

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



2001

Public sitting

held on Monday, 19 November 2001, at 3.00 p.m.,
at the International Tribunal for the Law of the Sea, Hamburg,

President P. Chandrasekhara Rao presiding

The MOX Plant Case
(Request for provisional measures)

(Ireland v. United Kingdom)

Verbatim Record

<i>Present:</i>	President	P. Chandrasekhara Rao
	Vice-President	L. Dolliver M. Nelson
	Judges	Hugo Caminos
		Vicente Marotta Rangel
		Alexander Yankov
		Soji Yamamoto
		Anatoli Lazarevich Kolodkin
		Choon-Ho Park
		Paul Bamela Engo
		Thomas A. Mensah
		Joseph Akl
		David Anderson
		Budislav Vukas
		Rüdiger Wolfrum
		Tullio Treves
		Mohamed Mouldi Marsit
		Gudmundur Eiriksson
		Tafsir Malick Ndiaye
		José Luis Jesus
		Guangjian Xu
	Judge <i>ad hoc</i>	Alberto Székely
	Registrar	Philippe Gautier

Ireland 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 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 represented by:

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

as Agent:

Ms. Jill Barrett, Foreign and Commonwealth Office,

as Deputy Agent;

and

Lord Goldsmith QC, Attorney General,

Mr. Richard Plender QC,

Mr. Daniel Bethlehem,

Mr. Samuel Wordsworth,

as Counsel;

Mr. Jonathan Cook,

Ms. Sara Feijao,

Mr. Alistair McGlone,

Mr. Brian Oliver,

Mr. Douglas Wilson,

as Advisers.

1 **MR SANDS:** I was dealing with the question of cooperation under Articles 123 and 197 of
2 the 1992 Convention. I have given you a first example of what we, on the Irish say, amounts
3 to behaviour, which is not cooperative in character.
4

5 I would like to refer to a second example, which has already been referred to this morning
6 but we think it is an important point, and that is why we come back to it. That is reflected in
7 the Secretary of State Mrs Margaret Beckett's letter of 24 October 2001, which Mr
8 Fitzsimons has already referred to. That letter ought to be on your screens now. The material
9 point that I want to make is in relation to the line which is highlighted in yellow on the text.
10 This is of course the letter of 24 October 2001, as you can see at the top of the page on the
11 right. The emphasised extract states: "It is in fact the case that the authorisation procedure
12 for the MOX plant has not yet been completed."
13

14 I reiterate the point made by Mr Fitzsimons. We say that Mrs Beckett's statement is highly
15 misleading and entirely out of keeping with the duty to cooperate. As Mr Fitzsimons has
16 shown, by reference to other correspondence, when Mrs Beckett wrote that letter she, or her
17 department for which she is responsible, knew that the MOX plant was to become operational
18 on 23 November. That information is not included in the letter. We say that she has withheld
19 information at a crucial date from the Irish Government.
20

21 In the correspondence you will also see further letters in which Ireland, having received
22 a copy of Freshfields' letter of 17 October, sought to provide Mrs Beckett with an
23 opportunity to clarify the situation. Letters were sent on 30 October 2001 and a reminder was
24 sent on 6 November 2001. Those letters which are in the annexes to the materials asked Mrs
25 Beckett to provide Ireland with information as to the proposed start date for commissioning
26 or operation of the plant and also asked, in relation to the language that you have there, when
27 the authorisation procedure for the plant would be completed.
28

29 I am very sorry to say that Mrs Beckett has not replied to that letter, and indeed there has
30 been no communication from her department notifying Ireland of the proposed start date for
31 the operation, the commissioning of the MOX plant. We do say that is a failure to cooperate
32 and it is a very serious one in the context of this dispute and in the context of the imminence
33 of proceedings.
34

35 That failure is reflective of other kinds of failures. It encapsulates what we say is a persistent
36 refusal to provide material information to a friendly, literal state. We have not been told for
37 how many years the plant will operate. We have not been told how many international
38 transports of spent nuclear fuel or box assemblies which will be filtering into the Irish Sea
39 will occur or over what period of time. We have not been told how much additional
40 radioactive material will be discharged into the Irish Sea, for example from the THORP plant,
41 as a consequential result of the commissioning of the MOX plant.
42

43 We say those are serious failures but there is another aspect of the letter of 24 October which
44 I think also merits close attention. It relates to the extent in which we say the United
45 Kingdom has not taken our views into consideration.
46

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

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

3
4 We say that is a surprising claim and we wonder whether she had to the forefront of her
5 mind, or whether her civil servants had to the forefront of their minds, the letters that we had
6 written on 30 July 1999, on 23 December 1999 and subsequent letters. We say that if you
7 look at those letters, and we invite you to look at those letters, they make it abundantly clear
8 what Ireland's concerns were and that we had gone to great efforts in an eight-page letter to
9 set out what our concerns were.

10
11 The letter of 24 October 2001 from Mrs Beckett is very useful for our side for another reason.
12 It confirms one important point, that the United Kingdom has not taken into account Ireland's
13 interests. After all, and I really want to emphasise this, how can a state take into account
14 interests and concerns which, by its own admission, it claims not to understand? We say the
15 letters, and in particular the letter of 23 December, are clear as to what our concerns are, and
16 we invite you to read them and to make up your own minds. But not having understood the
17 concerns raised by the letters, and not having taken into account the interests which they
18 reflect, we say that the United Kingdom cannot now in good faith claim to have cooperated
19 by taking into account our views, by having coordinated, as required by Articles 123 and 197
20 of the Convention.

21
22 What does this additional failure mean for the provisional measures phase? Ireland says that
23 it has the right to cooperation with the United Kingdom. That right is intended to ensure that
24 our interests, all of our interests, are taken into account in the decision authorising the MOX
25 plant and associated international movements. Necessarily, we say, that must happen before
26 the MOX plant becomes operational, otherwise the duty to cooperate becomes meaningless
27 since our interests plainly could not have been taken into account at the crucial stage of
28 decision making. If the plant becomes operational before the Annex VII tribunal is
29 constituted or is commissioned, and if the award comes down in favour of Ireland, there will
30 be no possibility that our right to cooperation could be restored in any meaningful sense.

31
32 Mr President, I have reached a point now where I can sum up. The United Kingdom says that
33 our rights to the substantive protection of the marine environment are not engaged because
34 the MOX plant will cause no pollution or harm within the meaning of Article 194 of the
35 Convention or the other substantive requirements of Part XII. They say that we have no right
36 under Article 206 to a proper, up-to-date and complete environmental assessment because the
37 MOX plant is not the kind of planned activity which will cause substantial pollution or
38 significant and harmful changes to the marine environment. They say that we have no right
39 to expect the United Kingdom's cooperation under Articles 123 and 197 beyond its
40 participation in regional agreements and its permission to us to participate in the domestic
41 consultations on economic justification. They say that since we have no rights, there can be
42 nothing to preserve. That, in a nutshell, is the argument of the United Kingdom.

43
44 Those are bold claims. They undermine the very purpose of Parts IX and XII of the
45 Convention which were in 1982, and even more today, of vital importance in contributing to
46 the protection of the marine environment which is under ever greater threat. We say that the
47 United Kingdom is wrong on each of the counts and we invite you to so declare by
48 prescribing the provisional measures that Ireland has requested.

49
50 The rights which Ireland claims are real rights and they are important rights. They are

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

5
6 The possibility of exercising any of these rights, as I have tried to explain, cannot survive the
7 commissioning of the MOX plant on 23 December. As the Attorney General has explained,
8 Ireland has proceeded with deliberation and with care and attention throughout the period
9 since 1993. The Attorney General also indicated that the decision to come to this Tribunal
10 was one which was very carefully considered and was not lightly taken and that Ireland is
11 ready to proceed expeditiously to the resolution of this dispute, through the Annex VII
12 tribunal or by other means. That necessarily requires that neither party should take steps
13 which could irreversibly impinge upon the rights of the other.

14
15 In conclusion, we say that the commissioning of the MOX plant is flatly inconsistent with the
16 preservation of Ireland's rights under the Convention.

17
18 Mr President, that concludes my submissions and, unless I can assist further, I would ask that
19 you invite Mr Lowe to the podium.

20
21 **THE PRESIDENT:** Thank you.

22
23 **MR LOWE:** Mr President, Mr Vice President, members of the Tribunal, it is an honour for
24 me to appear before you and to have been entrusted with that part of Ireland's case that
25 addresses the question of the procedures, the preconditions for the prescription of provisional
26 measures, Mr Sands having explained how the United Kingdom's actions violated Ireland's
27 substantive rights under the Law of the Sea Convention, which I shall refer to as "the
28 Convention".

29
30 The United Kingdom's written response begins with the bold assertion that. "The request for
31 provisional measures in this case meets none of the conditions prescribed for such relief by
32 Article 1290 of the Law of the Sea Convention". It is my task to explain why it is that this
33 statement is not merely somewhat dismissive and incautious, which even our learned friends
34 across the room might concede, but also wrong in fact and in law.

35
36 In part 3 of our statement of case, which begins at page 54, we explain step by step that the
37 jurisdictional and other conditions for the prescription of provisional measures are met.

38
39 This is a dispute concerning the interpretation and application of the Convention. The
40 dispute does not fall within any of the exceptions to the compulsory procedures under section
41 2 of Part XV of the Convention. This dispute has been submitted to an Annex VII arbitral
42 tribunal, which is not yet fully constituted.

43
44 *Prima facie*, that tribunal will have jurisdiction. The requirements of Article 283 have been
45 satisfied by the exchanges of correspondence and the meetings between Ireland and the
46 United Kingdom over many months, and there is an imminent and serious danger of
47 irreparable harm to Ireland's rights and of serious harm to the environment.

48
49 The British response is set out primarily in paragraphs 1-12 and 126 to 230 of its written
50 response. The British argument seems to come down to this. First, the parties have agreed to

1 seek settlement by a means entailing a binding decision on the matters now raised before the
2 Tribunal by Ireland so that Article 282 of the Convention requires that those other means, and
3 not the Law of the Sea Convention procedures, be pursued; accordingly, they say that Part
4 XV in general and Article 290 in particular do not apply in this case.

5
6 Furthermore, they say that if the Annex VII Tribunal were to have jurisdiction, there would
7 be a duplication of proceedings between it and the OSPAR Tribunal and it is implied that this
8 duplication, and the alleged risk of inconsistent findings, is in some sense a barrier to the
9 assumption of jurisdiction by the Annex VII Tribunal.

