable non-nuclear pollution associated with such activity. As an industrializing country, Ireland is not anti-development. The dispute is about the consequences of the fabrication of plutonium oxide fuel, one of the most dangerous substances known to humankind. Secondly, this case is not about the generation of peaceful nuclear power. In deciding this case, you are not required, by Ireland at any rate, to address in any way the merits or demerits of peaceful nuclear power. Thirdly, this case is not about military activities in any sense. The MOX plant is being proposed for one purpose only and the only justification offered for it: to make money. It is claimed to be a one hundred per cent commercial activity. Its sole *raison d'être* is profit. So, in deciding this case, you are not being called upon to address any aspects of nuclear weaponry or of Britain's strategic security or defence policy.

Fourthly, it is a dispute only between Ireland and the United Kingdom, in which the MOX plant is to operate and under whose jurisdiction and control the discharges are to be authorized. The dispute does not involve any other countries directly, and in particular not those countries whose utilities might or might not decide to make use of the MOX plant, should it proceed. As an inter-State dispute, the developer and intended operator of the MOX plant is not party to the dispute or to these proceedings either. I refer to BNFL. So you are not required, I submit, to consider the impact of these proceedings upon that operator. Indeed, we say you ought not to do so because your function is to apply the law as set out in article 290, paragraph 5, of the Convention.

Fifthly, we say that it is not your task at this time to decide on the merits, in particular whether the discharges from the MOX plant will or will not cause harm. That is a matter for the Annex VII tribunal. At this interlocutory point, we submit that the Tribunal's function is

limited to deciding whether Ireland has rights under the Convention and whether those rights could or could not be preserved if the operation of the plant was now to proceed. Professor Sands will elaborate on this part of our case and Professor Lowe will, in due course, remind the Tribunal that the approach taken by Ireland is precisely the same as that proposed by the United Kingdom in its request for provisional measures in a 1973 dispute concerning fisheries protection. The United Kingdom's approach in that case was accepted by the International Court of Justice. Now that it finds itself on the receiving end of such a request, its approach seems to have changed.

The task for this Tribunal we say is to apply the rule of law, to determine whether Ireland has rights under the Convention and whether these rights would be violated by the commencement of the operation of the MOX plant in present circumstances and in advance of the determination of the Irish claim on the merits. We say that it is self-evident that our rights will be irreparably harmed if the plant goes into operation on 20 December, without having been subject to a proper environmental assessment and without our informed views – and I stress the phrase "our informed views", those views put forward by Ireland on the basis of receiving the information to which we are entitled under international law – being taken into account in that process.

Any direct or indirect discharges of radioactive substances into the Irish Sea pending the constitution of the arbitral tribunal cannot be consistent with the preservation of our rights. The rights lost by the early operation of the plant with such consequences could not be restored by this Tribunal or by the arbitral tribunal if a finding is made in our favour in respect of the rights we claim.

There are two other conditions which must be satisfied for you to prescribe provisional measures. You must be satisfied that the Annex VII tribunal will have *prima facie* jurisdiction and that there exists a situation of urgency. In our submission, both conditions are amply satisfied, and Professor Lowe will make our submissions to you on those issues in due course.

In that regard, I want to point out at this stage that the plant has been idle for more than five years. Over that period, the United Kingdom has had more than two years' notice of our concern under the 1982 Convention, and of the rights we expressly reserved as early as July 1999 to commence these proceedings. Ireland is committed to proceeding expeditiously in the Annex VII proceedings. There is no reason why they cannot be completed quickly. We welcome the United Kingdom's early appointment of an arbitrator. We are committed to the rapid appointment of the other three arbitrators. If you prescribe the provisional measures that we have requested, then the United Kingdom will be free to make an application, even to the arbitral tribunal, to reconsider them. We invited the United Kingdom to desist from authorizing the operation of the plant until the arbitral tribunal had been constituted, which could have been as early as January 2002, but they refused. In these circumstances, we had no option but to file this request with this Tribunal, since the commissioning of the plan would immediately and irreversibly erode our rights under the 1982 Convention. We respectfully submit that the United Kingdom loses nothing by waiting to ensure that the fullest possible and legally due respect is maintained for both parties' rights under the 1982 Convention.

May I conclude with this point? The United Kingdom has said that we have erred in initiating proceedings under the 1982 Convention and that we ought not to have brought this application to you. It is one of the features of the modern international legal order that States now have available to them a range of procedures and institutions to protect their rights. Ireland is entitled to choose amongst those procedures. There is nothing inconsistent about using one procedure to protect rights relating to information and other procedures to protect rights relating to the protection of the marine environment, to cooperation or to

environmental assessment. This is all the more so when, as in this case, we have acted transparently and openly throughout and when we have given ample notice to the United Kingdom about the rights we consider to have been endangered by their actions and of our intention to initiate legal proceedings. The United Kingdom Government cannot claim to have been surprised by any of our actions, including those which have led to us being before you today.

Mr President, Members of the Tribunal, this concludes my introductory statement and overview. I respectfully ask the Tribunal now to call on Mr Eoghan Fitzsimons, Senior Counsel, my colleague, to continue Ireland's presentation.

The President:
Thank you, Mr Attorney General.

STATEMENT OF MR FITZSIMONS
COUNSEL OF IRELAND
[PV.01/06, E, p. 16–27]

Mr Fitzsimons:
Mr President, Mr Vice-President, Members of the Tribunal, it is an honour to appear before you to present submissions on behalf of Ireland on this application.

As has already been indicated, it is my task to outline to you the facts and history of this dispute. These are set out in some detail in the Request for provisional measures. In my submission, I propose to draw your attention to and emphasize aspects of the facts that are directly relevant to the submissions that will follow. As I proceed, I would also propose to comment as appropriate upon references to the facts contained in the United Kingdom reply to the Request for provisional measures.

I wish to emphasize at the outset that Ireland, in making this application, has sought to confine the material placed before you to what is necessary at this stage of the process.

In dealing with the facts, I will discuss firstly the MOX plant itself. I then propose to deal with the consequences, potential and otherwise, of permitting the MOX plant to commence operation. I will finish by bringing you briefly through the history of the dispute for the purpose of demonstrating the reliance of the United Kingdom on an inadequate and outdated Environmental Statement and outdated environmental standards to support its decision to open the MOX plant.

The history of the dispute will also indicate the attitude of the United Kingdom Government to the concerns of Ireland, which, in our submission, most regrettably, has fallen far short of what would be appropriate in the circumstances. In the latter context Ireland will of course be submitting that the United Kingdom has failed in duties owed by it to Ireland under the Law of the Sea Convention regarding matters relating to the marine environment.

The British Government has engaged in nuclear activities at a site at Sellafield on the west coast of England since the 1950s. Our Request for provisional measures, at paragraph 5, referred to the site as being in the north-east of England and I would wish to correct this error. The site at Sellafield is on the west coast of England, on the sea shore. It is directly across the Irish Sea from Ireland. At its nearest point it is some 112 miles from the Irish coast.

In the early years the activities at the site were carried on by a State agency and were directly related to nuclear weapons. Since in or about 1971, they have been carried out by a company incorporated under civil law known as British Nuclear Fuels Limited. This company is wholly owned by the British Government. It aspires to operate on a commercial profit-making basis. We may well hear a lot about BNFL from the United Kingdom. The Attorney General has stressed, and I would like to stress again, that although BNFL is the operator of the proposed MOX plant, it is not a party to this dispute. The parties are the United Kingdom and Ireland. It is their rights on which you will rule.

Since it entered the picture British Nuclear Fuels has engaged in a wide range of nuclear activities. These have included the reprocessing of spent nuclear power reactor fuel elements and the production of MOX fuel. In 1993 a pilot MOX demonstration facility was opened at Sellafield. It produced small quantities of MOX fuel each year – about 8 tonnes annually – until 1999, when MOX production was suspended. It was shut down as a result of a falsification scandal at the plant. It was discovered at the time that recordings of measurements, some of which had safety implications for MOX fuel destined for overseas customers, were being falsified by staff. An enquiry by the United Kingdom NII at the time established that systematic failure over some three years had allowed this to happen. As we understand the position, the facility has not yet reopened and there are no plans to reopen it.

Moving on from the plant itself, it would probably be helpful to focus on the word "MOX". What does it mean? The term "MOX" signifies mixed oxide fuel. This fuel is a mix of plutonium oxide and uranium oxide. It is suitable for use in nuclear power reactors. In this regard it is important to note that no nuclear reactor in the United Kingdom currently uses MOX fuel. There are some 30 nuclear power reactors in the United Kingdom. If, therefore, the MOX plant is permitted to commence operations the MOX fuel produced by it will be exported, primarily by sea.

As already stated, a number of different types of nuclear activity are carried out at the Sellafield site. One of these is particularly relevant to the issues that arise. In 1994 a plant known as the Thermal Oxide Reprocessing Plant began operating at Sellafield. This plant is commonly known as the THORP plant, and I will describe it as such in these submissions. The THORP plant is a reprocessing plant and operates as such at the present time. It reprocesses spent or waste nuclear power reactor fuel elements on a commercial basis. The THORP plant is to play a key role in the process leading to the production of MOX fuel at the MOX plant.

The process by which it is intended to produce MOX fuel at the proposed MOX plant can be described in simple terms as follows: spent nuclear fuel containing plutonium, unused uranium and fission products is to be transported to Sellafield, mostly by sea. British Nuclear Fuels operates a number of ships including an ordinary roll on/roll off cargo ship purchased second-hand on 20 July last for this purpose. When the spent nuclear fuel arrives it will be reprocessed at the THORP plant. The object of reprocessing is to recover from the spent nuclear fuel the plutonium and uranium that remains in it. This is achieved by firstly chopping up the spent fuel and then by dissolving it in boiling concentrated nitric acid, essentially in what can be described as an acid bath. By this process and associated processes the different elements in the spent fuel, including the remaining plutonium and unused uranium, are separated. They are then recovered for future use.

If the MOX plant is permitted to commence operation, the plutonium and uranium recovered from reprocessing at the THORP plant will be transferred to the MOX plant from the THORP plant to enable MOX fuel to be manufactured. In the MOX plant the plutonium, in the form of plutonium oxide, and the uranium, in the form of uranium oxide, will be mixed. A dry lubricant and conditioner will be added. The result of this process will be the product known as MOX fuel. MOX fuel, when manufactured, is produced in pellet form to dimensions and characteristics specified by the customer. The pellets are stored on site. When required by the customer they are placed in new fuel rods. The rods are then assembled into fuel assemblies suitable for use in the customer's nuclear power reactor. When so prepared the MOX fuel will be transported away from Sellafield to the overseas customer, again mainly by sea. An illustration of one of these assemblies can be found at page [7]9 of Annex 1 to Ireland's Request for provisional measures. This may all sound rather complex. This automated MOX production process is technically unprecedented. It is to be controlled by complex software which has never been used, in fact, before.

At this stage I wish to show the Tribunal what a MOX pellet looks like. I will show it on the screen beside a 1 Deutsche Mark coin. (*Pellet and coin shown on screen*). As you will see, it is a tiny object, smaller than the coin. A MOX pellet of this size would contain 0.4 grams of plutonium. If this plutonium was released and evenly distributed it could kill 5,000 people. In case the Tribunal is concerned, I would mention that the pellet shown is not made of MOX fuel and contains no plutonium.

I turn to the consequences of operating the MOX plant. What will be the consequences if the MOX plant is permitted to commence operation? As already stated, the Sellafield site has operated since the 1950s. Since that time it has discharged, and continues to discharge, directly by pipes, nuclear waste in liquid form into the Irish Sea. Since that time

it has discharged and continues to discharge, in the form of gases and particles, nuclear waste into the atmosphere. Quantities of these discharges find their way into the Irish Sea given its proximity to Sellafield. These are accepted facts and are not in dispute. The marine environment of the Irish Sea is, therefore, doubly damaged by Sellafield nuclear waste. It is argued by the United Kingdom that the amounts of nuclear waste discharges arising from routine operations are acceptable.

It is quite clear from the material relied upon by the United Kingdom to support its argument in this regard that the source of it is British Nuclear Fuels. British Nuclear Fuels, as a commercial entity, has a financial interest in the outcome of this Request by Ireland. The data relied upon by Ireland comes from independent sources and, it is submitted, should be preferred. I shall deal with the data issues in a little more detail later.

However, anything I say about the levels of discharges should be considered in the light of what Mr Sands will say about the duty to protect the marine environment. As he will explain, this is emphatically not a dispute about whether the discharges from the MOX plant will be large, medium or small. It is about Ireland's rights. This provisional phase is absolutely not the time to be distracted by scientific arguments which we say do not need to be adjudicated upon at this time one way or the other.

What is remarkable about the data and factual argument advanced by the United Kingdom is what it does not address or contain. It ignores, first, the irreversible nature of the damage caused by any form of nuclear contamination. Secondly, and critically, it takes no account of the cumulative effect of repeated discharges. Thirdly, and perhaps most importantly of all, it ignores the fact that cumulative deposits of discharged nuclear waste in the form of radionuclides remain contaminated and a danger to human life and the marine environment for hundreds, if not thousands, of years. Fourthly, it takes no account of the fact that the Irish Sea is a semi-enclosed sea, from which pollution is less readily swept away than it would be from an open ocean coast.

These unfortunate and unique features of nuclear contamination remove all validity from any argument which seeks to maintain that nuclear waste discharges in small quantities result in a level of damage which somehow or other is tolerable and which has to be accepted by those affected.

A recent report dated August 2001, commissioned by the European Parliament under its Scientific and Technological Option Assessment Programme, advised that marine discharges from Sellafield had led to significant concentrations of radionuclides in foodstuffs, sediments and biota. This is confirmatory of the findings of the United Kingdom Ministry responsible for the monitoring of radioactivity in the Irish Sea. The report addresses the topic of risk assessment where radiation is concerned and engages in a case study of Sellafield. I shall refer to it as the European Parliament report.

The report contains details of the adverse effect on marine life, particularly shellfish, from Sellafield discharges. The report further states that the deposition of plutonium within 20 kilometres of Sellafield attributable to aerial emissions has been estimated at 16-280 billion becquerels, that is two or three times plutonium fallout from all atmospheric nuclear weapons testing. It also estimated that over 40,000 trillion becquerels of caesium-137, 113,000 trillion becquerels of beta emitters and 1,600 trillion becquerels of alpha emitters have been discharged into the Irish Sea since the inception of reprocessing at Sellafield.

These statistics mean that between 250 and 500 kilograms of plutonium from Sellafield is now absorbed on sediments on the bed of the Irish Sea. This would be enough for between 40 and 80 nuclear weapons. It can be mentioned also that this same report indicates that the consequences for human health and the environment of an accidental release from one only of the 21 tanks storing liquid high-level radioactive waste at Sellafield

would be about four times greater than the consequences of the Chernobyl accident of April 1986. Such a release could also take place as a result of a terrorist or other attack. A summary of the European Parliament report is to be found at page 50 and the following pages of the second annex to the Request for provisional measures.

The United Kingdom in its submission seeks to dismiss this report by relying on a single newspaper article taking issue with it. A reading of the article makes it clear that the content of the article could not be relied upon by the Tribunal. It is astonishing that it is offered as evidence. Notwithstanding the fact that the United Kingdom has at its disposal an enormous amount of nuclear expertise, no attempt is made to dispute the scientific findings or detail in the report. It can be reasonably inferred that the United Kingdom experts, including those at British Nuclear Fuels, are not prepared to dispute the findings of this reputable scientific study. As will be evident from a reading of the summary of the European Parliament report, the irreversible, cumulative and extremely long-term effects of Sellafield marine nuclear contamination are very serious indeed.

The United Kingdom makes much of the allegedly low level of discharges from the MOX plant. However, it is important to note that this assertion applies only to the normal operation of the plant. It takes no account of the possibility of accident, attack, or malfunctioning of the highly experimental software which is supposed to control the process. The United Kingdom also makes much of the fact that the human unreliability and systemic failings brought to light by the MOX falsification scandal could not happen in the new automated plant.

We say that this is simply substituting one risk for another. On this topic, we also note that the United Kingdom assumes that the existence of a rule or regulation means that BNFL will comply with it. Some telling examples of BNFL's poor record of compliance with regulations are set out at Annex 2, page 65, and the following pages of the UK reply. The United Kingdom tries to confine the issue of non-compliance to the falsification scandal. However, at pages 66 and 67 of Annex 2 of our Request, we give details of other prosecutions by the Health and Safety Executive for a range of failures as well as reports that the Nuclear Installations Inspectorate has been forced to threaten closure of the reprocessing operation due to excessive levels of waste. Further, it is technically feasible to avoid discharging radioactivity from the THORP and MOX plant into the sea and air. Almost all of the radioactivity could be removed from the liquid stream and aerial discharges and stored at Sellafield along with other radioactive waste. Alternatively, the radioactive effluents could themselves be stored. Generally, this is not done because of the cost.

The adverse effects on the marine environment of the Irish Sea which I have detailed result from existing activities at Sellafield. However, the critical question that arises on this application is that of whether the MOX plant, if permitted to operate, has the potential to produce an increase in these adverse effects. You do not have to decide this issue on this application in that any decision you make will not be a decision on the merits. Once the potential for serious harm exists within the meaning of the Law of the Sea Convention – Mr Sands will develop the legal submissions on this point – that will be an issue.

We say that any increase in the adverse effects already produced and being produced by Sellafield would constitute serious harm. There is no need in this context to spell out the danger and risk to human life which arises from nuclear contamination. Ireland makes the case that it will have such an effect.

We say that the operation of the MOX plant by definition will result in an increase and expansion of activities at Sellafield involving critically and of necessity an increased use of the THORP plant with a consequential increase in discharges into the Irish Sea and the atmosphere. In pursuing its policy to open the MOX plant with relentless determination, the British Government appears to have taken the same line as that taken by it with regard to the

other activities at Sellafield about which Ireland has been protesting since the 1950s. The argument is, as mentioned earlier, that whilst there is damage this is tolerable and must be accepted by those adversely affected by it. This is a terrible, and indeed frightening, argument for a government to rely upon to support a commercial activity which is technically unnecessary.

In its submission, the United Kingdom seeks to make the case that existing stocks of plutonium will be used at the MOX plant. The suggestion is that this, somehow or other, will reduce discharges emanating, directly or indirectly, from the MOX plant operation in the short term at least. However, reprocessing at the THORP plant is an ongoing process. If existing stocks of plutonium are used in the MOX plant at the outset, they will be replaced by newly recovered plutonium from the waste being reprocessed on an ongoing basis at THORP. The United Kingdom's argument on this point is, therefore, quite clearly flawed.

The United Kingdom argues that the operation of the MOX plant will not affect the level of discharges from Sellafield. However, on the facts the position is clearly otherwise. Firstly, the operation of the MOX plant itself will give rise to the production of contaminated radioactive solid waste which, where not discharged, will be stored at Sellafield.

Secondly, the operation of the MOX plant will give rise to a greater amount of reprocessing at the THORP plant, with consequential increase in the production of waste from that plant. As I have already said, the materials to make MOX are obtained by getting spent nuclear fuel and reprocessing it at THORP. The two plants are inextricably linked, and it is disingenuous to suggest otherwise. As a result of the increased reprocessing activity as well as the increase in waste production, the discharges into the Irish Sea and the atmosphere are likely to be increased. This issue has not been addressed by the United Kingdom in its submission.

Thirdly, the operation of the MOX plant will strengthen the basis for reprocessing activities at the THORP plant at Sellafield and, most likely, expand the volume and prolong the lifespan of these activities as well as the resulting discharge. Norway, in a letter to the United Kingdom of 8 October 2001, made this point. This letter is in our Annex 2.

Fourthly, the operation of the MOX plant will result in an increase of shipping in the Irish Sea, firstly carrying increased amounts of spent nuclear fuel to Sellafield and, secondly, transporting MOX fuel back to customers. The potential hazards to the marine environment, whether resulting from accident or otherwise, from such increased shipping activity do not have to be spelt out. By way of illustration of shipping use a reference to likely shipments to Japan may be helpful. The transportation of the MOX fuel prepared at Sellafield to Japan and possibly to other States is expected to take place largely on dedicated civil (i.e. non-military) freighters. The potential routes are set out in the map at Annex 2, page 99, of our Request. The three possible routes for transport to and from Japan involve travel (i) via the Cape of Good Hope and the south-west Pacific; (ii) via Cape Horn; (iii) through the Caribbean Sea and via the Panama Canal. Each shipment will pass close to Ireland. If the MOX plant proceeds to plan, then about 30 tonnes of plutonium reprocessed from previously contracted Japanese irradiated fuel will probably be incorporated into MOX fuel assemblies. Thirty tonnes of plutonium could produce 600 tonnes of MOX fuel or 1,200 typical LWR assemblies. Assuming that the Japanese plutonium is returned to Japan in MOX fuel, it will involve a minimum of 40 shipments, if fully loaded, and many more if only partly loaded.

Fifthly, the operation of the MOX plant will lead to an increase in the amount of nuclear waste stored at Sellafield, with all the risks that this entails. The events of 11 September last have brought these risks sharply into focus as the risk of terrorist attack is ever present. Incidentally, I would mention that Ireland has not been informed of, and is therefore not aware of, any measures taken by the United Kingdom to establish an adequate security regime at Sellafield. Certainly no missiles have been placed around the perimeter of

the plant in an effort to protect it from air attack as at Cap de La Hague in France. To this day anyone can walk along the beach adjacent to the Sellafield site.

To move on, reference should also be made to the reliance by the United Kingdom on the Commission Opinion of 25 February 1997 made under Article 37 of the Euratom Treaty. This contention is made by the United Kingdom notwithstanding its argument that the Tribunal has no jurisdiction. The Opinion is almost five years old and was presumably based upon older data submitted by British Nuclear Fuels. Ireland contests this Opinion. Ireland also points out that the Directive under which this Opinion was issued does not relate to the marine environment.

For all of these reasons it is submitted that the case made by the United Kingdom to the effect that the MOX plant will have no effect on the marine environment does not stand up to scrutiny.

Before finishing this brief discussion of the facts I would like to return to shipping and marine issues.

The question of shipments to and from Sellafield is a most important one where the marine environment is concerned. Many countries, parties to the Law of the Sea Convention, not just Ireland, have made it clear to the United Kingdom that they will not accept such vessels in waters adjacent to their coasts. Does the United Kingdom suggest that the concerns of these countries are not valid? Does the United Kingdom suggest that these countries are wrong in being concerned about the marine environment? Details of the steps taken by countries other than Ireland in relation to Sellafield shipments are given at paragraphs 33 to 38 of our Request for provisional measures. We say that it is inconceivable that these countries have taken these steps without serious consideration.

On another note, the Tribunal may be interested to hear of an agreement which had existed for a number of years between Ireland's competent authority, the Radiological Protection Institute of Ireland, and the UK's Nuclear Installations Inspectorate. This agreement provided for the mutual exchange of information on nuclear matters between the two parties. Prior to being renewed in January 2001, the process of signature of the agreement was introduced by the Foreign and Commonwealth Office of the United Kingdom. To date the renewal of this agreement has not been approved by that Ministry; a further example of failure to cooperate.

Finally, leaving aside the question of shipping, brief mention can be made of Irish fishing and other interests. As already stated, the east coast of Ireland is just over 100 miles from Sellafield. Along the coastline southwards from Northern Ireland there are about 50 significant communities in villages, towns and cities, including Dublin, the capital. About 1.5 million, out of a total population of 3.8 million, live on the east coast and this level increases in holiday periods. The sea is very much part of the lives of these people both for recreational and commercial purposes. There are over 20 coastal sites, including marine environments, that are established by Ireland as special areas of conservation under the European Union Habitats Directive. There is a large fishing fleet operating from a number of ports on the coast such as Clogher Head, Carlingford, Howth and Arklow. The fleet fishes in the Irish Sea and, from time to time, some boats would find themselves in the sea area near Sellafield. This east coast population and the marine environment which it is entitled to enjoy is potentially at risk, sooner or later, from the MOX plant if it is permitted to operate. This risk results from the irreversible, cumulative and long-term effects that Sellafield discharges will have on the Irish Sea arising from the operation of the MOX plant.

I move now to the history of the dispute.

The President:
Mr Fitzsimons, there will be a 15-minute break. We'll assemble again at 11.45 a.m.

Short recess

Mr Fitzsimons:

To assist the Tribunal we have put on the screen the map which is in our annex showing Ireland and England. I am sure everybody probably knows where the two countries are, but that map is in the annex. Sellafield is marked on it and you can see how it is across the sea from the east coast of Ireland.

I now move to the history of the dispute. The story of the MOX plant commenced in the early 1990s when British Nuclear Fuels sought authorization to construct the plant. In connection with this application, the company published in October 1993 an Environmental Statement on the proposed MOX plant. This was an obligatory step in the authorization process. This Environmental Statement is at page 33 of Annex 1 to Ireland's Request for provisional measures. It should be emphasized that this is the only Environmental Statement to have been prepared in connection with the MOX plant. The United Kingdom relies upon it even though it is now eight years old and can no longer be regarded as a current statement of environmental needs and requirements. In particular, it does not address at all the effects that the proposed MOX plant will have on the marine environment. This is perhaps not surprising as the United Kingdom at the time had not yet acceded to the Law of the Sea Convention. The Environmental Statement does not, therefore, address matters relating to the marine environment or indeed that might be regarded as flowing from obligations undertaken by it under the provisions of the Convention. Notwithstanding this fact, the United Kingdom has not asked for the preparation of an up-to-date environmental statement which could have regard to these matters as well as current, instead of 1993, standards. It is submitted that there is only one inference that can be drawn from the determined reliance of the British Government on the 1993 Environment Statement, namely that it considers that a new environmental statement would not be favourable to its plans for the MOX plant. The United Kingdom asserts that Ireland is not saying that the Statement is wrong, that we somehow accept its conclusions. This is absurd. We have set out in great detail our view on the many serious inadequacies of the Statement. Mr Sands will deal in greater detail with these inadequacies.

In the hope that by availing itself of local procedures within the United Kingdom a result could be achieved, particularly since there was, and continues to be, a considerable amount of local opposition within the United Kingdom to the project, Ireland then involved itself over a number of years in relevant local inquiries and consultations. In 1994 Ireland made a submission to the local authority considering the authorization application. This submission asserted that the Environmental Statement and the assessment to which the proposed MOX plant had been subjected were inadequate. Permission for the construction of the plant was, however, given and construction of it was completed in 1996.

In November 1996, British Nuclear Fuels submitted applications to the United Kingdom Environment Agency for variations to the gaseous and liquid disposal authorizations from the Sellafield site, including in respect of emissions from the proposed operation of the MOX plant. At this point the question of whether the operation of the plant could be economically justified became an issue. Between February 1997 and July 2001 there occurred a series of what were described as public consultations overseen by the United Kingdom Environment Agency. The focus of these consultations was the question of whether the operation of the plant could be economically justified. The United Kingdom makes a virtue of the length of time over which the consultations were conducted. However, the consultation process took so long because of procedural problems on the part of the United Kingdom: for example, in 1998 the United Kingdom decided that too much information had

been omitted from the public version of a report obtained on the economics of the MOX process. This necessitated yet another round of consultations. The result of this process was a decision in favour of British Nuclear Fuels. It was decided that the operation of the plant was economically justified. However, importantly, the United Kingdom refused to release into the public domain all of the material upon which it based its decision, citing grounds of commercial confidentiality. This failure is the subject-matter of separate proceedings instituted by Ireland on 15 June 2001 under the OSPAR Convention. The Attorney General has told you of Ireland's reasons for bringing those proceedings.

On 9 February 2001 it had been intimated to the United Kingdom that Ireland considered that a dispute had arisen under the provisions of that Convention arising from the actions of the United Kingdom in continuing to withhold the information in question.

As will be evident from the withholding of information controversy, Ireland has not even been permitted to properly make its case in the internal arena of the United Kingdom. This is no way to treat a friendly neighbour.

During the process of public consultations that I mentioned, the Irish Minister dealing with the matter wrote to his British counterpart on 23 December 1999. This is an important letter and I specifically draw the attention of the Tribunal to it. It is to be found at page 87 of the first annex to our Request for provisional measures. This letter went into some detail in making Ireland's case at the time, particularly in relation to the 1993 Environmental Statement relied upon by the British Government. No less than five international instruments were identified in this letter, including the Law of the Sea Convention. These international instruments had created binding international legal obligations for the United Kingdom relating to the marine environment and nuclear discharges subsequent to the preparation of the 1993 Environmental Statement. The obligations created were spelt out in some detail. The case was made that these instruments and the obligations created by them had – quite obviously – not been taken into account in the 1993 Statement. The letter requested the United Kingdom to carry out a new environmental impact assessment procedure, taking into account the requirements of the instruments referred to. It requested that the MOX plant not be put into operation until the new assessment procedure was carried out. An acknowledgement dated 9 March 2000 was received to this letter which did not address any of the issues raised. The acknowledgement is to be found at page 12 in Annex 2 to the Request for provisional measures.

On any reading of the Irish Minister's letter of 23 December 1999, the points raised therein were substantial ones, which warranted very serious consideration. Instead, the letter and its contents have effectively and pointedly been ignored by the British Government. It may be that the United Kingdom calculated that Ireland would not ever take action of the type that it has now taken under the 1982 Convention. It may be that it thought that, since Ireland had sought to resolve the matter to date by engaging in consultations on the domestic front in the United Kingdom, it would ultimately be submissive to any action taken. Whatever the position is in this regard, it is clear that Ireland, which throughout this dispute has sought to behave like a friendly neighbour, has not received equivalent treatment from the United Kingdom. Instead, the United Kingdom has sought to impose its will and to relentlessly push through what it perceived to be in its own commercial interests to the detriment of Ireland and the marine environment of the Irish Sea. In this context, the point can be made that it is clear from the United Kingdom submission that its only concerns are commercial ones. How, after eight years without the MOX plant, have these concerns suddenly become urgent? It is suggested that if the MOX plant does not open immediately, British Nuclear Fuels will lose customers. These are customers who have waited for years; they will surely be prepared to wait a few months longer? Where the suggested losses are concerned, the amounts are small in the context of overall Sellafield operations.

This attitude of the United Kingdom has unfortunately continued up to the present time.

On 3 October 2001, two days after Ireland took over the presidency of the UN Security Council, and at a time of great international tension, the United Kingdom announced that the operation of the MOX plant was authorized. Further, the decision was taken two days before the United Kingdom and Ireland were due to meet to discuss the OSPAR proceedings. You can imagine the dismay felt by the Irish Government at this discourtesy. The timing of the decision is one more example of the United Kingdom's unwillingness to listen to any Irish representations on the matter. The Decision specifically states that it has sought the views of organizations and individuals. There is no reference to the views of Ireland or the interests of Ireland. The Irish Minister wrote to his British counterpart on 16 and 18 October 2001. Both letters were replied to, with a reply dated 24 October 2001 being received to the second one. This letter from the British Minister of 24 October 2001 is at Annex 9 to the Request for provisional measures. I ask you to look at this letter. We will show it on the screen.

As will be seen from the text of this letter, the British Minster states, and I quote: "It is in fact the case that the authorisation procedure for the MOX plant has not yet been completed." I draw your attention to the date of the letter.

I now ask you to look at another letter, which is to be found at page 28 of Annex 2 to the Request for provisional measures of 9 November 2001. We will show that on the screen. This is a letter from a law firm, Freshfields Bruckhaus Deringer, dated 17 October 2001, addressed to Friends of the Earth Ltd. Friends of the Earth Ltd., together with Greenpeace, have instituted judicial review proceedings in the United Kingdom courts challenging, on administrative law grounds, the decision of 3 October authorizing the operation of the MOX plant. As it happens, the High Court in London refused their application on 15 November 2001 and that decision has been appealed. However, the law firm responsible for the letter was acting for British Nuclear Fuels in those proceedings.

As can be seen from page 2 of the letter, it was copied to two United Kingdom Departments of State, including that of the Minister responsible for the letter of 24 October 2001 – the previous letter shown. The Minister was a named respondent in the proceedings. I wish to draw your attention to the fifth paragraph of the letter which states as follows:

> Following the decision of the Secretaries of State on 3 October 2001, BNFL commenced, with the consent of the Nuclear Installations Inspectorate, the initial stages of plutonium commissioning, which it expects to complete on or around 15 November 2001. These involve the transfer of sealed plutonium-containing materials into SMP in order to calibrate radiation monitoring equipment and test shielding. These initial stages are part of a commissioning programme which will lead to the opening of a plutonium can

– and this is the important phrase –

> scheduled to take place on or around 23 November 2001, allowing plutonium to be fed into the process as a prerequisite to the manufacture of MOX fuel. The cost and complexities involved in reversing the commissioning of SMP will be very significantly increased once the plutonium can has been opened and plutonium introduced into the plant processes.

The reference to SMP is a reference to the MOX plant.

As will be evident from this letter, it appears that the United Kingdom knew on 17 October that the MOX plant was to commence operation on 23 November 2001, and that in fact preliminary steps had at that time been taken. It is, therefore, most regrettable that on 24 October 2001 the United Kingdom, by its Minister's letter, informed Ireland that the authorization process for the MOX plant had not yet been completed. Clearly this statement was not in accordance with the facts. It is submitted that the only inference to be drawn is that the letter of 24 October 2001 was intended to influence Ireland towards delaying its recourse under the 1982 Convention so as to make this application impossible before the commencement of the operation of the MOX plant. This is extraordinary behaviour towards a neighbour State, which has acted with good faith at all times.

To finish in this context, I would mention that we understand that, since the exchange of letters discussed, the United Kingdom has decided to defer the date for commencement of operations at the MOX plant from 23 November 2001 to 20 December 2001.

Even more astonishing is the assertion in this letter that the United Kingdom could not understand the position of Ireland. The implication is that Ireland has never told the United Kingdom what its concerns are. The implication is that if only Ireland could make itself clear, the United Kingdom would be sympathetic. This is absurd. You have seen the correspondence. Ireland has made its views on the MOX plant and the Law of the Sea Convention violations known for over two years. The letter of 24 October made it clear that the United Kingdom was making no attempt to engage with those views. Ireland is said to be uncooperative for instituting proceedings soon after the letter. It is said that we refused to participate in an exchange of views. The history of contacts and the correspondence clearly demonstrates that this is not the case. You, the Tribunal, will make up your minds about this. We say that Ireland had set out its views and that any more talk, in the circumstances, was clearly futile. A deadlock had been reached, as Mr Lowe will explain.

We ask the Tribunal to take account of the conduct of the United Kingdom in relation to this matter in considering whether or not it is appropriate in all the circumstances to grant the orders sought. If its strategy had worked, the MOX plant would have been operating by the time Ireland was in a position to make this application. The status quo would therefore have been quite different from what it is at present and Ireland's position could have been seriously prejudiced. We submit that it can be inferred from this conduct that the United Kingdom considers that it is seriously exposed to injunctive orders of the type that Ireland seeks.

Mr President, there is one other point which needs to be addressed briefly. The United Kingdom has inserted a correction to paragraph 190. I am sorry to say that it still does not accurately reflect what happened that day. The correct situation is that both parties agreed that that was neither the time nor the place to discuss Ireland's claim under the Law of the Sea Convention.

That concludes my submissions, and Mr Sands will now follow. Thank you.

STATEMENT OF MR SANDS
COUNSEL OF IRELAND
[PV.01/06, E, p. 27–40]

Mr Sands:
Mr President, Vice-President, Members of the Tribunal, it is a pleasure to appear once again before you, but this time in your permanent home. It is also a privilege to appear in this case on behalf of Ireland, which raises issues of great importance for the Law of the Sea Convention and for international law generally.

Mr Fitzsimons has addressed the facts of this case and I am now going to turn to the law. The parties are separated by a wide gulf on the key issues and they have very different conceptions of what cooperation and community mean in the context of the International Law of the Sea. It is perhaps inevitable that, with their very different historical backgrounds, the United Kingdom and Ireland would approach the issue from different perspectives. For Ireland, the case at this stage of the proceedings is only about the preservation of its rights. We are not asking you in any way to deal with the underlying merits, but merely to maintain the present situation pending any decision by the Annex VII tribunal, which could be constituted, as has been said, very shortly. The United Kingdom, on the other hand, has expended a great deal of effort on material that goes to the merits, and in particular the adverse effects of the MOX plant, which they claim to be minuscule, and almost nothing on the question of Ireland's rights under the 1982 Convention. We say you cannot now address the merits and you have no need to take a view one way or another on the barrage of statistics that the United Kingdom relies upon, and which, as has been said, has been produced mostly by BNFL.

What the United Kingdom does say about Ireland's claimed rights under the 1982 Convention is either that they are not engaged at all in relation to the substantive obligations to protect the environment, or that they are meaningless in relation to their practical effects of cooperation, or that they simply do not apply, as in relation to environmental assessment. That dismissive approach is entirely consistent with the United Kingdom's attitude to Ireland over the past years. You will find not a single reference to the 1982 Convention in any of the United Kingdom correspondence prior to the initiation of these proceedings or in any decision or draft decision of the Government of the United Kingdom or of its regulatory authorities in relation to the MOX plant at any stage over eight years. The Law of the Sea and the protection of the marine environment had been entirely absent from the decision-making process, and this is in spite of Ireland's consistent efforts since the summer of 1999 to bring them to the attention of the United Kingdom.

The United Kingdom boldly claims that Ireland has no rights that are engaged by the MOX plant's authorization, and that even if they do have rights, they can be fully preserved and given effect after the plant has been commissioned on 10 December. We disagree on both counts. Ireland's position is that both parties have rights under the Convention and both sets of rights are entitled to be fully preserved pending the work of the Annex VII tribunal. For present purposes, Ireland's rights fall into three categories: (1) the right to ensure that the Irish Sea will not be subject to additional radioactive pollution; (2) the right to have the United Kingdom cause to be prepared a proper and up-to-date and complete environmental impact assessment on the MOX plant and on associated international movements of nuclear material; and (3) to have the United Kingdom cooperate with Ireland on the protection of the semi-enclosed Irish Sea and to coordinate in the promotion of activities. Each of these rights is fully engaged by the commissioning of the MOX plant. Each right will be violated if the plant is commissioned on 20 December and, if that commissioning occurs, the exercise of each right will be irretrievably prejudiced on Ireland's behalf.