10
11 Secondly, in any event, Article 283(1) stipulates that the operation of the 1982 Convention
12 procedures is conditional upon an exchange of views regarding its settlement by negotiation
13 or other peaceful means, which exchange they say has not taken place. Accordingly, Ireland
14 may not invoke the Part XV Section 2 procedures, including Article 290.

15
16 Thirdly, they say that there is no urgency in this case that would warrant the prescription of
17 provisional measures. Fourthly, they say that in any event no measures are necessary to
18 preserve the respective rights of the parties or to prevent serious harm to the environment. I
19 shall deal with each of these points raised by the United Kingdom in turn.

20
21 I begin with the argument based on Article 282, that Ireland and the United Kingdom have
22 agreed to submit the dispute to some other procedure outside the Law of the Sea Convention.
23 It is said by the United Kingdom that a dispute has been submitted to an OSPAR arbitration
24 tribunal, and that consequently,

25
26 *“the Annex VII Tribunal has no jurisdiction to determine a dispute which the parties*
27 *have agreed through a regional instrument to submit to an alternative procedure*
28 *entailing a binding decision.”*
29

30 That is to be found at paragraph 165 of the British written response. The precise wording of
31 Article 282 is, as ever, important. The article applies where there is “a dispute concerning the
32 interpretation or application of this Convention”; that is, the 1982 Law of the Sea
33 Convention.

34
35 There is no such dispute in this case. The claim submitted to the OSPAR Tribunal concerns
36 not the interpretation of the Law of the Sea Convention but the interpretation or application
37 of the OSPAR Convention and, indeed, only of Article 9 of the OSPAR Convention. The
38 OSPAR statement of claim is completely unambiguous. As you will see – it appears on page
39 104 of Ireland’s Annex 1 – the OSPAR Tribunal has been asked to order and declare:

- 40
41 (1) *That the United Kingdom has breached its obligations under Article 9 of the*
42 *OSPAR Convention by refusing to make available information deleted from*
43 *the PA Report as requested by Ireland;*
44
45 (2) *That as a consequence of the aforesaid breach of the OSPAR Convention, the*
46 *United Kingdom shall provide Ireland with a complete copy of the PA Report,*
47 *alternatively a copy of the PA Report which includes all such information the*
48 *release of which the arbitral tribunal decides will not affect commercial*
49 *confidentiality within the meaning of Article 9(3)(d) of the OSPAR*
50 *Convention.”*

1
2 One document was sought. That document, as Mr Fitzsimons told you, was sought primarily
3 in relation to the question of whether the MOX plant is economically justified by European
4 law. That is the first answer to the British point. This dispute is not the same as the OSPAR
5 dispute already submitted to the OSPAR Tribunal. Nor, indeed, is the present dispute one
6 that could be submitted to an OSPAR Tribunal.
7

8 The complaint in this dispute is, in essence, that the United Kingdom has failed to cooperate
9 and coordinate with Ireland; failed to carry out a proper and up-to-date environmental
10 assessment and failed to protect the marine environment, in each case in breach of its
11 obligations under the Law of the Sea Convention. Access to the PA and AD Little Reports
12 would now help Ireland to prepare a detailed argument concerning the economic justification
13 and environmental impacts of the MOX plant. In that sense it would certainly assist Ireland
14 to prepare its argument in the merits phase of the present case.
15

16 Article 9 of the OSPAR Convention was designed to be an effective means for obtaining
17 information on the marine environment. That is why Ireland chose to use Article 9.
18 However, OSPAR is in some respects a less effective convention when it comes to enforcing
19 duties to co-operate and to prevent pollution. That is why Ireland chose to bring the present
20 action under the Law of the Sea Convention, which secures Ireland's interests more
21 effectively and more comprehensively than does the OSPAR Convention.
22

23 This is most evident in relation to the duties of co-operation between states, and in particular
24 the coastal states of semi-enclosed seas. The very essence of Ireland's complaint is that the
25 United Kingdom has ridden roughshod over Ireland's interests and over Ireland's patient and
26 persistent attempt to become involved in the detailed consideration of a very significant
27 expansion of nuclear activities on the shores of the Irish Sea; a sea in which both states
28 clearly have the very greatest interest. The United Kingdom has not behaved in accordance
29 with the principles of cooperation and coordination that is expected of states in that situation.
30 Those principles are spelt out in some detail in the Law of the Sea Convention and are there
31 given the binding force of legal obligations. In the OSPAR Convention, by contrast, the
32 obligations are focused less clearly upon the duties of cooperation and coordination between
33 states, as a comparison of OSPAR Article 2 and Article 123 and 194 of the Law of the Sea
34 Convention will show.
35

36 The same answer applies to the United Kingdom's attempts to redirect this matter to the
37 European Court of Justice. The MOX plant, it is true, not only leads to serious environmental
38 problems; it also involves some questionable economics which appear to sit awkwardly with
39 the United Kingdom's obligations under the European Union treaties. That matter, plainly, is
40 for the European Commission and the Euratom Commission to deal with, and not for OSPAR
41 or the Annex VII Tribunal. Other aspects are, equally plainly, not within the jurisdiction of
42 the European Court.
43

44 Ireland is perfectly open about its strategy. The United Kingdom's handling of the MOX
45 plant entails violations of obligations under a number of different conventions. Ireland is
46 entitled to and will pursue them through a number of different procedures. There is no
47 principle of international law that can require Ireland to forego the stronger protection of the
48 1982 Convention and compel it to rely solely upon the OSPAR Convention, convenient as
49 that might be for the United Kingdom. The United Kingdom, indeed, seems to think that
50 there is something almost ungentlemanly in Ireland choosing the best tools available to it as

1 if, having once sought to use the OSPAR process to obtain information, Ireland must then use
2 OSPAR, despite all its limitations, for all other environmental disputes. But why should this
3 be so?
4

5 The Arbitral Tribunal in the Southern Bluefin Tuna case noted at paragraph 52 of the award:
6

7 *“There is frequently a parallelism of treaties, both in their substantive content and in*
8 *their provisions for settlement of disputes arising thereunder. The current range of*
9 *international legal obligations benefits from a process of accretion and cumulation.”*
10

11 States frequently choose to negotiate overlapping agreements and to ratify them, thereby both
12 accepting the burdens and claiming an entitlement to the benefits that the agreements confer.
13 As the *Tuna* Tribunal clearly signalled, the fact that one treaty overlaps with another does not
14 mean that it eclipses the provisions of that other. In principle the rights and duties under the
15 Law of the Sea Convention, OSPAR and European Union law are cumulative, and Ireland, as
16 a state party, may rely on any or all of them as it chooses.
17

18 Article 282 has a precise and limited role in the architecture of Part XV. It is, as one
19 distinguished commentator put it,
20

21 *“a specific instance of an agreement of the parties which could exclude the*
22 *jurisdiction of the (Law of the Sea) Tribunal”.*
23

24 It is concerned with situations where a dispute has arisen, and the parties have agreed in
25 advance how such disputes are to be settled.
26

27 If Ireland were asking an Annex VII Tribunal to rule that the United Kingdom had failed in
28 its duty under the OSPAR Convention to deliver a copy of the full PA Report, the United
29 Kingdom would of course be entitled to say, “But we agreed that OSPAR disputes would go
30 through the OSPAR Article 32 procedure. We have done this already. It is not a matter to be
31 handled under the Law of the Sea Convention procedures.” But what the United Kingdom
32 cannot say is that Ireland seeks this information through OSPAR in order to bring another
33 quite distinct claim and therefore that other distinct claim must also be taken under the
34 OSPAR procedures.
35

36 The distinct nature of the Law of the Sea Convention claim is evident. That becomes clear if
37 one imagines what would happen if the United Kingdom were to deliver up the full PA and
38 ADL reports, which (subject to the exclusion of commercially confidential material) is all
39 that is sought in the OSPAR proceedings. The OSPAR case might become moot, apart
40 perhaps from the declaration of the United Kingdom’s past breach of that Convention. But
41 the dispute before the Annex VII Tribunal would still be very much alive. Ireland’s
42 complaint is, in short, that the United Kingdom has failed to cooperate and coordinate and is
43 about to breach its duty to protect the environment of the Irish Sea.
44

45 Failure to deliver the PA and ADL Reports is only one among a host of instances of non-
46 cooperation. Obviously, the delivery of the reports could not now rewrite that history. The
47 MOX plant would still have been planned and authorized in complete disregard of Ireland’s
48 rights to be consulted and to have its views considered by the British Government. The
49 British Government can surely not then be allowed to say, “Very well; here are the reports,
50 but no matter what you might think of them the plant is going to go ahead anyway.” The

1 whole point of Ireland's case is that the United Kingdom has no right to press ahead
2 unilaterally with the project; no right to replace the prescribed processes of cooperation and
3 coordination with what are, it must be said, somewhat patronising assurances that Ireland has
4 nothing to worry about.

5
6 No OSPAR Tribunal has or could have jurisdiction over this broader dispute. The same is
7 true of the other element of Ireland's claims in the Annex VII Tribunal. The PA and ADL
8 Reports will assist Ireland in making a precise quantitative case to support its claim that the
9 United Kingdom is violating its duties under the Law of the Sea Convention to preserve the
10 environment of the Irish Sea. But it is again obvious that the delivery of the PA and ADL
11 Reports cannot affect the question of whether the United Kingdom is or is not in breach of
12 those substantive duties.

13
14 It might also be noted that on the one occasion when Ireland did try to extend the scope of the
15 OSPAR arbitration modestly to include the AD Little Report as well as the PA Report, it had
16 short shrift from the United Kingdom. The reply was,

17
18 *"I should make it clear that we do not accept that Ireland has the right unilaterally to*
19 *amend and extend the application for arbitration filed on 15 June last to include the*
20 *information from the ADL Report".*

21
22 That is what the United Kingdom wrote on 5 September this year, presumably before it was
23 thought expedient that Ireland should bring the entire dispute before the OSPAR Tribunal and
24 EC or Euratom bodies, as is now suggested in paragraphs 3 and 171 of the British written
25 response.

26
27 It is, then, clearly misleading to say that Ireland's claim before the Annex VII Tribunal is the
28 same as that before the OSPAR Tribunal and that Ireland should proceed only under OSPAR.
29 That argument, essential to Britain's assertion that the Annex VII arbitration would lack
30 *prima facie* jurisdiction, is factually and legally incorrect.