The approach we have taken to the preservation of our rights should be one that is abundantly familiar to the United Kingdom. It is the same approach – absolutely identical – to that taken by the United Kingdom in the 1972 proceedings concerning fisheries jurisdiction cases and we have very often relied on precisely the same language. Mr Lowe will say more about that in due course.

Let me begin with the first of Ireland's rights, the right to ensure that the Irish Sea, of which you have already heard a considerable amount, will not be subject to further radioactive pollution. That right arises under articles 192, 194, 207 and 212 of the 1982 Convention. For present purposes, I am going to focus only on article 194, but our argument is equally applicable to these other provisions which will be elaborated at the merits stage.

With the coming into force for the United Kingdom of the 1982 Convention – on 25 July 1997 – article 194 imposed a number of very specific obligations on the United Kingdom. The first obligation, in paragraph 1, is to "take … all measures consistent with [the 1982] Convention … necessary to prevent, reduce and control pollution of the marine environment from any source", and to that end the United Kingdom has an obligation to use "the best practicable means" at its disposal.

The second obligation under article 194, paragraph 2, has two distinct elements. The United Kingdom is required to "take all measures necessary to ensure", firstly, that "activities under [its] jurisdiction or control are so conducted as not to cause damage by pollution to [Ireland] and [its] environment" and, secondly, to ensure "that pollution arising from … activities under [its] jurisdiction or control does not spread beyond the areas where [it] exercise[s] sovereign rights …". The third obligation under article 194 is to take measures "designed to minimize to the fullest possible extent … the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources … or through the atmosphere".

Mr President, radionuclides are harmful, noxious and persistent. Their introduction into the marine environment, in any amount, constitutes pollution within the meaning of article 194 of the 1982 Convention. That surely cannot be in dispute. As Mr Fitzsimons has shown, radionuclides will be deliberately discharged from the MOX plant into the Irish Sea and they will be deliberately released into the atmosphere and they will then reach the marine environment of the Irish Sea. They will reach Ireland. Moreover, additional discharges of radionuclides will also be made into the Irish Sea from the THORP plant as a direct result of the commissioning and operation of the MOX plant, as Mr Fitzsimons has explained. I should say again that we do not know in what quantities because that information has not been made available by the United Kingdom and has never been subject to environmental assessment.

Beyond these two sources, there are of course potentially other releases from the MOX plant and from international movements by sea in the Irish Sea, firstly by reason of accident and, secondly, regrettably, potentially by reason of terrorist acts. We say that deliberate discharges of radionuclides are contrary to these three sets of obligations under article 194 and the other provisions that I have also mentioned. The United Kingdom has failed to prevent, reduce and control pollution by the best practicable means. It will cause pollution to reach Ireland. That is not in dispute. Given the existence of alternatives to the discharges into the Irish Sea and the atmosphere, for example by land-based storage, supported by British Energy, it has failed in its obligation to minimize to the fullest possible extent the release of harmful and persistent substances.

The United Kingdom says that the discharges are minimal and no harm is caused. That may have been right in 1982 when the Law of the Sea Convention was adopted, but our understanding of the impacts of radiation on the environment and on human health have changed and new technologies have emerged to reduce or eliminate entirely releases into the marine environment. The law evolves to take into account these changes. What may have

been internationally lawful in 1982 may not be lawful in 1993. What may have been lawful in 1993 may not be lawful in 2001. As the International Court of Justice put it in the *Gabčíkovo-Nagymaros* case, "What might have been a correct application of the law in 1989 or 1992 … could be a miscarriage of justice … in 1997."

The United Kingdom has indeed taken political decisions accepting more stringent international obligations. At this point it suffices to mention just two examples. The first is the obligation not to promote or allow the storage of any radioactive waste near the marine environment, unless the United Kingdom can demonstrate that such storage or disposal poses no unacceptable risk to Ireland, in accordance with the precautionary principle. I put in parentheses that the United Kingdom has said that precaution is not relevant to the MOX plant. The United Kingdom accepted that obligation, together with 173 other States, at the Rio Conference on Environment and Development in the summer of 1992. In the summer of 1998, to much domestic fanfare, the United Kingdom, through Mr John Prescott, then Secretary of State, undertook the obligation to ensure that its discharges, emissions and losses of radioactive substances would be reduced to levels where concentrations in the Irish Sea were "close to zero" by 2020. That is concentrations, not discharges.

We say that these and other obligations are directly and immediately relevant to the interpretation of article 194 of the 1982 Convention, which requires the United Kingdom not to authorize any new activities which would or which could lead to any increase in concentrations of radionuclides in the Irish Sea. We say that obligation can only be met by phasing out all existing discharges, by prohibiting new discharges and by avoiding activities on the coast of the Irish Sea which could lead to releases by reason of accident or other act, including an act of terrorism. This is the position set forth in our letter of 23 December 1999, which you can read for yourselves. We have been absolutely consistent ever since that date.

The content and extent of the obligations set forth in article 194, and in particular article 194, paragraph 3(a), have changed with time. They have evolved. That obligation is obviously not a static one. It means that the authorization of activities must always take into account current standards, not past standards. The ICJ has recognized this; the European Court of Justice has recognized this. It is common sense. The authorization of the MOX plant on 3 October 2001 by reference to an outdated and incomplete 1993 Environmental Statement, or by reference to the discharge authorizations granted to BNFL in 1996, or by reference to a 1997 Opinion of the European Commission, which I should say does not address the marine environment at all – it is concerned only with human health – is inappropriate and we say it is unlawful by reference to the obligations in article 194 of the 1982 Convention and the other obligations to which we have drawn the United Kingdom's attention.

The United Kingdom has not put before this Tribunal a shred of evidence to indicate that it took into account any international environmental standards which have arisen since the mid-1990s. Indeed, it is most instructive to read that in the decision of October 1998 the United Kingdom's Environment Agency expressly noted, and this is at our Annex 1, page 164 of our Annexes, that the question of discharges from the MOX plant raised international issues, which it was not in a position to address. On the evidence before this Tribunal, those issues have never been addressed by the United Kingdom.

When we raised this important point in 1999, the United Kingdom did not respond and did not ask for more information. It has still not responded. There is nothing in the Written Response filed last week which addresses this point that has been made by Ireland. We have no view from the United Kingdom on its position as to the obligation to apply evolving and increasingly stringent environmental obligations in relation to the pollution of the Irish Sea. Those obligations, as we say, arise under the 1982 Convention. They have

evolved under the 1982 Convention. They make it abundantly clear, we say, that 1993 standards are inappropriate for 2001 decisions. That is a very simple point.

It is easy to see why the United Kingdom finds itself in considerable difficulty on this point because all the key decisions, with the exception of economic justification, were taken expressly by reference to the standards of 1993 or 1996. By that date, the plant had been assessed for its environmental impacts – inadequately we say. Its intended discharges had been authorized – on outdated environmental standards, we say. And it had been built. But then the consultation process on justification ran into difficulty, on the grounds that the United Kingdom had not, according to its own internal national laws, released sufficient information to the public, so more information was made available and the consultation process was slowed down. Then in 1999 the data falsification scandal erupted. Years passed but the new standards, the more stringent obligations under article 194, were never taken into account and they have not been applied, and there is no evidence before you that they have been applied, or even taken into account.

The United Kingdom's pleadings are completely silent on this point. The approach reflects, I am sorry to say, a congenital attitude. Whenever Ireland raises a legitimate concern, the United Kingdom ignores it. But ignoring Ireland's rights under article 194 and the other Law of the Sea Convention articles will not dissolve them away. They cannot be wished away. Ireland has the right to insist that the United Kingdom honour its obligations to prevent harm to the marine environment to reduce concentrations of radionuclides in the Irish Sea. These international obligations may be inconvenient and they may place limits on the activities of the United Kingdom and its commercial operators, but they must be taken into account because they are binding under the 1982 Convention. These obligations, we say, give rise to our correlative rights, which can only be preserved if you prescribe the provisional measures we have requested.

After 20 December 2001 there will be discharges from the MOX plant into the Irish Sea which would not otherwise have occurred. It is as simple as that. As Mr Fitzsimons explained, the MOX activities will also increase discharges from THORP. Many of these discharges will have a half-life of thousands of years. They will be in the environment for generations. Their effects will prevail for thousands of years. Their effects are, to all intents and purposes, irreversible since they cannot be removed from the Irish Sea once they are in it. That sea comprises in half the Irish fishery zone.

The introduction into the marine environment cannot be compensated monetarily. If you cannot exclude the possibility, which we say you cannot, that the arbitral tribunal might find in favour of our claim, then there are compelling grounds for prescribing provisional measures. That is because the test in article 290 does not require you to establish, as the United Kingdom claims, that there will be irreversible physical damage to Ireland on a massive scale. All you have to do is to satisfy yourselves that Ireland has rights under articles 192, 194, 207 and 212 and that they would be irreversibly eroded.

As Judge Laing put it, in supporting the Order of this Tribunal in the *Southern Bluefin Tuna Cases*, "that 'grave standard'" – irreversible massive harm – "is inapt for application in the wide and varied range of cases that, pursuant to UNCLOS, are likely to come before this Tribunal." On a personal note, may I say how sorry I am that Judge Laing is not with us. In that Separate Opinion, Judge Laing also addressed the precautionary principle, which the United Kingdom says is not applicable to this case at all, although we noted that it did not dispute our characterization of the principle as one established in customary law.

We say that precaution does apply in this case. We say that there are numerous international instruments going back to the late 1980s and early 1990s – which we set out in our Statement of Case – which the United Kingdom and Ireland both accepted, which recognize that if precaution is to apply anywhere and in relation to any types of activities,

then it must be in relation to radionuclides and the protection of the marine environment. Our Statement of Case addresses this in detail. For present purposes, it is sufficient to say that prudence and caution are common-sense requirements when dealing with ultra-hazardous substances and activities. In this case prudence and caution militate decisively in favour of provisional measures.

The United Kingdom has gone to great lengths to demonstrate that Ireland has not provided any evidence to show environmental harm. We say that there will be harm. The European Parliament's report, which was referred to earlier, demonstrates that. On that basis, you are entitled to prescribe provisional measures under article 290, to "prevent serious harm to the marine environment". But we do not have to reach even that threshold. We say that we do not have to establish harm of that degree to obtain provisional measures, since irreparable harm to our rights is sufficient. Mr Lowe will say more about this in due course.

The United Kingdom states in its pleading that unlike Australia and New Zealand in the *Nuclear Tests* cases before the International Court of Justice, we have not brought any evidence to bear. It is worth looking at the pleadings in that case. The International Court's Order in the provisional measures phase is extremely pertinent to these proceedings. I am sorry to say that the UK makes a highly selective use of the material before that Court. That Court had before it virtually no evidence on the impacts of French tests, but mostly material of a general character on the potential dangers of the various levels of radiation, including low levels, to human health. At that time, in the early 1970s, the real dangers were not known, either to the environment or human health.

The Court did not say that it required proof of harm at the provisional measures phase. In applying what was in effect a precautionary approach, the Court said that at that phase it was sufficient to observe that the information submitted to the Court, which was mainly general reports of the United Nations Scientific Committee on the Effects of Atomic Radiation between 1958 and 1972,

> [did] not exclude the possibility that damage to New Zealand might be shown to be caused by the deposit on New Zealand territory of radio-active fall-out resulting from such tests and to be irreparable.

That is a shift of the burden of proof on to that side of the room. It would be curious, indeed, for this Tribunal in 2001 to adopt a less precautionary approach than the International Court adopted more than a quarter of a century ago.

If you ask yourself precisely the same question that the International Court of Justice asked itself, can you exclude the possibility that damage to Ireland might be shown to be caused by the deposit on Ireland's territory of radioactive fall-out resulting from the operation of the MOX plant and associated international movements and to be irreparable, the answer has to be "no", on the evidence that has been put forward by both sides.

In the *Nuclear Tests* cases, the International Court of Justice rejected France's views, which had been raised outside the courtroom, that nuclear tests had never involved any health dangers to the populations of Australia and New Zealand and that the concerns which had been expressed "could not be based on anything other than conjecture". The conjecture to which France was referring was exactly the same type of conjecture as that referred to by our friends on the United Kingdom's side. The United Kingdom's argument is the same today as that of France in the early 1970s. It was rejected then and we say that it should be rejected now.

Since the 1973 Order of the International Court of Justice there have been great changes in the state of international law. The protection of the environment has emerged as a central foundation of the international legal order and part of the corpus of customary law. It

would be quite amazing for this Tribunal to take a more restrictive approach than that which pertained in 1973, when the protection of the environment was only emerging in the international legal order. Now it is well established, and recognized as such by this Tribunal, by the Appellate Body of the World Trade Organization, by human rights bodies around the world and by the International Court, that the threshold for obtaining provisional measures should, if anything, be lower today than it was then. Like the distant consequences of radioactive fall-out from French nuclear tests, there is no possibility that the rights lost by the contamination produced by the MOX plant after 20 December could be fully restored in the event of an award by the Annex VII tribunal in Ireland's favour in the proceedings on the merits.

On this ground alone – deliberate and authorized discharges, without having had regard to recent environmental standards – we say provisional measures are justified until such time as the Annex VII tribunal can address the matter. There is then the additional risk from accidents. We have heard about – you have had evidence on – accidents, whether at the MOX plant or international transports. Then there are the dangers posed by terrorist attacks – you have seen the material in the evidence – in which the Director-General of the International Atomic Energy Agency, an institution which has always been cautious and prudent and is not known to be anti-nuclear in any way, characterized the current situation as one of "a clear and present danger" of attacks on nuclear facilities. These merely serve to provide further support for our claim.

I turn to the second right, which Ireland claims is the right to have the United Kingdom cause to be prepared a proper, complete and up-to-date assessment of the environmental impacts of the MOX plant and associated international movements of plutonium and other radioactive substances. This right arises under article 206 of the 1982 Convention. Article 206 provides:

> When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects … on the marine environment.

We say that article 206 of the Convention creates an obligation on the United Kingdom and that Ireland has the right to enforce that obligation. In our Statement of Case we addressed this right in considerable detail. It is at paragraphs 82 to 94 of our Request. Our claim is that the United Kingdom has breached its obligations under article 206 in the following four ways. First, it has failed to assess properly and fully the potential effects of the operation of the MOX plant on the Irish Sea, including the additional discharges from THORP. Secondly, it has failed to assess all the potential effects on the Irish Sea of international movements of radioactive materials being transported to or from the MOX plant; they have never been assessed. Thirdly, it has failed to revisit the 1993 Environmental Statement by reference to the evolving environmental obligations set forth in article 194 and the other provisions of the Law of the Sea Convention, to which I have referred. Fourthly, it has failed to assess the risk of potential effects by terrorist act or acts. At the very least one could say that between 11 September and 3 October is a remarkably short period of time to properly assess the consequences of the events on that terrible day.

At this stage of the proceedings you do not have to decide on the merits of Ireland's claim under article 206. You only have to satisfy yourself of two points: first, that Ireland has rights under article 206 in the sense that the provision is pertinent to the operation of the MOX plant and associated international movements of radioactive materials; and secondly,

that the erosion of those rights which would occur after 20 December could not be restored if the arbitral tribunal was to find in favour of Ireland.

In its pleadings, the United Kingdom has evidently again recognized the difficulty that it faces. The United Kingdom states that article 206 does not apply because "the United Kingdom does not have reasonable grounds for believing that the operation of the MOX Plant may cause substantial pollution or significant and harmful changes to the marine environment". That is a direct quote from their reply at paragraph 220. I have to say that that is one of the more surprising legal arguments I have come across. It reflects a complete disregard for the efforts of the drafters of the Convention. I find it almost impossible to know how to respond: if the MOX plant is not subject to article 206, it is difficult to imagine anything anywhere in the world which is subject to that provision.

We say that article 206 does apply, and that it requires an assessment of all the impacts of the plant from all the activities and associated activities which it engenders. The Environmental Statement of 1993 is in your bundle at Annex 1, page 33, of our materials. You can read it for yourselves. The United Kingdom states: "An Environmental Statement was prepared … it is nowhere said that the Environmental Statement is wrong".

Although there is no dispute as to the first point – an environmental statement, or something called an "environmental statement", was prepared – there is a dispute on the second point. It is true that we do not say that the Environmental Statement is wrong, but environmental statements are never right or wrong; they are complete or incomplete; adequate or inadequate; up to date or out of date. This one is incomplete, inadequate and out of date. I can provide you with a long list of omissions of the matters which we say it should have addressed but did not. The omissions are set out in the correspondence. You can read them for yourselves in the 1999 letters, particularly that of 23 December 1999.

To give you a sense of the inadequacies of the 1993 Statement, it is worth comparing that with the Environmental Statement for the NIREX project, which the Attorney General referred to earlier today. You will recall that that project was rejected by an earlier United Kingdom Government, in part on the grounds of the inadequacy of the Environmental Statement. The Environmental Statement for that project, which envisaged no discharges to the marine environment in any way and no international movements, ran to some 300 pages. We made a copy available to the United Kingdom late last night and we have made a copy available to the Tribunal this morning. Here is the Environmental Statement for the NIREX plant, with no discharges and no transport. It runs to more than 300 pages.

The Environmental Statement for the MOX plant with 43 pages, lots of photographs and a few maps, is double spaced. Make up your minds by reading both of the Statements. It is abundantly clear to us that the MOX Environmental Statement, which contains no assessment of the effects of the maritime transports, no assessment of impacts on the marine environment in Ireland nor, indeed, in the United Kingdom, and no assessment of the impacts on Irish fisheries, is inadequate. I could go on and on.

The fault lines within the United Kingdom's argument on article 206 also go on and on. Ireland set out its considered and detailed views in the letter of 23 December 1999. We raised then a serious concern, which again the United Kingdom has never addressed; namely that it was proposing to authorize MOX without having taken into account any of the evolving obligations under the 1982 Convention under article 194 and other provisions which had come into force for the United Kingdom in 1997. In that letter, Ireland called "upon the United Kingdom to carry out a new environmental impact assessment procedure taking into account the requirements of the 1982" Convention and various other conventions. You cannot be much clearer than that.

Ireland also sought confirmation that "the operation of the proposed MOX plant will not be authorized before such a revised environmental impact assessment procedure has been

carried out." In that letter, Ireland also expressly reserved its right to bring Part XV proceedings under the Convention in the event that the United Kingdom did not carry out those acts. That was nearly two years ago. The United Kingdom did not respond. It did not respond in 1999, 2000 or even in 2001. The decision of 3 October 2001 simply does not address the issue of the question of whether it is appropriate to authorize a nuclear facility on the basis of an Environmental Statement which is eight years old.

The very first time that the United Kingdom addressed that argument finally was last Wednesday at paragraph 172 of its Written Response. If nothing else, these proceedings will have enlightened us all on the United Kingdom's views on the merits of authorizing new projects by reference to old assessments, but no. It still does not want to address the point. I shall read out in full the totality of the United Kingdom's response to our arguments over the past two years on this point: "The Annex VII tribunal could have no jurisdiction in this matter." That is all it has to say on that argument. So sure is the United Kingdom of its own position on the irrelevance of article 206 of the 1982 Convention that it does not even feel the need to bother to address the merits of Ireland's claimed rights under that provision.

The United Kingdom's position might be comprehensible if Ireland's view could be said to be novel and not based on law. However, there is ample authority for the proposition that States have an obligation to authorize on the basis of an up-to-date environmental statement which takes into account current standards. The International Court of Justice was abundantly clear on this point in its Judgment in 1997 in the *Gabčíkovo-Nagymaros* case in dicta which go not to the rules pertinent to the parties to that dispute but are related to general international law, including the Law of the Sea Convention. It stated:

> In order to evaluate the environmental risks, current standards must be taken into consideration. … The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage. Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades.

I now emphasize:

> Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past.

We say that those dicta are right on this point. They relate to the position under general international law and are widely supported by commentators and States. Ireland respectfully submits that article 206 equally requires the application of new norms and standards, and that the authorization of the MOX plant and international movements must incorporate an assessment by reference to the environmental standards of 2001, not the environmental standards of 1993. That has not happened and to its credit the United Kingdom has not even tried to argue that it has.

On the United Kingdom's own evidence, the assessment of the effects of the plant were carried out by reference to standards of 1993 and 1996 and nothing subsequently. Those standards did not incorporate the evolving norms of the 1982 Convention, in particular article 194, paragraph 3(a). We say that until the impacts of the MOX plant are assessed by reference to that legally binding obligation, the MOX plant cannot be authorized lawfully under the 1982 Convention. In carrying out that assessment by reference to that standard, account must necessarily be taken of the cumulative effects of the MOX discharges and any accidental releases which are over and beyond those already authorized from other facilities, including consequential discharges from the THORP plant. This, too, has not happened and there is no proposal to make it happen.

It is self-evident that any assessment carried out pursuant to article 206 must necessarily be carried out, completed and shared with neighbouring States before the authorization of the plant. If it is completed after the commissioning of the plant, its conclusions plainly cannot be applied to the design and operation of the plant. That is self-evident. So, any conclusion that discharges from the MOX plant should be lowered or, as we say, eliminated altogether to take into account the United Kingdom's obligations under the 1982 Convention, could not be implemented and the loss of Ireland's rights would be irreversible. That is why we say our rights under article 206 can only be protected by prescribing the provisional measures we have requested.

If the plant becomes operational before the Annex VII tribunal is constituted, before it has given its award and the Tribunal finds in favour of Ireland's claims under article 206, there will be no possibility that the loss of Ireland's right to a proper and complete prior environmental impact assessment could be restored. It is gone for ever.

The third set of rights which Ireland claims is the right to have the United Kingdom cooperate with it and coordinate the implementation of rights and duties with respect to the protection of the marine environment. That right arises on the basis of two provisions: Articles 123 and 197 of the 1982 Convention. Article 123 is one of two articles in Part IX of the Convention entitled "Enclosed or Semi-Enclosed Seas". You will have seen from the map how semi-enclosed, or nearly enclosed, is the Irish Sea. Article 197 is in Part XII of the Convention. In our Statement of Case we address these rights in considerable detail at paragraphs 56 to 81.

Ireland attaches particular significance to the rights in relation to cooperation and coordination, which we consider impose real duties and obligations on the United Kingdom. It is for that reason that we thought to address cooperation and coordination methodically and systematically. In our Request and in our Statement of Case we explain that in our view, for present purposes, the right of cooperation and cooperation had three essential elements. The first element was our right to be notified about the essential details of the MOX plant and international movements. The second is our right to have the United Kingdom respond in a timely and substantive fashion to our reasonable request for information and assistance. The third is our right to have our rights and interests taken into account in any actions which the United Kingdom may take which may have adverse implications for the Irish Sea. Having set out the elements of the rights to cooperate and coordinate, we then provided some illustrative examples of the way in which the United Kingdom had, we say, manifestly failed to fulfil its obligations under articles 123 and 197.

In our pleading we sought to set out the basic principle with care. The Attorney General has already mentioned that Ireland is a smaller island State. We attach particular importance to the obligations of cooperation and coordination. Their purpose, particularly in Part IX of the Convention, underscores the vital importance which the drafters of the Convention evidently attached to cooperation and to the avoidance of conflict amongst neighbours of semi-enclosed seas.

What does the United Kingdom say in response? It says very little and in a most peculiar order. The impression one has from reading its statement in response is that cooperation was really treated as an afterthought. The United Kingdom does not address the provisions of the 1982 Convention, which we would have thought would be the very starting point for any discussion, until paragraph 218 of its reply. That paragraph repays a very careful reading. Three points can be made in relation to that paragraph.

The first point is that it is said that the matters of which Ireland complains are essentially limited to the withholding of information on grounds of commercial confidentiality. I have just explained, and we have explained during the course of this morning, that access to information is but one of the elements of cooperation. Inevitably, the more important requirement, to take account of Ireland's interests, is not mentioned by the United Kingdom in its Response or indeed anywhere else. It is a matter of some concern that the United Kingdom fails to acknowledge that cooperation entails taking into account the interests of one's neighbours. There is no response at all to our reference in the *Lac Lanoux* arbitration, the award of which affirmed that in the course of discussions, each State has an obligation "to take into consideration in a reasonable manner the interests of the [other]".

Nor does the United Kingdom have anything to say about the International Court's conclusion that States engaged in activities which may be harmful to the marine environment have an obligation to give "due recognition" to, and "take account of", the rights of other States. These latter dicta are ones with which the United Kingdom should be very familiar since the International Court addressed the point to the United Kingdom in respect of its treatment of Iceland, another of its smaller island neighbours. Nor does the United Kingdom address Principle 19 of the Rio Declaration, to which it and 173 other States gave their unconditional support and which emphasizes the importance in these respects of transboundary cooperation.

The second point in relation to paragraph 219 is that the United Kingdom says that the cooperation requirements set forth in article 197 have been entirely satisfied by the United Kingdom's participation in the OSPAR Convention and in the European Community and Euratom Directives, and by its generously having allowed Ireland to participate in its domestic consultations on economic justification. We say that cooperation means more than becoming party to an international instrument or three. The notion that Ireland, as one of the 9,000 "organizations and individuals" – that is the term used in the decision of 3 October 2001 – which participated in the consultations on MOX justification, has extinguished its entitlement as a State Party to the Law of the Sea Convention to invoke cooperation rights under article 197 is a startling claim. The argument is patronizing and has no merit.

My third point in relation to paragraph 219 is that the United Kingdom says that the obligation to cooperate under article 123 adds nothing beyond the requirements of article 197. That is plainly incorrect. It is not merely that article 123 specifies additional duties of coordination among littoral States. The very fact that enclosed and semi-enclosed seas are given a whole separate part on their own under the Convention indicates that they are the subject of distinct rights and duties. But the United Kingdom does not actually feel the need to refer to the language of article 123. If you look at it, as I know many of you know well, it is not the same language as in article 197. It says expressly that States bordering a semi-enclosed sea – Ireland and the United Kingdom – must "coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment". It is an additional requirement to "coordinate", not found in article 197. We say that coordination can only occur if there is listening, if there is sharing, and if there is taking into account. It is akin to the concept of *voisinage*. The evidence before you shows that the United Kingdom has not listened, has not shared, and has not taken into account Ireland's views. It cannot be said to have been a cooperative neighbour on this issue at least.

It is apparent that the United Kingdom sees no great substance in the duty to cooperate. In fact they say, rather disparagingly, that it is a right which is only "essentially procedural in nature". Even if that is correct, we say there is no rule in international law which says that procedural rights are entitled to any less respect than substantive rights. In fact, there is very much to suggest that where the substantive obligations have any degree of ambiguity in their content – which in our view is not the case here – then procedural rights become even more important. This point has been made very powerfully by many commentators, including on various occasions Professor and now Judge Rosalyn Higgins.

In the case of a contentious project such as this, cooperation is self-evidently of great importance. The United Kingdom makes no effort to engage with Ireland's submissions. The record shows that it has not cooperated. Mr Fitzsimons has taken you through the most important correspondence, which paints a consistently depressing picture, at least from our perspective: Ireland presents reasoned arguments or requests. They are ignored or they are met with holding responses or there are delays, further delays or there are bland assertions. Nowhere in the correspondence will you find a single example of the United Kingdom engaging with any of our substantive arguments; at no point.

To illustrate the absence of cooperation, I think it is appropriate to consider one or two examples. The letter of 23 December 1999, which I have already referred to in relation to the issue of environmental assessment, is especially instructive. I think if there is one letter worth reading it is that letter, nearly two years old. In that letter Ireland expressed unambiguous concerns about the impact of discharges and releases from the MOX plant into the marine environment having regard to obligations which the United Kingdom had accepted under the Law of the Sea Convention, which had entered into force for the United Kingdom shortly before then, and norms which are incorporated into the Law of the Sea Convention, in particular the obligation to reduce concentrations of artificial radioactive substances in the Irish Sea to "close to zero" by 2020. We referred in that also to the precautionary principle. Ireland sought the views of the United Kingdom Government on this point. We asked, can you please tell us "as to the basis upon which the proposed authorization of discharges from the MOX plant into the marine environment would 'meet all international standards and legal requirements' … [?] The Irish Government further seeks confirmation that no authorization will be granted or put into effect pending resolution of these matters".

We say that request is crystal clear. It is totally unambiguous and we are entitled, in the context of the duty to cooperate under articles 123 and 197, to an explanation as to how the United Kingdom can, on the one hand, fulfil its obligations to reduce concentrations of radionuclides and, on the other hand, subsequently authorize new radioactive discharges into the Irish Sea. Now it may well be that there is a perfectly simple explanation, but an explanation there must be, and an explanation Ireland is entitled to have. The United Kingdom cannot simply ignore us when we raise the matter, but that is what the United Kingdom has done. It waits more than ten weeks and then it responds by the letter of 9 March 2000. What does the letter say? It really does not say very much. You will find it up on the screen. It states that "[w]hatever our final decision, we do plan to publish a decision document which will explain our reasons in full. I will ensure that you are sent a copy immediately it is published". There was no further communication after that.

What Ireland did receive nearly two years after the request had been made, during which time we had persisted in our attempts to prise information out of the United Kingdom Government, was the decision document of 3 October 2001. That, to all intents and purposes, is the response to our request of 23 December 1999. It does not anywhere address Ireland's question or its concern as set out in that letter. We invite the United Kingdom, through its Agent, to direct Ireland and the Tribunal to the paragraph in the decision of 3 October 2001

where the United Kingdom responds to the question and the concern that I have just identified raised in the letter of 23 December 1999, as it said it would do. You will find no mention of Ireland in the decision of 3 October 2001. You will find no mention of Ireland's concerns, unlike the NIREX process, in the document of the decision of 3 October 2001. That stands in very stark contrast to the careful approach taken by Secretary of State Gummer in the NIREX inquiry. Here Ireland becomes, rather anonymously, one of the 9,000 or more consultees to the domestic process. We are simply an organization or an individual. You get a flavour of the rationale of the United Kingdom Reply in these proceedings: they say, to paraphrase, that by allowing us to participate in their consultations they have fulfilled their duty to cooperate and that is sufficient. With the greatest of respect, that is not what the duty of cooperation implies.

Mr President, I've got a few more minutes, but I wonder if this is a point to break for lunch rather than enter into an area which I think I could not complete before a suitable pause.

The President:
Thank you. Then the hearing is adjourned until 3 o'clock.

Luncheon recess

PUBLIC SITTING HELD ON 19 NOVEMBER 2001, 3.00 P.M.

Tribunal

Present: *President* CHANDRASEKHARA RAO; *Vice-President* NELSON; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, MENSAH, BAMELA ENGO, AKL, ANDERSON, VUKAS, WOLFRUM, TREVES, MARSIT, EIRIKSSON, NDIAYE, JESUS, XU; *Judge* ad hoc SZÉKELY; *Registrar* GAUTIER.

For Ireland: [See sitting of 19 November 2001, 10.00 a.m.]

For the United Kingdom: [See sitting of 19 November 2001, 10.00 a.m.]

AUDIENCE PUBLIQUE DU 19 NOVEMBRE 2001, 15 H 00

Tribunal

Présents : M. CHANDRASEKHARA RAO, *Président*; M. NELSON, *Vice-Président*; MM. CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, MENSAH, BAMELA ENGO, AKL, ANDERSON, VUKAS, WOLFRUM, TREVES, MARSIT, EIRIKSSON, NDIAYE, JESUS, XU, *juges*; M. SZEKELY, *juge* ad hoc; M. GAUTIER, *Greffier*.

Pour l'Irlande : [Voir l'audience du 19 novembre 2001, 10 h 00]

Pour le Royaume-Uni : [Voir l'audience du 19 novembre 2001, 10 h 00]

The President:
Mr Sands, you have the floor.

Argument of Ireland (continued)

STATEMENT OF MR SANDS (CONTINUED)
COUNSEL OF IRELAND
[PV.01/07, E, p. 5–7]

Mr Sands:
Thank you very much, Mr President. I was dealing with the question of cooperation under articles 123 and 197 of the 1982 Convention. I have given you a first example of what we on the Irish side say amounts to behaviour which is not cooperative in character.

I would like to refer to a second example, which has already been referred to this morning but we think it is an important point, and that is why we come back to it. That is reflected in the Secretary of State Mrs Margaret Beckett's letter of 24 October 2001, which Mr Fitzsimons has already referred to. That letter ought to be on your screens now. The material point that I want to make is in relation to the line which is highlighted in yellow on the text. This is of course the letter of 24 October 2001, as you can see at the top of the page on the right. The emphasized extract states: "It is in fact the case that the authorisation procedure for the MOX plant has not yet been completed."

I reiterate the point made by Mr Fitzsimons. We say that Mrs Beckett's statement is highly misleading and entirely out of keeping with the duty to cooperate. As Mr Fitzsimons has shown, by reference to other correspondence, when Mrs Beckett wrote that letter she, or her department for which she is responsible, knew that the MOX plant was to become operational on 23 November. That information is not included in the letter. We say that she withheld information at a crucial date from the Irish Government.

In the correspondence you will also see further letters in which Ireland, having received a copy of Freshfields' letter of 17 October, sought to provide Mrs Beckett with an opportunity to clarify the situation. Letters were sent on 30 October 2001 and a reminder was sent on 6 November 2001. Those letters which are in the annexes to the materials asked Mrs Beckett to provide Ireland with information as to the proposed start date for commissioning or operation of the plant and also asked, in relation to the language that you have there, when the authorization procedure for the plant would be completed.

I am very sorry to say that Mrs Beckett has not replied to that letter, and indeed there has been no communication from her department notifying Ireland of the proposed start date for the operation, the commissioning of the MOX plant. We do say that is a failure to cooperate and it is a very serious one in the context of this dispute and in the context of the imminence of proceedings.

That failure is reflective of other kinds of failures. It encapsulates what we say is a persistent refusal to provide material information to a friendly, littoral State. We have not been told for how many years the plant will operate. We have not been told how many international transports of spent nuclear fuel or box assemblies which will be filtering into the Irish Sea will occur or over what period of time. We have not been told how much additional radioactive material will be discharged into the Irish Sea, for example from the THORP plant, as a consequential result of the commissioning of the MOX plant.

We say those are serious failures, but there is another aspect of the letter of 24 October which I think also merits close attention. It relates to the extent to which we say the United Kingdom has not taken our views into consideration.

In the letter of 24 October, Mrs Beckett, on behalf of the United Kingdom, claims that she does not, and I quote, "understand why the Irish Government considers the United Kingdom to be in breach of the Law of the Sea Convention provisions and principles". She

says that the list of alleged breaches put forward by Ireland does not throw any light on the reasoning of the Irish Government.

We say that this is a surprising claim and we wonder whether she had to the forefront of her mind, or whether her civil servants had to the forefront of their minds, the letters that we had written on 30 July 1999, on 23 December 1999 and subsequent letters. We say that if you look at those letters, and we invite you to look at those letters, they make it abundantly clear what Ireland's concerns were and that we had gone to great efforts in an eight-page letter to set out what our concerns were.

The letter of 24 October 2001 from Mrs Beckett is very useful for our side for another reason. It confirms one important point, that the United Kingdom has not taken into account Ireland's interests. After all, and I really want to emphasize this, how can a State take into account interests and concerns which, by its own admission, it claims not to understand? We say the letters, and in particular the letter of 23 December, are clear as to what our concerns are, and we invite you to read them and to make up your own minds. But not having understood the concerns raised by the letters, and not having taken into account the interests which they reflect, we say that the United Kingdom cannot now in good faith claim to have cooperated by taking into account our views, by having coordinated, as required by articles 123 and 197 of the Convention.

What does this additional failure mean for the provisional measures phase? Ireland says that it has the right to cooperation with the United Kingdom. That right is intended to ensure that our interests, all of our interests, are taken into account in the decision authorizing the MOX plant and associated international movements. Necessarily, we say, that must happen before the MOX plant becomes operational, otherwise the duty to cooperate becomes meaningless, since our interests plainly could not have been taken into account at the crucial stage of decision making. If the plant becomes operational before the Annex VII tribunal is constituted or is commissioned, and if the award comes down in favour of Ireland, there will be no possibility that our right to cooperation could be restored in any meaningful sense.

Mr President, I have reached a point now where I can sum up. The United Kingdom says that our rights to the substantive protection of the marine environment are not engaged because the MOX plant will cause no pollution or harm within the meaning of article 194 of the Convention or the other substantive requirements of Part XII. They say that we have no right under article 206 to a proper, up-to-date and complete environmental assessment because the MOX plant is not the kind of planned activity which will cause substantial pollution or significant and harmful changes to the marine environment. They say that we have no right to expect the United Kingdom's cooperation under articles 123 and 197 beyond its participation in regional agreements and its permission to us to participate in the domestic consultations on economic justification. They say that since we have no rights, there can be nothing to preserve. That, in a nutshell, is the argument of the United Kingdom.

Those are bold claims. They undermine the very purpose of Parts IX and XII of the Convention, which were in 1982, and are even more today, of vital importance in contributing to the protection of the marine environment, which is under ever-greater threat. We say that the United Kingdom is wrong on each of the counts and we invite you to so declare by prescribing the provisional measures that Ireland has requested.

The rights which Ireland claims are real rights and they are important rights. They are substantive rights and they are procedural rights. Although each right is free-standing and gives rise, if you like, to provisional measures on its own account, they are interrelated and, looked at together in the round, they present a compelling argument for the Tribunal to give the provisional measures which we have requested.

The possibility of exercising any of these rights, as I have tried to explain, cannot survive the commissioning of the MOX plant on 23 December. As the Attorney General has

explained, Ireland has proceeded with deliberation and with care and attention throughout the period since 1993. The Attorney General also indicated that the decision to come to this Tribunal was one which was very carefully considered and was not lightly taken and that Ireland is ready to proceed expeditiously to the resolution of this dispute, through the Annex VII tribunal or by other means. That necessarily requires that neither party should take steps which could irreversibly impinge upon the rights of the other.

In conclusion, we say that the commissioning of the MOX plant is flatly inconsistent with the preservation of Ireland's rights under the Convention.

Mr President, that concludes my submissions and, unless I can assist further, I would ask that you invite Mr Lowe to the podium.

The President:
Thank you, Professor Sands.

Professor Lowe, you have the floor.

STATEMENT OF MR LOWE
COUNSEL OF IRELAND
[PV.01/07, E, p. 7–19]

Mr Lowe:
Mr President, Mr Vice-President, Members of the Tribunal, it is an honour for me to appear before you and to have been entrusted with that part of Ireland's case that addresses the question of the procedures and the preconditions for the prescription of provisional measures, Mr Sands having explained how the United Kingdom's actions violated Ireland's substantive rights under the Law of the Sea Convention, which I shall refer to as "the Convention".