31
32 I should perhaps say a word or two about the *Southern Bluefin Tuna* case. The British
33 argument under Article 282 would have some force if, but only if, the criteria spelled out by
34 the Annex VII Tribunal in the *Southern Bluefin Tuna* case were met. There, it will be
35 recalled, Australia and New Zealand claimed that Japan was overfishing Southern Bluefin
36 Tuna. Negotiations over the matter proceeded under the procedures set out in the 1993
37 Convention for the Conservation of Southern Bluefin Tuna. Australia and New Zealand then
38 decided to bring a claim against Japan under the Law of the Sea Convention for overfishing
39 Southern Bluefin Tuna. It was in reality exactly the same dispute as was being pursued under
40 the 1993 Convention. As the Annex VII Tribunal put it,

41
42 *"It is plain that all the main elements of the dispute between the parties had been*
43 *addressed within the Commission for the Conservation of Southern Bluefin Tuna and*
44 *that the contentions of the parties in respect of that dispute related to the*
45 *implementation of their obligations under the 1993 Convention."*

46
47 Nonetheless, the Tribunal expressly rejected what it called the "central contention of Japan"
48 that the 1993 Convention eclipsed the Law of the Sea Convention provisions so that there
49 was no Law of the Sea Convention dispute. The two sets of obligations co-existed. Indeed, it

1 was in that precise context that the Annex VII Tribunal made its remarks on the parallelism
2 of treaty obligations.

3
4 However, the Annex VII Tribunal went on to say in paragraph 54 of the arbitral award that
5 the parties to the dispute under the Law of the Sea Convention, which Australia and New
6 Zealand had brought before it,

7
8 *“are the same parties grappling not with two separate disputes but with what is in*
9 *fact a single dispute arising under both Conventions. To find that, in this case, there*
10 *is a dispute actually arising under UNCLOS, which is distinct from the dispute that*
11 *arose under the [Convention on the Conservation of Southern Bluefin Tuna] would be*
12 *artificial”.*

13
14 Accordingly, the agreement in the 1993 Convention on how tuna disputes would be settled –
15 that is, under the 1993 Convention procedures – prevailed and the single dispute was taken
16 outside the scope of the Law of the Sea Convention.

17
18 The situation here is radically different. This is no doubt the reason why the United Kingdom
19 has wisely chosen not to rely on the *Tuna* case. In our case, the OSPAR dispute is quite
20 obviously not the same as the Law of the Sea Convention dispute. Nor, indeed, is the present
21 dispute with that aspect of the United Kingdom’s behaviour that engages – and, Ireland says,
22 violates – European Union law. That is why it is wrong to say that the parties have agreed
23 that this dispute should be settled under OSPAR or European law procedures. That is why
24 this case is quite different from the *Southern Bluefin Tuna* case. There may one day be an
25 occasion when this Tribunal has to decide whether or not it accepts the views on jurisdiction
26 given by the Annex VII Tribunal in the *Southern Bluefin Tuna* award, but this is not that day.

27
28 The United Kingdom makes a further point under this article, that if the Annex VII Tribunal
29 were thought to have jurisdiction in this case there would be a duplication of proceedings
30 between it and the OSPAR Tribunal. As a matter of fact, that is incorrect, as I have
31 explained. The proceedings were purposefully different. But in any event, except in very
32 limited circumstances where it is precisely the same dispute that is submitted to the two
33 tribunals,

34
35 *“the same parties grappling not with two separate disputes but with what is in fact a*
36 *single dispute arising under both conventions”*

37
38 as the Annex VII Tribunal in *Tuna* put it, there is no support in state practice or in the
39 practice of international tribunals, for a principle analogous to the doctrine of
40 *forum non conveniens*. If an international tribunal has jurisdiction over a matter, a claimant
41 state is entitled to its remedy, even if there are other tribunals in which it might have chosen
42 to pursue its case.

43
44 I turn next to consider Article 282. The United Kingdom makes much of the stipulation in
45 Article 282(1) that the operation of the Convention procedures is conditional upon an
46 exchange of views regarding the settlement of the dispute by negotiation or other peaceful
47 means, which exchange they say has not taken place. That is to be found in paragraphs 5 and
48 7 of the British written response.

1 Article 283 certainly says something close to that. There is a duty to exchange views
2 regarding settlement of the dispute. It is not clear what is the basis of the implication in the
3 United Kingdom's written response that this is not merely a duty, to whose breach a tribunal
4 could attach what significance it thought appropriate, but rather a precondition of the
5 operation of the compulsory procedures under Part XV Section 2 of the 1982 Convention.
6 The more natural reading is that the only precondition for compulsory settlement is the failure
7 of the parties to reach a settlement of the dispute by means of their own choosing under
8 Section 1 of Part XV. That is what Article 286 of the Convention says. If the Tribunal were
9 to take that view, that alone would dispose of the British argument on Article 283. But there
10 is a more obvious and more substantial point. The obvious answer to the British argument on
11 Article 282 cries out from the evidence.

12
13 Let us recall the facts. The dispute is over the United Kingdom's multiple failures to co-
14 operate and the impending commissioning of a plutonium plant that threatens a significant
15 increase in the pollution of the Irish Sea, among other risks. Ireland has been trying to have
16 the British Government engage seriously with Irish concerns over the MOX plant for several
17 years. It is more than two years since Ireland's eight page letter of 30 July 1999 expressly
18 reserved the right to invoke procedures and substantive requirements under, *inter alia*, the
19 Law of the Sea Convention. That letter is to be found in Annex 2 of the Irish submission at
20 pages 1 to 8. It is almost two years since Ireland's six-page letter of 23 December 1999,
21 which is at Annex 1 of the Irish submission, pages 87 to 92. It was that letter which elicited
22 the sorry note of 9 March 2000, to which Mr Sands directed you before lunch. I remind you
23 of the response:

24
25 *"Whilst I am, of course, grateful to you for your further views and comments, I am*
26 *sure that you will understand why I cannot address these points in detail whilst we*
27 *are still in the process of coming to a final decision on the full operation of the plant.*
28 *I am also sure that you appreciate that the implications of the data falsification*
29 *incident at the Sellafield MOX Demonstration Facility will have some bearing on our*
30 *decisions. Whatever our final decision, we do plan to publish a decision document*
31 *which will explain our reasons in full. I will ensure that you are sent a copy*
32 *immediately it is published."*
33

34 That was the entire response to the six-page 23 December letter in which Ireland had
35 complained yet again at the lack of information, where Ireland had set out its concerns in
36 detail and where Ireland had reserved its right to raise further points and "to take such
37 measures, including legal measures, as may be appropriate."
38

39 One could, perhaps, be forgiven for thinking that the rather patrician response of the British
40 Government signalled a less than wholehearted commitment to government-to-government
41 cooperation.
42

43 Ireland has spent many, many months trying to draw the British Government into meaningful
44 consultations. And then, about seven weeks ago, it became clear that the United Kingdom
45 was determined to push on with the commissioning of the MOX plant without responding to
46 Ireland's request for information and regardless of Ireland's concerns. Ireland offered to
47 change views regarding a settlement of the dispute if the United Kingdom would delay
48 commissioning the plant. The United Kingdom took the position that it would exchange
49 views on the settlement of this dispute over its right to establish the MOX plant without prior

1 consultation with Ireland but only if Ireland agreed to allow the United Kingdom to establish
2 the MOX plant forthwith.

3
4 There are two points arising from these facts that are to be made in response to the argument
5 put forward by the United Kingdom on Article 283. First, the obligation to exchange views
6 has been discharged. Ireland has been trying to settle the dispute by repeatedly writing to the
7 British Government and by meeting with the British Government. Ireland signalled the
8 prospect of proceedings under the Law of the Sea Convention as far back as July 1999; and
9 given the institution of the OSPAR Arbitration in June 2001, and in particular given its
10 limited scope, the United Kingdom can scarcely claim to have been taken by surprise by the
11 notice of the Law of the Sea Convention arbitration.

12
13 As to the second point, no one suggests that the duty to exchange views extends to a duty to
14 reach an agreement. Nor is it suggested that any agreement on a procedure for settling this
15 dispute was imminent in the past few weeks. Article 283 sits in Section 1 of Part 15 of the
16 Law of the Sea Convention. That duty to exchange views applies to all disputes. Those
17 disputes may range from leisurely attempts to find an agreed continental shelf delimitation
18 shelf, for example, to urgent disputes over imminent and irreversible actions that cause
19 significant harm to the environment. Common sense suggests that the length of time to be
20 devoted to the search for an agreed procedure must differ in the two cases. Provisional
21 measures are measures to be prescribed in cases of urgency; and there comes a point where
22 the constraints of urgency must prevail over pointless repetitions of inflexible positions.
23 With the imminence of the commissioning of the MOX plant, then scheduled for Friday of
24 this week, the dispute had quite clearly, in the words of the International Court in the *Right of*
25 *Passage* case, “reached a deadlock”. Those were incidentally the words quoted by the then
26 Attorney General of the United Kingdom in support of his request for the indication of
27 provisional measures against Iceland in 1973.

28
29 International tribunals have been pragmatic in addressing this issue. For example, in the
30 *Southern Bluefin Tuna* case the Annex VII Tribunal noted that there had been negotiations
31 between the parties which had been prolonged, intense and serious. Those negotiations had
32 been conducted explicitly within the framework of the 1993 Tuna Convention, and yet the
33 Tribunal still held that, and this is paragraph 55 :

34
35 “Since in the course of negotiations, the Applicants invoked UNCLOS and relied
36 upon provisions of it, while Japan denied the relevance of UNCLOS and its
37 provisions, those negotiations may also be regarded as fulfilling another condition of
38 UNCLOS, that of Article 283... In the view of this Tribunal, this provision does not
39 require the parties to negotiate indefinitely while denying a Party the option of
40 concluding, for the purposes of both Articles 281(1) and 283, that no settlement has
41 been reached.”

42
43 Ireland and the United Kingdom corresponded for months; they met face to face all in an
44 attempt to resolve the dispute. Yet the United Kingdom seems to suggest that unless Ireland
45 expressly announced that its letters and discussions should be counted on the Article 283
46 record, they should be disregarded for this purpose. International tribunals, as we have seen,
47 adopt a rather more realistic approach. That accords better with the role of Article 283 in the
48 Convention.