The United Kingdom's Written Response begins with the bold assertion that "[t]he request for provisional measures in this case meets none of the conditions prescribed for such relief by Article 290 of the … Law of the Sea [Convention]". It is my task to explain why it is that this statement is not merely somewhat dismissive and incautious, which even our learned friends across the room might concede, but also wrong in fact and in law.

In Part 3 of our Statement of Case, which begins at page 54, we explain step by step that the jurisdictional and other conditions for the prescription of provisional measures are met.

This is a dispute concerning the interpretation and application of the Convention. The dispute does not fall within any of the exceptions to the compulsory procedures under Section 2 of Part XV of the Convention. This dispute has been submitted to an Annex VII arbitral tribunal, which is not yet fully constituted. *Prima facie*, that tribunal will have jurisdiction. The requirements of article 283 have been satisfied by the exchanges of correspondence and the meetings between Ireland and the United Kingdom over many months; and there is an imminent and serious danger of irreparable harm to Ireland's rights and of serious harm to the environment.

The British response is set out primarily in paragraphs 1 to 12 and 126 to 230 of its Written Response. The British argument seems to come down to this. First, the parties have agreed to seek settlement by a means entailing a binding decision on the matters now raised before the Tribunal by Ireland so that article 282 of the Convention requires that those other means, and not the Law of the Sea Convention procedures, be pursued; accordingly, they say that Part XV in general and article 290 in particular do not apply in this case.

Furthermore, they say that if the Annex VII tribunal were to have jurisdiction, there would be a duplication of proceedings between it and the OSPAR Tribunal; and it is implied that this duplication, and the alleged risk of inconsistent findings, is in some sense a barrier to the assumption of jurisdiction by the Annex VII tribunal.

Secondly, in any event, article 283, paragraph 1, stipulates that the operation of the 1982 Convention procedures is conditional upon an exchange of views regarding its settlement by negotiation or other peaceful means, which exchange they say has not taken place. Accordingly, Ireland may not invoke the Part XV Section 2 procedures, including article 290.

Thirdly, they say that there is no urgency in this case that would warrant the prescription of provisional measures. Fourthly, they say that in any event no measures are necessary to preserve the respective rights of the parties or to prevent serious harm to the environment.

I shall deal with each of these points raised by the United Kingdom in turn. I begin with the argument based on article 282, that Ireland and the United Kingdom have agreed to submit the dispute to some other procedure outside the Law of the Sea Convention. It is said by the United Kingdom that a dispute has been submitted to an OSPAR arbitration tribunal, and that consequently

> [t]he Annex VII Tribunal has no jurisdiction to determine a dispute which the parties have agreed through a regional agreement to submit to an alternative procedure entailing a binding decision.

That is to be found at paragraph 165 of the British Written Response. The precise wording of article 282 is, as ever, important. The article applies where there is "a dispute concerning the interpretation or application of this Convention"; that is, the 1982 Law of the Sea Convention.

There is no such dispute in this case. The claim submitted to the OSPAR Tribunal concerns not the interpretation of the Law of the Sea Convention but the interpretation or application of the OSPAR Convention and, indeed, only of Article 9 of the OSPAR Convention. The OSPAR Statement of Claim is completely unambiguous. As you will see – it appears on page 104 of Ireland's Annex 1 – the OSPAR Tribunal has been asked to order and declare:

> (1) That the United Kingdom has breached its obligations under Article 9 of the OSPAR Convention by refusing to make available information deleted from the PA Report as requested by Ireland.
>
> (2) That, as a consequence of the aforesaid breach of the OSPAR Convention, the United Kingdom shall provide Ireland with a complete copy of the PA Report, alternatively a copy of the PA Report which includes all such information the release of which the arbitral tribunal decides will not affect commercial confidentiality within the meaning of Article 9(3)(d) of the OSPAR Convention.

One document was sought. That document, as Mr Fitzsimons told you, was sought primarily in relation to the question of whether the MOX plant is economically justified as required by European law. That is the first answer to the British point. This dispute is not the same as the OSPAR dispute already submitted to the OSPAR Tribunal. Nor, indeed, is the present dispute one that could be submitted to an OSPAR tribunal.

The complaint in this dispute is, in essence, that the United Kingdom has failed to cooperate and coordinate with Ireland; failed to carry out a proper and up-to-date environmental assessment and failed to protect the marine environment, in each case in breach of its obligations under the Law of the Sea Convention. Access to the PA and AD Little Reports would now help Ireland to prepare a detailed argument concerning the economic justification and environmental impacts of the MOX plant. In that sense it would certainly assist Ireland to prepare its argument in the merits phase of the present case.

Article 9 of the OSPAR Convention was designed to be an effective means for obtaining information on the marine environment. That is why Ireland chose to use Article 9. However, OSPAR is in some respects a less effective convention when it comes to enforcing duties to cooperate and to prevent pollution. That is why Ireland chose to bring the present action under the Law of the Sea Convention, which secures Ireland's interests more effectively and more comprehensively than does the OSPAR Convention.

This is most evident in relation to the duties of cooperation between States, and in particular the coastal States of semi-enclosed seas. The very essence of Ireland's complaint is that the United Kingdom has ridden roughshod over Ireland's interests and over Ireland's patient and

persistent attempts to become involved in the detailed consideration of a very significant expansion of nuclear activities on the shores of the Irish Sea; a sea in which both States clearly have the very greatest interest. The United Kingdom has not behaved in accordance with the principles of cooperation and coordination that is expected of States in that situation. Those principles are spelt out in some detail in the Law of the Sea Convention and are there given the binding force of legal obligations. In the OSPAR Convention, by contrast, the obligations are focused less clearly upon the duties of cooperation and coordination between States, as a comparison of OSPAR, Article 2, and articles 123 and 194 of the Law of the Sea Convention will show.

The same answer applies to the United Kingdom's attempts to redirect this matter to the European Court of Justice. The MOX plant, it is true, not only leads to serious environmental problems; it also involves some questionable economics, which appears to sit awkwardly with the United Kingdom's obligations under the European Union treaties. That matter, plainly, is for the European Commission and the Euratom Commission to deal with, and not for OSPAR or the Annex VII tribunal. Other aspects are, equally plainly, not within the jurisdiction of the European Court.

Ireland is perfectly open about its strategy. The United Kingdom's handling of the MOX plant entails violations of obligations under a number of different conventions. Ireland is entitled to and will pursue them through a number of different procedures. There is no principle of international law that can require Ireland to forgo the stronger protection of the 1982 Convention and compel it to rely solely upon the OSPAR Convention, convenient as that might be for the United Kingdom. The United Kingdom, indeed, seems to think that there is something almost ungentlemanly in Ireland choosing the best tools available to it, as if, having once sought to use the OSPAR process to obtain information, Ireland must then use OSPAR, despite all its limitations, for all other environmental disputes. But why should this be so?

The Arbitral Tribunal in the *Southern Bluefin Tuna Case* noted at paragraph 52 of the Award:

> There is frequently a parallelism of treaties, both in their substantive content and in their provisions for settlement of disputes arising thereunder. The current range of international legal obligations benefits from a process of accretion and cumulation.

States frequently choose to negotiate overlapping agreements and to ratify them, thereby both accepting the burdens and claiming an entitlement to the benefits that the agreements confer. As the *Tuna* Tribunal clearly signalled, the fact that one treaty overlaps with another does not mean that it eclipses the provisions of that other. In principle, the rights and duties under the Law of the Sea Convention, OSPAR and European Union law are cumulative; and Ireland, as a State Party, may rely on any or all of them as it chooses.

Article 282 has a precise and limited role in the architecture of Part XV. It is, as one distinguished commentator put it, "a specific instance of an agreement of the parties which could exclude the jurisdiction of the [Law of the Sea] Tribunal". It is concerned with situations where a dispute has arisen, and the parties have agreed in advance how such disputes are to be settled.

If Ireland were asking an Annex VII tribunal to rule that the United Kingdom had failed in its duty under the OSPAR Convention to deliver a copy of the full PA Report, the United Kingdom would of course be entitled to say, "But we agreed that OSPAR disputes would go through the OSPAR Article 32 procedure. We have done this already. It is not a matter to be handled under the Law of the Sea Convention procedures." But what the United

Kingdom cannot say is that Ireland seeks this information through OSPAR in order to bring another quite distinct claim, and therefore that other distinct claim must also be taken under the OSPAR procedures.

The distinct nature of the Law of the Sea Convention claim is evident. That becomes clear if one imagines what would happen if the United Kingdom were to deliver up the full PA and ADL reports, which – subject to the exclusion of commercially confidential material – is all that is sought in the OSPAR proceedings. The OSPAR case might become moot, apart perhaps from the declaration of the United Kingdom's past breach of that Convention. But the dispute before the Annex VII tribunal would still be very much alive.

Ireland's complaint is, in short, that the United Kingdom has failed to cooperate and coordinate and is about to breach its duty to protect the environment of the Irish Sea. Failure to deliver the PA and ADL Reports is only one among a host of instances of non-cooperation. Obviously, the delivery of the reports could not now rewrite that history. The MOX plant would still have been planned and authorized in complete disregard of Ireland's rights to be consulted and to have its views considered by the British Government. The British Government can surely not then be allowed to say, "Very well; here are the reports, but no matter what you might think of them the plant is going to go ahead anyway." The whole point of Ireland's case is that the United Kingdom has no right to press ahead unilaterally with the project; no right to replace the prescribed processes of cooperation and coordination with what are, it must be said, somewhat patronizing assurances that Ireland has nothing to worry about.

No OSPAR tribunal has or could have jurisdiction over this broader dispute. The same is true of the other element of Ireland's claims in the Annex VII tribunal. The PA and ADL Reports will assist Ireland in making a precise quantitative case to support its claim that the United Kingdom is violating its duties under the Law of the Sea Convention to preserve the environment of the Irish Sea. But it is again obvious that the delivery of the PA and ADL Reports cannot affect the question of whether the United Kingdom is or is not in breach of those substantive duties.

It might also be noted that on the one occasion when Ireland did try to extend the scope of the OSPAR arbitration modestly to include the AD Little Report as well as the PA Report, it had short shrift from the United Kingdom. The reply was

> I should make it clear that we do not accept that Ireland has the right unilaterally to amend and extend the application for arbitration filed on 15 June last to include the information [omitted] from the ADL Report.

That is what the United Kingdom wrote on 5 September this year, presumably before it was thought expedient that Ireland should bring the entire dispute before the OSPAR Tribunal and EC or Euratom bodies, as is now suggested in paragraphs 3 and 171 of the British Written Response.

It is, then, clearly misleading to say that Ireland's claim before the Annex VII tribunal is the same as that before the OSPAR Tribunal and that Ireland should proceed only under OSPAR. That argument, essential to Britain's assertion that the Annex VII arbitration would lack *prima facie* jurisdiction, is factually and legally incorrect.

I should perhaps say a word or two about the *Southern Bluefin Tuna Case*. The British argument under article 282 would have some force if, but only if, the criteria spelled out by the Annex VII Tribunal in the *Southern Bluefin Tuna Case* were met. There, it will be recalled, Australia and New Zealand claimed that Japan was overfishing southern bluefin tuna. Negotiations over the matter proceeded under the procedures set out in the 1993 Convention for the Conservation of Southern Bluefin Tuna. Australia and New Zealand then

decided to bring a claim against Japan under the Law of the Sea Convention for overfishing southern bluefin tuna. It was in reality exactly the same dispute as was being pursued under the 1993 Convention. As the Annex VII Tribunal put it,

> it is plain that all the main elements of the dispute between the Parties had been addressed within the Commission for the Conservation of Southern Bluefin Tuna and that the contentions of the Parties in respect of that dispute related to the implementation of their obligations under the 1993 Convention.

Nonetheless, the Tribunal expressly rejected what it called the "central contention of Japan" that the 1993 Convention eclipsed the Law of the Sea Convention provisions so that there was no Law of the Sea Convention dispute. The two sets of obligations co-existed. Indeed, it was in that precise context that the Annex VII Tribunal made its remarks on the parallelism of treaty obligations.

However, the Annex VII Tribunal went on to say in paragraph 54 of the Arbitral Award that the parties to the dispute under the Law of the Sea Convention which Australia and New Zealand had brought before it,

> are the same Parties grappling not with two separate disputes but with what in fact is a single dispute arising under both Conventions. To find that, in this case, there is a dispute actually arising under UNCLOS which is distinct from the dispute that arose under the [Convention on the Conservation of Southern Bluefin Tuna] would be artificial.

Accordingly, the agreement in the 1993 Convention on how tuna disputes would be settled – that is, under the 1993 Convention procedures – prevailed and the single dispute was taken outside the scope of the Law of the Sea Convention.

The situation here is radically different. This is no doubt the reason why the United Kingdom has wisely chosen not to rely on the *Tuna* case. In our case, the OSPAR dispute is quite obviously not the same as the Law of the Sea Convention dispute. Nor, indeed, is the present dispute with that aspect of the United Kingdom's behaviour that engages – and, Ireland says, violates – European Union law. That is why it is wrong to say that the parties have agreed that this dispute should be settled under OSPAR or European law procedures. That is why this case is quite different from the *Southern Bluefin Tuna Case*. There may one day be an occasion when this Tribunal has to decide whether or not it accepts the views on jurisdiction given by the Annex VII Tribunal in the *Southern Bluefin Tuna* Award, but this is not that day.

The United Kingdom makes a further point under this article, that if the Annex VII tribunal were thought to have jurisdiction in this case there would be a duplication of proceedings between it and the OSPAR Tribunal. As a matter of fact, that is incorrect, as I have explained. The proceedings were purposefully different. But in any event, except in very limited circumstances where it is precisely the same dispute that is submitted to the two tribunals – "the same Parties grappling not with two separate disputes but with what in fact *is* a single dispute arising under both Conventions" – as the Annex VII Tribunal in *Tuna* put it, there is no support in State practice or in the practice of international tribunals for a principle analogous to the doctrine of *forum non conveniens*. If an international tribunal has jurisdiction over a matter, a claimant State is entitled to its remedy, even if there are other tribunals in which it might have chosen to pursue its case.

I turn next to consider article 283. The United Kingdom makes much of the stipulation in article 283, paragraph 1, that the operation of the Convention procedures is conditional upon an exchange of views regarding the settlement of the dispute by negotiation or other peaceful means, which exchange they say has not taken place. That is to be found in paragraphs 5 and 7 of the British Written Response.

Article 283 certainly says something close to that. There is a duty to exchange views regarding settlement of the dispute. It is not clear what is the basis of the implication in the United Kingdom's Written Response that this is not merely a duty, to whose breach a tribunal could attach what significance it thought appropriate, but rather a precondition of the operation of the compulsory procedures under Part XV, Section 2, of the 1982 Convention. The more natural reading is that the only precondition for compulsory settlement is the failure of the parties to reach a settlement of the dispute by means of their own choosing under Section 1 of Part XV. That in fact is what article 286 of the Convention says. If the Tribunal were to take that view, that alone would dispose of the British argument on article 283. But there is a more obvious and more substantial point. The obvious answer to the British argument on article 283 cries out from the evidence.

You will recall the facts. The dispute is over the United Kingdom's multiple failures to cooperate, and the impending commissioning of a plutonium plant that threatens a significant increase in the pollution of the Irish Sea, among other risks. Ireland has been trying to have the British Government engage seriously with Irish concerns over the MOX plant for several years. It is more than two years since Ireland's eight-page letter of 30 July 1999 expressly reserved the right to invoke procedures and substantive requirements under, *inter alia*, the Law of the Sea Convention. That letter is to be found in Annex 2 of the Irish submission at pages 1 to 8. It is almost two years since Ireland's six-page letter of 23 December 1999, which is at Annex 1 of the Irish submission, pages 87 to 92. It was that letter which elicited the sorry note of 9 March 2000, to which Mr Sands directed you before lunch. I remind you of the response:

> Whilst I am, of course, grateful to you for your further views and comments, I am sure that you understand why I cannot address these points in detail whilst we are still in the process of coming to a final decision on the full operation of the plant. I am also sure that you appreciate that the implications of the data falsification incident at the Sellafield MOX Demonstration Facility will have some bearing on our decisions.
>
> Whatever our final decision, we do plan to publish a decision document which will explain our reasons in full. I will ensure that you are sent a copy immediately it is published.

That was the entire response to the six-page 23 December letter in which Ireland had complained yet again at the lack of information, where Ireland had set out its concerns in detail and where Ireland had reserved its right to raise further points and "to take such measures, including legal measures, as may be appropriate."

One could, perhaps, be forgiven for thinking that the rather patrician response of the British Government signalled a less than wholehearted commitment to government-to-government cooperation.

Ireland has spent many, many months trying to draw the British Government into meaningful consultations. And then, about seven weeks ago, it became clear that the United Kingdom was determined to push on with the commissioning of the MOX plant without responding to Ireland's request for information and regardless of Ireland's concerns. Ireland

offered to exchange views regarding a settlement of the dispute, if the United Kingdom would delay commissioning the plant. The United Kingdom took the position that it would exchange views on the settlement of this dispute over its right to establish the MOX plant without prior consultation with Ireland, but only if Ireland agreed to allow the United Kingdom to establish the MOX plant forthwith.

There are two points, arising from these facts, that are to be made in response to the argument put forward by the United Kingdom on article 283. First, the obligation to exchange views has been discharged. Ireland has been trying to settle the dispute by repeatedly writing to the British Government and by meeting with the British Government. Ireland signalled the prospect of proceedings under the Law of the Sea Convention as far back as July 1999; and given the institution of the OSPAR Arbitration in June 2001, and in particular given its limited scope, the United Kingdom can scarcely claim to have been taken by surprise by the notice of the Law of the Sea Convention arbitration.

As to the second point, no one suggests that the duty to exchange views extends to a duty to reach an agreement. Nor is it suggested that any agreement on a procedure for settling this dispute was imminent in the past few weeks. Article 283 sits in Section 1 of Part XV of the Law of the Sea Convention. That duty to exchange views applies to all disputes. Those disputes may range from leisurely attempts to find an agreed continental shelf delimitation, for example, to urgent disputes over imminent and irreversible actions that cause significant harm to the environment. Common sense suggests that the length of time to be devoted to the search for an agreed procedure must differ in the two cases. Provisional measures are measures to be prescribed in cases of urgency; and there comes a point where the constraints of urgency must prevail over pointless repetitions of inflexible positions. With the imminence of the commissioning of the MOX plant, then scheduled for Friday of this week, the dispute had quite clearly, in the words of the International Court in the *Right of Passage* case, "reached a deadlock". Those were, incidentally, the words quoted by the then Attorney General of the United Kingdom in support of his request for the indication of provisional measures against Iceland in 1973.

International tribunals have been pragmatic in addressing this issue. For example, in the *Southern Bluefin Tuna Case* the Annex VII Tribunal noted that there had been negotiations between the parties which had been prolonged, intense and serious. Those negotiations had been conducted explicitly within the framework of the 1993 Tuna Convention, and yet the Tribunal still held that, and this is at paragraph 55 of the Award:

> Since in the course of those negotiations, the Applicants invoked UNCLOS and relied upon provisions of it, while Japan denied the relevance of UNCLOS and its provisions, those negotiations may also be regarded as fulfilling another condition of UNCLOS, that of Article 283 … in the view of the Tribunal, this provision does not require the Parties to negotiate indefinitely while denying a Party the option of concluding, for purposes of both Articles 281(1) and 283, that no settlement has been reached.

Ireland and the United Kingdom corresponded for months; they met face to face, all in an attempt to resolve the dispute. Yet the United Kingdom seems to suggest that unless Ireland expressly announced that its letters and discussions should be counted on the article 283 record, they should be disregarded for this purpose. International tribunals, as we have seen, adopt a rather more realistic approach. That accords better with the role of article 283 in the Convention.

Article 283 was included, according to the *Virginia Commentary*:

> …as a result of the insistence of certain delegations that the primary obligation should be that the parties to a dispute should make every effort to settle the dispute through negotiation.

Ireland has done that. The United Kingdom is now seeking to have this Tribunal turn article 283 into an artificial barrier to the operation of the compulsory procedures in Part XV of the 1982 Convention. The United Kingdom writes, paragraph 7 of its Response, that "Article 283 of UNCLOS seeks to avoid the very situation presented in this case: the constitution of a tribunal to adjudicate on disputes that might have been resolved by negotiation". That is absurd. All disputes might be resolved by negotiation. Many are not resolved by negotiation. All courts adjudicate upon such disputes. That is what courts are for. Ireland has done all that it could to achieve a negotiated solution and, when its attempts failed and the situation became urgent, it concluded that there was neither the time for further negotiation nor any prospect of success. At that point it exercised its right to invoke the 1982 Convention procedures.

Before I leave this point, it is right that I should record our appreciation of the good grace with which the United Kingdom withdrew two incorrect suggestions, in paragraph 190 and paragraph 192 of their Written Response – although we are still not satisfied that the revised paragraph 190 accurately reflects what happened at that meeting – two incorrect suggestions that Ireland has, in recent days, rejected invitations from the British Government to exchange views on the settlement of the dispute.

I turn now to the question of the urgency of the situation, the third point made by the United Kingdom. It is said that there is no urgency in this case that would warrant the prescription of provisional measures. It is common ground that urgency must be shown. In applications under article 290, paragraph 5, it is necessary to show both that the measures are urgent in the sense that one cannot await the final decision on the merits, and also that they are urgent in the sense that one cannot even await the constitution of the Annex VII tribunal, which would itself, of course, have the competence to prescribe provisional measures.

The United Kingdom proposes a threefold test of urgency. First, there must be a specified critical event. Second, there must be a real risk of harm occurring. Third, there must be a real risk of the critical event occurring before the Annex VII tribunal is itself able to act (paragraph 142 of the British Response). Quite rightly, the United Kingdom appears to accept that it is the imminence of the critical event rather than of the consequent harm that is the crucial matter. We do not argue with this general approach; but the fact that the United Kingdom considers Ireland's application to fail these three tests suggests that, once more, it has not comprehended what Ireland's case is.

What Ireland regards as the critical event is plain. It is the commissioning of the MOX plant. On 20 December or thereabouts a can of plutonium will be opened in the plant and, at that moment, the plant ceases to be a generic building and becomes a dedicated plutonium plant used for the production of nuclear fuel. Commissioning of the MOX plant, originally scheduled for next Friday, has been deferred for 27 days to 20 December – that against the background of the United Kingdom's refusal to defer commissioning until the Annex VII arbitral tribunal can be constituted and itself decide on the necessity for provisional measures. The Annex VII tribunal has not yet been constituted. There is, as yet, no agreement on the three non-Party arbitrators. There is no realistic prospect of the Annex VII tribunal being in a position to decide on provisional measures before 20 December.

The first British test – the specified critical event – and the third British test – the real risk of the event occurring before the Annex VII tribunal can act – are plainly satisfied. The

question is, does that critical event entail what the United Kingdom calls "a real risk of harm"?

The United Kingdom puts forward a novel and very limited notion of harm. International tribunals looking at provisional measures commonly refer to "action prejudicial to the rights of either party". That was the formula used in the *Great Belt* case. Or they describe the aim of provisional measures as being "…to preserve the respective rights of the Parties, pending a decision of the Court" and "to preserve by such measures the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent". The formula there was used in the case concerning the *Arrest Warrant of 11 April 2000* and in the *Cameroon and Nigeria* case.

Courts have also referred to the need to demonstrate "irreparable prejudice" to the rights in question.

Sometimes international tribunals have adopted a somewhat broader approach. They refer to the need not to frustrate the work of the tribunal. As the Permanent Court of International Justice put it in the case of *Electricity Company of Sofia and Bulgaria*, in a passage upon which the British Attorney General relied when he sought provisional measures against Iceland in 1973, the provision in the Court Statute on interim measures:

> … applies the principle universally accepted by international tribunals … to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute.

The International Court has also referred to the aim of protecting "rights which are the subject of dispute in judicial proceedings".

The essence and the rationale of this approach was captured elegantly in the statement that:

> The [International] Court, having been created … as one of a team of agencies of the United Nations having as their purpose the settlement of international disputes, cannot be expected to discharge this wide responsibility to the international community if it has not the right to expect of the parties, and the power to ensure, that during the proceedings they shall abstain from actions capable of prejudicing the execution of the Court's eventual decisions and of aggravating or extending the dispute submitted to the Court.

That statement, equally true of this Tribunal, was made by the United Kingdom in its submissions to the International Court in 1973. It was right then; it is right now: and it is this need to avoid the prejudicing of the final award on the merits, and to avoid aggravating the dispute, that is met by the prescription of specific provisional measures.

The United Kingdom invites you to read these authorities that refer to the need to preserve the rights of the parties from irreparable harm as if they referred to the need to avoid substantial injury to the interests of the parties. This is particularly evident in the move from the language of rights, which you will see in paragraph 140 of the British Response, where the United Kingdom quotes the International Court, to the language of harm, which the United Kingdom uses in paragraph 147 and following.

The way in which the United Kingdom handles the provisional measures phase of the *Great Belt* case in the International Court illustrates this point well. In paragraph 148 of the

Written Response the United Kingdom quotes from the Court's Order the words, "proof of the damage alleged has not been supplied" by Finland, as if the absence of such proof was central to the Court's decision to reject Finland's request for provisional measures. In fact – and this is evident if you read the proceedings – the allegation of economic damage was a minor argument used to buttress Finland's main argument, which was that its rights to have tall ships and oil rigs pass through the Great Belt would be infringed by the building of a bridge across the Great Belt. The Court treated the infringement of Finland's rights as the central point, and gave great weight to it, despite the fact that it was unclear whether there were any significant numbers of vessels so high that they would be impeded by the bridge and whether any such vessels could be easily modified so as to get under it.

What was crucial in the rejection of Finland's Application was an undertaking given by Denmark not to close the channel used by those ships before 1994, by which time the merits phase of the *Great Belt* case would, in the normal course of events, have been completed. As the Court said, "it has not been shown that the right claimed will be infringed by construction work during the pendency of these proceedings". It is, of course, precisely such an undertaking that Ireland is seeking from the United Kingdom in this case and which the United Kingdom is unwilling to give.

It is rights that are protected by provisional measures. Provisional measures protect rights. Ireland has a right to cooperation and coordination before the commissioning of a plutonium plant on the shores of the Irish Sea. As Mr Sands has said, that right by definition cannot be satisfied after the plant is commissioned. The same may be said for the right to receive a proper and up-to-date environmental assessment. Breach of those rights by the commissioning of the plant would be irreparable.

It is here that one comes to the issue that is central to this application – the one perhaps for which this decision of the International Tribunal for the Law of the Sea may chiefly be remembered. The United Kingdom says in paragraph 211 of its Response that "the allegations of violation of Ireland's rights are essentially procedural in nature". That is, of course, not true of all the allegations and I shall return to that point shortly. But it is the startling suggestion that somehow procedural rights are in some way matters of little significance, to be pushed lightly aside, that is the point now.

Procedural rights are rights; and it is not for the United Kingdom to decide that Ireland can do without them. Breaches of procedural duties entail legal consequences, as the *Lac Lanoux* Tribunal made clear. That Tribunal, speaking in the context of a duty to seek by preliminary negotiations terms for an agreement, and citing there the award in the *Tacna-Arica* arbitration and the Judgment of the PCIJ in the *Railway Traffic* case, said:

> one speaks, although often inaccurately, of the 'obligation of negotiating an agreement'. In reality, the engagements thus undertaken by States take very diverse forms and have a scope which varies according to the manner in which they are defined and according to the procedures intended for their execution; but the reality of the obligations thus undertaken is incontestable and 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 refusal to take into consideration adverse proposals or interests, and, more generally, in cases of violation of the rules of good faith. (paragraph 11 in the *Lac Lanoux* Award)

If the MOX plant is commissioned next month, it will be commissioned despite the long-running refusal by the United Kingdom to take Ireland's concerns seriously and to engage in serious consultations. It will be commissioned despite the fact that, as the United Kingdom

itself states, constitution of the Annex VII tribunal could not be delayed beyond 6 February next year.

The choice is between the irreparable setting aside of Ireland's rights, on the one hand, and, on the other hand, a further delay of a matter of weeks in the commissioning of the MOX plant. If the duties of cooperation, coordination and consultation set out in the Law of the Sea Convention are not upheld by the International Tribunal for the Law of the Sea in these circumstances, it is difficult to see the circumstances in which they, or the host of similar provisions in other treaties, will be upheld.

In fact as I mentioned earlier, Ireland does not, of course, allege "merely procedural" violations of its rights. Mr Sands has explained the particular importance that Ireland attaches to the performance by the United Kingdom of its substantive duties in this case. That importance is a consequence of simple facts. The Irish Sea is already one of the worst sites of radioactive pollution in the oceans, anywhere in the world. Radioactive pollution is highly toxic, it is cumulative, and it is long-lasting. In semi-enclosed seas, such as the Irish Sea, the tendency of pollution to accumulate is greater than on open ocean coasts, where major currents can sweep the pollution away.

In such a situation, international law rightly takes the view that the imperative is not simply to prevent isolated acts of substantial pollution. It is also necessary to stop the trend towards the further degradation of the environment by adding to the 250 or more kilograms of plutonium from the Sellafield plant that are already absorbed in the sediments of the Irish Sea. To paraphrase one of the Separate Opinions in the *Southern Bluefin Tuna Cases* before this Tribunal, each step in such deterioration can be seen as "serious harm" because of its cumulative effect, and that is exactly the point here.

The MOX plutonium plant will make a small but significant contribution to radioactive pollution. The MOX plant, as a commercial matter, will also enable the THORP plant to continue in operation and produce much more pollution. The MOX project will attract vessels carrying plutonium, vulnerable as all ships are to accident and to attack, into the Irish Sea; and all this at a time when new environmental measures oblige the United Kingdom to reduce concentrations of radioactive pollutants to "close to zero". Is it any wonder that Ireland felt the need to look closely at the details of the MOX plant, that Ireland takes the view that it has a right to the information and to be consulted, and to be provided with adequate environmental assessment, before the project is commissioned?

Perhaps the plant could be decommissioned and so terminate the continuing violation of Ireland's rights that would result from its commissioning. But, as BNFL put it in the letter dated 17 October 2001 (Annex 2, page 28, of the Irish submission), "[t]he cost and complexities involved in reversing the commissioning of SMP will be very significantly increased once the plutonium can has been opened and plutonium introduced into the plant processes". If, quite apart from the technical difficulty of decommissioning the plant, the costs of decommissioning are very significantly increased once the plutonium can is opened, there must be doubt as to how readily the United Kingdom would be able to comply with any eventual order that might require it to modify its plans to operate the Sellafield complex.

> … the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute.

That is how the PCIJ described the essence of provisional measures. The commissioning of the MOX plant would not only definitively violate Ireland's rights to prior cooperation and coordination; it would also plainly exercise a prejudicial effect in regard to the execution of

any decision that the United Kingdom had acted in breach of its duties in proceeding unilaterally to authorize the plant.

The final point made by the United Kingdom is that no measures are necessary to protect the respective rights of the parties or to prevent serious harm to the environment, and that the conditions set by article 290 of the Convention for the prescription of measures are not met.

That needs little comment. As we have explained in relation to the question of urgency, if Ireland's rights under the 1982 Convention to engage in consultations with the United Kingdom are not to be utterly illusory, the commissioning of the plant must be delayed. If the trend towards the concentration of radioactive pollution in the Irish Sea is to be arrested, the plant needs to be very carefully designed and operated, and we are far from sure that it is. If the increased risk of nuclear incidents is to be averted, and the risk accommodated by contingency plans from the moment that they arise, Ireland needs now to be able to coordinate its position in detail with whatever plans the United Kingdom might have.

A short delay is a minor detriment to the United Kingdom, to be balanced against the irreparable violation of Ireland's rights and a serious step towards the further pollution of the Irish Sea if there is no such delay. The conditions set in article 290 are clearly met.

That completes my submissions on behalf of Ireland. Unless I can help the Tribunal further, that closes this round of the Irish oral pleadings.

The President:
Thank you very much. The hearing is adjourned until 4.30 p.m..

Short recess

The President:
I now invite the Agent for the United Kingdom to take the floor.

Argument of the United Kingdom

STATEMENT OF MR WOOD
AGENT OF THE UNITED KINGDOM
[PV.01/07, E, p. 19–20]

Mr Wood:
Thank you, Mr President. Mr President, Members of the Tribunal, I shall describe very briefly the structure of our opening statement. The Attorney General, Lord Goldsmith QC, will begin the United Kingdom's statement this afternoon, continuing in the morning, with an introduction to our case, followed by an analysis of some important factual matters and then indicate the legal framework within which the Irish case falls to be considered.

Thereafter, Mr Richard Plender QC will cover the issues arising under article 282 and article 283 of the Law of the Sea Convention. He will also deal with issues arising under article 290 of the Convention: preservation of the respective rights of the parties, prevention of serious harm to the marine environment and the requirement for urgency pending the constitution of the arbitral tribunal under Annex VII.

In conclusion, Lord Goldsmith will deal with the exercise of the Tribunal's discretion in the matter of the prescription of provisional measures in the present case, and he will round off our opening statement with some concluding remarks.

Mr President, I now invite you to call upon the Attorney General, Lord Goldsmith, to address the Tribunal.

The President:
Thank you. The Attorney General has the floor.

STATEMENT OF LORD GOLDSMITH
COUNSEL OF THE UNITED KINGDOM
[PV.01/07, E, p. 20–38]

Lord Goldsmith:
Mr President, Mr Vice-President, Members of the Tribunal, it is an honour for me to appear before you today as Attorney General of the United Kingdom in these proceedings. This is an important case, not simply for the parties, with their sharply different perceptions of fact and law relevant to the case, but also for the Tribunal. It constitutes something of a departure from the cases that have come before the Tribunal to this point. It is, of course, an affirmation of the important place that the Tribunal now occupies, after a relatively short period of time, as one of the pre-eminent international tribunals established to facilitate the settlement of disputes between States. Its focus is on an area of international law, which the United Kingdom, as an island and a major seafaring nation, has always considered to be of particular importance and in respect of the development of which it has always sought to play an active role. It is thus a particular pleasure for me to appear before the Tribunal.

But it will not surprise you to hear that the pleasure that I have in appearing before you today, and in leading the United Kingdom team in this matter, is tinged with some dismay. Ireland and the United Kingdom have long-standing and very close relations within the framework of the European Union, bilaterally and internationally. The two States cooperate closely on a wide range of matters of mutual interest. I hasten to add, for the avoidance of doubt, that from our point of view these proceedings will not affect that close relationship. Nevertheless, as I have said, the United Kingdom has some dismay at these proceedings.

I also have to express some dismay at some of the things said today, although not, I hasten to add, by my good friend, the Attorney General of Ireland. I will have to take exception to certain other remarks by others, including a particular assertion from Mr Fitzsimons, and repeated by Mr Sands, relating to a letter from the Secretary of State, Mrs Beckett, of 24 October, which he suggested amounted to a calculated attempt to mislead Ireland and forestall the initiation of proceedings before the Annex VII Tribunal. I shall return to that observation. It was not a point foreshadowed. We had no notice that that would be said.

Notwithstanding what you have been told by Ireland today, this case is not a sober, last-ditch attempt by Ireland to resolve a long-crystallized dispute with the United Kingdom, the details of which have been the subject of close, but fruitless discussion between the parties. On the contrary, we first learned of the detail of the Irish claims on 25 October of this year, at the point at which Ireland filed its Notification and Statement of Claim requesting the establishment of an arbitral tribunal under Annex VII of the Law of the Sea Convention. Although Ireland has long made known its opposition to all activities at the Sellafield site, and had indicated in passing that it considered that these activities raised issues under the Law of the Sea Convention, it did not once spell out its concerns in a manner that would have permitted an exchange of views between the parties. We regret that Ireland has proceeded in this way.

Ireland has made much of the point that it has long expressed its views about the MOX plant, and indeed it has. It has participated in each of five rounds of public consultation that have been conducted in the United Kingdom as part of the authorization process. It raises the question of why Ireland has initiated these proceedings now. What is behind *these* proceedings before *this* Tribunal? Ireland has already, several months ago, initiated proceedings raising a number of the same issues before an arbitral tribunal constituted under the OSPAR Convention, the Convention for the Protection of the Marine Environment of the

North-East Atlantic. Key aspects of its present claim derive from European Community law, in respect of which the European Court of Justice is the agreed sole arbiter. So why *this* claim before *this* Tribunal at *this* point in time?

Regrettably, only one answer to this question is apparent, and I suspect that in a quiet moment those representing Ireland in this matter would not draw back from admitting it. *This* claim before *this* Tribunal at *this* point in time has all the hallmarks of a case that is purely and exclusively brought to try to secure the prescription of provisional measures. There is nothing else that explains the timing of the case. Had Ireland initiated these proceedings a year ago – it might have done, its claims now are not hinged on the recent decision paving the way for operation of the plant – the Annex VII tribunal would have been able to rule on the merits of the case by this point. But perhaps that would not have suited its purpose.

As we have touched upon in our Written Response, there are significant shortcomings to Ireland's substantive claims. Indeed, they are not sustainable on the merits. They will not withstand analysis. Yet at this point, at the stage of provisional measures, Ireland can simply stand and assert, as it has done repeatedly today, that there is a risk. It takes the position, as it has today, that it need say no more. Indeed, no evidence has been offered. Yet the fear of radioactive pollution resonates widely, substantiated or not. It follows, in Ireland's scheme, that there will be a powerful impulse toward the prescription of provisional measures. You may feel that the Irish case ultimately plays on emotion rather than fact and reason. It postulates a risk of radioactive pollution but deftly avoids engaging on the important question of whether any such risk really exists.

I must stress up front that it is not a situation of urgency that brings this case so suddenly before this Tribunal. We will look at this in detail tomorrow. The case that Ireland has brought before you this morning raises, in our submission, no urgent issues that require measures pending the constitution of the Annex VII tribunal.

First, the case is about radioactive discharges, but it is now becoming clear that there is no great dispute about the infinitesimally small discharges from the MOX plant. The real complaint concerns the THORP plant and it involves looking at how the quantity of fuel processed at the THORP plant might be increased at an uncertain date in the distant future. There is no urgency in this.