49
50 Article 283 was included, according to the *Virginia Commentary*:

1
2 *“...as the result of the insistence of certain delegations that the primary obligation*
3 *should be that the parties to a dispute should make every effort to settle the dispute*
4 *through negotiation.”*
5

6 Ireland has done that. The United Kingdom is now seeking to have this Tribunal turn Article
7 283 into an artificial barrier to the operation of the compulsory procedures in Part XV of the
8 1982 Convention. The United Kingdom writes, paragraph 7 of its Response, that “Article
9 283 of UNCLOS seeks to avoid the very situation presented in this case: the constitution of a
10 tribunal to adjudicate on disputes that might have been resolved by negotiation.” That is
11 absurd. All disputes “might be resolved by negotiation”. Many are not resolved by
12 negotiation. All courts adjudicate upon such disputes. That is what courts are for. Ireland
13 has done all that it could to achieve a negotiated solution and, when its attempts failed and the
14 situation became urgent, it concluded that there was neither the time for negotiation nor any
15 prospect of success. At that point it exercised its right to invoke the 1982 Convention
16 procedures.
17

18 Before I leave this point, it is right I should record our appreciation of the good grace with
19 which the United Kingdom withdrew two incorrect suggestions, in paragraph 190 and
20 paragraph 192 of their Written Response (although we are still not satisfied that the revised
21 paragraph 190 accurately reflects what happened at that meeting) to incorrect suggestions that
22 Ireland has, in recent days, rejected invitations from the British Government to exchange
23 views on the settlement of the dispute.
24

25 I turn now to the question of the urgency of the situation, the third point made by the United
26 Kingdom. It is said that there is no urgency in this case that would warrant the prescription
27 of provisional measures. It is common ground that urgency must be shown. In applications
28 under Article 290(5) it is necessary to show both that the measures are urgent in the sense
29 that one cannot await the final decision on the merits, and also that they are urgent in the
30 sense that one cannot even await the constitution of the Annex VII Tribunal, which would
31 itself, of course, have the competence to prescribe provisional measures.
32

33 The United Kingdom proposes a threefold test of urgency. First, there must be a specified
34 critical event. Second, there must be a real risk of harm occurring. Third, there must be a
35 real risk of the critical event occurring before the Annex VII Tribunal is itself able to act.
36 (paragraph 2 of the British Response) Quite rightly, the United Kingdom appears to accept
37 that it is the imminence of the critical event rather than of the consequent harm that is the
38 crucial matter. We do not argue with this general approach but the fact that the United
39 Kingdom considers Ireland’s application to fail these three tests suggests that, once more, it
40 has not comprehended what Ireland’s case is.
41

42 What Ireland regards as the critical event is plain. It is the commissioning of the MOX plant.
43 On 20 December or thereabouts a can of plutonium will be opened in the plant and, at that
44 moment, the plant ceases to be a generic building and becomes a dedicated plutonium plant
45 used for the production of nuclear fuel. Commissioning of the MOX plant, originally
46 scheduled for next Friday, has been deferred for 27 days to 20 December; that against the
47 background of the United Kingdom’s refusal to defer commissioning until the Annex VII
48 arbitral tribunal can be constituted and itself decide on the necessity for provisional measures.
49 The Annex VII tribunal has not yet been constituted. There is, as yet, no agreement on the

1 three non-Party arbitrators. There is no realistic prospect of the Annex VII tribunal being in a
2 position to decide on provisional measures before 20 December.

3
4 The first British test (the specified critical event) and the third British test (the real risk of the
5 event occurring before the Annex VII tribunal can act) are plainly satisfied. The question is,
6 does that critical event entail what the United Kingdom calls “a real risk of harm”?

7
8 The United Kingdom puts forward a novel and very limited notion of harm. International
9 tribunals looking at provisional measures commonly refer to “action prejudicial to the rights
10 of either party”. That was the formula used in the *Great Belt* case, or they describe the aim of
11 provisional measures as being:

12
13 “...to preserve the respective rights of the parties pending the decision of the court”
14 and “to preserve by such measures the rights which may subsequently be adjudged by
15 the Court to belong either to the Applicant or to the Respondent”.

16
17 The formula there was used in the case concerning *The Arrest Warrant of 11 April 2000* and
18 in the *Democratic Republic of the Congo v Belgium, Cameroon/Nigeria* cases.

19
20 Courts have also referred to the need to demonstrate “irreparable prejudice” to the rights in
21 question.

22
23 Sometimes international tribunals have adopted a somewhat broader approach. They refer to
24 the need not to frustrate the work of the Tribunal. As the Permanent Court of International
25 Justice put it in the case of *Electricity Company of Sofia and Bulgaria* in a passage upon
26 which the British Attorney General relied when he sought provisional measures against
27 Iceland in 1973, the provision in the Court Statute on interim measures:

28
29 “...applies the principle universally accepted by international tribunals...to the effect
30 that the parties to a case must abstain from any measure capable of exercising a
31 prejudicial effect in regard to the execution of the decision to be given and, in general,
32 not to allow any step of any kind to be taken which might aggravate or extend the
33 dispute.”

34
35 The International Court has also referred to protecting “rights which are the subject of dispute
36 in judicial proceedings”.

37
38 The essence and the rationale of this approach was captured elegantly in the statement that:

39
40 “The [International] Court, having been created...as one of a team of agencies of the
41 United Nations having as their purpose the settlement of international disputes, cannot
42 be expected to discharge this wide responsibility to the international community if it
43 has not the right to expect of the parties, and the power to ensure, that during the
44 proceedings they shall abstain from actions capable of prejudicing the execution of
45 the Court’s eventual decisions and of aggravating or extending the dispute submitted
46 to the Court.”

47
48 That statement, equally true of this Tribunal, was made by the United Kingdom in its
49 submissions to the International Court in 1973. It was right then. It is right now, and it is this

1 need to avoid the prejudicing of the final award on the merits, and to avoid aggravating the
2 dispute, that is met by the prescription of specific provisional measures.

3
4 The United Kingdom invites you to read these authorities that refer to the need to preserve
5 the rights of the parties from irreparable harm as if they referred to the need to avoid
6 substantial injury to the interests of the parties. This is particularly evident in the move from
7 the language of rights, which you will see in paragraph 140 of the British Response (where
8 the United Kingdom quotes the International Court) to the language of harm which the
9 United Kingdom uses in paragraph 147 and following.

10
11 The way in which the United Kingdom handles the provisional measures phase of the *Great*
12 *Belt* case in the International Court illustrates this point well. In paragraph 148 of the Written
13 Response the United Kingdom quotes from the Court's Order the words, "proof of the
14 damage alleged has not been supplied" by Finland, as if the absence of such proof was central
15 to the Court's decision to reject Finland's request for provisional measures. In fact – and this
16 is evident if you read the proceedings – the allegation of economic damage was a minor
17 argument used to buttress Finland's main argument which was that its rights to have tall ships
18 and oil rigs pass through the Great Belt would be infringed by the building of a bridge across
19 the Great Belt. The Court treated the infringement of Finland's rights as the central point,
20 and gave great weight to it, despite the fact that it was unclear whether there were any
21 significant numbers of vessels so high that they would be impeded by the bridge and whether
22 any such vessels could be easily modified so as to get under it.

23
24 What was crucial in the rejection of Finland's application was an undertaking given by
25 Denmark not to close the channel used by those ships before 1994, by which time the merits
26 phase of the *Great Belt* case would, in the normal course of events, have been completed. As
27 the Court said, "it has not been shown that the right claimed will be infringed by construction
28 work during the pendency of these proceedings". It is, of course, precisely such an
29 undertaking that Ireland is seeking from the United Kingdom in this case and which the
30 United Kingdom is unwilling to give.

31
32 It is rights that are protected by provisional measures. Provisional measures protect rights.
33 Ireland has a right to cooperation and coordination before the commissioning of a plutonium
34 plant on the shores of the Irish Sea. As Mr Sands has said, that right by definition cannot be
35 satisfied after the plant is commissioned. The same may be said for the right to receive a
36 proper and up to date environmental assessment. Breach of those rights by the
37 commissioning of the plant would be irreparable.

38
39 It is here that one comes to the issue that is central to this application – the one perhaps for
40 which this decision of the International Tribunal on the Law of the Sea may chiefly be
41 remembered. The United Kingdom says in paragraph 211 of its Response that "the
42 allegations of violation of Ireland's rights are essentially procedural in nature". That is, of
43 course, not true of all the allegations and I shall return to that point shortly. But it is the
44 startling suggestion that somehow procedural rights are in some way matters of little
45 significance to be pushed lightly aside that is the point now.

46
47 Procedural rights are rights; and it is not the United Kingdom to decide that Ireland can do
48 without them. Breaches of procedural duties entail legal consequences, as is the *Lac Lanoux*
49 tribunal made clear. That tribunal, speaking in the context of a duty to seek by preliminary

1 negotiations terms for an agreement, and citing there the award in the *Tacna-Arica* arbitration
2 and the judgement of the PCIJ in the *Railway Traffic* case said:

3
4 “one speaks, although often inaccurately, of the ‘obligation of negotiating an
5 agreement’. In reality engagements thus undertaken by States take very diverse forms
6 and have a scope which varies according to the manner in which they are defined and
7 according to the procedures intended for their execution; but the reality of the
8 obligations thus undertaken is incontestable and sanctions can be applied in the event,
9 for example, of an unjustified breaking off of the discussions, abnormal delays,
10 disregard of the agreed procedures, systematic refusal to take into consideration
11 adverse proposals or interests, and, more generally, in cases of the violation of the
12 rules of good faith.” [paragraph 11 in the *Lac Lanoux* award]

13
14 If the MOX plant is commissioned next month, it will be commissioned despite the long-
15 running refusal by the United Kingdom to take Ireland’s concerns seriously and to engage in
16 serious consultations. It will be commissioned despite the fact that, as the United Kingdom
17 itself states, constitution of the Annex VII tribunal could not be delayed beyond 6 February
18 next year.

19
20 The choice is between the irreparable setting aside of Ireland’s rights, on the one hand, and,
21 on the other hand, a further delay of a matter of weeks in the commissioning of the MOX
22 plant. If the duties of cooperation, coordination and consultation set out in the Law of the
23 Sea Convention are not upheld by the International Tribunal for the Law of the Sea in such
24 circumstances, it is difficult to see the circumstances in which they, or the host of similar
25 provisions in other treaties, will be upheld.