Secondly, the case is about the transport of MOX fuel, but it is of the utmost importance that this Tribunal realizes that there will be no shipments in or out of Sellafield that are in any way related to the MOX plant before the summer of 2002. Now, Ireland accepted this morning that the Annex VII tribunal can be constituted swiftly and I am grateful that they welcomed our contributions in this respect. Once the tribunal is constituted, it would be in a position to prescribe provisional measures if it considered them appropriate. Instead of requiring us to respond as we have had to in six days, it may even be the case that there could be a full and measured consideration of the merits by the Annex VII tribunal before the first shipment. We will return to this issue tomorrow.

It is important to realize and to emphasize why the requirement of a real showing of urgency is vital; because an applicant can hide behind the proposition that it is not necessary to prove its case at the provisional measures stage, and you have heard that several times from Ireland this morning.

The Irish Request will require the Tribunal, in our submission, to give careful consideration to issues that have not usually come before international tribunals in the context of provisional measures requests; whether the Applicant has adduced any relevant evidence in support of its claim; whether there is any imminent risk of harm; the risk of serious prejudice to the rights and interests of the Respondent. As I will show, by reference to each of these issues, as well as to others, Ireland's case is unsustainable.

There is more. What happens if provisional measures are prescribed along the lines requested by Ireland? What is the consequence of this? Well, as we have pointed out in our Written Response, the consequence of this would be potentially catastrophic for British Nuclear Fuels, the owners of the plant, and, through BNFL, for the United Kingdom as the sole shareholder in the company.

Customers may be lost; commercial opportunities carefully nurtured may disappear; competitors may step into the breach; jobs may vanish; the investment put into the development of the plant may be wasted. We are talking here about a potential cost of hundreds of millions of pounds. These issues have been widely canvassed in the press. At the extreme end of the spectrum, these proceedings, the prescription of provisional measures along the lines requested by Ireland, could serve to undermine the long-term operational viability of the MOX plant, whatever the outcome of the proceedings on the merits.

As I have said, Ireland has a long-stated objection to the existence of Sellafield at all. That is a perfectly legitimate political position to take, but, having a legitimate political position to take, one it has pushed strongly and vocally, is not the same as having a legal right to veto Sellafield.

This case, therefore, this request for provisional measures, has a *raison d'être* all of its own. The Tribunal is quite consciously being asked to prescribe measures of restraint that would have very serious economic consequences for the United Kingdom but in circumstances in which Ireland has failed to adduce even the most basic foundation of evidence in support of its claim of some kind of imminent and real risk of harm.

The United Kingdom regrets this. It regrets this because, in so far as Ireland is concerned, it hoped for something more. The authorization process concerning the MOX plant has been long and thorough. It has proved the safety of the MOX plant rigorously and at every stage, both nationally and by the European Commission after consulting independent experts. It has taken place in a form that has allowed Ireland to advance its views at every stage. Ireland has taken the opportunity to do so. Its views have been very carefully considered by those in the United Kingdom charged with taking the decision. The decision of 3 October of this year, as I will show, addresses all the points which Ireland has made. Ireland now objects to the decision that has been taken. Its objection effectively is that the United Kingdom has not followed the course urged upon it by Ireland.

Let me interpolate, if I may, and we shall return tomorrow to this. The constant repetition today by Ireland has been an assertion that we have not consulted them or not taken their concerns seriously. We have consulted. We have taken their concerns seriously. Their constant repetition does not make a falsehood true. The facts will show it to be untrue: consideration over eight years, five public consultations, meetings, letters and a fully reasoned decision at the end. We did not agree with Ireland's view, but no duty to cooperate, no duty to consult, requires that we must agree with Ireland, still less that we must cede to Ireland the right to take the decision in relation to this development in the United Kingdom.

As we progress through the case we will see, I submit, fact after fact which reinforces, rather than relieves, the point I have just made. Let me identify now a few which you may find raise this concern.

First, though Ireland now raises allegations of breach of UNCLOS as central to its concerns, why does the correspondence show so little emphasis on this aspect? Secondly, why did Ireland not produce any specificity in those claims of breach of UNCLOS, which they did belatedly raise? Thirdly, why did it decline the opportunity for an exchange of views, something, indeed, which is mandatory? Fourthly, why is there no evidence presented to contradict the clear evidence as to the effect of the MOX plant, which Ireland has had for years and has had ample opportunity to check, validate and contradict?

Why is the only material which is relied upon by Ireland relating not to the MOX plant but to existing, and in many cases historic, activities of Sellafield? Why is that material selectively chosen? The report from which they draw most comfort is "slammed", as the press put it; roundly criticized as unscientific and lacking in objectivity by the very committee which commissioned it. Mr Fitzsimons, to our surprise, described this report this morning as the European Parliament Report. This is not a report of the European Parliament. Indeed, it appears to have been disowned by the very committee of the European Parliament which commissioned it. I shall return to that.

Why do they not cite material which is plainly contradictory to their assertions? Why in particular do they make no reference in their written observations to the authoritative Opinion of the European Commission which approved the MOX plant and, despite protestations to the contrary, specifically dismissed any fears of risks to Ireland? I shall return to that later.

Indeed, why does Ireland not even refer to the findings of its own advisory Institute charged with giving authoritative guidance on all issues of public health relating to radiation hazards from nuclear industry? Because that body, as we shall show, said in terms that Sellafield did not pose a significant health risk to people living in Ireland. These are all important but unanswered questions. The true answers to them may demonstrate that this application is simply a last-ditch attempt to stop a venture which has been properly assessed and properly cleared at every applicable level.

Why is this case on analysis, we say, entirely about procedure – "procedural infractions" to use the words of my distinguished counterpart, the Irish Attorney General this morning – an alleged failure to provide information or to cooperate and singularly not about substance? Why, indeed, does the Request raise as a key issue an allegation that the manufacture of MOX represents significant risks for the Irish Sea, when that assertion did not even figure in the Statement of Claim?

Mr President, Members of the Tribunal, I shall make two final observations of a general nature which are closely related in this introductory part of our submissions. The first concerns the evidentiary burden on an applicant requesting provisional measures. The second concerns the exceptional character of provisional measures as a form of relief. We will return to both in more detail tomorrow.

Provisional measures are an exceptional form of relief. Most municipal systems have some such procedure. Many international dispute settlement mechanisms do as well. Although such procedures differ in some respects, there are common threads that run between them. One such common thread is the exceptional nature and character of provisional measures, but this point is so self-evident that it has been described as "a banal truth" by one authoritative commentator. The same commentator, Jerzy Sztucki, went on to note that,

> [it] follows therefrom [that is, from the exceptional nature of provisional measures] that the discretion in these matters is probably not supposed to manifest itself too liberally and should rather be used with restraint and prudence.

As I have said, we shall return to this element tomorrow for the purposes of identifying the substantive elements of law that are relevant to the Tribunal's consideration of these issues. But what may be usefully recalled at this point is that, with an exceptional form of this kind, a procedure by which the Tribunal can impose measures of restraint on a party without having heard it in defence of its interests on the merits, comes also a responsibility. That is, a responsibility that rests with an applicant seeking provisional measures. It is incumbent on such an applicant to adduce at least a basic foundation of evidence in support of its claim.

Often this evidence will simply emerge from the facts, as what a court will be asked to do is to restrain some conduct that is ongoing, where there is a discernible history of harm already having occurred. That, indeed, is the invariable situation faced by the International Court of Justice in the cases in which it has ordered provisional measures. Where, however, such evidence of harm does not simply emerge from the facts and history, the applicants must surely adduce sufficient evidence to persuade the court or tribunal that pre-emptive measures of restraint are warranted.

After those introductory remarks, I turn to the facts of the matter. There are three basic areas I want to cover: underlying facts, the nature of the evidence on risks and the factual answer to the allegations which are made. However, before turning to those matters I will deal with the central allegations made by Ireland about the history of the dispute. I will deal head on with them.

What that will show – I will take you through the materials in detail; I am afraid I have no option given the submissions which Ireland has chosen to make – is the following. There are two main points. First, although there are references to the UNCLOS obligations in the correspondence, the focus of that correspondence has been entirely different. It has been on the economic justification for the MOX plant under the relevant European Union obligations. But the question of whether or not there was an economic justification was a matter not for UNCLOS or the Annex VII tribunal; it was a matter for the United Kingdom domestic courts – where such a claim has been rejected so far – or for the European Court of Justice.

In the course of that question about the justification, there arose a dispute whether certain information relevant to the question of economic justification for the plant should be disclosed to the public and to Ireland. But that is an issue for the OSPAR Tribunal, which is specifically concerned with the issue of communications and information.

The second main point is that the references which were made to UNCLOS in the correspondence were never sufficiently specific to enable the United Kingdom to understand what was the essence of the Irish complaint. When the United Kingdom asked for information so that it could understand the complaint and offered an exchange of views, Ireland simply refused. That, we say, is not a substantial basis of complaint on which to move, as Ireland does, to block a major development at a potential loss of hundreds of millions of pounds and hundreds of jobs.

I turn to the record of correspondence. The first reference of any sort to the Law of the Sea Convention and MOX was in Ireland's letter to the United Kingdom of 30 July 1999. UNCLOS had by then bound the United Kingdom already for some two years, yet no prior issue had been raised by Ireland. More importantly, the reference made then is slight and non-specific. The letter is found at page 1 of Annex 2 to the Irish Statement of Case. I hesitate to ask you to look at it now. Nevertheless, let me highlight quite specifically certain elements of this letter that do warrant consideration from the perspective of these particular proceedings.

"By way of introduction", that letter states, "the Irish Government wishes to stress that it remains strongly opposed to any expansion of nuclear activity at Sellafield, and to the proposed MOX plant in particular".

But the whole purpose of the letter is to raise issues about the economic justification for MOX. When you do have a chance to see the letter, you will see that time and again the words "economic" and "costs" appear. The conclusion to the letter makes clear its purpose. Each bullet point in the conclusions relates to economic considerations and questions. There are in that letter but two references to UNCLOS. First, there is a specific statement on the Law of the Sea. Perhaps I may be allowed to quote this single statement:

> What is apparent is that the British Government is provisionally minded to authorise significant increases in transportation of radioactive materials by sea. These would inevitably pass by or in proximity to Ireland. The British Government will be aware that for a zone of up to 200 miles around its coast Ireland has established an exclusive fisheries zone whereby it has jurisdiction *inter alia* in respect of the protection and preservation of the fisheries resources (in accordance with Article 56(1)(b)(ii) of the 1982 UN Convention on the Law of the Sea).

However, the reference is purely to show that such an obligation might add to the economic costs. I note immediately that there is no reference, in either the Statement of Claim or the Request filed by Ireland in connection with the present claim to that article, article 56, paragraph 1(b)(ii) of UNCLOS, or any dispute concerning Ireland's Exclusive Fisheries Zone.

The second reference is a bare reservation of rights. The letter goes on to state: "[the] Irish Government … reserves its rights to invoke … procedures and substantive requirements under …". There then follows a list including European Community directives, the Espoo Convention on Environmental Impact Assessment in a Transboundary Context, the OSPAR Convention and, I quote here the precise language used in the letter, "the 1982 UN Convention on the Law of the Sea". However, no provision and no detail is given here or anywhere else in the letter except the now irrelevant reference to article 56, paragraph 1(b)(ii).

Over the next two years there is much correspondence. I have counted at least 12 letters. Most are in Annex 2 to the Statement of Case. But until the very month the claim was filed, only one referred to UNCLOS. That was the letter of 23 December 1999. You have heard something of this letter today. The reason Ireland keeps returning to this letter is because it is the only one to raise any UNCLOS issue until the very month in which these proceedings were commenced. It is set out at Annex 3 to Ireland's Notification and Statement of Claim. It does, indeed, refer to some of the specific provisions of UNCLOS. Thus, addressing what Ireland alleges is the inadequacy of the original BNFL environmental assessment, Ireland sets out a list of "new EU and international obligations" which it says are relevant to this matter.

Amongst them is a reference to articles 192 to 194 of UNCLOS, addressing the obligation to protect and preserve the marine environment; to article 207 of UNCLOS, which provides that States shall adopt national measures to prevent and reduce marine pollution from land-based sources; and to article 206 of UNCLOS, which provides that States must assess the potential effects of activities that may cause substantial harm or significant and harmful changes to the marine environment. Ireland calls on the United Kingdom to provide a new environmental assessment, but it makes no assertion, still less produces any evidence, that the earlier assessment was wrong.

That is it; nothing more. The letter sets out a list of provisions: some European Community, some OSPAR, some UNCLOS and some from other sources. It does not particularize specific claims under UNCLOS with any clarity. It raises no claim, for example, of a failure to cooperate, though that seemed to be Ireland's principal claim in its written pleadings.

Ireland complains that its request to produce a new environmental assessment was not accepted. That fact was clear to Ireland, as they have said, nearly two years ago. No attempt was made to engage the Annex VII tribunal, or any other tribunal at that time, instead of waiting until the last moment and then hiding behind the absence of a need to prove a case.

It was almost another two years before Ireland raised UNCLOS again. That was not even in writing but at a meeting between the Agents of the parties in London on 5 October this year, called to discuss procedural issues relating to the OSPAR arbitration commenced four months before. At this point Ireland, without specifying the details of its complaint, indicated that it considered that a dispute existed with the United Kingdom under the Law of the Sea Convention. I think that this far it is common ground that no detail was given of the specific UNCLOS issues that Ireland proposed to pursue.

Not until 16 October of this year was there any written statement. That is at Annex 1 to Ireland's Statement of Case. Here, Ireland states that it considers that the United Kingdom is in breach of its obligations to protect and preserve the marine environment as required by articles 192 to 194; that it has failed to take steps to prevent and eliminate pollution from land-based sources; and that it has failed to assess the impact on the marine environment of the MOX plant. As you will see, most of the letter focuses on other measures, notably European Community directives and the OSPAR Convention. Again, specific details of Ireland's allegations are not given.

The United Kingdom Secretary of State responded to that letter two days later. It is set out in Annex 1 to the United Kingdom's Written Response. In this letter the Secretary of State indicated that the United Kingdom had, indeed, considered the radiological risks associated with the manufacture of MOX fuel. She then went on to state:

> the UK is anxious to exchange views on the points you raise in your letter as soon as possible. In order to do so meaningfully, we need to understand why the Irish Government considers the UK to be in breach of the provisions and principles identified in your letter. We will be pleased to exchange views with you on alleged breaches of the UK's obligations with respect to the environment.

Ireland responded to that letter a few days later. That is set out in Annex 2 to the United Kingdom's Written Response. The operative part states:

> Ireland's position concerning the incompatibility of the Sellafield MOX plant with the United Kingdom's international obligations is set out in my letter of 16 October, as well as in earlier communications, including my letter of 23 December 1999 addressed to your predecessor. Ireland's position has also been set out repeatedly, since 1994, in formal submissions relating to the MOX authorisation process.

The letter continues:

> The object of any exchange of views pursuant to Article 283 of [UNCLOS] is to achieve a settlement of the dispute between Ireland and the United Kingdom concerning the interpretation and application of UNCLOS by negotiation or other peaceful means. No such settlement will be possible so long as the MOX plant remains authorised.

The United Kingdom again responded, the following day – the letter is at Annex 9 to Ireland's Statement of Claim – affirming its willingness to exchange views on the matter and noting that the Irish correspondence "simply lists alleged breaches" and "did not throw any light on the reasoning of the Irish Government".

But Ireland continued in its refusal to give detail prior to proceedings or to exchange views. The next occurrence was the filing by Ireland, the following day, of its Notification, Statement of Claim and Request for provisional measures. It is at that point that the United Kingdom was first apprised of some of the detail of Ireland's claims.

While I am dealing with this letter I must return to the assertion from Mr Fitzsimons and Mr Sands relating to the letter from the Secretary of State, Mrs Beckett, of 24 October 2001, the day before the proceedings commenced, which Mr Fitzsimons suggested amounted to a calculated attempt to mislead Ireland and forestall the initiation of proceedings before the Annex VII tribunal. This amounts effectively to an allegation of bad faith. There is a reference, I interpolate, in the written pleadings to the fact that information had not been provided but no prior notice that an allegation would be made of being deliberately misleading or of bad faith. I am sorry, but that notice was not given.

Let me say immediately that the Secretary of State was entirely accurate. The letter stated that "the authorisation [procedure] for the MOX plant has not yet been completed". I refer you back to the letter from BNFL's lawyers of 17 October 2001, referred to this morning, which was the basis of the Irish allegation. The operative part of that letter refers to "a commissioning programme". It also referred to the "initial stages of plutonium commissioning".

That a further stage in the commissioning process is still to come is evident from another BNFL letter attached by Ireland, this time pages 30 and 30A of its Annex 2. That letter affirms that further authorizations are still required today from the Nuclear Installations Inspectorate before final commissioning can take place.

It is also unworthy to suggest that Ireland was somehow misled into delaying the proceedings in this case. Ireland had already, on 23 October, signalled its intentions by a letter to start proceedings before the Annex VII tribunal. The letter from the Secretary of State can therefore hardly have been a calculated attempt to forestall such action, which in any event took place the following day. An allegation in this Tribunal of bad faith by a senior politician is, in my submission, to be regretted. I hope that Ireland will reflect and that this particular allegation will be withdrawn by Ireland when it comes to make its rejoinder tomorrow.

We will come back tomorrow to address the legal issues relevant to the point under article 283. However, let me simply observe that the requirement to exchange views, or to consult, as a prior condition to the initiation of legal proceedings, is a feature of a number of international dispute settlement arrangements. It is set out in article 283 of UNCLOS and found, for example, also in Article 4 of the Dispute Settlement Understanding of the World Trade Organization and in Articles XXII and XXIII of GATT.

There are a number of reasons for such provisions. First, they afford an opportunity for parties to a dispute to attempt to resolve the dispute in a low-key manner by agreement, which is always a desirable outcome. Secondly, where a negotiated settlement is not possible, the consultations will have the effect of crystallizing the dispute between the parties. Thirdly, particularly in circumstances in which other States may also have an interest, this crystallization of issues, followed in some instances by a further formal obligation upon a claimant to identify the issues in dispute with a reasonable degree of specificity, enables other States to consider whether they may also have an interest in the matter. Fourthly, and perhaps most importantly, there is a general principle of fairness in litigation that requires a claimant to specify a claim in enough detail to enable the respondent to have a clear understanding of the nature of the claim that it is required to defend.

Such is the importance of these considerations that a panel of the World Trade Organization, following guidance on the matter from the Appellate Body, has recently determined that a claimant cannot proceed with a claim before a panel on an issue that has

not been the subject of specific notification and consultation. The case concerned a complaint by Mexico against anti-dumping measures taken by Guatemala on Grey Portland cement. Citing Article 4(5) of the WTO *Dispute Settlement Understanding*, which provides effectively that WTO Members should attempt to obtain a satisfactory adjustment of the matter in dispute in the course of consultations before resorting to panel proceedings, the Panel stated as follows:

> … Mexico's application does not meet the requirements of Article 4 … since Mexico has failed, in this process, to hold consultations with Guatemala concerning the provisional measure [in issue] per se as required for the Panel to be able to examine it … At the same time, the failure to hold such consultations has made it impossible for third parties to exercise their rights … In addition, Article 6.2 … emphasises the substantive nature of the consultation procedure as a prelude to examination by the Panel of the complainant's claims; in other words, it leads to the examination by the Panel itself of the specific measures at issue on which consultations have been requested.

We, of course, accept that the WTO regime procedures constitute something of a special regime but there are important similarities between that regime and the one we are concerned with here under Part XV of UNCLOS. Article 283 of UNCLOS does impose an obligation to exchange views. Article 286 of UNCLOS makes it clear that this requirement is a necessary precondition to the application of the dispute settlement procedures in Section 2 of Part XV, including, for present purposes, access to this Tribunal and to the Annex VII Tribunal. In our submission, the principle at the heart of the WTO Panel's decision in the *Guatemala – Grey Portland Cement* case is relevant to the obligation to exchange views in article 283 of this Convention.

Ireland in its Statement of Case makes much of the general obligation upon States to cooperate in good faith. It cites the *Lac Lanoux Arbitration* and dicta of law of the sea cases before the International Court of Justice, the *North Sea Continental Shelf* case and the *Fisheries Jurisdiction* case. What must avail Ireland must avail the United Kingdom, too. Ireland has been nursing this case, it says, for years. It must, at the very least, specify its claim in sufficient detail to the United Kingdom to enable the United Kingdom to have an accurate appreciation of Ireland's concerns. This requires not simply the enumeration of articles of UNCLOS upon which it might rely at some future date but also some basic description of the substantive issues with which it is concerned.

I am conscious that between my submissions on this point and those of Ireland earlier today, the Tribunal may feel that it is faced with duelling claims of failure to cooperate. What is clear, however, I suggest, when you examine the record, is that the United Kingdom has only very recently been presented with anything approaching a particularization of Ireland's claims. Ireland, asserting that no settlement would be possible "as long as the MOX plant remains authorized", has refused all invitations to exchange views.

I now want to move on to the more technical part of my presentation. As the obvious way in, I just want to give a brief explanation of the nature and purpose of a MOX plant and to clear up a few obvious misconceptions at the same time. I am then going to look at four issues in the following order: first, the regulatory framework, by which I mean the extensive international, European and national regulations that apply to the operation of the MOX plant and the transport of any MOX fuel; second, I am going to examine the history of events leading up to the decision of 3 October, which is really just the history of how that extensive international, European and national regulatory framework was implemented; and, third, I

will turn to the results of that implementation. I shall examine what the relevant statements and submissions, that were carried out in accordance with the applicable regulations, show. At the same time, I will have to look in some detail at the heart of allegations by Ireland as to risk. Finally, I will invite you to look at the other side of the coin, the harm that the United Kingdom is likely to suffer if provisional measures are ordered.

With regard to the technical background, the Tribunal will now be aware that spent plutonium can be reprocessed and once reprocessed, it can be recycled into the manufacture of MOX fuel. I would stress a MOX plant is not a reprocessing plant. It is a fuel-manufacturing facility, in which the fuel is manufactured by the mixing of plutonium dioxide and uranium dioxide powders. Ireland blurs the boundaries between the MOX plant and the reprocessing facilities at Sellafield, particularly the THORP plant. But they are quite distinct and it is disingenuous otherwise not to accept that.

Another important element is that the process of manufacture is an essentially dry process. It involves the mixing of powders. It follows that this is not a case where the Tribunal has to be concerned with harmful radioactive liquids being discharged or seeping into the Irish Sea.

There is another very important point, and it is directly relevant to the assertion of risk by Ireland. If MOX does not operate, the plutonium which is being separated at Sellafield will still have to be transported from Sellafield back to the customer or a third country. So there would still be movements of radioactive material. But they would be in a form which is not as safe as the MOX ceramic pellets. Mr Justice Collins of the English High Court, in his judgment (Annex 9 to our Written Response), said:

> It has been known for some time that nuclear reactors can operate efficiently using a fuel called MOX, which is a mixture of plutonium oxide and uranium oxide. The manufacture of MOX enables the reclaimed plutonium to be recycled. This has the advantage of reducing the amount of stored plutonium and saving the use of fresh uranium so that the environmental hazards of mining new uranium can be reduced. In addition, it avoids the need to transport the plutonium back to the customers or for reprocessing in a third country. MOX fuel in the form of what are known as ceramic pellets is said to be less attractive to terrorists and safer than plutonium (which is transported in the form of plutonium oxide powder).

MOX is also a well-established process. Nuclear reactors have operated on MOX fuel for over 30 years. As Ireland says in its Statement of Case, the MOX manufacturing process is "relatively straightforward". That is a fair assessment and so, on an unusual note of harmony, I move on to the first of the four remaining issues, which is the regulatory framework.

I want to make reference to four particular aspects: the national requirements – which, as you will see, are themselves dictated by international obligations –, the European Community obligations, the international standards protecting the safety of transport, and the specific agreements relating to the Irish Sea in OSPAR. Firstly, as to the national requirements, as you will hear, there are three separate processes of authorization required at the local, national and European level, and I will be showing later how these processes were carried out and entirely satisfied.

First, BNFL had to apply to the local planning authority, Copeland Borough Council, for planning permission. A key part of the process was a requirement for BNFL to produce an environmental statement, that is a statement to identify, describe and assess the likely

significant effects on the environment that might be brought about by the construction, operation and eventual decommissioning of the MOX plant. The obligation to have such an environmental statement arose as a result of European law.

Another key part of the planning application process was the need for wide public consultation. Ireland responded in that process of consultation. The planning permission was, in fact, granted on 23 February 1994.

The second requirement relates to the disposal of radioactive waste from any nuclear site in England and Wales and is regulated under an act called the Radioactive Substances Act 1993. There is a national agency, the [Environment] Agency, which has the power, subject to directions of the Secretaries of State, to grant or refuse applications for discharge authorizations.

In November 1996, BNFL applied under that Act for variations to its existing authorizations for the Sellafield site as a whole. Following that application, the Environment Agency asked BNFL to provide information specifically on the MOX plant, which it did.

In November 1998, the Authority issued a provisional or proposed decision, but referred that proposed decision in respect of the plutonium commissioning and full operation of the MOX plant to the relevant Secretaries of State. The Environment Agency – and you have the document which I will come to – concluded that no additional limits to the Sellafield discharge authorizations were required in order for the MOX plant to be commissioned and operated since the plant's discharges could be accommodated within the existing limits in the discharge authorizations.

Directive 29 of 1996 of the [Treaty establishing the] European Atomic [Energy Community] – that is Euratom – provides by Article 6(1):

> Member States shall ensure that all new classes or types of practice resulting in exposure to ionizing radiation are justified in advance of being first adopted or first approved by their economic, social or other benefits in relation to the health detriment they may cause.

That is the process of economic justification which took place over the last three years and it is by the decision on 3 October this year that the relevant Secretaries of State decided that the manufacture of MOX fuel was justified in accordance with Article 6(1).

Thirdly, with regard to the European regulatory framework, Article 37 of the Euratom Treaty requires Member States to provide to the Commission information relating to any plan for the disposal of radioactive waste. This is to enable the Commission to determine whether the implementation of the plan is liable to result in the radioactive contamination of the water, soil or airspace of another Member State. The objective of Article 37 is to forestall any possibility of radioactive contamination of another Member State.

On 2 August 1996, in accordance with its obligations under Article 37, the United Kingdom supplied the European Commission with data relating to the disposal of radioactive waste from the MOX plant.

The Commission is required by the Treaty to consult a group of experts. They are appointed from among scientific experts and, in particular, public health experts. They advise the Commission on laying down standards within the Community for the protection of the health of workers and the general public against the dangers arising from ionizing radiation.

I shall return to the very important Opinion of the Commission. I say at this stage that it reached a clear and unambiguous conclusion showing that Ireland's fears are ill-founded. They concluded that the implementation of the plan for the disposal of radioactive waste from the plant, both in normal operation and in the event of an accident, is not liable to result in

radioactive contamination, significant from the point of view of health, of water, soil or airspace of another Member State.

I turn then to the international standards for transport. They apply to transports to and from Sellafield. They provide assurance that the public is protected from risk. The transport of radioactive materials is, as you would expect, stringently regulated in the United Kingdom by the competent regulatory bodies in accordance with the compulsory requirements of the relevant international organizations. For transports by sea, the relevant requirements are those of the International Maritime Organization. All sea transports undertaken by BNFL are carried out in full compliance with the IMO standards.

The transport of hazardous materials by sea is also governed by the International Convention for the Safety of Life at Sea. That incorporates the International Maritime Dangerous Goods Code which covers all categories of hazardous materials, including radioactive materials. For the sea transport of such radioactive materials that Code incorporates a separate specific Code which was established in coordination with the IAEA. It is called the International Code for the Safe Carriage of Packaged Nuclear Fuel, Plutonium and High-Level Radioactive Wastes on Board Ships. This sets out mandatory requirements concerning the carriage of radioactive materials. This is called the INF Code.

The INF Code applies to all new and existing ships engaged in the transport of INF Code materials. Specific regulations in the Code cover a rage of issues including damage, stability, fire protection, temperature control of cargo spaces, structural considerations, cargo securing arrangements, electrical supplies, radiological protection equipment and emergency planning.

I turn finally to the OSPAR Convention. That is a regional convention for cooperation in respect of the law of the sea of the kind contemplated in article 197 of UNCLOS. Mr Plender will return to this tomorrow. This is not primarily concerned with regulation of radioactive emissions, but Article 1(4) of Annex I says this:

> When adopting programmes and measures in relation to radioactive substances, including waste, the Contracting Parties shall also take account of:
> a. the recommendations of the other appropriate international organisations and agencies;
> b. the monitoring procedures recommended by these international organisations and agencies.

That is precisely what the United Kingdom has done and continues to do, as has been shown. One complaint never made by Ireland is that the United Kingdom has failed to comply with Article 1(4) of Annex 1 of OSPAR.

I turn now to the second of the four main issues, and that is the long history of the process of authorization of the MOX plant. It is an eight-year process during which, at every step, the United Kingdom has, as a matter of course, ensured that all the environmental and other requirements for the construction and operation of the MOX plant have been satisfied.

Much of the history this Tribunal already knows. Let me just take you briefly through the steps in the authorization process and when I have done that I want just to go back and look at some of the material in more detail. I will address the arguments of Ireland in that context.

With regard to step 1, in 1993 BNFL sought permission to construct the MOX plant. It presented its Environmental Statement as required by European and national law. Permission was granted in early 1994. With regard to step 2, the Article 37 General Data was submitted by the United Kingdom, the Opinion of the European Commission – a favourable

opinion – was given in early 1997. Then step 3, also in 1997: BNFL made an application to the Environment Agency in relation to the justification of the MOX plant as required under the Euratom Directives. Then step 4, a first round of public consultation, lasting eight weeks, was conducted by the Environment Agency. Step 5, in response to concerns that there was insufficient information on the economic case for the MOX plant, the Environment Agency commissioned an independent consultant's report. That report was released for public consultation in December 1997, subject as you have heard to the excision of certain commercially confidential information. Step 6, a second round of public consultation then took place in early 1998. Step 7, following that, in October 1998 the Environment Agency issued its *Proposed Decision* to the effect that the plutonium commissioning and full operation of the MOX plant was justified. This is an important document. I will have to return to it. You may just like to note now that Ireland is listed as one of the consultees. Steps 8 to 11, I summarize: further rounds of public consultation took place in September 1999, March 2001 and August 2001, with a further independent report on the economic case being commissioned by the Secretaries of State. Step 12, on 3 October 2001, the decision authorizing the commissioning of the MOX plant was made.

It is obviously an important document. You will find it at Annex 4 to our written submissions. It shows how the concerns raised in the public consultation were considered and responded to. Can I just identify, so that when you look at the document you can see it, the areas that were covered: environmental issues (Annex 1, paragraphs 6 to 14); health and safety issues; implications for plutonium and uranium; security issues – terrorist attack and so forth; transportation issues; wider nuclear issues; local issues; economic issues; the assessment of the independent consultant; trust issues - and that relates particularly to the falsification episode of which you have heard; international and other issues and issues relating to the decision-making process. These are the issues of concern to Ireland.

By way of postscript I should add that an application for judicial review of the decision was made to the High Court in London by two environmental organizations, Friends of the Earth and Greenpeace, which advanced arguments not dissimilar at least to some of those arguments now advanced by Ireland. That was dismissed on 15 November of this year, although it is subject to an appeal later this month.

This is the history, a history of the implementation of European and national regulations. With that in mind I can now turn to my third main issue, the results, as it were, of implementation, the impacts of the MOX plant as shown in the Environmental Statement, the Commission Opinion and other documents.

I want to make two central points. First, the operation of the MOX plant has been the subject of detailed and rigorous scrutiny by the national and international bodies who are charged to assess its safety and, secondly, it has been shown, and indeed I will say it is the case, that the plant poses no risk whatsoever to the marine environment of the Irish Sea.

I should add up front that the material that I will direct the Tribunal's attention to has not been prepared for the purposes of this hearing. It is material in the public domain that Ireland has had access to for many years. It is no answer for Ireland to hide behind assertions that the information on risk is inadequate or out of date. It has had many years to check the key data on radioactive discharges and to validate or contradict those figures. It has not done so. The fact that it still does not do so is the clearest indication, we would submit, that the data is correct.

As I go through the key documents, I will try to highlight where the data may be found so that the Tribunal can see it is there, out in the open, and has remained unchallenged for so long.

In essence, Ireland's argument has five steps: manufacture of MOX fuel is a dangerous process; the MOX plant is next to the sea and there will therefore be related

transports by sea; operation of the MOX plant will lead to harmful discharges; operation is due to commence around 20 December 2001; and provisional measures are therefore needed to stop the discharges.

It follows that Ireland's case really is about harmful radioactive discharges. The Tribunal is not concerned with other forms of pollution. Ireland's case on the facts goes nowhere unless it can show that the manufacture of MOX fuel involves harmful radioactive discharges, that harmful radioactive discharges make their way into the sea. It must show both of those but Ireland can show neither.

Let me start with the question: does the manufacture of MOX fuel at the MOX plant involve harmful radioactive discharges? The short answer is: it does not.

Of course, my starting point is that the operation of the plant, like any other nuclear installation in the United Kingdom, is subject to stringent regulation. That applies equally to the transport of the MOX fuel to the end customer.

As I have said, as a first step, in order to obtain permission to construct the MOX plant, BNFL had to prepare an environmental statement. The Statement is at Annex 6 to the United Kingdom's Written Response. It shows – and this is what has been in the public domain since 1993 – low-level radioactive liquid discharges from MOX will be negligible (para. 4.37 and 5.49); low-level radioactive gaseous discharges from the MOX plant will be insignificant (para. 5.50); overall, the radiological impact of discharges from the MOX plant will be insignificant. There will be an insignificant effect on flora and fauna. Fourthly, transport of the MOX fuel is to be in containers subject to tests, including a rigorous regime of impact on to an unyielding target followed by all-engulfing fire – during which the containment system must remain leak-tight to the limits prescribed by the International Atomic Energy Agency.

It follows that, at the earliest stage, the issue of whether or not the MOX plant would lead to harmful radioactive discharges was being considered in the context of both plant operations and transport of MOX fuel. These are the two issues on which Ireland now focuses, as if they had never been given any consideration before. I know that Ireland says the Environmental Statement is inadequate or out of date. I will come back to that. But what it does not say is that the Environmental Statement, which contains a considerable amount of data on the discharge of radioactive emissions, is wrong, and yet it has had eight years to find the flaws.

I move on to the next important stage in the regulatory process, the Article 37 approval. The Commission has to consult the "Group of Experts". They are scientific experts appointed by the Scientific and Technical Committee under Article 31 of Euratom, and Ireland has an expert on this Committee.

The "General Data" provided by the United Kingdom under Article 37 of Euratom is at Annex 10 of our Written Response. It contains, again, data on radioactive discharges. The data have not been challenged by Ireland.

Ireland says that the assessment of the impact of the MOX plant has been inadequate. It says that there has been no examination of accidents or of issues such as topology of the Sellafield site, its geography, its geology and seismology, hydrology, meteorology. If one turns to the United Kingdom's Article 37 "General Data" at Annex 10 of our Written Response, you see: "Geographical and [Topographical] Situation of the Site"; "Geology – Seismology"; "Hydrology"; "Meteorology and Climatology"; "Natural Resources" – all of the issues are dealt with.

At section 6 of the General Data, the United Kingdom sets out data on what is called "Unplanned releases of radioactive effluents". That is precisely a section dealing with the consequences of accidents at the MOX plant, including consideration of what are called euphemistically "Extreme External Events", including earthquakes and aircraft impact. The

impact of a reference accident is looked at in detail, and I quote, "it is the worst case potential fault condition (having the greatest release of radioactive material) which is considered credible". As appears from page 36 of the General Data, the radiological consequences of the reference accident were considered with specific reference to Ireland.

How then did the Commission respond? On 25 February 1997, the Commission gave its Opinion. It is a particularly important document and I would like you to turn to this Opinion, if you would, in the Annexes at tab 3 in the first volume of the Annexes to the Written Response, or look at the document, if you would be so kind, later.

Let me just go through the conclusions one-by-one. Conclusion (a):

> The distance between the plant and the nearest point on the territory of another Member State, … Ireland, is 184 km.

This shows that Ireland was being considered up front by the European Commission.

Conclusion (b):

> Under normal operating conditions, the discharges of liquid and gaseous effluents will be small fractions of present authorized limits and will produce an exposure of the population in other Member States that is negligible from the health point of view.

That deals with liquid and gaseous effluents under normal conditions but there is no shade of ambiguity about those conclusions. The discharges are small fractions of authorized limits; the exposure to other Member States – notably Ireland – is negligible.

Conclusion (c) deals with solid wastes. Again, there is no suggestion of a problem here:

> Low-level solid radioactive waste is to be disposed to the authorized Drigg site operated by BNFL [plc]. Intermediate-level wastes are to be stored at the Sellafield site, pending disposal to an appropriate authorized facility.

We have dealt with normal conditions, but conclusion (d) deals with accident situations:

> In the event of unplanned discharges of radioactive waste which may follow an accident on the scale considered in the general data, the doses likely to be received by the population in other Member States would not be significant from the health point of view.

The Opinion was therefore comprehensive. It dealt with liquid emissions, gaseous emissions, solid wastes, accident conditions, and in each case, it found that there was no risk to other Member States. I therefore turn to its overall conclusion. It is so important that I read it in full, although it is only a few lines.

> In conclusion, the Commission is of the [opinion] that the implementation of the plan for the disposal of radioactive wastes arising from the operation of the BNFL Sellafield [MOX] Plant, both in normal operation and in the event of an accident of the [type and] magnitude considered in the general data, is not liable to result in radioactive contamination, significant from the point of view of health, of the water, soil or airspace of another Member State.

There is no significant radioactive contamination from the point of view of health, of water, soil or airspace of another Member State. That opinion could not be more at odds with Ireland's allegations of risk to the Irish Sea.

As I have said, the European Commission's Opinion does not represent the end of the story in so far as the regulatory process is concerned.

I have already referred to the justification exercise. I want to dwell for a moment on the Proposed Decision of October 1998, taken within the context of that exercise, to the effect that the plutonium commissioning was fully justified.