26
27 In fact as I mentioned earlier, Ireland does not, of course, allege “merely procedural”
28 violations of its rights. Mr Sands has explained the particular importance that Ireland
29 attaches to the performance by the United Kingdom of its substantive duties in this case.
30 That importance is a consequence of simple facts. The Irish Sea is already one of the worst
31 sites of radioactive pollution in the oceans anywhere in the world. Radioactive pollution is
32 highly toxic, it is cumulative, and it is long-lasting. In semi-enclosed seas, such as the Irish
33 Sea, the tendency of pollution to accumulate is greater than on open ocean coasts where
34 major currents can sweep the pollution away.

35
36 In such a situation, international law rightly takes the view that the imperative is not simply
37 to prevent isolated acts of substantial pollution. It is also necessary to stop the trend towards
38 the further degradation of the environment by adding to the 250 or more kilograms of
39 plutonium from the Sellafield plant that are already absorbed in the sediments of the Irish
40 Sea. To paraphrase one of the Separate Opinions in the *Southern Bluefin Tuna* case, before
41 this Tribunal, “Each step in such deterioration can be seen as ‘serious harm’ because of its
42 cumulative effect”, and that is exactly the point here.

43
44 The MOX plutonium plant will make a small but significant contribution to radioactive
45 pollution. The MOX plant as a commercial matter will also enable the THORP plant to
46 continue in operation and produce much more pollution. The MOX project will attract
47 vessels carrying plutonium, vulnerable as all ships are to accident and to attack, into the Irish
48 Sea, and all this at a time when new environmental measures oblige the United Kingdom to
49 reduce concentrations of radioactive pollutants to ‘close to zero’. Is it any wonder that
50 Ireland felt the need to look closely at the details of the MOX plant, that Ireland takes the

1 view that it has a right to the information and to be consulted, and to be provided with
2 adequate environmental assessment, before the project is commissioned?
3

4 Perhaps the plant could be decommissioned and so terminate the continuing violation of
5 Ireland's rights that would result from its commissioning. But, as BNFL put it in the letter
6 dated 17 October 2001 (Annex 2, page 28 of the Irish submission), "The cost and
7 complexities involved in reversing the commissioning of SMP will be very significantly
8 increased once the plutonium can has been opened and plutonium introduced into the plant
9 processes". If, quite apart from the technical difficulty of decommissioning the plant, the
10 costs of decommissioning are very significantly increased once the plutonium can is opened,
11 there must be doubt as to how readily the United Kingdom would be able to comply with any
12 eventual order that might require it to modify its plans to operate the Sellafield complex.
13

14 "... the parties to a case must abstain from any measure capable of exercising a prejudicial
15 effect in regard to the execution of the decision to be given and, in general, not to allow any
16 step of any kind to be taken which might aggravate or extend the dispute. That is how the
17 PCIJ described the essence of provisional measures. The commissioning of the MOX plant
18 would not only definitively violate Ireland's rights to prior cooperation and coordination; it
19 would also plainly exercise a prejudicial effect in regard to the execution of any decision that
20 the United Kingdom had acted in breach of its duties in proceeding unilaterally to authorise
21 the plant.
22

23 The final point made by the United Kingdom is that no measures are necessary to protect the
24 respective rights of the parties or to prevent serious harm to the environment, and that that the
25 conditions set by Article 290 of the Convention for the prescription of measures is not met.
26

27 That needs little comment. As we have explained in relation to the question of urgency, if
28 Ireland's rights under the 1982 Convention to engage in consultations with the United
29 Kingdom are not to be utterly illusory, the commissioning of the plant must be delayed. If
30 the trend towards the concentration of radioactive pollution in the Irish Sea is to be arrested,
31 the plant needs to be very carefully designed and operated, and we are far from sure that it is.
32 If the increased risk of nuclear incidents is to be averted, and the risk accommodated by
33 contingency plans from the moment that they arise, Ireland needs now to be able to
34 coordinate its position in detail with whatever plans the United Kingdom might have.
35

36 A short delay is a minor detriment to the United Kingdom, to be balanced against the
37 irreparable violation of Ireland's rights and a serious step towards the further pollution of the
38 Irish Sea if there is no such delay. The conditions set in Article 290 are clearly met.
39

40 That completes my submissions on behalf of Ireland. Unless I can help the Tribunal further,
41 that closes this round of the Irish oral pleadings.
42

43 **THE PRESIDENT:** Thank you very much. The hearing is adjourned until 4.30.
44

45 (Short recess)
46

47 **THE PRESIDENT:** I now invite the Agent for the United Kingdom to take the floor.
48

49 **MR WOOD:** Mr President, members of the Tribunal, I shall describe very briefly the
50 structure of our opening statement. The Attorney General, Lord Goldsmith QC, will begin

1 the United Kingdom's statement this afternoon, continuing in the morning, with an
2 introduction to our case, followed by an analysis of some important factual matters and then
3 indicate the legal framework within which the Irish case falls to be considered.

4
5 Thereafter, Mr Richard Plender QC will cover the issues arising under Article 282 and
6 Article 283 of the Law of the Sea Convention. He will also deal with issues arising under
7 Article 290 of the Convention: preservation of the respective rights of the parties, prevention
8 of serious harm to the marine environment and the requirement for urgency "pending the
9 constitution of the arbitral tribunal "under Annex VII.

10
11 In conclusion, Lord Goldsmith will deal with the exercise of the Tribunal's discretion in the
12 matter of the prescription of provisional measures in the present case, and he will round off
13 our opening statement with some concluding remarks.

14
15 Mr President, I now invite you to call upon the Attorney General Lord Goldsmith, to address
16 the Tribunal.

17
18 **THE PRESIDENT:** Thank you. The Attorney General has the floor.

19
20 **LORD GOLDSMITH:** Mr President, Mr Vice President, members of the Tribunal, it is an
21 honour for me to appear before you today as Attorney General of the United Kingdom in
22 these proceedings. This is an important case, not simply for the parties, with their sharply
23 different perceptions of fact and law relevant to the case, but also for the Tribunal. It
24 constitutes something of a departure from the cases that have come before the Tribunal to this
25 point. It is, of course, an affirmation of the important place that the Tribunal now occupies,
26 after a relatively short period of time, as one of the pre-eminent international tribunals
27 established to facilitate the settlement of disputes between states. Its focus is on the area of
28 international law which the United Kingdom, as an island and a major sea-faring nation, has
29 always considered to be of particular importance and in respect of the development of which
30 it has always sought to play an active role. It is thus a particular pleasure for me to appear
31 before the Tribunal.

32
33 It will not surprise you to hear that the pleasure that I have in appearing before you today, and
34 in leading the United Kingdom team in this matter, is tinged with some dismay. Ireland and
35 the United Kingdom have long-standing and very close relations within the framework of the
36 European Union, bilaterally and internationally. The two states cooperate closely on a wide-
37 range of matters of mutual interest. I hasten to add, for the avoidance of doubt, that from our
38 point of view these proceedings will not affect that close relationship. Nevertheless, as I have
39 said, the United Kingdom has some dismay at these proceedings.

40
41 I also have to express some dismay at some of the things said today, although not, I hasten to
42 add, by my good friend, the Attorney General of Ireland. I will have to take exception to
43 certain other remarks by others, including a particular assertion from Mr Fitzsimons, and
44 repeated by Mr Sands relating to a letter from the Secretary of State, Mrs Beckett, of 24
45 October, which he suggested amounted to a calculated attempt to mislead Ireland and
46 forestall the initiation of proceedings before the Annex VII Tribunal. I shall return to that
47 observation. It was not a point foreshadowed. We had no notice that that would be said.

48
49 Notwithstanding what you have been told by Ireland today, this case is not a sober, last-ditch
50 attempt by Ireland to resolve a long-crystallised dispute with the United Kingdom, the details

1 of which have been the subject of close, but fruitless discussion between the parties. On the
2 contrary, we first learned of the detail of the Irish claims on 25 October of this year, at the
3 point at which it filed its Notification and Statement of Claim requesting the establishment of
4 an arbitral tribunal under Annex VII of the Law of the Sea Convention. Although Ireland has
5 long made known its opposition to all activities at the Sellafield site, and had indicated in
6 passing that it considered that these activities raised issues under the Law of the Sea
7 Convention, it did not once spell out its concerns in a manner that would have permitted an
8 exchange of views between the parties. We regret that Ireland has proceeded in this way.

9
10 Ireland has made much of the point that it has long expressed its views about the MOX plant,
11 and indeed it has. It has participated in each of five rounds of public consultation that have
12 been conducted in the United Kingdom as part of the authorisation process. It raises the
13 question of why Ireland has initiated these proceedings now. What is behind these
14 proceedings before this Tribunal? Ireland has already, several months ago, initiated
15 proceedings raising a number of the same issues before an arbitral tribunal constituted under
16 the OSPAR Convention, the Convention for the Protection of the Marine Environment of the
17 North-East Atlantic. Key aspects of its present claim derive from European Community law
18 in respect of which the European Court of Justice is the agreed sole arbiter. So why this
19 claim before this Tribunal at this point in time?

20
21 Regrettably, only one answer to this question is apparent, and I suspect that in a quiet
22 moment those representing Ireland in this matter would not draw back from admitting it.
23 This claim before this Tribunal at this point in time has all the hallmarks of a case that is
24 purely and exclusively brought to try to secure the prescription of provisional measures.
25 There is nothing else that explains the timing of the case. Had Ireland initiated these
26 proceedings a year ago, it might have done; its claims now are not hinged on the recent
27 decision paving the way for operation of the plant. The Annex VII tribunal would have been
28 able to rule on the merits of the case by this point. But perhaps that would not have suited its
29 purpose.

30
31 As we have touched upon in our written response, there are significant shortcomings to
32 Ireland's substantive claims. Indeed, they are not sustainable on the merits. They will not
33 withstand analysis. Yet at this point, at the stage of provisional measures, Ireland can simply
34 stand and assert, as it has done repeatedly today, that there is a risk. It takes the position, as it
35 has today, that it need say no more. Indeed, no evidence has been offered. Yet the fear of
36 radioactive pollution resonates widely, substantiated or not. It follows, in Ireland's scheme,
37 that there will be a powerful impulse toward the prescription of provisional measures. You
38 may feel that the Irish case ultimately plays on emotion rather than fact and reason. It
39 postulates a risk of radioactive pollution but deftly avoids engaging on the important question
40 of whether any such risk really exists.