The Proposed Decision is important for three reasons. First, it shows how the United Kingdom considered and addressed the issues raised in the preceding public consultations, including issues raised by Ireland. Second, it sets out in a readily accessible way the applicable regulations in terms of radioactive discharges, and then evaluates the discharges in the light of those regulations. Third, importantly, it shows how data on radioactive discharges has been in the public domain for years and has not been challenged by Ireland.

Let me just focus, if I may, on those last two points because it is crucial that the Tribunal understand, if I may say so, that the European Commission's Opinion is entirely consistent with the objective facts. I must just introduce two technical terms: first, something called the "sievert". That is, a unit of measurement, as you may well know, of radiation doses. A millisievert is of course one-thousandth of a sievert. A microsievert is one-millionth of a sievert.

The second is something called the "critical group". That is the notional group of people who would be most exposed to the relevant source of radioactivity.

With those two things in mind, the Proposed Decision shows a number of things. May I go through these and perhaps conclude on this, Mr President?

First, the average yearly radiation dose to members of the United Kingdom population from natural background sources is 2.2 millisieverts. That is 2.2 thousandths of a sievert.

Second, and I will come to the document that I have asked to be shown to you at this point, if I may, the International Commission on Radiological Protection recommends that the radiation dose to members of the public from man-made sources should not exceed 1 millisievert per year – one thousandth of a sievert. In so far as the United Kingdom is concerned, this is less than one-half of the average yearly radiation dose from natural background sources.

That recommendation, thirdly, was implemented in Directive 96/29/Euratom of 13 May 1996. The relevant parts of this Directive have been implemented in United Kingdom legislation. In fact, the United Kingdom standards are even more stringent because, pursuant to the recommendations of our National Radiation Protection Board, the exposure to members of the public from a single new source should not exceed 0.3 millisieverts, that is three-tenths of a thousandth of a sievert.

How then does radiation from the MOX plant compare with these standards? Was the European Commission right to conclude that the discharge of liquid and gaseous effluents from the MOX plant would be small fractions of authorized limits?

The radiation dose from the MOX plant is so small that it has to be measured in small fractions of microsieverts, i.e., fractions of a millionth of a sievert.

With respect to gaseous discharges from the MOX plant, the yearly radiation dose to the critical group is 0.002 microsieverts, that is two-thousandths of a millionth of a sievert. This is less than one hundred thousandth of the United Kingdom standard.

A dose to the critical group from liquid discharges will be even smaller. The dose is 0.000003 microsieverts per year – three-millionths of a millionth of a sievert. This is

precisely one hundred millionth of what the United Kingdom standard would allow. As I have said, the United Kingdom standard is more stringent than the European standard.

You can see the document, which I asked to be put up on the screen, and I will read three short passages from A3.13. This was produced in October 1998, and Ireland has had this document and has had every opportunity to challenge, to contradict or to verify it, if it wishes to do so.

> "MAFF has assessed the data and estimated the radiation dose to the most exposed group for gaseous discharges to be two thousandths of a microsievert per year … and the dose to the most exposed group for liquid discharges is estimated to be three millionths of a microsievert per year …
>
> The Agency notes that the radiation doses assessed by MAFF are extremely small and have negligible radiological significance.

The final sentence of that paragraph reads:

> It may be noted that the assessed dose due to gaseous and liquid discharges from the MOX plant is less than one millionth of that due to natural background radiation.

Mr President, Members of the Tribunal, that is the fact in relation to MOX. Ireland has had every opportunity to dispel and dispute it and it has not done so. Perhaps I may make the final point: what about the effect on Ireland? Those were all figures for the United Kingdom. Ireland is 184 kilometres away.

The exposure to the critical group in Ireland to gaseous discharges from the MOX plant is 0.0004 microsieverts per year – four hundred thousandths of a millionth of a sievert. That is one-fiftieth of the exposure of the UK critical group. The exposure of the critical group in Ireland to liquid discharges from the MOX plant is also considerably less than the exposure to the United Kingdom critical group of three millionths of a millionth of a sievert per year.

We suggest that those figures dispose of Ireland's case on the facts in all its aspects. I return to my original question: does the manufacture of MOX fuel at the MOX plant involve harmful radioactive discharges? The answer is clearly, "no". There is no ambiguity, there are no "maybes", and it follows that there is no serious risk of harm to the Irish Sea. Nor is there any question of the United Kingdom withholding information on radioactive discharges, as has been suggested today. Ireland has had this data for years.

I suggest that Ireland's other complaints have to be seen in the light of those facts. I will come to those later, but what sense do its allegations of non-cooperation, inadequate assessment, pollution and harm retain once it is seen that the MOX plant emissions come within hundreds of thousandths of a fraction of the authorized limits?

Mr President, I will move on to what Ireland says about that, but you may feel that that would be an appropriate moment to draw the drapes.

The President:
Thank you.

The hearing is adjourned until [10] a.m. tomorrow.

The hearing adjourned at 6 p.m.

PUBLIC SITTING HELD ON 20 NOVEMBER 2001, 9.30 A.M.

Tribunal

Present: *President* CHANDRASEKHARA RAO; *Vice-President* NELSON; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, MENSAH, BAMELA ENGO, AKL, ANDERSON, VUKAS, WOLFRUM, TREVES, MARSIT, EIRIKSSON, NDIAYE, JESUS, XU; *Judge* ad hoc SZÉKELY; *Registrar* GAUTIER.

For Ireland: [See sitting of 19 November 2001, 10.00 a.m.]

For the United Kingdom: [See sitting of 19 November 2001, 10.00 a.m.]

AUDIENCE PUBLIQUE DU 20 NOVEMBRE 2001, 9 H 30

Tribunal

Présents : M. CHANDRASEKHARA RAO, *Président*; M. NELSON, *Vice-Président*; MM. CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, MENSAH, BAMELA ENGO, AKL, ANDERSON, VUKAS, WOLFRUM, TREVES, MARSIT, EIRIKSSON, NDIAYE, JESUS, XU, *juges*; M. SZEKELY, *juge* ad hoc; M. GAUTIER, *Greffier*.

Pour l'Irlande : [Voir l'audience du 19 novembre 2001, 10 h 00]

Pour le Royaume-Uni : [Voir l'audience du 19 novembre 2001, 10 h 00]

Argument of the United Kingdom (continued)

STATEMENT OF LORD GOLDSMITH (CONTINUED)
COUNSEL OF THE UNITED KINGDOM
[PV.01/08, E, p. 5–11]

Lord Goldsmith:
Mr President, Members of the Tribunal. I concluded my presentation yesterday looking at the Environment Agency's consideration of the issue of radioactive discharge from the MOX plant. The passage I was looking at is up on your screens at the moment and it says, "It may be noted that the assessed dose due to gaseous and liquid discharges from the MOX plant is less than one millionth of that due to natural background radiation".

What does Ireland say in the face of this? Ireland has four main points: first, it says that the Sellafield site as a whole has a harmful impact on the Irish Sea; second, it says that there is a poor record of safety and compliance with regulatory require-ments at Sellafield; third, it says that the operation of the MOX plant will inevitably lead to discharges of radioactive substances into the marine environment; and, fourth, it says that the MOX fuel manufacturer is vulnerable to accidents.

May I address those four points in turn? First, the allegation as to the discharge from the Sellafield site as a whole. Now here Ireland aims at a different and, it hopes, an easier target than the MOX plant and yesterday it focused in particular on the THORP plant. There are two responses to this. First, this is the *MOX Plant Case*. That is its name. This name reflects the dispute that Ireland relies on in its provisional measures. This is not the THORP plant case. Ireland seeks no provisional measures in relation to the THORP plant. There are no allegations about the THORP plant before the Annex VII tribunal. How then could this Tribunal possibly order provisional measures on the basis of allegations of harm from the THORP plant? It is said that Ireland must somehow have protection for its rights in this respect even though it has not made a claim in respect of them.

Secondly, and the Tribunal should not take this response which deals, in our view, conclusively with the point for any defensiveness on the part of the United Kingdom because Ireland's allegations of yesterday are not merely, as I have just submitted, irrelevant. They are also, we say, misconceived.

We will just explore a little further the allegations. Ireland says that discharges from Sellafield increased significantly in the 1970s. It is difficult not to ask – so what? This provisional measures request is being made in 2001; and discharges from Sellafield have reduced very significantly indeed since the 1970s. Discharges of the principal radionuclides are now less than 1 per cent of their peak values in the 1970s: a 99 per cent reduction since the 1970s. That is a reference to a statement by the European Commission on 23 October 1997.

Then Ireland says, and I quote from the Statement of Case, "many independent scientific assessments" have concluded that as a result of radioactive pollution from Sellafield the Irish Sea is amongst the most radioactively polluted seas in the world. In fact, Ireland only referred to one assessment. That is the report – the WISE Report – commissioned by the European Parliament's Panel for Scientific and Technological Offers Assessment (STOA) Programme. As I said yesterday, that report commissioned by the European Parliament has now been elevated into a report of the European Parliament. That was the way it was described yesterday but it is not a European Parliament report. It is a report, apparently leaked to the press, that has been widely criticized as unscientific. It has led, according to those reports, the Chairman of the very Committee, STOA, to say that the behaviour of WISE has not been "in line with the long standing tradition of STOA, which always endeavoured to

associate its work with the highest scientific and ethical standards". You have that and I leave you to look at it in Annex 16 to our written observations.

Yesterday the United Kingdom was criticized for relying solely on a newspaper article to respond to this report. Of course, we do not just rely on a newspaper article. Our principal response is to refer to the publications of Ireland's own relevant domestic body, a body called the Radiological Protection Institute of Ireland. It was referred to yesterday by my friends from Ireland. We have, at Annex 15 to our Written Response, its Annual Report for 1999. What it says, in the words of its Chairman, is that it is "an independent and authoritative source of information and guidance on all issues relating to the protection of the public from hazards associated with ionising radiation, whether the origin of the radiation is the nuclear industry" or others. That is at page [2], paragraph 2, of the report.

The Annual Report deals specifically with the impact of radioactive discharges from the Sellafield site on the Irish critical group. You will remember the critical group is those most vulnerable, most affected, by these issues. It is said there that the dose to this group is less than 2 millionths of a sievert, which is to be compared to the European limit of 1 thousandth of a sievert. Although the official line in the report is "radiation doses to Irish people resulting from the Sellafield discharges are clearly objectionable", I interpolate, that is an understandable political point. I have made that point before but the conclusion of the Institute is nonetheless clear, "they do not pose a significant health risk to people living in Ireland" and that is in the report at Annex 15, a clear statement.

I turn to Ireland's second main point. This is allegedly poor regulatory compliance at Sellafield. The focus here has been on the data falsification incident that I have already referred to concerning the MOX demonstration facility. I would like to make quickly five points in response: first, this Tribunal should rest assured that the United Kingdom has taken this incident extremely seriously. A full investigation has been carried out by the United Kingdom Health and Safety Executive. You have its report at Annex 8 to our observations. Certain personnel who were working at the MOX demonstration facility were dismissed.

Secondly, the Tribunal should see the incident in context. What happened was that false data was given relating to the diameter measurements of MOX pellets that had been specified by a potential customer. So the incident had everything to do with the issue of compliance with that customer's specific requirements, and plainly it was quite wrong not to, but it had nothing to do with safety or the environment. There were no safety or environmental issues despite what was said yesterday. I would invite you to look at Annex 8 to our Response, paragraphs 89 and 90. I will just interpolate one sentence from paragraph 89, "NII [that is the relevant Inspectorate] is satisfied that the fuel manufactured in MDF will be safe in use in spite of incomplete [quality assurance] records caused by the falsification of some … data by process workers in the facility". It is there for you to see.

The third point is that the incident happened at the MOX demonstration facility. That is a different plant in a different building to the MOX plant we are talking about. The important point is that the MOX plant uses an automated procedure which would preclude similar incidents.

The fourth point is that Ireland is simply wrong to say, in its Statement of Case, that all the recommendations of the Health and Safety Executive have not been complied with. They have. This is confirmed in a report of the United Kingdom's Nuclear Installations Inspectorate dated 22 February 2001, which is at Annex 17 to our Written Response. I think, and it appears, that Ireland has now dropped that point.

In substance, I dealt yesterday with Ireland's third point. I remind myself that that point was that there would be inevitable discharges of radioactive substances into the marine environment. The allegation has no meaning. Ireland says nothing to challenge the figures on radioactive discharges which I already put before the Tribunal yesterday and which show that

the discharges are infinitesimally small. Ireland has had eight years to query these figures or develop some argument as to how such tiny discharges could cause serious harm to the environment of the Irish Sea. It has done neither.

The fourth point was the risk of accident in the manufacture of MOX fuel. That is comprehensively dealt with once one has examined the United Kingdom's general data submitted by the United Kingdom under Article 37 of the Euratom Treaty and the European Commission's resulting Opinion. Again I interpolate, you will recall that that Opinion dealt specifically with accident as well as normal operation.

It is as if the European Commission's Opinion did not exist. It is as if this Opinion did not specifically address this issue and conclude that in accident conditions, "the doses likely to be received by the population in other Member States would not be significant from the health point of view".

In all, what Ireland did yesterday was to raise a spectre of danger and threat. No scientific analysis, no scientific data, no scientific opinion is brought into play to support this spectre. The Tribunal, we would suggest, will look at this spectre in the harsh light of precise information on radiological impact that has been in the public domain for eight years and it will see, in our submission, Ireland's case for what it is.

I turn to the second question. Will harmful radioactive material make its way into the Irish Sea? There will be no harmful discharges from the MOX plant but will harmful radioactive material nonetheless somehow make its way into the Irish Sea? Ireland has a second string to its bow. It says there are significant risks involved in the transport by sea of radioactive materials to and from the MOX plant. Actually it has got a third string because it says there is a security risk, terrorists and so forth.

Let me turn to the first of those. Ireland addresses the issue of transport as if there were no regulatory bodies setting appropriate standards or as if the United Kingdom were content to let MOX fuel be transported without implementing such standards. The true picture is that there are the IAEA Regulations for the safe transport of radioactive material. Ireland is, after all, a member of the IAEA and is involved in the establishment of these Regulations. There is the IMO's International Code for the Safe Carriage of Packaged Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Wastes on Board Ships. That is the INF Code I referred to yesterday and this became mandatory on 1st January of this year.

BNFL's transportation of nuclear fuel – and we will insist on this – complies with all applicable international and national safety and security standards. That is expressly noted by the Secretaries of State in paragraph 30 of their decision of 3 October.

Does the United Kingdom have, despite all of that, to address an argument to the effect that, although the relevant standards have been developed by long-established international organizations, somehow they are inadequate? Ireland says nothing as clear as that, but let me deal head-on with that in case there is a lurking issue there.

A major five-year research project has been carried out by a joint IAEA, IMO and UNEP working group between 1995 and 1999. Their report on the "Severity, probability and risk of accidents during maritime transport of radioactive material" was published in July this year. Extracts are at Annex 7 to our Written Response. The Tribunal is respectfully invited particularly to read the concluding remarks in section 9 of that report. They are now up upon the screen.

The major research project considered severe maritime accidents, in particular ship collisions and ship fires. It estimated the likelihood of failure in a severe accident situation of the flasks for highly radioactive materials, that is the so-called Type B flask, built in accordance with the IAEA Regulations. It found, and I quote, that the risks of transporting highly radioactive material in Type B packages are "very small". I invite the Tribunal to take

a very close look at this report. You will see that particular quotation at the end, highlighted on that page.

Surely Ireland's allegation of risk must be seen in the context of this regulatory background and the extensive study on the point? The risks of accidents during maritime transport of radioactive material have been extensively studied. The risk has been shown to be very small. Ireland's allegations of the "complete failure to assess the consequences of transport accidents" must also be considered in the light of the existence of this joint IAEA, IMO and UNEP working group report.

I have three further comments that must be made on Ireland's allegation on this point.

First, the issue on transportation is in fact not as broad, in any event, as Ireland would have the Tribunal think. It has been seen that it divides the issue into transport of nuclear materials to the MOX plant, and transport of MOX fuel away from the MOX plant. But there will in fact be no transport of radioactive materials to the MOX plant. The plutonium dioxide used in the manufacture of MOX fuel will be sourced from plutonium stored at Sellafield.

Second, if the MOX plant were not to be commissioned, plutonium belonging to overseas customers that was already in separated form at Sellafield would still have to be transported back to customers or taken to a third country for manufacture into MOX fuel or for some other form of treatment. So transport of nuclear materials in some form is inevitable, irrespective of the operation of the MOX plant.

Third, there is of course a history of safety. In over 30 years of transporting radioactive materials by all forms of transport, BNFL has had no case of a release of radioactivity. You will see that referred to in paragraph 69 of the Secretary of State's decision letter.

MOX fuel for lightwater reactors has been transported safely in Europe since 1966. That is in the Environmental Statement, paragraph 5.53, Annex 6.

In terms of transportation of spent nuclear fuel by sea, some 8,000 tons have been transported over a distance of approximately 4.5 million miles over a 30-year period. In over 160 transports of nuclear materials from Japan to Europe in the same period, in no case has there been a single incident involving the release of radioactivity.

I would only add to this the urgency point that I looked at yesterday. There will be no shipments until the summer of 2002. So Ireland's allegations of risk from transportation have no basis and demonstrate no urgency.

What then for the third string in Ireland's bow, which is the alleged security risks? This can be dealt with in quite short order.

The Tribunal is again confronted by a spectre of danger, not anything approaching a real risk of serious harm to the Irish Sea. Again, it is as if there were no regulatory framework. It is as if the United Kingdom were indifferent to these issues. The threat of an attack on civil nuclear facilities of course engages the concern of us all. The merest possibility of it is, of course, disturbing. Ireland points to various public statements made by a number of States concerning measures that they have taken in recent weeks to safeguard against such an attack: air exclusion zones, the placement of ground-to-air missiles around such facilities, and heightened states of alertness. Ireland says that the United Kingdom has not been prepared to discuss with Ireland, even on a confidential basis, what measures it has taken to safeguard against such an attack. We were even accused yesterday of discourtesy. I have to respond to this.

Ireland has not particularized its concerns in this area. There are various facets of security, including patrols at the Sellafield site, measures taken to safeguard transport (land, sea and air), the security of the wider territory and airspace around Sellafield, and other similar sites. There are other domestic initiatives to combat terrorism and broader global initiatives to address such matters as proliferation. If I interpolate, I hope, Mr President, you

and Members of the Tribunal will not hesitate to recognize the great concern that the United Kingdom has demonstrated since 11 September in dealing with all of these risks.

Given the acute sensitivity of these matters, the security measures, it is not the policy of the United Kingdom Government to engage in discussion on such issues without cause. Ireland ought, at least, to be identifying issues with which it has particular concern.

The United Kingdom of course takes its responsibilities in this field extremely seriously. Major centres of population in the United Kingdom are a good deal closer to Sellafield than those in Ireland. It is a little provocative, if I may say so, for Ireland to suggest that because the United Kingdom has not chosen to initiate confidential discussions with Ireland on this matter, the United Kingdom is somehow lax about it.

Let me simply say this. The existence of a potential terrorist threat, both in terms of seizure of nuclear materials with a view to later use and direct attack of nuclear materials with a view to causing destruction of assets and radioactive release, has been known to the United Kingdom, and has been the object of security measures, for many years. The Tribunal should note that the security issues, including the events of 11 September, are specifically dealt with and addressed in the decision of 3 October.

Let me once again refer to the applicable regulatory framework. With respect to the security of nuclear material, both on site and in transportation, the IAEA has published guidance notes on the physical protection of nuclear material and nuclear facilities. Security arrangements have been put in place in respect of both the Sellafield site and future transportation of MOX fuel, and are consistent with the IAEA guidelines. The protection of the Sellafield site, including the MOX plant, is kept under regular review by the Office for Civil Nuclear Security and the Health and Safety Executive. The measures of protection have been reviewed in the light of 11 September. The advice of the Office for Civil Nuclear Security is that the manufacture of MOX fuel presents negligible security risks. This advice has been reviewed since 11 September. The advice of the Office for Civil Nuclear Security is also that the transport of MOX fuel presents negligible security risks. This advice has been reviewed since 11 September.

The precautions to prevent theft or sabotage of MOX fuel during transport comply with all relevant international obligations and recommendations and are amply robust to cope with any credible threat. You will see this fully dealt with in the Secretary of State's decision letter.

Finally in this context, I should also emphasize specifically that the existence and operation of the MOX plant does not increase the security risk of the Sellafield site. I interpolate: you will recall that there are other facilities there already. Ireland here is challenging the commissioning of the MOX plant and the MOX plant is not itself a source of special risk.

It follows that the second question that I have posed, "will harmful radioactive material make its way into the Irish Sea?", is also answered with a resounding negative, neither as a result of transports, nor as a result of security risks.

I turn, if I may, to the question of harm to BNFL. What I have been addressing so far is the factual basis on which Ireland seeks to beguile this Tribunal into ordering the exceptional remedy of provisional measures. It is a factual basis that has no more substance than a few millionths of a microsievert. That is only half the story. It is not just that the operation of the MOX plant is not going to cause serious harm, or even any harm at all to Ireland or the Irish Sea; it is that the order of provisional measures would cause real harm to the United Kingdom. This is the fourth and final issue I want to examine. It is the forgotten issue in so far as Ireland's written submissions are concerned.

If the United Kingdom were restrained from authorizing the operation of the MOX plant, in advance of any finding that such operation entailed an infringement of rights

pertaining to Ireland, real injury would be sustained. I can be quite clear. I am talking about really serious financial injury. The capital expenditure to date has been £470 million. Its operation has already been delayed. Provisional measures in the form requested by Ireland would be likely to result in the loss of commercial business for the MOX plant amounting to approximately £10 million as a minimum. There is then the prospect of further losses valued at several tens of millions of pounds. The maintenance of the MOX plant in a state of operational readiness will also carry a further cost of approximately £385,000 per week. There will also be a cost to BNFL's competitive position by continuing delay and risks as a result.

But financial harm is not the only part of the risk to the United Kingdom. Real injury would be sustained, not only by the employees of BNFL and by others in West Cumbria and further afield whose livelihoods depend on this venture, but also by BNFL itself.

These details are set out in paragraph 72 to 93 of our Written Response. Time is short now. I do invite the Tribunal to examine these paragraphs with considerable care because surely the Tribunal will want to weigh Ireland's unsupported assertions and its speculations of risk that go against the grain of the hard statistics of the United Kingdom's General Data under Article 37 and the European Commission's Opinion against the risk of real harm to the United Kingdom and its subjects.

Mr President, that completes the factual analysis. With your permission, I would like to make a slight change in our cast for presentation. The next section of our submissions relates to legal issues, the conditions for provisional measures. Rather than my delivering this, I would ask you to invite Mr Daniel Bethlehem of Cambridge and of Counsel to address that issue.

The President:
Thank you.

Mr Bethlehem? You have the floor.

STATEMENT OF MR BETHLEHEM
COUNSEL OF THE UNITED KINGDOM
[PV.01/08, E, p. 11–20]

Mr Bethlehem:
Mr President, Members of the Tribunal, it is an honour for me to appear before you today representing the United Kingdom in this matter. You have heard something of the facts of the case. In our contention, the facts speak for themselves. Ireland has not adduced any evidence in support of its claim of an imminent risk of harm. It has not respected the requirement, in article 283, paragraph 1, of UNCLOS, to enter into an exchange of views. In our contention, the Tribunal can decide the matter simply on the basis of the quite palpable absence of any evidential support for the claim developed by Ireland. Mr Lowe referred you yesterday to the provisional measures Order of the International Court of Justice in the *Great Belt* case with a view to distinguishing the circumstances of that case from the present one. Let me take you back to that case.

The Court there refused to order provisional measures. Mr Lowe sought to narrow the grounds of this refusal. In doing so, he adopted the line of the unsuccessful Applicant in that case. Finland there argued that the Court was not entitled to form a view of the merits of the case when considering whether provisional measures were necessary. Ireland did the same thing yesterday. The International Court clearly would have none of that. In rejecting the provisional measures request, the Court noted in response to various claims advanced by Finland:

> Whereas however evidence has not been adduced [by Finland] of any invitations to tender for drill ships and oil rigs which would require passage out of the Baltic [after] 1994, nor has it been shown that the decline in orders to the Finnish shipyards for the construction of drill ships and oil rigs is attributable to the existence of the Great Belt project; whereas accordingly proof of the damage alleged has not been supplied.

There is no ambiguity in this. Finland failed to adduce any evidence in support of its claim. The Court had no hesitation in taking account of this element. The absence of such evidence was central to the Court's reasoning in rejecting the provisional measures request. So it should be here. The facts – or, I should say, the absence of facts – speak for themselves.

The United Kingdom's case does not, however, rest on an appreciation of the facts alone, and the almost shocking failings of the Irish case in this regard given the scope of the measures that Ireland is asking from the Tribunal. The United Kingdom's case rests firmly on the law as well. This is a tribunal of law. We are engaged in a procedure that is bound on all sides by legal principle. The law must be applied. The Attorney General of Ireland opened Ireland's case yesterday by appealing to the law. The United Kingdom endorses this approach; but not, with respect, to some flexible notion of the law on provisional measures that would see this Tribunal lay down a charter for applicants wishing to make life difficult for those with whom they take issue, even if their claims have no substance. Precaution, of course, but not in circumstances in which an applicant has failed even to adduce evidence of uncertainty, let alone evidence of a real risk of imminent and serious harm.

However one looks at it, provisional measures are an exceptional form of relief – before this Tribunal, before the International Court of Justice, before the European Court of Justice and before other courts and tribunals. Mr Sands would have the Tribunal rewrite the law on provisional measures in a way that would turn such measures into a self-standing procedure of substantive redress. He says that such measures are necessary to preserve

Ireland's rights in this process. He omits to say that the United Kingdom has rights here, too. The question in issue is whether this Tribunal ought to prescribe provisional measures to restrain the United Kingdom from undertaking conduct, within its own jurisdiction, in circumstances in which it has satisfied itself that such conduct does not violate its international obligations. This is the issue. Are there good, solid grounds that warrant the Tribunal prescribing measures restraining the United Kingdom in the exercise of its rights? On the evidence presented to you, we cannot see how you could possibly reach that conclusion.

Mr President, Members of the Tribunal, you heard something yesterday of the law relevant to provisional measures from Mr Sands and Mr Lowe. It was, of course, self-serving but that was to be expected. We ought to redress the imbalance. Mr Plender will shortly address the application of the law to the facts of this case. My task is to provide a foundation for those remarks by giving you something of a road map through the principles relevant to provisional measures. There are three broad points to address. One, provisional measures are discretionary. Two, provisional measures are exceptional. Three, three conditions must be satisfied before the Tribunal can exercise its discretion: first, questions of *prima facie* jurisdiction must be resolved; secondly, it must be shown that the urgency of the situation requires such measures, and, thirdly, the substantive requirements of paragraph 1 of article 290 must be satisfied; namely, it must be shown that there is a risk of irreparable prejudice to Ireland's rights or of serious harm to the marine environment. I will deal with each of these in turn.

I turn first to the issue of discretion. The point is simply made. Provisional measures are discretionary. I do not mean that the Tribunal can act without being satisfied that the procedural and substantive conditions relevant to the prescription of provisional measures have been met. But even if these conditions have been met, the Tribunal is not compelled to prescribe such measures. It has a discretion to do so. If support is needed for the proposition, the point emerges clearly from the language of article 290, which emphasizes that the court or tribunal seized of the matter *may* prescribe provisional measures. Perhaps I may be permitted to cite a Member of the Tribunal in further illustration of the point. Judge Eiriksson, although not writing in his judicial capacity, observed as follows:

> … even in a case where it concludes that all the jurisdictional, procedural and substantive requirements for the prescription, modification or revocation of provisional measures have been complied with, the Tribunal may nonetheless decide not to act.

He goes on to state:

> … it may not be necessary for the Tribunal to specify that it is declining to take requested actions under a general right to exercise its discretion. There may, however, be cases where it may choose to so indicate; for instance, to emphasise its judicial role or to prevent a misuse of process.

The discretionary character of provisional measures – to act in a manner which it considers is appropriate in the circumstances – implies that the Tribunal has a responsibility to consider the rights and interests *of both parties*, rather than of the applicant alone. This point, indeed, is reinforced by the substantive criteria in article 290, paragraph 1, which emphasizes that it is the respective rights of the parties that must be considered. The point is important. We heard much of Ireland's rights yesterday; not so much of the rights of the United Kingdom. But what the Tribunal is being asked to do is to restrain the United Kingdom in the exercise

of its rights. The Tribunal should only exercise its discretion to this effect if, on the evidence, it is necessary for it to do so. On the evidence presented, we cannot see how the Tribunal could reach such a conclusion.

I turn next to the exceptional character of provisional measures. This, too, is uncontroversial. The Attorney General made the point yesterday by reference to the comments of Jerzy Sztucki, writing on the subject of provisional measures in the Hague Court. The point has been made in respect of provisional measures under article 290 of UNCLOS as well. I hesitate to refer again to the non-judicial writings of a Member of the Tribunal, but the point is made cogently by Judge Wolfrum in the volume that has recently appeared containing contributions by a number of Members of the Tribunal.

The explanation for the exceptional character of provisional measures is to be found in what the court or tribunal seized of the matter is asked to do. Is it open to the court or tribunal by way of provisional measures, in the words of Judge Shahabuddeen of the International Court of Justice, "to restrain a state from doing what it claims it has a right to do without having heard it in defence of that right"? The power to prescribe provisional measures is an exception to the normal rules relating to burden of proof. It should only be exercised in circumstances in which there are exceptional and compelling reasons for doing so. It is not simply a procedure for freezing the position of the parties pending a final decision on the matter. The question is whether there are compelling grounds for restraining a respondent in the exercise of its rights before a decision on the merits. The presumption is against such measures of restraint. Any other approach would see provisional measures elevated to a self-standing remedy. Applicants would be persuaded to initiate proceedings simply so that provisional measures could be requested, much in the way that Ireland appears to be doing in this case. This cannot be right.

The exceptional character of provisional measures requires that a tribunal seized of the matter has special regard to the evidence put before it in support of that request. A basic foundation of evidence must be adduced in support of its claim. The Order of the International Court of Justice in the *Great Belt* case, to which I referred a moment ago, endorses the proposition. If this were not so, an exceptional procedure of pre-emptive restraint would simply become an exercise in endorsing the untested claims of an applicant – claims that would, as in this case, favour hyperbole and hypothesis rather than the sober presentation of an imminent and real risk of serious harm.

The *Great Belt* case apart, the requirement of evidence finds wider support. Notwithstanding the attempts by Mr Sands yesterday to downplay the approach of the International Court in the 1973 *Nuclear Tests* cases, the extent of the documentary material provided to that Court by Australia at the provisional measures phase was considerable. Let me highlight their content. First, six substantive reports of the United Nations Scientific Committee on the Effects of Radiation were annexed. These addressed the extent, effect and mechanics of radioactive contamination from atmospheric nuclear testing. Secondly, Australia also pointed to a report of an Advisory Committee on the Biological Effects of Ionising Radiation published by the Academy of Sciences of the United States. Thirdly – and perhaps most importantly – during the period of the French weapons testing, Australia conducted a detailed fall-out monitoring programme. The results were annexed to the pleadings. Many aspects were addressed explicitly in argument. Fourthly, a report on the subject of the effect of the French weapons testing on the atmosphere and water proximate to Australia was prepared by the Australian Academy of Sciences and passed to the French Government.

Mr President, Members of the Tribunal, nothing even approaching material of this kind has been presented to you by Ireland in this case. You are asked to take Ireland's

allegations of harm entirely on trust. This cannot be a sound basis on which to prescribe provisional measures.

I do not want to labour this point. I would recall, though, that this Tribunal was also presented with a good deal of scientific evidence in support of the provisional measures requested in the *Southern Bluefin Tuna Cases*. It is explicitly referred to on the face of the Order. Furthermore, there was no dispute between the parties in that case that the state of bluefin tuna stocks was, to quote the Order of the Tribunal, "a cause for serious biological concern". Once again, you are presented with no comparable evidence in this case. The United Kingdom firmly contests Ireland's unsubstantiated allegations of harm. This cannot be a sound basis on which to order provisional measures restraining the United Kingdom in the exercise of its rights.

I turn now to the procedural and substantive conditions that Ireland must satisfy if it is to sustain its request for provisional measures. There are three elements: jurisdiction, urgency and the substantive conditions of irreparable prejudice to the rights of Ireland or serious harm to the marine environment.

The question of jurisdiction can be dealt with briefly at this stage. Mr Plender will return to it shortly at greater length. Two points may be made. First, the procedure under article 290, paragraph 5, of UNCLOS is an unusual procedure. It is unusual because the Tribunal – this Tribunal – which is being asked to prescribe provisional measures is not the tribunal that is seized of the merits of the case. Nor is it the tribunal which has ultimate competence in respect of provisional measures. Both of these elements rest with the Annex VII tribunal. The point is simply this: provisional measures pursuant to article 290, paragraph 5, are doubly exceptional in character. The relief sought is exceptional. The Tribunal seized of the request – this Tribunal – is exercising a competence which hinges on an assessment of the jurisdiction of the tribunal which will be seized on the merits. Its competence, furthermore, only subsists pending the constitution of the Annex VII tribunal.

Mr President, I do not for a moment suggest that the competence or authority of this Tribunal in respect of provisional measures requested under article 290, paragraph 5, is irregular. It is not. It is laid down in the Convention. It is an important safeguard against irreparable prejudice. But it is, nonetheless, an unusual procedure. In our submission it is a procedure which should be exercised with particular caution.

Secondly, as article 290, paragraph 5, makes clear, before it can prescribe provisional measures, this Tribunal must consider that *prima facie* the Annex VII tribunal will have jurisdiction on the merits of the case. This is uncontroversial and is accepted by both parties. We fundamentally disagree with Ireland, however, on whether *prima facie* jurisdiction is evident. By reference principally to articles 282 and 283 of UNCLOS we say that jurisdiction is lacking. Ireland contests the point. You heard Ireland on the matter yesterday. Mr Plender will develop our arguments on this point shortly.

Next is the requirement of urgency. Ireland yesterday accepted that the threefold test set out in paragraphs 142-152 of the UK's Written Response was the appropriate assessment of the issue. There is, therefore, agreement between the parties that what must be shown is the following:

- first, that a specified event will cause prejudice of some significant order to the rights of the parties or serious harm to the marine environment. This is described in our pleadings as a "critical event". Ireland accepts this description;

- secondly, there must be a real risk of harm occurring as a result of this critical event. In other words, the risk of harm occurring must not be merely hypothetical or remote. Again, Ireland accepts this element, although it disputes our conception of "harm," conflating this

element of the urgency test with the substantive conditions relevant to provisional measures in paragraph 1 of article 290. I will return to this issue shortly;

- thirdly, the risk of the critical event occurring must satisfy the temporal conditions in article 290, paragraph 5; namely, there must be a real risk of the critical event occurring before the Annex VII tribunal is itself able to act. Once again, Ireland accepts this element of the urgency test.

Without trespassing into Mr Plender's submissions, let me simply identify where the parties differ on these key elements and draw out one or two aspects of the law on which we disagree. The basic disagreement between the parties is that whereas Ireland says that all of the elements of the test are met in this case, we disagree. Ireland says that the critical event is the commissioning of the MOX plant. We dispute this. The commissioning of the MOX plant will not itself result in any prejudice to Ireland of any significant order, or at all. Neither will it set in motion a process that is in any way irreversible. Mr Plender will deal with each of these elements fully.

If the commissioning of the MOX plant does not satisfy the requirement of a critical event, then neither can it satisfy the temporal requirement of article 290, paragraph 5, namely, that there must be a real risk of the critical event occurring before the Annex VII tribunal is itself able to consider a request for provisional measures.

The element to which Mr Lowe directed most attention was the second rung of the test; namely, that there must be a real risk of harm occurring in consequence of the critical event. Mr Lowe suggested in particular that the United Kingdom was advancing "a novel and very limited notion of harm". Let me deal with that point.

In his comments on the question of the real risk of harm, Mr Lowe was conflating two elements that, although related, should be kept distinct. The first is the question of the threshold of the risk of harm occurring as a result of a critical event. The second is the harm that is integral to the substantive conditions in paragraph 1 of article 290; namely, harm of some substantial order to the rights of Ireland or serious harm to the marine environment. Although linked, these are separate issues. The issue in respect of urgency is not the meaning of the substantive condition in article 290, paragraph 1, but what is the appropriate threshold of the risk of harm occurring.

We contend that the appropriate threshold is a *real* risk of harm occurring. It cannot be simply the suggestion that harm might occur. The risk that harm will occur must be more than merely hypothetical or remote. Mr Lowe did not address this element, perhaps understandably. It is rather central, and quite problematic, for Ireland's case. Ireland's allegations of *harm*, however they define the term, have not been substantiated. It is entirely hypothetical. Ireland has not shown that there is a real risk of harm occurring.

In summary, on the requirement of urgency, our contention is that Ireland has not satisfied this requirement. It has not shown urgency. The commissioning of the MOX plant does not constitute a critical event. Ireland has not shown that there is a real risk of harm occurring pending the constitution of the Annex VII tribunal or before that tribunal will itself be able to act.

Mr President, Members of the Tribunal, I turn finally to the substantive conditions relevant to provisional measures set out in article 290, paragraph 1; namely, that provisional measures must be necessary to preserve the respective rights of the parties or to prevent serious harm to the marine environment. We heard something on this yesterday from both Mr Sands and Mr Lowe. I shall respond to them both in turn.

In essence, Mr Sands suggested that, by reference to the precautionary principle and evolving standards of international law relating to the environment, the substantive requirements of article 290, paragraph 1, ought to be interpreted flexibly. By reference to the

1973 *Nuclear Tests* cases, the question for the Tribunal, he suggested, was whether you could,

> exclude the possibility that damage to Ireland might be shown to be caused by the deposit on Ireland's territory of radioactive fall-out resulting from the operation of the MOX plant and associated international movements and to be irreparable.