41
42 I must stress up front that it is not a situation of urgency that brings this case so suddenly
43 before this Tribunal. We will look at this in detail tomorrow. The case that Ireland has
44 brought before you this morning raises, in our submission, no urgent issues that require
45 measures pending the constitution of the Annex VII Tribunal.

46
47 (1) The case is about radioactive discharges, but it is now becoming clear that there is no
48 great dispute about the infinitesimally small discharges from the MOX plant. The real
49 complaint concerns the THORP plant and it involves looking at how the quantity of

1 fuel processed at the THORP plant might be increased at an uncertain date in the
2 distant future. There is no urgency in this.
3

- 4 (2) The case is about the transport of MOX fuel, but it is of the utmost importance that
5 this Tribunal realises that there will be no shipments in or out of Sellafield that are in
6 any way related to the MOX plant before the summer of 2002. Now, Ireland accepted
7 this morning that the Annex VII Tribunal can be constituted swiftly and I am grateful
8 that they welcomed our contributions in this respect. Once the Tribunal is constituted,
9 it would be in a position to prescribe provisional measures if it considered them
10 appropriate. Instead of requiring us to respond as we have had to in six days, it may
11 even be the case that there could be a full and measured consideration of the merits by
12 the Annex VII Tribunal before the first shipment. We will return to this issue
13 tomorrow.
14

15 It is important to realise and to emphasise why the requirement of a real showing of urgency
16 is vital because an applicant can hide behind the proposition that it is not necessary to prove
17 its case at the provisional measures stage, and you have heard that several times from Ireland
18 this morning.
19

20 The Irish request will require the Tribunal, in our submission, to give careful consideration to
21 issues that have not usually come before international tribunals in the context of provisional
22 measures requests, whether the applicant has adduced any relevant evidence in support of its
23 claim; whether there is any imminent risk of harm; the risk of serious prejudice to the rights
24 and interests of the respondent. As I will show, by reference to each of these issues, as well
25 as to others, Ireland's case is unsustainable.
26

27 There is more. What happens if provisional measures are prescribed along the lines
28 requested by Ireland? What is the consequence of this? Well, as we have pointed out in our
29 written response, the consequence of this would be potentially catastrophic for British
30 Nuclear Fuels, the owners of the plant, and, through BNFL, for the United Kingdom as the
31 sole shareholder in the company.
32

33 Customers may be lost; commercial opportunities carefully nurtured, may disappear;
34 competitors may step into the breach; jobs may vanish; the investment put into the
35 development of the plant may be wasted. We are talking here about a potential costs of
36 hundreds of millions of pounds. These issues have been widely canvassed in the press. At
37 the extreme end of the spectrum, these proceedings, the prescription of provisional measures
38 along the lines requested by Ireland, could serve to undermine the long-term operational
39 viability of the MOX plant, whatever the outcome of the proceedings on the merits.
40

41 As I have said, Ireland has a long-stated objection to the existence of Sellafield at all. That is
42 a perfectly legitimate political position to take, but, having a legitimate political position to
43 take, one it has pushed strongly and vocally, is not the same as having a legal right to veto
44 Sellafield.
45

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

1
2 The United Kingdom regrets this. It regrets this because, in so far as Ireland is concerned, it
3 hoped for something more. The authorisation process concerning the MOX plant has been
4 long and thorough. It has proved the safety of the MOX plant rigorously and at every stage,
5 both nationally and by the European Commission after consulting independent experts. It has
6 taken place in a form that has allowed Ireland to advance its views at every stage. Ireland has
7 taken the opportunity to do so. Its views have been very carefully considered by those in the
8 United Kingdom charged with taking the decision. The Decision of 3 October of this year, as
9 I will show, addresses all the points which Ireland has made. Ireland now objects to the
10 decision that has been taken. Its objection effectively is that the United Kingdom has not
11 followed the course urged upon it by Ireland.

12
13 Let me interpolate, if I may, and we shall return tomorrow to this. The constant repetition
14 today by Ireland has been an assertion that we have not consulted them or not taken their
15 concerns seriously. We have consulted. We have taken their concerns seriously. Their
16 constant repetition does not make a falsehood true. The facts will show it to be untrue:
17 consideration over eight years, five public consultations, meetings, letters and a fully
18 reasoned decision at the end. We did not agree with Ireland's view but no duty to cooperate,
19 no duty to consult, requires that we must agree with Ireland, still less that we must cede to
20 Ireland the right to take the decision in relation to this development in the United Kingdom.

21
22 As we progress through the case we will see, I submit, fact after fact which reinforces,
23 rather than relieves, the point I have just made. Let me identify now a few which you may
24 find raise this concern.

25
26 First, though Ireland now raises allegations of breach of UNCLOS as central to its concerns,
27 why does the correspondence show so little emphasis on this aspect? Secondly, why did
28 Ireland not produce any specificity in those claims of breach of UNCLOS, which they did
29 belatedly raise? Thirdly, why did it decline the opportunity for an exchange of views,
30 something, indeed, which is mandatory? Fourthly, why is there no evidence presented to
31 contradict the clear evidence as to the effect of the MOX plant, which Ireland has had for
32 years and has had ample opportunity to check, validate and contradict.

33
34 Why is the only material which is relied upon by Ireland relating not to the MOX plant but to
35 existing and in many cases historic activities of Sellafield? Why is that material selectively
36 chosen? The report from which they draw most comfort is "slammed", as the press put it;
37 roundly criticised as unscientific and lacking in objectivity by the very committee which
38 commissioned it. Mr Fitzsimons, to our surprise, described this report this morning as the
39 European Parliament Report. This is not a report of the European Parliament. Indeed, it
40 appears to have been disowned by the very committee of the European Parliament which
41 commissioned it. I shall return to that.

42
43 Why do they not cite material which is plainly contradictory to their assertions? Why in
44 particular do they make no reference in their written observations to the authoritative opinion
45 of the European Commission which approved the MOX plant and, despite protestations to the
46 contrary, specifically dismisses any fears of risks to Ireland? I shall return to that later.

47
48 Indeed, why does Ireland not even refer to the findings of its own advisory institute charged
49 with giving authoritative guidance on all issues of public health relating to radiation hazards
50 from nuclear industry because that body, as we shall show, said in terms that Sellafield did

1 not pose a significant health risk to people living in Ireland? These are all important but
2 unanswered questions. The true answers to them may demonstrate that this application is
3 simply a last-ditch attempt to stop a venture which has been properly assessed and properly
4 cleared at every applicable level.

5
6 Why is this case on analysis, we say, entirely about procedure – “procedural infractions” to
7 use the words of my distinguished counterpart, the Irish Attorney General this morning – an
8 alleged failure to provide information or to cooperate and singularly not about substance?
9 Why, indeed, does the request raise as a key issue an allegation that the manufacture of MOX
10 represents significant risks for the Irish Sea when that assertion did not even figure in the
11 statement of case?

12
13 Mr President, Members of the Tribunal, I shall make two final observations of a general
14 nature which are closely related in this introductory part of our submissions. The first
15 concerns the evidentiary burden on an applicant requesting provisional measures. The
16 second concerns the exceptional character of provisional measures as a form of relief. We
17 will return to both in more detail tomorrow.

18
19 Provisional measures are an exceptional form of relief. Most municipal systems have some
20 such procedure. Many international dispute mechanisms do as well. Although such
21 procedures differ in some respects, there are common threads that run between them. One
22 such common thread is the exceptional nature and character of provisional measures, but this
23 point is so self-evident that it has been described as a banal truth by one authoritative
24 commentator. The same commentator, Jerzy Sztucki, went on to note that,

25
26 *“[it] follows therefrom [that is from the exceptional nature of provisional measures]
27 that the discretion in these matters is probably not supposed to manifest itself too
28 liberally and should rather be used with restraint and prudence.”*

29
30 As I have said, we shall return to this element tomorrow for the purposes of identifying the
31 substantive elements of law that are relevant to the Tribunal’s consideration of these issues.
32 But what may be usefully recalled at this point is that with an exceptional form of this kind, a
33 procedure by which the Tribunal can impose measures of restraint on a party without having
34 heard it in defence of its interests on the merits comes also responsibility. That is a
35 responsibility that rests with an applicant seeking provisional measures. It is incumbent on
36 such an applicant to adduce at least a basic foundation of evidence in support of its claim.
37 Often this evidence will simply emerge from the facts, as what a court will be asked to do is
38 to restrain some conduct that is ongoing where there is a discernible history of harm already
39 having occurred. That, indeed, is the invariable situation faced by the International Court of
40 Justice in the cases in which it has ordered provisional measures. Where, however, such
41 evidence of harm does not simply emerge from the facts and history, the applicants must
42 surely adduce sufficient evidence to persuade the court or tribunal that pre-emptive measures
43 of restraint are warranted.

44
45 After those introductory remarks, I turn to the facts of the matter. There are three basic areas
46 I want to cover: underlying facts, the nature of the evidence on risks and the factual answer to
47 the allegations which are made. However, before turning to those matters I will deal with the
48 central allegations made by Ireland about the history of the dispute. I will deal head on with
49 them.

1 What that will show – I will take you through the materials in detail; I have no option given
2 the submissions which Ireland has chosen to make – is the following. There are two main
3 points. First, although there are references to the UNCLOS obligations in the
4 correspondence, the focus of that correspondence has been entirely different. It has been on
5 the economic justification for the MOX plant under the relevant European obligations. But
6 the question of whether or not there was an economic justification was a matter not for
7 UNCLOS or the Annex VII Tribunal; it was a matter for the United Kingdom domestic
8 courts – where such a claim has been rejected so far – or for the European Court of Justice.
9

10 In the course of that question about the justification, there arose a dispute whether certain
11 information relevant to the question of economic justification for the plant should be
12 disclosed to the public and to Ireland. But that is an issue for the OSPAR Tribunal, which is
13 specifically concerned with the issue of communications and information.
14

15 The second main point is that the references which were made to UNCLOS in the
16 correspondence were never sufficiently specific to enable the United Kingdom to understand
17 what was the essence of the Irish complaint. When the United Kingdom asked for
18 information so that it could understand the complaint and offered an exchange of views,
19 Ireland simply refused. That, we say, is a substantial basis of complaint on which to move, as
20 Ireland does, to block a major development at a potential loss of hundreds of millions of
21 pounds and hundreds of jobs.
22

23 I turn to the record of correspondence. The first record of any sort to the Law of the Sea
24 Convention and MOX was in Ireland’s letter to the United Kingdom of 30 July 1999.
25 UNCLOS had by then bound the United Kingdom already for some two years, yet no prior
26 issue had been raised by Ireland. More importantly, the reference made then is slight and
27 non-specific. The letter is found at page 1 of Annex 2 to the Irish statement of case. I
28 hesitate to ask you to look at it now. Nevertheless, let me highlight quite specifically certain
29 elements of this letter that do warrant consideration from the perspective of these particular
30 proceedings.
31

32 By way of introduction that letter states,
33

34 *“the Irish Government wishes to stress that it remains strongly opposed to any*
35 *expansion of nuclear activity at Sellafield and to the proposed MOX plant in*
36 *particular”.*
37

38 But the whole purpose of the letter is to raise issues about the economic justification for
39 MOX. When you do have a chance to see the letter, you will see that time and again the
40 words “economic” and “costs” appear. The conclusions to the letter make clear its purpose.
41 Each bullet point in the conclusions relates to economic considerations and questions. There
42 are in that letter but two references to UNCLOS. First, there is a specific statement on the
43 Law of the Sea. Perhaps I may be allowed to quote this single statement:
44

45 *“What is apparent is that the British Government is provisionally minded to authorize*
46 *significant increases in transportation of radioactive materials by sea. These would*
47 *inevitably pass by or in proximity to Ireland. The British Government will be aware*
48 *that for a zone of up to 200 miles around its coast Ireland has established an exclusive*
49 *fisheries zone whereby it has jurisdiction *inter alia* in respect of the protection and*

1 preservation of the fisheries resources (in accordance with Article 56(1)(b)(ii) of the
2 1982 UN Convention on the Law of the Sea.”

3
4 However, the reference is purely to show that such an obligation might add to the economic
5 costs. I note immediately that there is no reference, in either the statement of case or the
6 request filed by Ireland in connection with the present claim to that article, Article
7 56(1)(b)(ii) of UNCLOS, or any dispute concerning Ireland’s Exclusive Fisheries Zone.

8
9 The second reference is a bare reservation of rights. The letter goes on to state:

10
11 *“[the] Irish Government ... reserves its rights to invoke ... procedures and*
12 *substantive requirements under ...”*

13
14 There then follows a list including European Community Directives, the Espoo Convention
15 on Environmental Impact Assessment in a Transboundary Context, the OSPAR Convention
16 and, I quote here the precise language used in the letter, “the 1982 UN Convention on the
17 Law of the Sea”. However, no provision and no detail is given here or anywhere else in the
18 letter except the now irrelevant reference to Article 56(1)(b)(ii).

19
20 Over the next two years there is much correspondence. I have counted at least 12 letters.
21 Most are in Annex 2 to the statement of case. But until the very month the claim was filed,
22 only one referred to UNCLOS. That was the letter of 23 December 1999. You have heard
23 something of this letter today. The reason Ireland keeps returning to this letter is because it is
24 the only one to raise any UNCLOS issue until the very month in which these proceedings
25 were commenced. It is set out at Annex 3 to Ireland’s notification and statement of claim. It
26 does, indeed, refer to some of the specific provisions of UNCLOS. Thus, addressing what
27 Ireland alleges is the inadequacy of the original BNFL environmental assessment, Ireland sets
28 out a list of “new EU and international obligations”, which it says are relevant to this matter.

29
30 Amongst them is a reference to Articles 192 to 194 of UNCLOS, addressing the obligation to
31 protect and preserve the marine environment; to Article 207 of UNCLOS, which provides
32 that states shall adopt national measures to prevent and reduce marine pollution from land-
33 based sources, and to Article 206 of UNCLOS which provides that states must assess the
34 potential effects of activities that may cause substantial harm or significant and harmful
35 changes to the marine environment. It calls on the United Kingdom to provide a new
36 environmental assessment, but it made no assertion, still less produce any evidence, that the
37 earlier assessment was wrong.

38
39 That is it; nothing more. The letter sets out a list of provisions, some European Community,
40 some OSPAR, some UNCLOS and some from other sources. It does not particularise
41 specific claims under UNCLOS with any clarity. It raises no claim, for example, of a failure
42 to cooperate, though that seemed to be Ireland’s principal claim in its written pleadings.

43
44 Ireland complains that its request to produce a new environmental assessment was not
45 accepted. That fact was clear to Ireland, as they have said, nearly two years ago. No attempt
46 was made to engage the Annex VII Tribunal or any other tribunal, at that time instead of
47 waiting until the last moment and then hiding behind the absence of a need to prove a case.

48
49 It was almost another two years before Ireland raised UNCLOS again. That was not even in
50 writing but at a meeting between the agents of the parties in London on 5 October this year

1 called to discuss procedural issues relating to the OSPAR arbitration commenced four months
2 before. At this point Ireland, without specifying the details of its complaint, indicated that it
3 considered that a dispute existed with the United Kingdom under the Law of the Sea
4 Convention. I think that this far it is common ground that no detail was given of the specific
5 UNCLOS issues that Ireland proposed to pursue.

6
7 Not until 16 October of this year was there any written statement. That is at Annex 1 to
8 Ireland's statement of case. Here, Ireland states that it considers that the United Kingdom is
9 in breach of its obligations to protect and preserve the marine environment as required by
10 Articles 192 to 194; that it has failed to take steps to prevent and eliminate pollution from
11 land-based sources and that it has failed to assess the impact on the marine environment of
12 the MOX plant. As you will see, most of the letter focuses on other measures, notably
13 European Community Directives and the OSPAR Convention. Again, specific details of
14 Ireland's allegations is not given.

15
16 The United Kingdom Secretary of State responded to that letter two days later. It is set out in
17 Annex 1 to the United Kingdom's written response. In this letter the Secretary of State
18 indicated that the United Kingdom had, indeed, considered the radiological risks associated
19 with the manufacture of MOX fuel. She then went on to state:

20
21 *"The UK is anxious to exchange views on the points you raise in your letter as soon*
22 *as possible. In order to do so meaningfully we need to understand why the Irish*
23 *Government considers the UK to be in breach of the provisions and principles*
24 *identified in your letter. We will be pleased to exchange views with you on alleged*
25 *breaches of the United Kingdom's obligations with respect to the environment."*

26
27 Ireland responded to that letter a few days later. That is set out in Annex 2 to the
28 United Kingdom's written response. The operative part states:

29
30 *"Ireland's position concerning the incompatibility of the Sellafield MOX plant with*
31 *the United Kingdom's international obligations is set out in my letter of 16 October as*
32 *well as in earlier communications, including my letter of 23 December 1999*
33 *addressed to your predecessor. Ireland's position has also been set out repeatedly*
34 *since 1994 in formal submissions relating to the MOX authorization process."*

35
36 *The letter continues:*

37
38 *"The object of any exchange of views pursuant to Article 283 of UNCLOS is to*
39 *achieve a settlement of the dispute between Ireland and the United Kingdom*
40 *concerning the interpretation and application of UNCLOS by negotiation or other*
41 *peaceful means. No such settlement will be possible so long as the MOX plant*
42 *remains authorized."*

43
44 The United Kingdom again responded, the following day (the letter is at Annex 9 to Ireland's
45 statement of claim) affirming its willingness to exchange views on the matter and noting that
46 the Irish correspondence "simply lists alleged breaches" and "did not throw any light on the
47 reasoning of the Irish Government".

48
49 But Ireland continued in its refusal to give detail prior to proceedings or to exchange views.
50 The next occurrence was the filing by Ireland, the following day, of its notification, statement

1 of claim and request for provisional measures. It is at that point that the United Kingdom was
2 first apprised of some of the detail of Ireland's claims.

3
4 While I am dealing with this letter I must return to the assertion from Mr Fitzsimons and Mr
5 Sands relating to the letter from the Secretary of State, Mrs Beckett, of 24 October 2001, the
6 day before the proceedings commenced, which Mr Fitzsimons suggested amounted to a
7 calculated attempt to mislead Ireland and forestall the initiation of proceedings before the
8 Annex VII Tribunal. This amounts effectively to an allegation of bad faith. There is a
9 reference, I interpolate, in the written pleadings to the fact that information had not been
10 provided but no prior notice that an allegation would be made of being deliberately
11 misleading or of bad faith. I am sorry, but that notice was not given.

12
13 Let me say immediately that the Secretary of State was entirely accurate. The letter stated
14 that "the authorization for the MOX plant has not yet been completed". I refer you back to
15 the letter from BNFL's lawyers of 17 October 2001, referred to this morning, which was the
16 basis of the Irish allegation. The operative part of that letter refers to "a commissioning
17 programme". It also referred to the "initial stages" of plutonium commissioning.

18
19 That a further stage in the commissioning process is still to come is evident from another
20 BNFL letter attached by Ireland, this time pages 30 and 30A of its Annex 2. That letter
21 affirms that further authorizations are still required today from the Nuclear Installations
22 Inspectorate before final commissioning can take place.

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

31
32 We will come back tomorrow to address the legal issues relevant to the point under Article
33 283. However, let me simply observe that requirements to exchange views, or to consult, as a
34 prior condition to the initiation of legal proceedings, is a feature of a number of international
35 dispute settlement arrangements. It is set out in Article 283 of UNCLOS and found, for
36 example, also in Article 4 of the dispute settlement understanding of the World Trade
37 Organization and in Articles 22 and 23 of GATT.

38
39 There are a number of reasons for such provisions. First, they afford an opportunity for
40 parties to a dispute to attempt to resolve the dispute in a low-key manner by agreement,
41 which is always a desirable outcome. Secondly, where a negotiated settlement is not
42 possible, the consultations will have the effect of crystallising the dispute between the parties.
43 Thirdly, particularly in circumstances in which other states may also have an interest, this
44 crystallisation of issues followed in some instances by a further formal obligation upon a
45 claimant to identify the issues in dispute with a reasonable degree of specificity, enables other
46 states to consider whether they may also have an interest in the matter. Fourthly, and perhaps
47 most importantly, there is a general principle of fairness in litigation that requires a claimant
48 to specify a claim in enough detail to enable the respondent to have a clear understanding of
49 the nature of the claim that it is required to defend.