With the greatest of respect, Ireland cannot here ride on the coat-tails of the Applicants in the 1973 *Nuclear Tests* cases. As I have already said, a good deal of material was adduced by the Applicants in those early cases. Nothing is adduced by way of evidence here. All we are told here is that there is some unspecified risk of pollution. No evidence is provided in support of the assertion. The risk is not quantified. Possible repercussions are not mooted. There is nothing. Of course, Ireland would characterize the question as one of whether the possibility of damage can be excluded. Ireland would have us prove a negative. There are all sorts of possibilities that cannot be excluded. The point is that the United Kingdom has undertaken a protracted and detailed assessment of these risks and concluded that they are infinitesimally small. We have adduced that evidence. There is nothing on Ireland's side of the equation.

There is another point made by Mr Sands that warrants comment. He said that "radionuclides are harmful, noxious and persistent"; language no doubt calculated to satisfy the test set out in paragraph 156 of our Written Response relating to the phrase "serious harm to the marine environment". He then went on to say that there will be discharges of radionuclides from the MOX plant. Finally, he said that while the United Kingdom's statement that these discharges would be minimal and cause no harm might have been correct in 1982, it is not correct when assessed in the light of present-day environmental standards.

There is something of a *non sequitur* here. As the Attorney General addressed, discharges from the MOX plant will be infinitesimally small. They would not have caused harm in 1982; they will not cause harm now. The key point is that liquid and gaseous discharges from the MOX plant are assessed by reference to *current* standards. That was the essence of the Attorney General's detailed review of the facts. The legality of emissions is assessed by reference to current European and national legislation. As the Attorney General pointed out, emissions from the MOX plant are assessed by reference to *current* standards at a fraction of a thousandth of one per cent of applicable limits. The evolutionary standard that Ireland urges the Tribunal to adopt does not get it anywhere.

There is one final point to make in response to Mr Sand's submission. Ireland says that it would be curious indeed for this Tribunal to adopt a less precautionary approach than did the International Court of Justice in 1973 in the *Nuclear Tests* cases. The spectre painted is of the Tribunal setting the clock back on the important developments in the field of international environmental law. But this is not the case at all. I return to the point. Ireland has provided no support other than allegation and hyperbole as a basis for its Request for provisional measures. If precaution is to operate, there must be a risk. Not only has Ireland provided no evidence of risk; it has not even established, as opposed to merely alleged, that there is even uncertainty.

I turn now to the arguments by Mr Lowe. Whereas Mr Sands focused on what was said to be the factual dimension of the risk of harm, Mr Lowe addressed the substantive conditions in article 290, paragraph 1, by reference to the law. He argued, as I have said, that the United Kingdom has put forward a novel and limited notion of harm. His object, in contrast, was to broaden that notion. How did he do this? He first studiously avoided addressing the meaning of the two elements in article 290, paragraph 1, the respective rights of the parties and serious harm to the marine environment. The points made were simply

directed towards some generic concept of harm. By reference to the text, that would seem to be a little too imprecise. The question is how the phrase "to preserve the respective rights of the parties" in article 290, paragraph 1, is to be interpreted and how the phrase "to prevent serious harm to the marine environment", elsewhere in the same provision, is to be interpreted. This is not an exercise focused on some generic notion of harm.

By reference to his generic notion, Mr Lowe then developed three broad points. First, he referred to a series of Hague Court cases which were said to contain a range of tests of harm. Second, he settled beguilingly on a formula advanced *in the argument* in the *Fisheries Jurisdiction* case, namely that the parties should refrain from actions capable of prejudicing the execution of the Court's ultimate decision. Third, it was said that "procedural rights are rights" and that they too require protection. Let me make two brief points in response.

First, the Hague Court cases. Mr Lowe is correct, of course, that a number of different formulae have been adopted in the Orders of the Permanent and the International Court over a period of 80 years. In cases of hostilities and armed action that have resulted in deaths – such as in the Nicaragua case or the case of Cameroon v. Nigeria – the Court has ordered the parties to refrain from doing anything that would aggravate the dispute. These cases are not in any way analogous to the present case. In other cases of armed action – such as the case of the Democratic Republic of the Congo v. Uganda – the Court has also ordered the parties to refrain from such armed action as would prejudice the rights of the other party in respect of whatever judgment might be given on the merits. These circumstances, too, are not in any way analogous to the present case. There is, however, one phrase that recurs repeatedly in all of the recent Orders of the International Court in this area. Interpreting the phrase, "to preserve the respective rights of either party" in Article 41 of the Court's Statute, the provision on which the corresponding phrase in article 290, paragraph 1, of UNCLOS was based, interpreting that phrase, the Court has repeatedly used the language of "irreparable prejudice". The absence of irreparable prejudice was the basis for the Court's rejection of the request for provisional measures in the recent *Arrest Warrant* case. It was the basis for provisional measures in the *LaGrand* case, in the Breard case, in the *Cameroon and Nigeria* case, in the Genocide Convention case and others. The list goes on. This language has become the central pivot of provisional measures orders of the International Court.

Second, it is evident that the language of irreparable prejudice to the rights of a party connotes some form of irreparable harm to that party. One explanation for this is to be found in an observation by Judge Wolfrum in his recent note on provisional measures that I referred to a moment ago. As the point is addressed succinctly, I hope you will forgive me if I read out the relevant passage and it is as follows:

> The notion of 'preservation of rights', as used in article 290 of the UNCLOS or article 41 of the Statute of the ICJ, may lead to some misinterpretation. Rights cannot, or at least only in rare cases, be destroyed. Rights are rather violated or infringed and they continue to exist in spite of their violation. Taking the term 'preservation of rights' literally would, in consequence, limit the prescription of provisional measures to exceptional cases. On the other hand, a reading of the term 'preservation of rights' as 'infringement of rights' would widen the application of provisional measures in an unacceptable way. In particular, it would make it nearly impossible that a provisional measure would not anticipate the final decision of the court.

That the phrase "irreparable prejudice to the rights of the parties" refers to the possibility of irreparable *harm* being caused to that party is apparent from the recent *Arrest Warrant* Order

of the International Court. As is addressed in our written statement, in that case the Democratic Republic of the Congo challenged the legality of a Belgian arrest warrant naming the Congolese Foreign Minister. In the midst of the provisional measures proceedings, the Minister was moved to another portfolio. He became the Minister of Education. The arrest warrant, however, remained in place, as did a real risk of arrest. The Congo maintained its claim that any arrest warrant would violate its sovereign immunity. The Court, however, refused to order provisional measures on the ground that no risk of irreparable prejudice to the Congo's rights had been shown. This decision is only explicable if the notion of a risk of irreparable prejudice to the rights of a party is construed to mean a risk of irreparable *harm* being caused to that party. As Mr Plender will address, Ireland cannot show any risk of irreparable harm.

Mr President, two very brief concluding comments are warranted. First, article 290, paragraph 1, requires consideration to be given to the *respective* rights of the parties. I return to a point I have already made. The United Kingdom has rights here too. The United Kingdom is entitled to act in exercise of its sovereign rights within its own jurisdiction, as it sees fit, save to the extent that such action would violate its international obligations. This case is not simply about preserving an alleged right of Ireland. It is about not presumptively, and without evidence, violating the United Kingdom's rights.

Finally, as regards the prevention of serious harm to the marine environment, I note simply that Ireland did not address the meaning of this phrase in its oral submissions. The issue is addressed in paragraphs 156 and 157 of our Written Response. If Ireland is to sustain its claim under this heading, it must adduce a basic foundation of evidence to show the harm alleged would be (1) substantial; (2) enduring; (3) incapable of easy rectification. It has not done so.

Mr President, that brings me to the end of my submissions. Mr Plender will now address Ireland's case more specifically by reference to these elements of law if it is convenient to do so. Now may be a good point to break, allowing Mr Plender to begin immediately thereafter. But we are in your hands on this point. Mr President, Members of the Tribunal, let me simply thank you for the attention with which you have listened to these pleadings. Thank you.

The President:
Thank you.

Would you prefer a 15-minute break now or would Mr Plender like to commence his arguments now?

Mr Plender:
Mr President, Members of the Tribunal, I am quite content to begin now if that is convenient and we could take a break at an appropriate point during my address.

The President:
Yes. Please continue.

STATEMENT OF MR PLENDER
COUNSEL OF THE UNITED KINGDOM
[PV.01/08, E, p. 20–32]

Mr Plender:
Mr President, Members of the Tribunal. Addressing the General Assembly of the United Nations one year ago, Mr President, you stated "the establishment of new tribunals in recent years is … a positive development since such bodies fulfil complementary needs". Precisely so. It is because international tribunals fulfil complementary needs that each one must be scrupulous to respect the jurisdiction of the others. The point was underscored by Judge Treves in his article in the *New York University Journal of International Law and Politics* in 1999. He pointed out that the dangers of conflicting judgments are "particularly acute because international courts and tribunals are growing in number within an international system that has no unified judiciary".

This Tribunal must be particularly vigilant to respect the jurisdiction of other courts and tribunals when requested to grant interim relief under article 290, paragraph 5. That is so because you are at risk of being victims of your own success. You have exceptional powers to prescribe provisional measures; and you have established a reputation for the speed with which you can deal with applications for such relief. This creates a danger of forum shopping. States have an inducement artificially to bring disputes before an Annex VII tribunal in order to obtain provisional measures here, when the subject of their dispute ought properly to be brought elsewhere.

The draftsmen of the Law of the Sea Convention were determined that States Parties should not bring their disputes to Part XV fora to gain tactical advantage when they had agreed that such disputes would be adjudicated elsewhere. They stated in article 282,

> [i]f the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a … regional … agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties … otherwise agree.

Judge Treves observed, in the article to which I have referred, that the purpose of this provision is precisely to avoid the situation in which the Tribunal now finds itself. In his words, "Article 282 … is a mechanism that … precludes forum-shopping [and] overlapping litispendence".

Two features of article 282 deserve particular emphasis. The first is its mandatory character. Where States have established alternative binding arrangements their disputes shall be submitted to the alternative procedure. The mandatory terms of article 282 are matched by those of the OSPAR Convention and the Treaties establishing the European Communities. Article 32 of the OSPAR Convention states that disputes concerning the interpretation or application of the Convention *shall* be submitted to arbitration under the conditions there laid down. The Treaties establishing the European Community and Euratom both provide in identical terms as follows: "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".

The second aspect of article 282 that deserves emphasis is that it refers to disputes "concerning the interpretation or application of this Convention". Relying on the words of the Annex VII Tribunal in the *[Southern] Bluefin Tuna Case*, Mr Lowe contended that the

dispute concerning the MOX plant is one concerning the Law of the Sea Convention and not the OSPAR Convention or the Treaties establishing the European Communities. What the Annex VII Tribunal actually said in that case, at paragraph 52, is that a dispute can concern more than one treaty. In such an event, it said, it is appropriate to identify the convention to which the real dispute can be said reasonably to relate. The Annex VII Tribunal was very clear on the point. At paragraph 49 it stated that in order to address the appropriate forum it is necessary to isolate the most acute events of the dispute or the main elements of the claim.

If we were to apply to this case the principles laid down in the Award of the Annex VII Tribunal in the *Bluefin Tuna Case*, as Mr Lowe urges the Tribunal to do, then there could be no question of the Annex VII tribunal in this case assuming jurisdiction. In these proceedings, Ireland puts its case on the basis of three claims: first, that the United Kingdom failed to cooperate with Ireland; second, that we failed to prevent damage to the marine environment of the Irish Sea; and, third, that we failed to protect the marine environment of that sea. The most acute elements of these issues, or in other words the main elements of the claim, are governed by the OSPAR Convention. This contains, particularly in Articles 2, 3, 6 and 9 and in Annex I, specific provisions that do not merely reflect the UNCLOS rules on which Ireland relies but express the obligations arising from those provisions in more express terms. For that reason the real dispute between the parties can be said reasonably to relate to the OSPAR Convention.

It is no answer to say – *pace* Mr Lowe – that Ireland has chosen to invoke the OSPAR Convention in relation only to the failure to supply information. Neither the Law of the Sea Convention nor the OSPAR Convention permits parties to make a choice of the forum according to their perceived interest. Even if Ireland had not invoked the OSPAR Convention at all in relation to the present dispute, Ireland would be under an obligation to apply the procedures of the OSPAR Convention to that dispute. That follows from the terms of the OSPAR Convention to which I have referred. The fact that Ireland has actually chosen to invoke the OSPAR Convention in relation to the part of the dispute which it judges most to its advantage to submit to the means provided for by that Treaty merely illustrates the impropriety of simultaneous proceedings before the OSPAR tribunal and an Annex VII tribunal.

But it is not necessary for this Tribunal to rely on the award of the Annex VII Tribunal in the *Southern Bluefin Tuna Case*, and the United Kingdom does not invite the Tribunal to do so. In the present case, the fact is not merely that the real dispute between Ireland and the United Kingdom can be said reasonably to relate to the OSPAR Convention. Rather, Ireland has failed, and continues to fail even to this late stage in these proceedings, to identify a single element in its claim that is not governed by the OSPAR Convention or by the European Community Treaties.

In these proceedings Ireland first puts its case on the basis of article 197 of the Law of the Sea Convention. This provides,

> States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules … consistent with this Convention, for the protection and preservation of the marine environment.

Ireland alleges, at paragraph 33 of its Statement of Case, that the United Kingdom acted in breach of that provision by failing to reply adequately to Ireland's request for information; by withholding that information; by failing to supply a fresh Environmental Statement; and by

failing to suspend authorization of the MOX plant pending the outcome of the OSPAR proceedings.

I will deal with those points in turn. The allegations that the United Kingdom failed to reply adequately to the requests for information, and withheld certain information, amount to a claim that the United Kingdom acted in breach of Article 9 of the OSPAR Convention. Indeed, they are the subject of the present proceedings actually instituted by Ireland under the OSPAR Convention and in relation to Article 9. That allegation is not converted into a dispute under article 197 of the Law of the Sea Convention by reason of the mere fact that Ireland cites that provision of the Law of the Sea Convention. Article 197, it will be recalled, provides for cooperation between States Parties in formulating rules, standards and practices. Either the United Kingdom discharged its duty to formulate common rules about the supply of information by concluding Article 9 of the OSPAR Convention, or it did not. If it discharged its duty under article 197 of the Law of the Sea Convention by formulating Article 9 of the OSPAR Convention, then there is nothing left of Ireland's claim that there was any breach of article 197. But assuming in Ireland's favour that article 197 requires more than cooperation in the formulation of rules and extends also to the observance of the rules so formulated, then any dispute as to whether the United Kingdom has observed the rules so formulated is a matter governed by the OSPAR Convention. That is why not only is Ireland bound to refer that complaint to the OSPAR Tribunal if it cannot be settled otherwise, it has actually done so.

I turn next to the complaint about failing to suspend authorization of the MOX plant pending the outcome of the OSPAR proceedings. Here once again article 197 adds nothing to the OSPAR Convention relevant to Ireland's case. The OSPAR Convention contains provisions for the tribunals established thereunder to grant interim relief. Either the United Kingdom discharged its obligation, if it had one, under article 197 of the Law of the Sea Convention by formulating the rules of the OSPAR Convention governing provisional relief or it did not. If it did, then there is nothing left of Ireland's case that there was a breach of article 197. If it did not, then this is precisely a matter to be governed by the OSPAR Convention.

I invite the Tribunal here to examine Ireland's case with a little bit of care and, if I may say so, some common sense. Here we have a State, Ireland, which has invoked the OSPAR Convention in its dispute with the United Kingdom. The OSPAR Convention gives the OSPAR Tribunal power to afford interim relief. Ireland does not take the view that it is for the OSPAR Tribunal to determine whether interim relief shall be granted pending the outcome of the proceedings before that very OSPAR Tribunal. Ireland contends that the appropriate tribunal to determine whether the United Kingdom ought to suspend authorization of the MOX plant pending the outcome of the proceedings before the OSPAR Tribunal is an Annex VII tribunal. On the basis of that contention, Ireland then submits that it is for this Tribunal to prescribe interim measures pending the constitution of the Annex VII tribunal to enquire into the very matter that this Tribunal is asked to determine upon by way of provisional measures. It would be difficult to conceive a clearer case of the adventitious misuse of this Tribunal's jurisdiction.

I turn now to Ireland's complaint that the United Kingdom failed to prepare a second environmental statement. This is not, in my submission, a matter governed by UNCLOS but by European Community law. Indeed, in the correspondence on this point prior to 16 October this year, Ireland made it clear that it relied on European Community law and particularly Council Directive 85/337. It is neither necessary nor appropriate for this Tribunal even to consider the submission now advanced by Ireland that the United Kingdom was bound by article 197 of UNCLOS to make a fresh environmental statement.

Assuming, in Ireland's favour, that article 197 of the Convention requires States Parties to formulate common rules about environmental statements, then the United Kingdom either fulfilled that duty through the European Community or it did not. If it fulfilled that duty through the European Community there is nothing left of Ireland's case on the point. But assuming further, in Ireland's favour, that article 197 requires States Parties to comply with the rules so formulated, then it must be for the Court of Justice of the European Communities to determine whether the United Kingdom has done so. That is so because the Member States of the Community have expressly agreed that disputes between them concerning obligations undertaken pursuant to the Treaties shall be submitted to the means of settlement for which the founding treaties made provision.

Indeed, as regards European Community law, the United Kingdom has made a larger and more important point, to which Ireland has made no answer at all. It is important that this Tribunal should not lose sight of it. The European Community is a party to the United Nations Convention on the Law of the Sea. Since Member States are also parties, the Convention is, for the Community, a mixed agreement. It is, therefore, important to ascertain in respect of each and every obligation under the Convention whether competence lies in the Member State or in the Community. When ratifying the Convention, the Community made the declaration contained in Annex 18 to the Annexes of the Written Response of the United Kingdom. This is now shown on the projector. It will merit a little study. As it shows, Part XII of the Convention governing the protection of the marine environment is a matter on which the Community has extensive competence.

Under the Treaty establishing the European Community, and under that establishing the European Atomic Energy Community (Euratom), a Member State which considers that another Member State has failed to fulfil "an obligation under this Treaty" may bring the matter before the Court of Justice. It is well established in Community law that the words, "an obligation under this Treaty" – and now I paraphrase the Court of Justice – cover all rules of Community law binding on Member States including international treaties concluded by the Community. That principle was established 20 years ago in the judgment of the European Court of Justice in *Hauptzollamt Mainz* v. *Kupferberg*. Indeed, the Court of Justice of the European Communities has had occasion to examine the Law of the Sea Convention on a number of occasions.

Ireland's second main submission is that the United Kingdom failed to assess the potential impact of its activities on the marine environment, contrary to article 206 of the Law of the Sea Convention. This provides for States Parties to assess the potential effects of their activities where they "have reasonable grounds for believing that planned activities under their jurisdiction … may cause substantial pollution of or significant changes to the marine environment". As the Tribunal now knows the United Kingdom concluded that there are no reasonable grounds for believing that the MOX plant will cause substantial pollution or significant … changes to the marine environment. The matter has been examined by the European Commission, whose Opinion on this point is at Annex 3 to the United Kingdom's Written Response. The Commission concluded that

> the plan for the disposal of radioactive waste arising from the operation of the BNFL Sellafield Mixed Oxide Fuel Plant, both in normal operation and in the event of an accident of the magnitude considered in the general data, is not liable to result in radioactive contamination, significant from the point of view of health, of the water, soil or airspace of another Member State.

Ireland could have challenged that Opinion before the Court of Justice of the European Communities. It did not do so. This is emphatically not the forum in which to question an Opinion of the Commission of the European Communities, if indeed Ireland now does wish to call that Opinion into question, despite the fact that it appears until yesterday to have accepted it for the last eight years.

Lastly, Ireland relies on an amalgam of provisions in the Law of the Sea Convention, including article 192, which provides that "States have the obligation to protect and preserve the marine environment", and article 194, which deals with measures to prevent, reduce and control pollution, together with the precautionary principle.

The President:
Mr Plender, we will take a 15-minute break now. We will reassemble at 11.15 a.m.

Short recess

The President:
Mr Plender, you have the floor.

Mr Plender:
Mr President, Members of the Tribunal, before the adjournment I was dealing with the last of the Irish submissions, which relied upon an amalgam of provisions of the Law of the Sea Convention, including article 192, which states that "States have an obligation to protect and preserve the marine environment", and article 194, which deals with measures to prevent, reduce and control pollution.

The OSPAR Convention applies to the north-east Atlantic and elaborates these very provisions. Indeed, the precautionary principle, which is not expressly articulated in those provisions of the Law of the Sea Convention, finds its expression in Article 2(e) of the OSPAR Convention. The United Kingdom does not engage in debate with Ireland on whether the precautionary principle is a principle of customary international law. The answer, I suppose, must depend on what exactly you mean by "the precautionary principle". The expression tends to be used in a variety of senses. The term is given particular meaning by Article 2(2)(a) of the OSPAR Convention. The obligation to respect the principle so defined arises from the OSPAR Convention and any disputes in respect of that obligation must be resolved by the means prescribed by that Convention in Article 32.

Why then has Ireland instituted these proceedings for provisional measures under the Law of the Sea Convention instead of pursuing its case in the OSPAR Tribunal or the Court of Justice of the European Communities?

To find the answer to that question, one has to look at the history of the dispute. Ireland does not disguise the fact that its objection is not to the MOX plant alone. It seizes on the MOX plant as part of a wider campaign against the Sellafield site generally. In its submission dated 4 April 1997, which will now be put on the projector, made to one of the inquiries into the MOX plan, reproduced at Annex 13 to the United Kingdom's Written Response, the Irish Government states that it has "long-standing objections to existing nuclear operations at the Sellafield site and opposes any extension to those operations, such as the proposed MOX plant". Ireland repeated that statement later, as the Tribunal will see in the submission contained in Annex 14 of our observations. Although in these two submissions the Irish Government added that it also had concerns about radioactive discharges into the Irish Sea, it expressly acknowledged that, in the Irish Government's words quoted at Annex 13, these were "likely to be small".

As Lord Goldsmith demonstrated yesterday, the correspondence between the two Governments contained until recently remarkably little mention of the Law of the Sea Convention. It is notable that in these proceedings Ireland relies upon a series of its own letters referring not to the Law of the Sea Convention but to provisions of European Community law and the OSPAR Convention. References were made to the Law of the Sea Convention twice in 1999, but in both cases the context was a claim that an environmental statement made pursuant to Community law should be brought up to date.

It appears that Ireland has chosen to come to this Tribunal because it finds that your powers or speed suit its purposes better than the tribunal entrusted with the task of resolving aspects of the dispute. If so, Ireland has engaged in precisely the sort of conduct that the draftsmen of the Law of the Sea Convention meant to avoid when concluding the text of article 282. Members of the Tribunal will recall that this provides that where parties have agreed that such disputes relating to the interpretation or application of the Convention *shall* be submitted to an alternative procedure, it is the latter procedure that *must* be applied.

There is a second reason why the Annex VII tribunal will have no jurisdiction. For that reason also this Tribunal should not grant interim relief. Article 283 of the Law of the Sea Convention provides that "[w]hen a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed … to an exchange of views regarding its settlement by negotiation or other peaceful means". Once again, the wording is mandatory: the parties *shall* proceed to an exchange of views.

Contrary to Ireland's assertion, it is crystal clear that there has not been an exchange of views such as is required by article 283. The United Kingdom requested such an exchange. Ireland refused. Ireland pleads that it has written to the United Kingdom on numerous occasions and has received either inadequate or no responses. This appears to be a reference to letters requesting the public disclosure of information, which was withheld from the public versions of the reports following public consultations on the economic case for the MOX plant. That correspondence did not amount to an exchange of views on what Ireland now characterizes as the dispute under the Law of the Sea Convention. As Lord Goldsmith demonstrated yesterday, the letters made little reference to the Law of the Sea Convention, save that of 23 December 1999. Indeed, Ireland relies upon the perceived inadequacy of the United Kingdom's response as constituting a breach of the Law of the Sea Convention. It is not easy to see how the same correspondence could be at one and the same time a breach of the Convention and an exchange of views regarding settlement of a dispute arising from such a breach.

In drawing attention to Ireland's failure to comply with article 283 of the Convention, I do not take a point of empty form. At least an exchange of views might have disabused the Irish Government of some misapprehensions of fact. Had he waited for a reply, Mr Jacob would have learned that there was no need for his demand that the United Kingdom should halt shipments to and from the MOX plant because there are not going to be any such shipments, at least until next summer. The United Kingdom would have learned the precise nature of Ireland's submissions on the Law of the Sea Convention and could have responded to them.

If the Annex VII tribunal were to assume jurisdiction in respect of a dispute which has not been the subject of an exchange of views, it would act contrary to article 283 of the Convention. It would also act contrary to a wider principle. The duty to seek settlement of disputes by negotiation is one to which reference has been made in various international fora, including the International Court of Justice in the *North Sea Continental Shelf* case and the Arbitral Tribunal on German External Debts. The function of international adjudication is to resolve disputes which cannot be settled by negotiation. The States Parties did not intend that this Tribunal, or tribunals established under Annex VII, should assume jurisdiction where one

party to the dispute declines to exchange views, giving as its reason that it does not expect the outcome to be equal to its ambitions.

I now turn to a second central point in this case: urgency. Ireland has simply failed to demonstrate that there is urgency such as to warrant prescribing provisional measures.

Few propositions are more elementary than the rule whereby provisional measures are to be prescribed only where this is necessary for reasons of urgency. This principle finds its expression in article 290, paragraph 5, of the Law of the Sea Convention. This provides that this Tribunal may prescribe provisional measures if it is satisfied that the tribunal to be established under Annex VII will have jurisdiction and that the urgency of the situation so requires.

The same principle is expressed in article 89, paragraph 4, of the Tribunal's Rules, which provide that a request for provisional measures under article 290, paragraph 5, must indicate *inter alia* the urgency of the situation. In the *Southern Bluefin Tuna Cases* this Tribunal expressly acknowledged the Applicant's obligation to satisfy it that there was urgency such as to warrant provisional measures.

The first paragraph of article 290 of the Convention provides that provisional measures may be prescribed *pending* the final decision. Paragraph 6 adds that the parties to the dispute shall comply *promptly* with any provisional measures prescribed under the article. The language emphasizes the urgency of the situation. It presupposes imminent harm. In this respect the provisions applying to the Law of the Sea Convention are similar to those that apply in the International Court of Justice. The requirement of substantive urgency is also established in international law more generally. In the *Great Belt* case, to which Mr Lowe referred yesterday, the Court stated:

> provisional measures under Article 41 of the Statute are indicated 'pending the final decision' of the Court on the merits of the case, and are therefore only justified if there is urgency in the sense that action prejudicial to the rights of either party is likely to be taken before such final decision is given.

At paragraphs 142 to 152 of our Written Response we set out our reasons for maintaining that urgency has three elements. First, the event that the provisional measures aspire to prevent must be "critical". It must be of a sufficient order of gravity to warrant restraining a State from exercising its rights in advance of any determination that such exercise amounts to the interference with the rights of another State. Second, there must be a real risk of the occurrence of the event that the provisional measures aspire to prevent. That does not, of course, mean a probability that it will occur, but it must be more than conjecture. Third, the risk must be of the occurrence of the event before the tribunal to determine the dispute is itself able to take action. All three conditions must be fulfilled.

I consider first the rule that what is foreseen must be a critical event, one of sufficient gravity. In the *Southern Bluefin Tuna Cases* this Tribunal was able to detect a critical event. It concluded; "the stock of southern bluefin tuna is severely depleted and is at its historically lowest levels and that this is a cause for serious biological concern". There was before the Tribunal real evidence of the depletion of the stock to levels from which it might not recover in the period before the Annex VII Tribunal could take action. On the other hand, as Mr Bethlehem has just pointed out, in the *Arrest Warrant* case the International Court of Justice declined to order provisional measures restraining the extradition of a Congolese minister, since the threatened act was not of a sufficient order of gravity.

In the course of his speech yesterday, Mr Lowe identified what he saw as the critical event. It is the plutonium commissioning of a plant, the uranium commissioning of which has

already taken place. The critical event for Ireland is not a terrorist act, it is not a catastrophe, it is not an act of pollution: it is the plutonium commissioning of a plant which has already been subjected to uranium commissioning.

It is however impossible to find in this anything that is critical. Ireland has now abandoned its claim that commissioning would be irreversible. It is not. It is merely that decommissioning is expensive, and not expensive for Ireland but expensive for somebody else. How would Ireland be deprived of its rights by the commissioning of the plant? Mr Lowe argues that if this were to happen, Ireland would be deprived of its right to be consulted or to require a further environmental statement. I leave aside the fact that it has been consulted repeatedly and exhaustively over a period of years. I ignore the fact that the Environmental Statement was prescribed by Community law, which does not impose an obligation for a further one. Even on Ireland's premises, it is impossible to see how it is deprived of any right irreversibly by the commissioning of the plant. The tribunal properly seized of the matter will, at the full hearing on the merits, be able to grant such relief as is appropriate to the rights of the parties. That relief could amount to an order that the plant shall be decommissioned.

It is by now clear that the commissioning of the plant will have no significant effects on human health, even of the group most likely to be affected by it. It is not only the Commission of the European Communities that reports that the discharges will be "negligible from the health point of view". Ireland's own Radiological Protection Institute confirms that this is the case. The Tribunal has heard repeatedly from Irish advocates the assertion that there will be radiation from the MOX plant. We have not heard much from them about the scale. Let me inject a little realism into the subject. The dose of radiation received by each member of the Irish team in flying to this Tribunal from Dublin would be about 2,500 times the dose received from the MOX plant by a member of the critical group in the course of a whole year.

The commissioning of the plant cannot amount to a "critical event" by reason of radiation; nor can it by reason of shipping. There is not going to be any shipping associated with the MOX plant pending the constitution of the Annex VII tribunal.

Ireland warns of the risk of a marine casualty and produces correspondence from Caribbean governments and from a congressman in the United States expressing concern about the marine transportation of plutonium. There was reference to this yesterday. Its relevance is remote. None of this deals with the MOX plant. It deals with the international transportation of reprocessed nuclear materials. That will continue whether the MOX plant is commissioned or not. Indeed, the MOX plant has some advantages in respect of security. Mr Justice Collins referred to these in his judgment of 15 November, to be found in Annex 9 to the United Kingdom's Written Response. Lord Goldsmith referred to this yesterday. I repeat that the Judge concluded:

> The manufacture of MOX enables the reclaimed plutonium to be recycled. This has the advantage of reducing the amount of stored plutonium and saving the use of fresh uranium so that the environmental hazards of mining new uranium can be reduced. In addition, it avoids the need to transport the plutonium back to the customers or for reprocessing in a third country. MOX fuel in the form of what are known as ceramic pellets is said to be less attractive to terrorists and safer than plutonium (which is transported in the form of plutonium oxide powder).

Both Mr Fitzsimons and Mr Sands referred to what they called a report from the European Parliament. Mr Fitzsimons characterized the body that produced the report as "highly

reputable". It is in fact a report by one Mycle Schneider, working for a body called the World Information Service on Energy, known by its acronym as WISE. It is not specifically concerned with the MOX plant. It is concerned with nuclear reprocessing plants at Sellafield and La Hague generally. The report is not from the European Parliament. Indeed, the Chairman of the Committee of the European Parliament that commissioned it had some harsh criticisms to make of it. It was not published by the Parliament. It was leaked.

Mr Fitzsimons criticized us yesterday for relying on a report in the Irish press derived from a press release from the Commission. Very well, I take the court directly to the Commission's press release, which has this morning been added to the annexes submitted by the United Kingdom to the Registry. It will now be shown on the projector. As may be seen, Members of the European Parliament expressed concerns about the objectivity of that report by an independent contractor and the responsible parliamentary committee expressed regret that the organization that produced it should see fit to break its contract by leaking to the press the document on which Ireland now relies. Indeed, we understand that there was some consideration given to the issuance of legal proceedings by the European Parliament against this body. There are press reports of that matter.

We hear of the group called WISE elsewhere in Ireland's submissions. At page 94 of the annexes to Ireland's Statement of Case, which I do not take the Tribunal to at the moment, there is a rather sensational newspaper article about Royal Air Force jets responding to a hoax call at Sellafield. In your own time, Members of the Tribunal, you will see in that report that a spokesman from WISE, professing no military experience or knowledge of military matters, is ready with a comment to the press expressing surprise that the United Kingdom has not stationed missiles there.

Mr Fitzsimons expressed some indignation that we should question the WISE report. We prefer to rely upon the reports of bodies which we characterize as reputable, including particularly the Irish Government's own RPII and the Commission of the European Communities. These have indeed looked at the matter carefully and objectively and the Commission has concluded that radiation from the MOX plant will be insignificant from the point of view of public health and the Irish Institute has concluded that radiation from Sellafield is not such as to present dangers to health in Ireland.

I can deal relatively briefly with the remaining data on which Ireland relies for the presentation of its case. It refers to the data falsification incident at the MOX demonstration facility, an episode which did not affect safety and which, incidentally, BNFL itself drew to the attention of the regulatory authorities when it was discovered. Lord Goldsmith has dealt with this.

On the basis of this and such other reports of the Health and Safety Executive as Ireland has been able to discover, dealing with any regulatory breach or mishap at Sellafield, Ireland makes the general assertion that there is a pattern of regulatory failures in the company. The insinuation appears to be that an accident at the MOX plant is more likely to occur than would otherwise be the case. What the reports show is that nuclear sites in the United Kingdom are subject to close regulatory control. What they do not show is that there is a risk to Ireland; still less is there reason to fear adverse effects in the period pending the constitution of the Annex VII tribunal on 6 February next at the very latest. Evidence of a real risk of the occurrence of a critical event before that date is not just weak, it is absent. There is no basis on which the Tribunal can properly conclude that provisional measures are justified by the urgency of the situation pending the establishment of the Annex VII tribunal.

We now reach my third and final point. The Tribunal cannot be satisfied that the first paragraph of article 290 is satisfied. The jurisdiction to prescribe provisional measures comes into play only where an applicant can satisfy one of the two conditions laid down in that

paragraph. Either such conditions must be justified to preserve the respective rights of the parties or they must be justified to prevent serious harm to the marine environment.

In the case of the first of these, the preservation of the rights of the parties, Mr Bethlehem has demonstrated that the burden on an applicant is heavier than Ireland would have the Tribunal believe. An applicant has to show that it would suffer irreparable prejudice. That must be so, for when both parties are asserting rights and a tribunal has not yet been placed in a position in which it can adjudicate upon those rights, it can only proceed on the premise that an asserted right will be sufficiently preserved when any infringement of it, which has neither occurred nor been established as a matter of law, could be rectified at a trial on the merits. That is what Mr Bethlehem meant when he spoke of "duelling rights".

What are the rights claimed by Ireland, violation of which is liable to cause Ireland to suffer irreparable prejudice? Mr Sands says that there are three: the right to ensure that the Irish Sea will not be subject to what he calls "further radioactive pollution"; the right to have the United Kingdom prepare a second environmental statement and the right to have the United Kingdom cooperate with Ireland on the protection of the Irish Sea.

The first of these, which Mr Sands calls the right to ensure that the Irish Sea will not be subject to further radioactive pollution, is so similar to the prevention of serious harm to the marine environment that it amounts in essence to the same thing. Nevertheless, I address Mr Sands' submissions on their merits, such as they are. His submission is that the introduction into the environment of any radionuclides is unlawful. In making that statement he is confronted with the uncomfortable fact that the Commission has found, as is the case, that the scale of any radiation from the MOX plant would be infinitesimal. To this his response is, "Our understanding of the impact of radiation on the environment and on human health has changed".

The suggestion appears to be that radiation on a scale described in the Commission's Opinion is now considered by some reputable scientific opinion to be noxious to human health. This Tribunal has literally no scientific evidence, indeed, no evidence to that effect at all. The proposition is simply wrong. It is plainly not the case. Members of the Tribunal will recall that there are parts of the United Kingdom in which doses of radiation every nine seconds are equal to that emitted to the critical group in one year from the MOX plant. These are healthy areas of the country.

Far from producing evidence, Ireland has not produced so much as a claim, even from the wildest and most unreliable of pseudo-scientists, to suggest that the emissions from the MOX plant will be harmful to human health. That being the case, Mr Sands turns away from the MOX plant and concentrates on the THORP plant. The United Kingdom does not accept his submissions on the THORP plant but I shall not deal with them in detail. This case is not about the THORP plant; it is about the MOX plant. Still less is it about how the THORP plant might develop over coming years.

The remaining rights that Mr Sands asserts on Ireland's behalf are those that we describe as procedural: the right to have the United Kingdom prepare a second environmental statement and the right to have the United Kingdom cooperate with Ireland on the protection of the Irish Sea. He cannot show that these failures, assuming that they existed, would cause irreparable prejudice to Ireland. The assertion is made that there could be no remedy, but the assertion is nowhere explained. If the Annex VII tribunal should find that the United Kingdom ought to have made a second environmental statement, why could that defect not be rectified? The United Kingdom could cure the defect. If curing the defect was not sufficient to protect Ireland from the consequences of the defect, it would be for the tribunal, properly seized of the matter, at the appropriate juncture to decide what remedy would be appropriate. The submission appears to have been drafted on the false premise that

decommissioning is irreversible. There is nothing irremediable about the alleged violation of procedural rights invoked by the Applicant.

I can now omit to deal with the preservation of the marine environment from serious harm because I have addressed the point when dealing with the analogous right asserted by Ireland. As repeated enquiries have found, and as Lord Goldsmith demonstrated comprehensively, there is no evidence to show that the Irish Sea is likely to suffer anything approaching serious harm in consequence of the authorization of the MOX plant.

Hitherto, I have been dealing with Ireland's rights. However, as Mr Bethlehem observed, the Tribunal must consider also those of the United Kingdom, which have received scant attention from the Irish side. If the Tribunal were to make the order that Ireland claims, it would, in the words of Lord Goldsmith, cause a potential loss of hundreds of millions of pounds. At the extreme, it would threaten the long-term viability of the MOX plant.

In our written observations we drew attention to the fact that Ireland has not offered to indemnify the United Kingdom against these losses if the Annex VII tribunal should ultimately find that its claims are without merit. Ireland has had time to consider the matter. Yet, to this point there has been no offer of any indemnity. Ireland's position appears to be that the Tribunal should make an award which might cause financial losses on a catastrophic scale, greater than those which to my recollection have ever been caused by any international tribunal, and that nothing should be done to protect the United Kingdom against those losses in the event that the Irish application should fail.

In view of the common law rule, common to our countries, whereby applicants for injunctions are required to give undertakings as a matter of routine, Ireland's present position is breathtaking. Indeed, specific provisions in relation to provisional measures are now standard in international rules governing arbitrations between States and commercial arbitrations. It may be noted that the Iran-US Claims Tribunal required an applicant to defray costs to the other party in interim protection.

The Attorney General for Ireland sought to sweep away this little problem by saying that BNFL is not a party to these proceedings. This Tribunal will require no lesson from me on the *Mavrommatis* principle: a State has the right to secure, in the person of its nationals, respect for the rules of international law. Indeed, this is familiar territory to the Tribunal. I laboured it with the Tribunal in the *Saiga* case not so long ago. At the international level, the protection of the interests of a British company is a right possessed by the United Kingdom. The interests of BNFL are not to be ignored on the basis that the Government of the United Kingdom, which is, incidentally, the owner of the company, is the person appearing before this international tribunal.

The only other response given by Ireland is that the sums were small in relation to total expenditure, or that the United Kingdom has not yet produced evidence of losses that have yet to materialize. As for the size of the losses, I echo once more the words of Lord Goldsmith. We are speaking not of millions of pounds but of tens and possibly hundreds of millions of pounds. The size is not small, not even by the broadest stretch of the English language. As regards the probability of the losses being sustained, the United Kingdom has gone as far as it believes that it prudently can without disclosing the current stage of sensitive negotiations between BNFL and its customers. The risk of losses to BNFL is a real risk. Nor is this the only risk. There is the risk of loss of employment in an area of high unemployment, and there is the forgoing of the security advantages identified in the judgment of Mr Justice Collins.

I conclude by stating that the Annex VII tribunal does not have jurisdiction in respect of Ireland's complaints. Rather, jurisdiction is vested in the OSPAR Tribunal and in the European Court of Justice. Furthermore, Ireland has failed to exchange views as required by article 283 of the Convention. In any event, there is no urgency such as to warrant the

prescription of provisional measures and no evidence to support Ireland's claims that provisional measures are required for the protection of its rights or the preservation of the marine environment from serious harm. For good measure, it would be wrong to prescribe such measures, since this would leave out of account the important and immediate interests of the United Kingdom.

The Attorney General, Lord Goldsmith, will now conclude the United Kingdom's submissions.

The President:
Thank you.

The Attorney General has the floor.

STATEMENT OF LORD GOLDSMITH
COUNSEL OF THE UNITED KINGDOM
[PV.01/08, E, p. 33–36]

Lord Goldsmith:
Thank you. Mr President, Members of the Tribunal, perhaps I may make some concluding remarks. First, I would like to express appreciation to the United Kingdom team. Although the bulk of the oral presentation has fallen to Mr Plender, Mr Bethelehem and me, the work done has been very much a team effort. Mr Wordsworth of Counsel contributed enormously, as has the Agent and his staff and colleagues from the departments.

This has been a great task. As you will appreciate, there were only six days between the delivery of the written application and the filing of our own written observations. It has been no easy task. As you will know, it is our submission that we should not have been put under that pressure, but I wanted to express appreciation to those involved for having done it. I would also like to express appreciation to you, Mr President, and all Members of the Tribunal, for convening the Tribunal at such short notice and for listening so patiently to our submissions. We would also like to thank the Registrar and his staff for the administrative arrangements made. I say this now because, sadly, I am not able to stay this afternoon and would not want to leave without expressing the United Kingdom's appreciation in that way.

We know that there is more hard work for you to do as you examine further the materials and the issues raised before reaching your decision. While that work will, we know, be significant, we on behalf of the United Kingdom would respectfully suggest, now that the issues have been exposed, that the decision will not be a difficult one. I should like to summarize why that should be so, drawing together the threads of the arguments you have heard. In doing so I shall take the liberty of identifying at least some of the most important documents which we believe will demonstrate the justice of our case.

First, we have submitted that provisional measures are an exceptional form of relief, not lightly or liberally to be granted. There has been much talk of the rights of Ireland, but the United Kingdom has rights, too. They are not to be prevented from exercising those rights, save on good and compelling grounds, and if the conditions in which the United Kingdom conferred jurisdiction on any international tribunal are fully and strictly satisfied.

Mr Bethlehem has demonstrated the four conditions which must be satisfied before provisional measures can be granted: first, that the Annex VII tribunal has *prima facie* jurisdiction to address the merits of the case; secondly, that the urgency of the situation requires the granting of provisional measures pending the constitution of the Annex VII tribunal; thirdly, that the conditions in article 290 are complied with; and fourthly, even if all those conditions are satisfied, that the Tribunal considers in its discretion that it is right to grant the order.

As this Tribunal is in the unusual position of being able to act in place of the Annex VII tribunal, as has been pointed out, there is the particular consideration that it should be shown that urgency requires you to act instead of waiting the short time before the tribunal which will be seized of the merits can decide whether it believes that provisional measures should be granted or whether it should allow the matter to proceed instead to a full hearing. That tribunal will have, for example, the opportunity to decide whether it should move to an expedited hearing where disputed questions of fact could be more thoroughly examined. That is not an option you have.

Next, Mr Plender has developed our arguments that each of those conditions has not been fulfilled. It is sufficient for our purposes that Ireland has not persuaded you of any one of these. The burden must be on Ireland because it is the Applicant asserting the right to have such measures in its favour. It has to satisfy all of the conditions.

I shall not repeat Mr Plender's submissions, which have so recently been made. I stress that there is no irreversible step being taken by commissioning. It can be reversed, although it will be expensive. I stress that there is no urgency. In particular, the state of the MOX plant's programme is such that there will be no transports before the summer of next year. By that time the Annex VII tribunal will long since have been constituted; indeed, it might even have been able finally to determine some of the issues, if not more.

It is extraordinary that, given what Ireland says now, it did not seize the Annex VII tribunal a long time ago; for example, early in the year 2000, when it says that its one and only specific complaint – the letter of 23 December 1999 – was rejected by the United Kingdom in March 2000. Why did it not seize an Annex VII tribunal then, or why did it not seize the European Court of Justice even earlier when in 1997 the European Commission gave its Opinion? Had they done so, the tribunal or court concerned would have had time fully to investigate the facts and Ireland would not have been able to make a virtue, as it now seeks to do, of the absent time to investigate the facts.

Those considerations alone would be sufficient for us to say with confidence that the request for provisional measures should be rejected. But there is more. At bottom, Ireland is saying two things: that MOX will be harmful and that it had the right to be consulted and its views taken into account. That is what it comes down to. But surely the history and the facts show three things very clearly. First, they show that Ireland has been fully consulted and has taken the opportunity to speak over eight years of rigorous process of investigation, during five public consultations and a review of this application. It is true that in the end its point of view has not been shared by the United Kingdom, but no duty to cooperate or consult requires that it should.

The truth is that Ireland would never have been satisfied unless the United Kingdom had refused authorization for MOX, simply because as it has frankly made clear, it has always been against all parts of Sellafield. The merits of its complaints of lack of cooperation, we say, amount to nothing. Whether Ireland should have seen some of the information withheld from the public on the grounds of commercial confidentiality – incidentally, a ground permitted by the agreement between Ireland and the United Kingdom and recorded in the OSPAR Convention – is for the OSPAR Tribunal to determine.

However, in any event, the information that Ireland was then seeking that was kept out by reasons of commercial confidentiality, as we say, related to the economic case for the MOX plant, not the safety issues. We were very surprised to hear it suggested that information about the radiation discharges had not been disclosed. I have shown you the publicly available documents: the environmental assessment; the Proposed Decision of the Environment Agency and the Article 37 application.

The second point that is clear is that the rigorous process of review by the bodies charged with the responsibility of investigating the safety has concluded that the interests of Ireland are entirely safeguarded. I dealt with that at length yesterday. I will not repeat it, but perhaps I may simply remind the Tribunal of the conclusions of the European Commission, which are at Annex 3 to our written observations (*Shown on screen*):

> In conclusion, the Commission is of the opinion that the implementation of the plan for the disposal of radioactive waste arising from the operation of the BNFL Sellafield Mixed Oxide Fuel Plant, both in normal operation and in the event of an accident of the magnitude considered in the general data, is not liable to result in radioactive contamination, significant from the point of view of health, of the water, soil or airspace of another Member State.

I turn secondly to the conclusions of the Environment Agency. Its Proposed Decision is at Annex 5. I showed you one extract yesterday. Later, I shall invite you to look at paragraph 22 from the Executive Summary. Now on screen is paragraph A3.14. That paragraph states that: "the assessed dose due to gaseous and liquid discharges from the MOX plant is less than one millionth of that due to natural background radiation."

Thirdly, I remind you of the detailed consideration by the Secretaries of State of all the issues, including security issues after 11 September. That is at Annex 4. On the screen is paragraph 28 of the decision letter. I shall read the relevant part:

> Security risks to nuclear and other installations are kept under review. The Office for Civil Nuclear Security …, which regulates security within the civil nuclear industry, has taken account of the terrorist attacks which took place in America on 11 September and continues to be satisfied that the security arrangements to be applied by BNFL will provide effective security once the SMP starts to operate.

Finally, all operations and transports will be conducted in accordance with the latest international standards at the least.

The third fact to which I refer is that those conclusions are demonstrably right. I shall not repeat the analysis I gave yesterday. However, the key point surely is that the exposures are a tiny fraction of permitted standards. The highest figure for the United Kingdom is one hundred thousandth of the United Kingdom standard, and the figure for the Irish is one-fiftieth of that. As Mr Plender has pointed out, there is many times more exposure in an airplane flight. It is no use Ireland talking about contemporary standards. The radiological discharges have not changed. The standards we have referred to are the up-to-date standards.

Fourthly, Ireland has ignored those figures and that data, although it has had years to prove it wrong. Instead, it refers to different figures and the position about fuel reprocessing. That is not the point. MOX is a dry process and does not produce liquid discharges in the way other processes might. But even so, in relation to those other activities, irrelevant though they are, Ireland ignores the evidence; for example, that of its own Radiological Institute. That is at Annex 15 to our observations. The key finding is that discharges from Sellafield "do not pose a significant health risk to people living in Ireland".

On these facts there is absolutely no justification to put the United Kingdom and BNFL to the certainty of some significant loss and the real risk of much greater loss through further delay.

I suggested yesterday that I felt some dismay and perhaps disappointment about the Irish application, and that the Irish scheme was a strategy to use the advantages of a preliminary measures application to try to block the MOX Plant, having failed to persuade the United Kingdom to agree to its point of view, relying on the absence, so it says, of the need to prove the irreparable harm and the injurious effect of MOX.

In the light of the evidence, the Tribunal may have found that suggestion compelling. Others might say that strategies are understandable and that nobody should be blamed for trying. I do not want to fall out with our good Irish friends because they have used a strategy. However, either way there is no good reason for granting this ill-founded application. Mr President, Members of the Tribunal, the United Kingdom respectfully urges you to reject it. Thank you, Mr President.

The President:
Thank you very much.

The hearing is adjourned until 3.15 p.m.

Luncheon adjournment

PUBLIC SITTING HELD ON 20 NOVEMBER 2001, 3.15 P.M.

Tribunal

Present: *President* CHANDRASEKHARA RAO; *Vice-President* NELSON; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, MENSAH, BAMELA ENGO, AKL, ANDERSON, VUKAS, WOLFRUM, TREVES, MARSIT, EIRIKSSON, NDIAYE, JESUS, XU; *Judge* ad hoc SZÉKELY; *Registrar* GAUTIER.

For Ireland: [See sitting of 19 November 2001, 10.00 a.m.]

For the United Kingdom: [See sitting of 19 November 2001, 10.00 a.m.]

AUDIENCE PUBLIQUE DU 20 NOVEMBRE 2001, 15 H 15

Tribunal

Présents : M. CHANDRASEKHARA RAO, *Président*; M. NELSON, *Vice-Président*; MM. CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, MENSAH, BAMELA ENGO, AKL, ANDERSON, VUKAS, WOLFRUM, TREVES, MARSIT, EIRIKSSON, NDIAYE, JESUS, XU, *juges*; M. SZEKELY, *juge* ad hoc; M. GAUTIER, *Greffier*.

Pour l'Irlande : [Voir l'audience du 19 novembre 2001, 10 h 00]

Pour le Royaume-Uni : [Voir l'audience du 19 novembre 2001, 10 h 00]

The President:
I give the floor to the Agent of Ireland.

Reply of Ireland

STATEMENT OF MR O'HAGAN
AGENT OF IRELAND
[PV.01/09, E, p. 5]

Mr O'Hagan:
Mr President, Members of the Tribunal, in closing Ireland is going to ask three Counsel to address the Tribunal. Firstly, we are going to hear from Mr Eoghan Fitzsimons SC. Mr Fitzsimons will be followed by Mr Philippe Sands, and Mr Sands will be followed by Mr Lowe. At the conclusion I will be addressing the Tribunal on the reliefs which will be sought by Ireland.

The President:
Thank you very much.
Mr Fitzsimons, you have the floor.

STATEMENT OF MR FITZSIMONS
COUNSEL OF IRELAND
[PV.01/09, E, p. 5–8]

Mr Fitzsimons:
Mr President, Mr Vice-President, Members of the Tribunal. In view of the time constraints I am going to deal with the factual issues; firstly, the RPII issue. Both Lord Goldsmith and Mr Plender have referred to the RPII Annual Report of 1999 at page 12 and have sought to use it as a stick with which to beat Ireland, but in reading out a sentence in this report they failed to read out the next portion, which states that the Institute strongly takes the view that there is no justification for the continuing contamination of the Irish marine environment by discharges from Sellafield. It is not correct, as we say, the United Kingdom Counsel did seek to imply the RPII findings somehow or other approved discharges from Sellafield.

Moving on to the STOA Report prepared for the European Parliament, the data contained in the summary of the report remains intact as evidence before this Tribunal. As I already stated, the United Kingdom has chosen not to challenge this scientific data contained in the report. The data fully supports Ireland's contention that the commencement of the MOX plant with the resultant increased activity at THORP will give rise to a cumulative, irreversible and long-term pollution of the Irish Sea.

The United Kingdom has sought to dismiss the report on the basis of a single article in a Sunday newspaper. They have now produced a press release on the basis of which that article was written and I call your attention to it. As you will see, it is issued by Professor Trakatellis, Chairman of the STOA Panel. He does not, as was suggested, criticize or seek to discredit the content of the report in any way. The contractual dispute with the party which prepared the report has no bearing on its content. It was stated that Members of the European Parliament expressed concern, but if you read the press release you will see that *some* Members of the European Parliament expressed concerns regarding the report's objectivity. But, of course, the report is strongly critical of France and the United Kingdom; the French and British Governments. I am not sure of the number but there are perhaps up to 100 representatives of France and England in the European Parliament.

We submit that it is not unreasonable to assume that the few Members of the European Parliament who apparently were critical of the report were either English or French or both. We ask you to read the press release. When you read the press release you will see in it a statement as follows, and the first of these is highlighted, "The new study should be seen as an additional contribution to the effort of STOA to enrich the political debate with the most objective and comprehensive scientific and technical information possible on this subject."

More importantly, in the second sentence which is highlighted: "The Panel places great value in an open event of this kind, as the best way of treating a subject on which significantly divergent opinions may exist". Ireland and the United Kingdom have significantly divergent opinions on the issue that you have to decide. These will be decided upon at the Annex VII tribunal hearing. They do not arise for determination now. What is important is that there is evidence, some of which is in the STOA Report, which supports the Irish case in relation to harm and damage and particularly in relation to the irreversible, cumulative and long-term effects of the discharges. We say that it is inconceivable that the United Kingdom has not considered whether or not it should attack the data in this report.

Their defence, as will be apparent from their Written Response and their submissions made here, has been meticulously prepared. They have had clearly enormous assistance from experts and yet no attempt is made to attack any of the data in the STOA Report and particularly the figures I referred you to. Not one figure has been contradicted and we submit

that in those circumstances that evidence remains intact. We submit that the only inference to be drawn from the United Kingdom approach is that they accept that the data is accurate and are not in a position to dispute it. We, therefore, ask you to treat that evidence accordingly.

The United Kingdom has, of course, produced data in their written submission and again here. It is there but it is all land-based data. They have produced no data regarding the marine environment and, of course, the STOA Report addresses that specifically. There is no evidence from the United Kingdom containing any data about the levels of pollution in the Irish Sea. They have avoided that topic completely. You are entitled to draw inferences from that.

Moving on to THORP, the United Kingdom has also avoided addressing the involvement of the THORP reprocessing plant in the MOX process. It is as if they have tried to wish THORP away. It is inconvenient to their case because the Irish case in relation to the discharges is based upon the discharges from the MOX plant together with the increased discharges from the THORP plant arising from the operation of the MOX plant. There is no doubt that there will be a significant increase in those discharges, that is, the discharges from the THORP plant.

This, in fact, is verified by the decision of the United Kingdom's Secretary of State of 3 October 2001 authorizing the MOX plant, at paragraph 77. In this paragraph the Secretary of State refers to "benefits which would flow from operation of the SMP [which is the MOX plant] from BNFL's other businesses, including nuclear [fuel] reprocessing". These additional economic benefits are, according to the report, and I quote again, "likely to be substantial". It is not small or significant. It is substantial. British Nuclear Fuels consider that they will make a lot of money from THORP as a result of the commissioning of the MOX plant and the resultant increased use of the THORP plant. We submit that this evidence fully vindicates Ireland's case. As stated, any increase in reprocessing at THORP will give rise to increased discharges at both plants. It is as simple as that.

With regard to the comments of the United Kingdom's Attorney General yesterday, the transcript will show that Ireland made no allegation of personal bad faith against Secretary of State Beckett. Any such suggestion was not and is not part of Ireland's case. The parties have agreed that a further letter dated 15 November 2001 delivered by hand yesterday in Dublin should be admitted into evidence; delivered to us in Dublin by the United Kingdom yesterday when we were here. That should be admitted into evidence. The Tribunal is invited to read and consider this letter together with the letter of 24 October 2001 and draw such conclusions as it considers appropriate from them. In reading this brand new letter which arrived on 19 November 2001, the Tribunal might ask itself why the information contained in it was not, together with the information in the Freshfield letter, included in the letter from the Secretary of State of 24 October last.

You have asked us some questions and I wish to deal with the second question relating to MOX transport in so far as it is possible for us to do so. The commissioning of the MOX plant would increase transport by sea of radioactive materials to and from Sellafield in the following ways. Firstly, MOX fuel assemblies fabricated for the first time at the MOX plant will be exported from Sellafield. Secondly, there will be an increase in the shipments of spent fuel for reprocessing at THORP to produce plutonium for the MOX plant. This, as I have pointed out, is accepted at paragraph 77 of Annex 4 of the UK's submission by implication.

In the future it could be – though this point may not be one that would arise at the moment but none the less I will put it in – that plutonium could be shipped directly to Sellafield for the production of MOX fuel. The source of such plutonium could be, for example, the decommissioning of nuclear weapons.

In terms of quantities, Ireland cannot assist the Tribunal, regrettably. We are not privy to BNFL's accounts or business plans. When we came here on the written case filed by the United Kingdom they said they would suffer a loss of £10 million, I think, initially. This has somehow or other developed into hundreds of millions whilst we have been in this chamber. If that is so, there is going to be a great deal of business generated by this MOX plant and it would follow that there will be a considerable increase in the transport.

Finally, Sirs, you raised the question regarding publications verifying the assertion that the Irish Sea was the most radioactive sea in the world. I can refer you to two publications; firstly, *Radionuclides in the Oceans – Inputs and Inventories* published by *L'Institut de Protection et de Sécurité Nucléaire* in 1996 in Paris. This is a study of different seas, their radioactive content, and a.comparison of the results of the studies gives one the conclusion that the Irish Sea is the most radioactive in the world.

The second document which I can refer you to is a United Kingdom House of Commons Select Committee Report. This is a report of a United Kingdom House of Commons Select Committee of a session back in 1985 before the THORP plant was commissioned, before the MOX demonstration facility was started and before the MOX plant was presumably thought of. I must say this document turned up as a result of your request, and I am grateful for that request. We will submit to the [Tribunal] the full report, of course, as requested. It contains a statement which is on the screen and I will just read the highlighted part, "Disposal at the moment has taken the form of discharge of huge volumes of low-level liquid waste from the Sellafield pipeline. The result of this is that at least a quarter of a tonne of plutonium has been deposited in the Irish Sea which has become the most radioactive sea in the world". I attach significance to this document which was only brought to my attention within the last hour because here we have, from a United Kingdom document, verification of the STOA Report which an attempt has been made to rubbish.

One of the figures which I drew your attention to in the STOA Report was that there is in the Irish Sea between 250 and 500 kilograms of plutonium. A quarter of a tonne, I am told, is 250 kilograms – and this is as far back as 1985-1986. Suddenly the mystery as to why the data in the STOA Report was not being contested is solved. It cannot be contested. Here is one of the items verified in a 1985 document. Think of how much has gone into the Irish Sea since 1985, and this is an official United Kingdom Parliamentary Report. I thank the [Tribunal] for alerting us to that.

I thank you, Members of the Tribunal, for this opportunity and honour to have addressed you here.

STATEMENT OF MR SANDS
COUNSEL OF IRELAND
[PV.01/09, E, p. 8–13]

Mr Sands:
Mr President, Members of the Tribunal. In the short amount of time available to me, I am going to deal with four points. I apologize if I have to deal with them at some speed, and I apologize in particular to our interpreters.

The first point that I want to make is that Ireland brought its Annex VII proceedings at the appropriate time. It has been suggested by the United Kingdom that somehow Ireland has brought the claim too late: it should have been done years ago; that it has failed to make the information in its claim adequately clear; that we have been unspecific, and so on.

Let me deal with the first point. The Law of the Sea Convention claim was brought at the right time. The Law of the Sea Convention was raised in July and again in December 1999. Between December 1999 and June 2001 nothing happened. Why? Because there was a safety scandal at British Nuclear Fuels. There was an absence of safety culture and it was not just workers who left; the entire Board left.

Let us be clear about what happened. The justification issue did not return until the spring of 2001 and the explanation for the lack of correspondence is as simple as that. When matters took off again in the spring of 2001, as you have seen from the correspondence, Ireland once again requested information from the United Kingdom. It was again refused. Ireland put the United Kingdom on notice that it wished to make a claim if the information was not provided, with a view to identifying information not only on economic justification but also on environmental impact because the information contained in the PA Reports – and we did not know then about the ADL Reports – has environmental consequences. It deals with transports, it deals with quantities. It deals with how many years this plant is going to operate for. We had none of that information then. We have none of that now. That explains the delay.

Then, in the autumn and out of the blue, the matter proceeds at a far greater pace. A further consultation takes place in the course of which it is not even proposed to make available the ADL Report. That ultimately is made available and it leads to a quick decision on 3 October 2001, a decision, I should say, that was taken in the shadow of the events of 11 September. It was taken whilst other countries – the United States – were prohibiting all international movements of radioactive materials. The United Kingdom was taking the opportunity to authorize new ones and new activities. Until that decision was taken on 3 October 2001 there was no decision to challenge under UNCLOS. There had been no authorization. Quite simply if we had come to you a year ago or two years ago, we would have been told by the United Kingdom that we were acting prematurely.

Another point: we are told we were not specific enough in our letters. Let us just focus on the letter of 23 December. I listened with interest as the United Kingdom identified the very same provisions we are relying upon now, with one exception that I will say something about in a moment; the very same provisions that we raised and rely upon at this point. It is true that articles 123 and 197 were not referred to in that letter but the reason for that is simple. There had not at that point been a failure to cooperate. It was December 1999. All of that effectively emerged in the period April to August 2001. That was when the failure to cooperate emerged.

I move on to my second major point. We say the substantive and procedural rights which Ireland claims are related to the protection of the marine environment from radioactive pollution. This is not a case about the protection of human health. The United Kingdom has been deft in seeking to recharacterize this as a case about human health, not the protection of

the marine environment. We should be alert to the way in which they have done that. The United Kingdom say that under UNCLOS the only right we have is the right not to be subject to harmful health effects from the operation of the MOX plant. But if you read our claim you will see it goes far more broadly than health effects. We say we are entitled not to be subject to pollution which will have impacts upon – and here I take the language of article 1, paragraph 4, of the Convention – which will have impacts upon living resources and marine life or marine activities, or quality for the use of the sea, or reduction of amenities. It is far broader. We are not just concerned about health. Loss of amenities is especially significant, since it includes, for example, loss of tourism as the result of the construction of the new operations at Sellafield.

The entire UK strategy is to shift attention away from the sea, away from the marine environment and on to human health. We were presented with an extremely polished performance about the infinitesimally small additional doses and tiny risks to human health, almost too small to measure, it was suggested.

In the light of correspondence and the history of the dispute, we leave it to you to judge for yourselves what this dispute is about. Is it about health, as the United Kingdom says, or is it about the marine environment, with all that implies, as Ireland says?

We do not have to show that on 20 December some dramatic event is going to happen which is going to cause harm to human health in any way. Our case is not about that issue. All we have to show is that there is a prospect that there will be new and additional pollution, which will violate our rights under the Convention. I identified the provisions of the Convention. It is exactly the same claim as we made on 30 December 1999: namely, the United Kingdom was proposing to authorize activities which were going to be harmful to the marine environment without having considered the impacts on the marine environment. That is what our case is.

I think it is clear who is playing strategies in this courtroom. You are not the International Tribunal for the Protection of World Health. You are the International Tribunal for the Law of the Sea. That is your function. So it is all very interesting to hear about sieverts and millisieverts and microsieverts and millionths of this or that, but it is irrelevant to this case. It is totally irrelevant to this case.

Our case is a simple one. It has been confirmed by the United Kingdom. They have not put before you a single document which indicates that they ever took into account amenities in Ireland, the protection of marine and living resources and so on. They do not even pretend to claim that they have taken it into account. That is why what they seek to do is recharacterize the matter as being about human health. But of course harm can be viewed in two ways. You can have harm to human health, which both sides are concerned about, obviously, and you can also have harm to the environment, which they are evidently not concerned about, but we are deeply concerned about. With regard to human life, it is of course appropriate to consider radiation by reference to doses, to individuals or groups.

We heard yesterday that those dose levels were quite low, and we have not challenged that fact.

The President:
May I interrupt you? The interpreters are finding it difficult to translate this into French. Would you slow down the tempo of your presentation? Thank you.

Mr Sands:
Harm to the environment in terms of radioactive pollution is measured in a different way, and we have not heard anything about that. It is a reflection of the amounts of radioactive substances that contaminate the environment. These amounts are measured in units of

radioactivity which are called becquerels. You will have seen them in the European Parliament report. You will have not heard anything about becquerels from the United Kingdom because the United Kingdom does not want you to focus on concentrations in sediments or in marine species or so on and so forth. It is undisputed that after 20 December there will be increased discharges into the marine environment from the MOX plant and becquerel levels will increase.

This is the key to what the case is really about. As we say, it is about protecting the marine environment and addressing the issue of concentration in the Irish Sea of becquerels, of radionuclides.

We are astonished that at this stage in the proceedings the United Kingdom has ignored entirely its obligation to reduce concentrations of radionuclides in the Irish Sea to "close to zero" by 2020. You have not heard anything from the United Kingdom about that. That is an obligation which emerged in 1998 and which we say informs articles 194, 207 and so on.

Once MOX is commissioned after 20 December, there will be large discharges into the Irish Sea. The UK again sought to downplay this but they did not deny that those discharges which would occur would have irreversible effects. They cannot. Plainly, once you open the pipe and let the radionuclides in, whether it is on 21 December or 2 January, it will enter the sea. Some of it will reach Ireland and it will be there to all intents and purposes for ever. That is why we say our rights will be violated on 20 December.

What does the United Kingdom say? The United Kingdom says it, too, has rights. What is the right that the United Kingdom is claiming? Really the right that the United Kingdom is claiming is nothing less than the right to continue polluting the Irish Sea, which they have done for 40 years. They say they have that right because they do not have to take into account the marine environment. All they have to do is look at human health. That is what Lord Goldsmith effectively said to you: we have the right to discharge this stuff into the Irish Sea and we have the right to do it in order to make money, because that is what it is about. We heard a lot about money from that side. And, said Lord Goldsmith, we do not have to cooperate with you about that; we do not have to assess that; we can just keep on discharging it. So long as it does not harm human health.

And, they say, gentlemen on the Tribunal, if for some reason you decide you are going to prescribe provisional measures, perhaps Ireland might compensate us for the end of our right to discharge. That is what you are being asked to do. Frankly, after 40 years, it is unacceptable, it is completely unacceptable. Our rights are set forth and have been set forth by us in absolute detail and with precision in this case. Most of our arguments have been ignored entirely in the context of an effort to recharacterize this as a minor matter of nuisance with no harm to human health: tiny discharges, nothing to worry about, go home, leave us alone.

Much was made of the 1997 Euratom Opinion. We want to thank the United Kingdom for putting that Opinion in and for relying on it so extensively because it actually confirms our case. It does two things. If you read it very carefully, and you will have noticed that certain readers of the Opinion did not read it so carefully – although I am grateful to Mr Plender who was entirely accurate throughout his readings of that provision –, firstly, it confirms that there will be contamination of the water, soil or air space of Ireland. It does not say that is not going to happen. Nothing in the opinion says it is not going to happen. But, it says, the second point, such contamination is not liable to result in radioactive contamination significant from the point of view of human health. That is all it does. The reason it only does that is that the European Commission is not charged with the task of looking at the effects on the marine environment, on loss of amenity, on uses of waters and so on. That is not their function. Under the relevant chapter of the European Atomic Energy Treaty, all they can do

is look at human health. But it is plain that something which is not harmful to human health could nevertheless cause harm to the marine environment.

Again, we note that, notwithstanding the fact that we asked for a reassessment of the authorization process by reference to the new standards relating to concentrations which emerged after 1998, there is no reference to any such attempt. It is ignored and everything has been authorized by reference to standards which existed in 1993 and 1996. It is true that, in assessing impact on human health, current standards may have been taken, but we are not only interested in human impacts. This is the Law of the Sea Tribunal which is concerned with the protection of the marine environment. It is not an organ of the World Health Organization.

I mention a couple of other matters that were not referred to by the United Kingdom. Nothing was said about article 123, we noted with great interest this morning. A number of people in this room know the importance of article 123. There is nothing that needs to be added, except to say that that silence speaks louder than anything I can say about the United Kingdom's attitude, to *voisinage*, to neighbourliness, to the responsibilities of littoral States.

Let me turn now, in conclusion, to what all this means for the standards that you are to apply in deciding whether or not to prescribe provisional measures. For the purposes of article 290, you have to show the possible existence of rights which need to be protected, which Ireland holds, and we went into that in some detail yesterday. Or you have to show serious harm to the marine environment. We maintain both aspects because we say that discharge of any radiation into the marine environment constitutes pollution. The United Kingdom has not denied that it constitutes pollution, and pollution by radiation is always serious. It can never not be serious from an environmental perspective.

The discharges which will happen after 20 December and the new movements which will occur, unless of course the United Kingdom is going to give us an undertaking in relation to movements, violate our rights. These are rights which the United Kingdom says we do not have. But what becomes clear after 80 pages of argument, and four hours of impressive and detailed presentation, is that there is a genuine dispute there. There truly is a dispute about the nature of the rights. The United Kingdom may be correct; it may be that it is nothing more than human health. Or we may be right to say that it is broader and it is about environment and amenity and uses of water, but plainly there is a dispute. You cannot escape that fact.

Disputed rights are capable of protection under article 290. That is the purpose of the first limb. The situation in fact in which we find ourselves today is not a new one. These arguments are made every time there is a provisional measures application.

I think the best thing I can do is to refer you to the leading commentary on provisional measures: Mr Justice Collins's Hague lectures of 1991, which have been re-published by Oxford University Press in 1993 – and I know you have a copy in your library because we have dealt with this in the *Saiga* provisional measures phase –, and in particular pages 177 to 181. We say that is all you need to deal with this case. Those pages are entitled "The Merits of the Claim", which is what our friends from the United Kingdom have spent about 86 per cent of their time dealing with. Mr Justice Collins, as he now is, refers to almost all of the same cases that we referred to yesterday and he notes, and I quote, that the "prevailing view is that the merits of the underlying claim are irrelevant", although of course he recognizes that "if a State were to bring an apparently hopeless … claim, it would not obtain an order for interim measures". Well, the United Kingdom has said many things about our presentation, but "apparently hopeless" is even too far for them. Of course, ultimately it is for you to judge whether what you have heard is "apparently hopeless". We think that it is not.

Mr Collins notes in particular the *Nuclear Tests* cases, which I referred to yesterday, and he quotes the very same test which I referred you to and which I do not need to go into – again, the question I posed. Then he says: The International Court of Justice was not swayed

by a French claim that Australia's own National Radiation Advisory Committee had concluded that fallout from the French tests did not constitute a danger to the health of the Australian population – that is very similar to the situation we have had today. Substitute Australia for the Radiological Protection Institute of Ireland and you have an identical situation. The Australian Government, for understandable reasons, did not want to alarm its population about what was going on, but that does not mean that they cannot also address the environmental consequences. But of course the United Kingdom is completely silent about the case.

The International Court was in effect saying that the case was arguable, and we say that our case is arguable. Mr Collins concludes this magisterial piece by considering the opinion of Judge Shahabudeen in the *Great Belt* case, of which we have heard quite a lot today. Judge Shahabudeen concluded not that the applicants must show a *prima facie* case on the merits, but that it must, and I quote, "establish the possible existence of the rights sought to be protected". That is all we say you have to do.

You have plenty of material. It is said that we have not provided sufficient facts, but we have noted with interest the considerable effort expended by the United Kingdom in trying to undermine, unsuccessfully we say, the European Parliament's report. At the end of the day all we have to do is rely on their own documents because those documents prove that there will be discharges. That is the end of the matter. There will be increases in radionuclide concentrations in the Irish Sea as a result of the activity they have authorized and which will start very shortly. We say you need do no more than rely on their very own documents and admissions and your job is done.

The final point I can deal with very quickly. That concerns whether or not our rights need to be protected. We say that it is self-evident that radioactive pollution which is discharged after 20 December can never be removed from the Irish Sea. We say that environmental impact assessment becomes meaningless, for obvious reasons, and we say that no account can, in a meaningful way, be taken of our interests if the plant begins to spew out its radioactive pollution after 20 December. Our case is as simple as that. Thank you very much.

Mr President, Members of the Tribunal, that concludes my presentation and I invite you now to ask Mr Lowe to the podium.

STATEMENT OF MR LOWE
COUNSEL OF IRELAND
[PV.01/09, E, p. 13–17]

Mr Lowe:
Thank you , Mr President, Members of the Tribunal. My task is to deal finally, in wrapping up the Irish case, with the jurisdictional points that were made by our friends on my left this morning. Some of those points we accept. It was said that provisional measures are an exceptional measure, and that, of course, is true. Not every case needs them and they should not be given in every case. Where they are needed, they should be indicated.

The fact that the International Court has not indicated them in any case like the present simply reflects the fact that the International Court has not had before it any case like the present in which it would have been appropriate to indicate provisional measures. The closest case, the *Great Belt* case, is one where Denmark volunteered an undertaking of exactly the kind that we seek from the United Kingdom, and so, unsurprisingly, the International Court decided that it had no need to indicate provisional measures in that case.

The United Kingdom has refused to give an undertaking of that kind, although it may be that this morning the United Kingdom was volunteering an undertaking that there will be no shipments until the summer of 2002, so that the relief that is sought in paragraph 150, subparagraph (2), of our Statement of Claim would be covered by an undertaking. We would invite our friends to indicate this afternoon whether they were giving that undertaking and, if so, to define what exactly they mean by "the summer of 2002".

But let me turn to Mr Plender's three basic hurdles that he says stand between us and the remedy we seek from you: Articles 282, 283 and 290.

As far as article 282 is concerned, I explained yesterday that the OSPAR and Annex VII applications are patently and visibly different. Mr Plender asks you to put aside the evidence of your own eyes when you look at the Statement of Claim, because his point is that this claim could and should have been brought by Ireland before the OSPAR or the EU case.

I repeat that that is not possible. The OSPAR Tribunal does not have jurisdiction that extends to all of the matters claimed in this case now. I shall give you one instance of that. Article 123 of the Law of the Sea Convention prescribes particular rights and duties of States in semi-enclosed seas. That was a provision not mentioned at all by the United Kingdom this morning, which seemed to be stuck on Convention articles 197, 192 and 194. Article 123 of the Law of the Sea Convention has no parallel in the OSPAR Convention, whose general obligations apply broadly, to more than half of the North Atlantic.

If a State chooses to frame a case in terms of OSPAR or EU obligations, it must use the OSPAR or EU procedures to handle that case. But disputes do not arise with legal labels already pinned on them. Disputes begin not as OSPAR or as EU disputes; they begin as disputes over pollution; over non-cooperation: as factual disputes. States then look for the legal remedy, which allows them to protect their interests in that dispute. The freedom of a State to invoke whatever legal rights it might have under any international legal instrument is one which is not subject to any limitation of the kind that the United Kingdom would have you believe here. How could an Annex VII arbitral tribunal say to Ireland, "You must go to OSPAR. You must settle for the more limited rights that you have under that Convention and not seek to come before us and claim the wider rights that the 1982 Convention gives you." The only possible circumstances in which Ireland could be sent away from the Annex VII tribunal would be if the two claims were identical, as they were in all material respects in the *Southern Bluefin Tuna Cases*. That is not so here.

I also raise another point. If it is the case, as Mr Plender suggested, that this is truly a matter of jurisdiction and not a matter of admissibility – that point is crucial to his argument on article 282 of the Convention – the OSPAR Tribunal might equally decline jurisdiction and say that this is a matter which should go to the Law of the Sea Convention. There is no pre-determined wisdom that says that it would be the Annex VII tribunal that would decide that its jurisdiction is limited there.

However, in any event, Mr Plender is plainly not right. The OSPAR and Article VII cases are plainly and purposefully different. There is no authority that has been cited, nor even any serious argument from the United Kingdom, as to why Ireland should not frame its legal case exactly as it thinks proper. Indeed, I remark in passing that if the United Kingdom's contentions were correct, that would have the effect that all regional fisheries and pollution conventions would sweep every dispute which might be brought under one of those Conventions out of the scope of Part XV of the Law of the Sea Convention. That is plainly not something which was ever contemplated by the drafters of that Convention.

As regards Mr Plender's point on the EU mixed agreements, I will not trouble you by reading out now the terms of the European Community's declaration made when it ratified the Law of the Sea Convention. However, you will see from paragraph 2 of that declaration that it is simply not arguable that every aspect of the Irish case is covered by the terms of the Community's exclusion.

I turn to article 283. The allegation there is that Ireland has not exchanged views. It was curious that the Attorney General suggested this morning that Ireland could have taken the dispute to the Law of the Sea procedures two years ago, shortly after it raised the Law of the Sea concerns in the 1999 letters; but, because Ireland had chosen instead to press on with its attempts to find a solution through meetings and correspondence with the United Kingdom, it had now become barred from doing so because it had failed to exchange views. That suggestion makes no sense whatever.

It is true that the Irish exchanges did not explicitly identify themselves as exchanges for the purposes of article 283; but tribunals have never required that negotiations must comply with particular formalities. Let me read very briefly an extract from the Judgment of the International Court in the 1962 *South West Africa* case where exactly this question as to whether a dispute could be settled by negotiation arose. I have taken the extract from the publication on the Court's website. That states:

> In the Court's view, the fact that a deadlock had been reached in the collective negotiations in the past, and the fact that both the written pleadings and oral arguments of the Parties had clearly confirmed the continuance of this deadlock, compelled a conclusion that no reasonable probability existed that further negotiations would lead to a settlement.

The Respondent having contended that no direct negotiations between it and the Applicants had ever been undertaken, the Court found that what mattered was not so much the form of negotiation as the attitude and views of the parties on the substantive issues of the question involved.

There can be no doubt that in this case the correspondence shows that the attitude and views of the parties on the substantive issues in question were in dispute.

That, too, accords with the approach taken in the *Southern Bluefin Tuna Cases*, to which I referred yesterday. This is an important point. It goes to the heart of the utility of the Part XV procedures. Negotiations are not normally conducted by lawyers; they are conducted by technical experts. If they try in good faith to find a practical solution to a practical dispute, and they fail, that should be enough to satisfy the requirements of article 283.

The real core of the United Kingdom's case is simply that we were not good enough. They say that our objections were unparticularized; that they had insufficient specificity; and that we did not explain what our concerns were. That point was repeated this morning. You have the correspondence. You will read it and form your own view. Cooperation and consultation are two-way processes. It is not enough for the United Kingdom to say, "Here we are; consult us". Ireland has no nuclear industry. It has no body of commercial experience in running nuclear plants as a business. We think that we spelled out our concerns: that the Irish Sea is being polluted by the Sellafield complex, and that the problem will get worse as a result of the commissioning of the MOX plant, of whose intended operations we have only the most incomplete picture. We think that we spelled this out perfectly clearly. We indicated also how we might pursue those concerns in law. What more do they want?

I am told, Mr President, that the interpreters are having difficulty. It seemed that I was to address this to you, but I suspect that the remark is addressed to me.

You will note also from the Secretary of State's letter of 15 November submitted in evidence this morning that the decision to give the green light to the MOX operation was taken on 3 October and that, as they say, any further steps are a matter for the regulators. It is plain that in any event there was no room for negotiation after 3 October. Britain's position had already been defined.

If Ireland's claim is entirely without merit, as Mr Plender says, the Annex VII tribunal will say so, and Ireland will accept that result. What Ireland now asks is that the United Kingdom do nothing that will prejudice the execution of the Annex VII tribunal's award if it upholds Ireland's claim.

That brings me to my final point, which is the question of urgency. The Tuna case was cited against us. There, they say, it was common ground that tuna stocks were seriously depleted. That is so; but the parties were diametrically opposed on the question of whether the modest catches under the Japanese scientific fishing programme would make the situation significantly worse. In the face of that diametric opposition, this Tribunal prescribed provisional measures. We are in the same position here.

It is, I hope, common ground that Sellafield has already made the Irish Sea the most radioactively polluted in the world. The only division between us is over whether the consequences of MOX will make it significantly worse. Mr Sands has explained the basis of our case on this. I recall, too, that our application is not based solely on the substantive pollution of the Irish Sea. Ireland also invokes procedural rights to consultation, cooperation and coordination of activities with the United Kingdom. Even today it seems that they have not understood this point. Mr Plender said this morning that if the Irish Minister had waited for a reply from the Secretary of State to his letter, the United Kingdom would have learned the precise nature of Ireland's views and would have responded. Again, we hear the idea that the United Kingdom had it all covered and that the only need was for Ireland to explain its fears and that it would be reassured by the United Kingdom that it had all been anticipated and taken into account.

That is not consultation or cooperation; that is condescension. One wonders if there is not, from time to time, a certain blurring of the United Kingdom's international responsibilities as a State with its interests as a shareholder in BNFL. If the plutonium commissioning goes ahead next month, Ireland's procedural rights will have been defeated. It will always then be possible for States to justify failures to consult or cooperate on the ground that no harm has been caused by their failure. An entire body of legal mechanisms which is intended to introduce rationality and fairness into the actions of States will be reduced to nothing more than a matter of courtesy and convenience.

The United Kingdom says that the plant could be decommissioned. It stresses the losses of tens or hundreds of millions of pounds if we delay. There has been no evidence

given for those figures. But it is important finally to come back to the reality of the situation. We seek a short delay: no commissioning until the Annex VII tribunal can be constituted and take a view. This is absolutely not a stratagem. I can assure the United Kingdom that we look forward keenly to the merits phase in this case, where our real remedy is sought. We are looking for a delay of weeks, not years. If the United Kingdom is concerned by this delay it could ask the Tribunal to limit the provisional measures to, say, six months with the possibility of reapplying for an extension if some unforeseen circumstances made that necessary; but no. The United Kingdom's position is that the plant must go ahead, and that we, Ireland, will learn in due course from the decision of the Annex VII tribunal that we never had the rights that we claimed anyway.

That concludes our submissions, Mr President. I would ask you to invite the Irish Agent to make our final formal submissions.

The President:
Thank you.

Mr O'Hagan?

STATEMENT OF MR O'HAGAN
AGENT OF IRELAND
[PV.01/09, E, p. 17–18]

Mr O'Hagan:
Mr President, Mr Vice-President, Members of the Tribunal, Ireland requires that ITLOS prescribe the following provisional measures:

(1) that the United Kingdom immediately suspend the authorization of the MOX plant dated 3 October 2001; alternatively take such other measures as are necessary to prevent with immediate effect the operation of the MOX plant;
(2) that the United Kingdom immediately ensure that there are no movements into or out of the waters over which it has sovereignty or exercises sovereign rights of any radioactive substances or materials or wastes which are associated with the operation or, or activities preparatory to the operation of, the MOX plant;
(3) that the United Kingdom ensure that no action of any kind is taken which might aggravate, extend or render more difficult of solution the dispute submitted to the Annex VII tribunal. (Ireland hereby agreeing itself to act so as not to aggravate, extend or render more difficult of solution that dispute); and
(4) that the United Kingdom ensure that no action is taken which might prejudice the rights of Ireland in respect of the carrying out of any decision on the merits that the Annex VII tribunal may render (Ireland likewise will take no action of that kind in relation to the United Kingdom).

The President:
Thank you.
The hearing is adjourned until 5.15 p.m.

The hearing is adjourned until 5.15 p.m.

The President:
I now ask the Agent for Ireland whether he would like to add anything to what he has already said.

Mr O'Hagan:
Mr President, Mr Vice-President, Members of the Tribunal, I would like to refer to the three questions which were sent from the Tribunal to the Irish Agent and to counsel this afternoon. I advise the Tribunal that the Irish delegation will have the replies to the questions ready tomorrow. With the permission of the Tribunal we intend to submit a written response tomorrow.

The President:
Thank you very much. You have our permission.
I now give the floor to the Agent of the United Kingdom.

Reply of the United Kingdom

STATEMENT OF MR WOOD
AGENT OF THE UNITED KINGDOM
[PV.01/09, E, p. 18]

Mr Wood:
Thank you, Mr President. Mr President, Members of the Tribunal, Mr Wordsworth and Mr Plender will respond on behalf of the United Kingdom. I shall then read out the United Kingdom's final submissions. I invite you to call Mr Wordsworth to address the Tribunal.

The President:
Yes.

STATEMENT OF MR WORDSWORTH
COUNSEL OF THE UNITED KINGDOM
[PV.01/09, E, p. 18–20]

Mr Wordsworth:
Mr President, Members of the Tribunal, it is an honour to appear in front of you today. We have heard a lot this afternoon about Ireland's case; how clear it is and how clearly it has been set out. It is said that Ireland's case is that there will be pollution which will be harmful to the marine environment in the absence of any assessment of the relevant facts. It is said that the MOX harm will be added to by the increased use of the THORP facility due to the MOX plant operation. It is said that it is clear who is playing strategies. By that, it is meant that the United Kingdom are playing strategies.

Members of the Tribunal, neither of the above allegations are in Ireland's Statement of Claim. By Ireland's Statement of Claim before the Annex VII tribunal I refer specifically to the document in respect of which provisional measures are sought. I do not refer to the Statement of Case, which is the written submissions prepared for today's hearing. The Annex VII tribunal can only decide the case, the dispute, on the basis of the Statement of Claim. It follows that this Tribunal can only have jurisdiction in respect of that dispute, i.e., the dispute that is before the Annex VII tribunal.

We made that point clearly at paragraph 94 of our Written Response. We said that there had been no allegations of harm in the Statement of Claim. We said that the Tribunal can only prescribe provisional measures with reference to the dispute that is before the Annex VII tribunal. We made the same point yesterday and Ireland has not responded.

What about THORP? Is there an allegation that the MOX plant, together with the increased operation or the increased economic activity at the THORP plant, will lead to harm? Do we see that in the Statement of Claim? So much reliance has been placed on that this afternoon and yesterday morning. The answer to that is that the THORP plant gets one mention in the Statement of Claim, and one mention only, in paragraph 6. I invite the Tribunal to turn to that paragraph in its deliberations and see what Ireland is saying to the Annex VII tribunal in relation to THORP. Is the allegation that was being made before you today or yesterday being made before the Annex VII tribunal? I submit that it simply is not. It is not we who are engaging in strategies, it is Ireland.

I turn to the evidence of harm. This is the key point to which Mr Bethlehem referred in his presentations this morning. What of the evidence? Ireland suddenly welcomes the Article 37 Opinion. This is the Opinion of the European Commission. That is surprising. Apparently, the Article 37 Opinion shows how wrong the United Kingdom is. So, it is rather odd that the Article 37 Opinion was not relied on by Ireland if it really supports its case. Apparently it is now said that the Article 37 opinion supports the proposition that the United Kingdom has only ever looked at issues of human health. The United Kingdom, it is said, has forgotten all about the environment; the dispute before you is all about the environment. Human health, we are led to believe, is an entirely discrete topic and the United Kingdom has focused solely on that discrete topic.

Unfortunately at this juncture the Article 37 Opinion has to come back up on the screen. It states:

> In conclusion, the Commission is of the opinion that the implementation of the plan for the disposal of radioactive waste arising from the operation of the BNFL Sellafield [Mixed Oxide Fuel] Plant, both in normal operation and in the event of an accident of the magnitude considered in the general data, is not liable to result in radioactive contamination,

> significant from the point of view of health, of the water, soil or airspace of another Member State.

Is the Article 37 Opinion solely about health? It clearly is not. Health is one facet but it is only one facet. Is Ireland right otherwise? Is this just one example that I have managed to pick up? Has the marine environment been ignored by the United Kingdom? Of course, it has not. Environmental issues specifically are considered in every single one of the documents that we rely on. They are considered in the 1993 Environmental Statement; in the Article 37 General Data and in the 1998 proposed decision and, of course, they are considered in the key decision of 3 October 2001.

The environmental issues here are considered right upfront. They are considered at paragraphs 6-14 of Annex 1 of the decision. At paragraph 9 of Annex 1 of the decision it is concluded that there would be a negligible impact on wildlife. Paragraph 10 goes into details of discharges and, indeed, uses Ireland's new favourite measurement, the becquerel. Paragraph 10 is now on the screen. It states:

> The Agency concluded that radioactive discharges to the air from the [SMP] would contribute less than 1% to the total discharges to the air from the Sellafield site. Annual discharges from the SMP are estimated to be 0.0566 Gigabecquerels … of plutonium-241 …, 0.00268 GBq of plutonium alpha … and 0.000512 GBq of americium-241 … With regard to liquid radioactive discharges from the SMP, the Agency concluded that these will contribute less than 0.0001% to the total annual liquid radioactive discharges from the Sellafield site of these radionuclides. Annual discharges from the SMP are estimated to be 0.0113 GBq … and 0.000102 GBq of [Am-241].

What does that show? Clearly, it shows that the relevant bodies have been looking at issues of discharge in terms of the measurement of the becquerel, and it has also been looking at it in terms of the sievert about which Lord Goldsmith spoke so compellingly yesterday. It also shows that the measurements, the doses, in terms of becquerels or gigabecquerels, are just as infinitesimally small. That, of course, is not surprising.

Mr President, Members of the Tribunal, it is not just that Ireland is splitting hairs when it says that we must talk about negligible discharges measured in becquerels instead of microsieverts; it is that Ireland is wrong. Whatever the measurement, the United Kingdom is within fractions of thousandths of a per cent of the legally binding discharge limits; limits that are legally binding as a matter of European and national legislation.

These infinitesimally small discharges are now common ground. Mr Sands said that Ireland did not challenge the figures that Lord Goldsmith put before you yesterday. It is common ground that the MOX plant will lead only to radioactive discharges measured in thousandths of a per cent of applicable limits. In that light, I have no idea what Mr Fitzsimons seeks to gain from referring to the figures in the WISE Report. They were not relevant before because they did not apply to the MOX plant. They are not relevant now as the tiny discharges from the MOX plant are agreed. Mr Sands says that he has enough to get him home; it is enough that there be any discharges, even if the doses are less than a few *seconds* in an aeroplane.

Mr President, Members of the Tribunal, the answer to that is very simple. As Mr Bethlehem amply demonstrated this morning, Mr Sands is simply applying the wrong test. As Mr Bethlehem showed this morning, the threshold is high. The threshold is one of irreparable prejudice, i.e., irreparable harm or serious harm to the marine environment. That

is the wording and the phrase expressly laid down in article 290, paragraph 1, of UNCLOS. Ireland has skated over that fact, but there it is.

There is no question in this case of serious harm on what are now admitted facts as to the levels of discharge, even if measured in discharges or in doses from the MOX plant. They are infinitesimally small, and on the basis of those admitted facts Ireland simply cannot get home in terms of the requirements of article 290, paragraph 1.

Mr President, Members of the Tribunal, thank you very much.

The President:
Thank you.

STATEMENT OF MR PLENDER
COUNSEL OF THE UNITED KINGDOM
[PV.01/09, E, p. 20–27]

Mr Plender:
Mr President, Members of the Tribunal, in closing for the United Kingdom, or delivering the United Kingdom's final speech, I must sweep up a miscellany of issues. The Tribunal asks three questions. First, you ask for additional information about the United Kingdom's statement that Ireland has made public its intention of initiating separate proceedings in respect of the United Kingdom's alleged breaches of its obligations arising under the Euratom Treaty and the EC Treaty. We were then referring to statements by Mr Joe Jacob, the Irish Minister, dated 3 and 4 October 2001, which Miss Barrett will, in a moment, put on the screen.

In those statements he announced that Ireland was in the process of preparing for the institution of proceedings against the United Kingdom for infringement of directives – apparently those relied upon here – and adds that,

> Papers have already been drafted and will centre on the justification of the facility … and violation of the obligations to subject the plant to a proper environmental impact assessment.

The second statement will now be shown. We wait, of course, to hear from our Irish colleagues who know more about this than we do and what exactly Ireland proposes to do but Ireland has made clear, indeed to the public, its intention of ventilating before the European Court of Justice certain of the very complaints, particularly in respect of Environmental Impact Statements and failure to comply with directives, which appear in the Statement of Case before this Tribunal.

The Tribunal's second question is primarily addressed to Ireland as it seeks further information on Ireland's assertion that independent scientific assessments of the state of the Irish Sea haven't concluded, "that as a result of radioactive pollution from Sellafield the Irish Sea is amongst the most radioactively polluted seas in the world". On this matter I would like to say only that for Ireland surely the most authoritative body is its own Radiological Protection Institute of Ireland (RPII). There will be on the screen pages of the report of that Institute on "Radioactivity Monitoring of the Irish Maritime Environment 1998 and 1999". This is a technical document and I regret the necessity of plucking from it a brief passage without being able to expand the full context, but the report does say at page 4, "The primary source of radioactivity in the marine environment is of natural origin". It goes on to say at page 18 that "radiation doses to Irish people resulting from Sellafield discharges are now very low and do not pose a significant health risk to the public". I quote again, "it is emphasised that the levels of radioactive contamination which prevail at present do not warrant any modification of the habits of people in Ireland, either in respect of consumption of seafood or of any other use of the amenities of the marine environment". I emphasize the last words, "amenities of the marine environment". The concerns of the Institute are not confined to health alone but include the marine environment more generally.

The Tribunal's third question was to what extent would the commissioning of the MOX plant increase the transport by sea of radioactive materials to and from Sellafield.

First, I should emphasize a point which is no doubt at the forefront of the Tribunal's mind by now. Before summer 2002 – at the earliest – 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. I shall revert to that subject in a moment in order to avoid any possibility of misunderstanding over the use of terms.

Thereafter, there will be shipments of radioactive material from the Sellafield MOX plant – namely MOX fuel assemblies – and shipments of spent nuclear fuel for reprocessing will continue. The extent, if any, to which the plutonium commissioning of the MOX plant would result in the long term in an increase in the volume of imports to the THORP plant of spent fuel for reprocessing depends upon the conclusion of future contracts. It is, therefore, impossible at this stage to give a finite answer to the Tribunal's third question.

The question has, however, arisen as to how many transports of MOX fuel there would be each year from the MOX plant. The planned frequency of shipments is considered to be commercially confidential information although, as can be seen from paragraph 195 of the United Kingdom's Written Response, the United Kingdom has offered to discuss that information with the Irish Government on a confidential basis, and our offer has not yet been accepted.

Further, as we have seen from the judgment of Mr Justice Collins, if the MOX plant is not commissioned there will still be transports of separated plutonium belonging to BNFL's overseas reprocessing customers. If this is not returned in the form of MOX, the plutonium would be returned to them as separated plutonium or would be sent to a third country for manufacture into MOX fuel or for some other treatment. It is BNFL's assessment that the number of shipments of separated plutonium that would otherwise be converted into MOX fuel in the MOX plant would be of the same order or even exceed the number of shipments there would be of MOX fuel derived from that plutonium.

Contrary to Mr Fitzsimons' cautiously expressed suggestion this afternoon there are at present no plans to move separated plutonium to Sellafield as a result of the commissioning of the MOX plant. Of course, it can be noted that all such transports will be undertaken in full compliance with the stringent regulatory requirements that were described by Lord Goldsmith, so as to ensure they can be carried out safely and securely.

I turn now to the question of the Secretary of State's letter of 15 November. In the course of their speeches yesterday Mr Fitzsimons and Mr Sands made criticisms of the letter dated 24 October by the Secretary of State, Margaret Beckett, to her Irish counterpart. Yesterday the United Kingdom understood Mr Fitzsimons and Mr Sands – although not the Attorney General for Ireland – to suggest that Mrs Beckett was attempting deliberately to deceive Mr Jacob. As Lord Goldsmith explained, this was certainly not the case and Mrs Beckett's letter was entirely accurate.

I was, therefore, glad to hear this afternoon Mr Fitzsimons' confirmation that it is no part of Ireland's case to allege bad faith against Mrs Beckett. As he said, the parties have agreed that a further letter dated 15 November, which was delivered by hand yesterday in Dublin, should be admitted into evidence. I should say immediately I regret the delay of four days in the delivery of this letter. That should not have occurred. As our Irish friends will appreciate, and I hope the court will accept, we have been under some pressure in the last few days and in other circumstances we would have hoped to attend to the matter more promptly.

The first thing to note about the letter of 15 November is that it confirms the accuracy of the letter of 24 October. As it makes clear, further consents were required and so Mrs Beckett was right to say that the authorization procedure had not been completed.

It is now said that the letter of 15 November shows that our criticism of Ireland for refusing to exchange views was misplaced. We take the diametrically opposite view on that point. It confirms the criticism we make. Until delivery of the Statement of Claim, Ireland's only identification of any disputes this year was a bare assertion of violation of articles 192 to 194 of UNCLOS in the letter of 16 October. There was no identification of any other complaints or even a reference to the other articles now relied upon. The last omission is

particularly surprising because these are allegations of non-cooperation which have formed such a large part of Ireland's complaint. It is not at all surprising that the United Kingdom wanted to understand and sought an exchange of views as it did in the letter of 18 October. Ireland provided some information in its reply of 23 October but this was still very sketchy and it refused to engage in an exchange of views without an undertaking on the part of the United Kingdom to suspend authorization of the plant. Plainly, by 21 October Ireland had concluded that what it now calls irreversible steps or later called "near irreversible" steps would be taken on 23 November.

But is the key point to all this not as follows? Of course, Mrs Beckett had already made the statutory decision she had to make and to that extent she was *functus officio*. But the Government's role was not over. Further consents were required, as she said in her letter of 24 October, and that must be right. Indeed, if the Government is incapable of doing anything now as a result of Ireland's concern, there would be little point in these proceedings.

If Ireland had agreed to exchange views the clarification that has been sought about this exchange of correspondence could have been achieved outside a courtroom. In any event, there are measures which could be taken or information supplied which might have been offered if Ireland had followed its legal obligation to exchange views. This might have satisfied any reasonable person that a particular concern could be set aside.

Mr Fitzsimons mentioned yesterday a further item which has required a little research on our part. He referred to a bilateral agreement providing for a mutual exchange of information on nuclear matters. He alleged that the Foreign Office had in some way blocked renewal of the agreement and referred to this as "a further example of failure to cooperate" (see transcript[*], page 22, lines 47-50 and page 23, lines 1-4).

This was, as with so much else of the Irish Government's complaint, the very first we have heard of it, raised for the first time in this courtroom. Even now we are not sure what is the agreement to which Mr Fitzsimons was referring. We assume he may have meant what is called the "Arrangement for the exchange of information between the Health and Safety Executive of the United Kingdom and the Radiological Protection Institute of Ireland", signed by the two agencies in 1980. On hearing his allegation yesterday we contacted the Health and Safety Executive to discover the present position.

This arrangement is renewed every few years, most recently in January this year. When the two agencies decided to renew it, they also decided to update the written text. The Health and Safety Executive tell us that the new text is in draft form and they expect to have it finalized and signed by the two agencies in the near future.

We are mystified by the suggestion that the Foreign Office has imposed a new procedure or blocked renewal of the arrangement, and we can only assume that the allegation is based on some kind of misunderstanding. This arrangement is not a treaty. It is an operational arrangement between two agencies. The two agencies have, in practice, renewed the arrangement and continue their cooperation pending the signing of the updated text. The Chief Inspector of the Nuclear Installations Inspectorate of the Health and Safety Executive holds an annual meeting with his counterpart from the Irish RPII to discuss matters of mutual interest. Indeed, this year's meeting is to take place next week, 30 November. Regular contacts at working level continue between the agencies as they have for many years.

The Health and Safety Executive consider that their relations with their Irish counterparts are excellent. They have told us of no dissatisfaction with the current arrangement. None have been expressed by either side to the other. In my submission this should be regarded as an example of successful cooperation between the United Kingdom

[*] Note by the Registry: This refers to the uncorrected transcript ITLOS/PV.01/06.

and the Irish authorities. If the Irish Government's team should continue to believe otherwise we will be only too pleased to discuss with them the means of meeting their concerns.

In the course of his address yesterday, Mr Sands dealt with the Environmental Statement submitted by NIREX UK for a rock characterization facility in Cumbria. With a somewhat dramatic gesture, which members of the Tribunal perhaps recall, he made the point that the report in relation to that is longer than the report produced for the Sellafield MOX plant. He suggested this is surprising, given the fact that it did not involve any radiological discharges or international transports of radioactive material.

As I said this morning, this is a comparison of chalk and cheese. There are significant differences between the Environmental Statement produced by NIREX in respect of rock characterization and the Environmental Statement produced by BNFL in respect of the MOX plant. The NIREX statement dealt with a significant new development project which would have consequences for the landscape and environment in an area of outstanding natural beauty: the Lake District of North-West England.

The rock characterization facility proposed by NIREX would not have involved radioactive material in the same way as the MOX plant (see paragraph 1.28 of the Environmental Statement). Accordingly, it does not deal with radiological issues at all, but the project would have been a wholly new development on a new site which would have involved significant impacts on the local physical environment and on the social and economic environment.

The proposal from NIREX can be contrasted to BNFL's proposal to construct the MOX plant, which would be one further building sited on BNFL's existing industrial plant at Sellafield. The suggestion that the Environmental Statement produced in respect of this added building was inadequate because it covered fewer pages than the rock characterization facility, a new development in the Lake District, is one which is simply untenable.

I turn next to the Sintra Statement, a point on which Mr Sands also made submissions. This is a ministerial statement communicated within the framework of the OSPAR Convention. To the extent, if at all, that the objectives in it give rise to legally enforceable obligations on contracting parties, the ascertainment of that matter, as well as the content of the obligations, is a matter for the OSPAR process.

In any event, the key point, not always brought out by Ireland, is that the commitment is to reduce by the year 2020 radiation to levels where the additional concentrations in the marine environment *above historic levels* are close to zero.

Ireland has made no case, not even a *prima facie* case, that the MOX plant – a dry process – will in any way prevent the United Kingdom from realizing that objective. The United Kingdom has recently produced a draft strategy setting out how it proposes to meet the objectives set out in the Sintra Statement, which it intends to finalize by early next year. I shall, in a moment, have to say more about that.

Moreover, as paragraph 58 of the decision of 3 October 2001 on justification makes clear, the objectives of the Sintra Statement were reflected in that decision. Paragraph 58 says:

> … the maximum permitted discharges to the air …. – which would include discharges from the [MOX plant] – and aerial and liquid discharges from the Sellafield site as a whole would be significantly lower in the future, even with the [MOX plant] in operation.

This afternoon Mr Fitzsimons produced a report of a House of Commons Select Committee on Radioactive Waste dated 1985. It is from this, we understand, that Ireland derives the statement that the Irish Sea is the most radioactive sea in the world. It would be more

accurate to say it had been so characterized in 1985. What is important today is to look at the situation today. If this is done, it will show that the situation is very much improved.

As I pointed out this morning, and as I think is common ground with our Irish friends, the highest discharges of radioactivity in the Irish Sea took place in the 1970s. Since then, there have been marked improvements. As Mr Sands suggested that figures should be given in becquerels, I shall do so. I can only do so, however, by referring to the document that I foreshadowed a moment ago, one that is prepared for publication but not yet published. It will appear early in the new year, entitled "The Strategy on Radioactive Discharges 2001-2020", to be published by DEFRA.

The highest levels of beta-emitting radionuclides in the 1970s were 9,070 terabecquerels in any one year. That was in the mid-1970s. In the year 2000, the level was 77 terabecquerels, a 99.2 per cent decrease. As far as alpha-emitting radionuclides – including plutonium – are concerned, the highest total discharges in any one year were 181 terabecquerels. In 2000 the figure was 0.12 terabecquerels, a 99.3 per cent decrease. The United Kingdom is indeed making progress towards reducing discharges so that the additional concentrations in the marine environment above historic levels are close to zero.

I now turn to Mr Lowe's speech. Early in his address, Mr Lowe asked whether the United Kingdom would be prepared to give an undertaking to meet the second condition requested by Ireland. This refers to shipping associated with the MOX plant. The word "associated" is extremely imprecise, so it is important to make the position clear. Indeed, I am particularly requested by the Attorney General, Lord Goldsmith, to expand his comments on the point, lest there be any misunderstanding or misrepresentation of what he had to say on the point.

Much of Ireland's case, we know, is an objection to the THORP plant. Since the MOX plant will make use of derivatives from the THORP plant, it might be possible to say that shipments to the THORP plant are shipments associated with the MOX plant. It was precisely to avoid such ambiguity that the Attorney General, while of course now and again using such terms as "related" and "associated", took care to speak of transports arising from the commissioning of the MOX plant. It was to the latter that he was referring, as I hope was perfectly clear when he spoke. He was not talking of shipments to or from the THORP plant.

You have also heard a certain amount about the falsification of data incident at the MOX demonstration facility. It is a matter of public knowledge that the MOX fuel, which was the subject of that incident, is to be returned. It will not be returned to the MOX plant but to a storage pool. It is presently not anticipated that this will be returned until some time late next year. It is a matter for agreement with the Japanese authorities, among others.

There will be no export of MOX fuel from the plant until summer 2002. There is to be no import to the THORP plant of spent nuclear fuel pursuant to contracts for conversion to the MOX plant within that period either. Indeed, the lead times for contracts of this kind are such that it is not likely to be anywhere near within that period.

I have been asked by my Irish friends to be more precise in the use of these terms. I have deliberately spoken of "summer" rather than giving a fixed date because all of this is anticipation, although in some cases rather confident anticipation, of arrangements yet to be made, but I have been told this afternoon that if one were to read the word "October" for "summer" that would give acceptable greater precision.

In the course of his address, Mr Lowe responded to my comments that a case could be brought before the OSPAR Tribunal or before the European Court of Justice in respect of each and every one of Ireland's present claims. He submitted that it was otherwise in the case of article 123 of UNCLOS, which has no parallel in the OSPAR Convention.

I note that the Irish response was not that all of their complaints were suitable for this Tribunal and none were suitable elsewhere, but that they thought they could identify one

provision which would not be justiciable under the OSPAR Convention. My initial view is that I agree that the OSPAR Convention would not be appropriate for the resolution of a dispute under article 123 but the same cannot be said of the European Community and Euratom Treaties, given that these are mixed agreements in the area of Community competence.

Indeed, one cannot help noticing the extreme brevity with which Ireland has, even at this stage, responded to the United Kingdom's submission on the question of mixed competence.

Mr Lowe's submission, as I took it down this afternoon, was that it is not arguable that every aspect of the Irish case is covered by the accession of the European Communities. I do not find in his response so much as an averral that some or even most or perhaps all except Article 9 are a matter covered by EU accession. Indeed, there is one important development which we had expected our Irish friends to draw to this Tribunal's attention. We asked them this afternoon if they proposed to draw it to the court's attention and showed them a document which we would draw to the court's attention if they failed. Since there has been silence from the Irish counterpart, I must now say that it is our information, confirmed from an OSPAR meeting yesterday, that the Commission of the European Communities had itself taken up with the Irish authorities the complaint that by instituting the present OSPAR proceedings, it has already traversed upon the proper jurisdiction of the European Court of Justice and, in the present view of the Commission, failed to comply with the very obligation to which I drew this Tribunal's attention, namely the obligation to refrain from submitting disputes arising under the Community Treaties other than in the manner for which Community law provides.

We may suppose that when the Commission has fully considered the Irish action in raising its further complaints before this Tribunal, including its complaints about Community Directives and its comments upon a Commission Opinion, they may take the same view in relation to that matter.

No doubt, in responding to the Tribunal's questions, Ireland will consider whether it wishes to avail itself of its opportunity to expand on the position. We, when we have written confirmation with permission to release, will be very happy to release it to the Tribunal.

Members of the Tribunal, there is an author whom I think the Irish and the English claim as their own. He will be known to many of you – Sir Arthur Conan Doyle. One of his best known stories is *The Hound of the Baskervilles.* Some Members of the Tribunal will remember the tale of the dog which did not bark in the night. The mystery was resolved by silence. Ireland's silence on the question of European Community law resonates like the non-barking dog in *The Hound of the Baskervilles.* Ireland's failure to respond to this point gives this Tribunal a strong lead.

Unless I can assist further, Members of the Tribunal, those are the submissions of the United Kingdom.

The President:
Thank you.

I call on the Agent of the United Kingdom.

STATEMENT OF MR WOOD
AGENT OF THE UNITED KINGDOM
[PV.01/09, E, p. 27–28]

Mr Wood:
Mr President, Members of the Tribunal, it only remains for me to read out the final submission of the United Kingdom.

The United Kingdom requests the International Tribunal for the Law of the Sea to:
(1) reject Ireland's request for provisional measures;
(2) order Ireland to bear the United Kingdom's costs in these proceedings.

Thank you, Mr President.

Closure of the Oral Proceedings
[PV.01/09, E, p. 28]

The President:
I thank the Agent of the United Kingdom.

That brings us to the end of the oral proceedings. I would like to take this opportunity to thank the Agents and Counsel of both parties for the presentations they have made before the Tribunal over the past two days.

The Registrar will now address the parties in relation to documentation.

The Registrar:
Mr President, in conformity with article 86, paragraph 4, of the Rules of the Tribunal, the parties have the right to correct the transcripts of the presentations and statements made by them in the oral proceedings. Any such corrections should be submitted as soon as possible, but in any case no later than Friday, 23 November 2001.

In addition, the parties are requested to certify that all the documents that have been submitted and which are not originals are true and accurate copies of the originals of those documents. For that purpose, they will be provided with a list of the documents concerned.

Thank you.

The President:
The Tribunal will now withdraw to deliberate on these requests. The Order will be read on a date to be notified to the Agents. The Tribunal has tentatively set a date for the delivery of the Order and that date is 3 December 2001. The Agents will be informed reasonably in advance if there is any change in this schedule.

In accordance with the usual practice, I request the Agents to remain at the disposal of the Tribunal in order to provide any further assistance and information that it may need in its deliberations prior to the delivery of the Order.

The sitting is now closed.

The hearing closes at 6.05 p.m.

PUBLIC SITTING HELD ON 3 DECEMBER 2001, 11.00 A.M.

Tribunal

Present: *President* CHANDRASEKHARA RAO; *Vice-President* NELSON; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, MENSAH, BAMELA ENGO, AKL, ANDERSON, VUKAS, WOLFRUM, TREVES, MARSIT, EIRIKSSON, NDIAYE, JESUS, XU; *Judge* ad hoc SZÉKELY; *Registrar* GAUTIER.

For Ireland: Mr David J. O'Hagan,
Chief State Solicitor,
as Agent;

and

Mr Philippe Sands,
Member of the Bar of England and Wales, Professor of International Law, University of London, United Kingdom,
as Counsel and Advocates;

Ms Alison Macdonald,
Member of the Bar of England and Wales, Fellow, All Souls' College, Oxford, United Kingdom,
as Counsel.

For the United Kingdom: Mr Michael Wood, CMG,
Legal Adviser, Foreign and Commonwealth Office,
as Agent.

AUDIENCE PUBLIQUE DU 3 DECEMBRE 2001, 11 H 00

Tribunal

Présents : M. CHANDRASEKHARA RAO, *Président*; M. NELSON, *Vice-Président*; MM. CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, MENSAH, BAMELA ENGO, AKL, ANDERSON, VUKAS, WOLFRUM, TREVES, MARSIT, EIRIKSSON, NDIAYE, JESUS, XU, *juges*; M. SZEKELY, *juge* ad hoc; M. GAUTIER, *Greffier*.

Pour l'Irlande : M. David J. O'Hagan,
Chief State Solicitor,
comme agent;

et

M. Philippe Sands,
membre du barreau d'Angleterre et du Pays de Galles, professeur de droit international, à l'Université de Londres, Royaume-Uni,
comme conseil et avocat;

Mme Alison Macdonald,
membre du barreau d'Angleterre et du Pays de Galles, *Fellow, All Souls' College*, Oxford, Royaume-Uni,
comme conseil,

Pour le Royaume-Uni : M. Michael Wood, *CMG*,
conseiller juridique, Ministère des affaires étrangères et du Commonwealth,
comme agent.

Reading of the Judgment
[PV.01/10, E, p. 4–5]

The Registrar:
The Tribunal will today deliver its Order in the *MOX Plant Case*, Request for provisional measures, Case No. 10 on the List of cases, Ireland, Applicant, and the United Kingdom, Respondent. The Tribunal heard oral arguments from the parties at four public sittings on 19 and 20 November 2001.

The hearing concluded with the final submissions of both parties.

Ireland, in its final submissions, requested the prescription by the Tribunal of the following provisional measures:

(1) that the United Kingdom immediately suspend the authorisation of the MOX plant dated 3 October, 2001, alternatively take such other measures as are necessary to prevent with immediate effect the operation of the MOX plant;
(2) that the United Kingdom immediately ensure that there are no movements into or out of the waters over which it has sovereignty or exercises sovereign rights of any radioactive substances or materials or wastes which are associated with the operation of, or activities preparatory to the operation of, the MOX plant;
(3) that the United Kingdom ensure that no action of any kind is taken which might aggravate, extend or render more difficult of solution the dispute submitted to the Annex VII tribunal (Ireland hereby agreeing itself to act so as not to aggravate, extend or render more difficult of solution that dispute); and
(4) that the United Kingdom ensure that no action is taken which might prejudice the rights of Ireland in respect of the carrying out of any decision on the merits that the Annex VII tribunal may render (Ireland likewise will take no action of that kind in relation to the United Kingdom).

The United Kingdom presented its final submission as follows:

The United Kingdom requests the International Tribunal for the Law of the Sea to:

(1) reject Ireland's request for provisional measures;
(2) order Ireland to bear the United Kingdom's costs in these proceedings.

Mr President.

The President:
I note the presence of Mr David O'Hagan, the Agent of Ireland, and Mr Michael Wood, the Agent of the United Kingdom.

I will now read relevant extracts from the Order in the *MOX Plant Case*.

[The President reads the extracts.]

The sitting is closed.

The Tribunal rises.

These texts are drawn up pursuant to article 86 of the Rules of the International Tribunal for the Law of the Sea and constitute the minutes of the public sittings held in *The MOX Plant Case (Ireland* v. *United Kingdom), Provisional Measures*.

Ces textes sont rédigés en vertu d'article 86 du Règlement du Tribunal international du droit de la mer et constituent le procès-verbal des audiences publiques de l'*Affaire de l'usine MOX (Irlande c. Royaume-Uni), mesures conservatoires*.

Le 22 février 2007
22 February 2007

Signé/Signed

Le Président
Rüdiger Wolfrum
President

Signé/Signed

Le Greffier
Philippe Gautier
Registrar