1 Such is the importance of these considerations that a Panel of the World Trade Organisation,
2 following guidance on the matter from the Appellate Body, has recently determined that a
3 claimant cannot proceed with a claim before a panel on an issue that has not been the subject
4 of specific notification and consultation. The case concerned a complaint by Mexico against
5 anti-dumping measures taken by Guatemala on grey Portland cement. Citing Article 4(5) of
6 the WTO *Dispute Settlement Understanding* which provides effectively that WTO Members
7 should attempt to obtain a satisfactory adjustment of the matter in dispute in the course of
8 consultations before resorting to panel proceedings, the Panel stated as follows:

9
10 “...Mexico’s application does not meet the requirements of Article 4...since Mexico
11 has failed, in this process, to hold consultations with Guatemala concerning the
12 provisional measure in issue *per se* as required for the Panel to be able to examine
13 it... At the same time, the failure to hold such consultations has made it impossible
14 for third parties to exercise their rights... In addition, Article 6.2...emphasizes the
15 substantive nature of the consultation procedure as a prelude to examination by the
16 Panel of the complainant’s claims; in other words, it leads to examination by the
17 Panel itself of the specific measures at issue on which consultations have been
18 requested.”

19
20 We, of course, accept that the WTO regime procedures constitute some of a special regime
21 but there are important similarities between that regime and the one we are concerned with
22 here under Part XV of UNCLOS. Article 283 of UNCLOS does impose an obligation to
23 exchange views. Article 286 of UNCLOS makes it clear that this requirement is a necessary
24 precondition to the application of the dispute settlement procedures in Section 2 of Part XV,
25 including for present purposes access to this Tribunal and to the Annex VII Tribunal. In our
26 submission, the principle at the heart of the WTO Panel’s decision in *Guatemala – Grey*
27 *Portland Cement* case is relevant to the obligation to exchange views in Article 283 of this
28 Convention.

29
30 Ireland in its Statement of Case makes much of the general obligation upon States to
31 cooperate in good faith. It cites the *Lac Lanoux Arbitration* and dicta of law of the sea cases
32 before the International Court of Justice, the *North Sea Continental Shelf* cases and the
33 *Fisheries Jurisdiction* case. What must avail Ireland must avail the United Kingdom too.
34 Ireland has been nursing this case, it says, for years. It must, at the very least, specify its
35 claim in sufficient detail to the United Kingdom to enable the United Kingdom to have an
36 accurate appreciation of Ireland’s concerns. This requires not simply the enumeration of
37 articles of UNCLOS upon which it might rely at some future date but also some basic
38 description of the substantive issues with which it is concerned.

39
40 I am conscious that between my submissions on this point and those of Ireland earlier today,
41 the Tribunal may feel that it is faced with duelling claims of failure to cooperate. What is
42 clear, however, I suggest when you examine the record is that the United Kingdom has only
43 very recently been presented with anything approaching a particularization of Ireland’s
44 claims. Ireland, asserting that no settlement would be possible “as long as the MOX plant
45 remains authorized” has refused all invitations to exchange views.

46
47 I now want to move on to the more technical part of my presentation. As the obvious way in,
48 I just want to give a brief explanation of the nature and purpose of a MOX plant and to clear
49 up a view obvious misconceptions at the same time. I am then going to look at four issues in
50 the following order: first, the regulatory framework, by which I mean the extensive

1 international, European and national regulations that apply to the operation of the MOX plant
2 and the transport of any MOX fuel; second, I am going to examine the history of events
3 leading up to the Decision of 3 October 2001, which is really just the history of how that
4 extensive international, European and national regulatory framework was implemented; and,
5 third, I will turn to the results of that implementation. I shall examine what the relevant
6 statements and submissions that were carried out in accordance with the applicable
7 regulations show. At the same time I will have to look in some detail at the heart of
8 allegations by Ireland as to risk. Finally, I will invite you to look at the other side of the coin,
9 the harm that the United Kingdom is likely to suffer if provisional measures are ordered.

10
11 With regard to the technical background, the Tribunal will now be aware that spent
12 plutonium can be reprocessed and once reprocessed, it can be recycled into MOX fuel. I
13 would stress a MOX plant is not a reprocessing plant. It is a fuel manufacturing facility in
14 which the fuel is manufactured to the mixing of plutonium dioxide and uranium dioxide
15 powders. Ireland blurs the boundaries between the MOX plant and the reprocessing facilities
16 at Sellafield, particularly the THORP plant. But they are quite distinct and it is disingenuous
17 otherwise not to accept that.

18
19 Another important element is that the process of manufacture is an essentially dry process. It
20 involves the mixing of powders. It follows that this is not a case where the Tribunal has to be
21 concerned with harmful radioactive liquids being discharged or seeping into the Irish Sea.

22
23 There is another very important point and it is directly relevant to the assertion of risk by
24 Ireland. If MOX does not operate, the plutonium which is being separated at Sellafield will
25 still have to be transported from Sellafield back to the customer or a third country. So there
26 would still be movements of radioactive material. But they would be in a form which is not
27 as safe as the MOX ceramic pellets. Mr Justice Collins of the English High Court in his
28 judgement (Annex 9 to our Written Response) said:

29
30 “It has been known for some time that nuclear reactors can operate efficiently using a fuel
31 called MOX, which is a mixture of plutonium oxide and uranium oxide. The manufacture of
32 MOX enables the reclaimed plutonium to be recycled. This has the advantage of reducing
33 the amount of stored plutonium and saving the use of fresh uranium so that the environmental
34 hazards of mining new uranium can be reduced. In addition, it avoids the need to transport
35 the plutonium back to the customers or for reprocessing in a third country. MOX fuel in the
36 form of what are known as ceramic pellets is said to be less attractive to terrorists and safer
37 than plutonium (which is transported in the form of plutonium oxide powder).”

38
39 MOX is also a well-established process. Nuclear reactors have operated on MOX fuel for
40 over 30 years. As Ireland says in its Statement of Case, the MOX manufacturing process is,
41 “relatively straightforward”. That is a fair assessment and so, on an unusual note of harmony,
42 I move on to the first of the four remaining issues which is the regulatory framework.

43
44 I want to make reference to four particular aspects: the national requirements (which as you
45 will see are themselves dictated by international obligations), the European Community
46 obligations, the international standards protecting the safety of transport and the specific
47 agreements relating to the Irish Sea in OSPAR. Firstly, as to the national requirements, as
48 you will hear, there are three separate processes of authorization required of local, national
49 and European level, and I will be showing later how these processes were carried out and
50 entirely satisfied.

1
2 First, BNFL had to apply to the local planning authority, Copeland Borough Council, for
3 planning permission. A key part of the process was a requirement for BNFL to produce an
4 Environmental Statement, that is a Statement to identify, describe and assess the likely
5 significant effects on the environment that might be brought about by the construction,
6 operation and eventual decommissioning of the MOX plant. The obligation to have such an
7 Environmental Statement arose as a result of European law.

8
9 Another key part of the planning application process was the need for wide public
10 consultation. Ireland responded in that process of consultation. The planning permission
11 was, in fact, granted on 23 February 1994.

12
13 The second requirement is the disposal of radioactive waste or from any nuclear site in
14 England and Wales is regulated under an act called the Radioactive Substances Act 1993.
15 There is a national agency, the Environment Agency, which has the power, subject to
16 directions of the Secretaries of State, to grant or refuse applications for discharge
17 authorizations.

18
19 In November 1996 BNFL applied under that Act for variations to its existing authorizations
20 for the Sellafield site as a whole. Following that application, the Environment Agency asked
21 BNFL to provide information specifically on the MOX plant which it did.

22
23 In November 1998 the Authority issued a provisional or proposed decision but referred that
24 proposed decision in respect of the plutonium commissioning and full operation of the MOX
25 plant to the relevant Secretaries of State. The Environment Agency (and you have the
26 document which I will come to) concluded that no additional limits to the Sellafield discharge
27 authorizations were required in order for the MOX plant to be commissioned and operated
28 since the plant's discharges could be accommodated within the existing limits in the
29 discharge authorizations.

30
31 Directive 29 of 1996 of the European Atomic Agency Treaty (that is Euratom) provides by
32 Article 6(1):

33
34 "Member States shall ensure that all new classes or types of practice resulting in exposure to
35 ionising radiation are justified in advance of being first adopted or first approved by their
36 economic, social or other benefits in relation to the health detriment they may cause."

37
38 That is the process of economic justification which took place over the last three years and it
39 is the decision on 3 October this year that the relevant Secretaries of State decided that the
40 manufacture of MOX fuel was justified in accordance with Article 6(1).

41
42 Thirdly, with regard to the European regulatory framework, Article 37 of the Euratom Treaty
43 requires Member States to provide to the Commission information relating to any plan for the
44 disposal of radioactive waste. This is to enable the Commission to determine whether the
45 implementation of the plan is liable to result in the radioactive contamination of the water,
46 soil or airspace of another Member State. The objective of Article 37 is to forestall any
47 possibility of radioactive contamination of another Member State.

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

4
5 The Commission is required by the Treaty to consult a group of experts. They are appointed
6 from among scientific experts and, in particular, public health experts. They advise the
7 Commission on laying down standards within the Community for the protection of the health
8 of workers and the general public against the dangers arising from ionising radiation.

9
10 I shall return to the very important opinion of the Commission. I say at this stage it reached a
11 clear and unambiguous conclusion showing that Ireland's fears are ill-founded. They
12 concluded that the implementation of the plan for the disposal of radioactive waste from the
13 plant, both in normal operation and in the event of an accident, is not liable to result in
14 radioactive contamination, significant from the point of view of health, of water, soil or
15 airspace of another Member State.

16
17 I turn then to the international standards for transport. They apply to transports to and from
18 Sellafield. They provide assurance that the public is protected from risk. The transport of
19 radioactive materials is, as you would expect, stringently regulated in the United Kingdom by
20 the competent regulatory bodies in accordance with the compulsory requirements of the
21 relevant international organisations. For transports by sea, the relevant requirements are
22 those of the International Maritime Organisation. All sea transports undertaken by BNFL are
23 carried out in full compliance with the IMO standards.

24
25 The transport of hazardous materials by sea is also governed by the International Convention
26 for the Safety of Life at Sea. That incorporates the International Maritime Dangerous Goods
27 Code which covers all categories of hazardous materials, including radioactive materials. For
28 the sea transport of such radioactive materials that code incorporates a separate specific code
29 which was established in coordination with the IAEA. It is called the International Code for
30 the Safe Carriage of Packaged Nuclear Fuel, Plutonium and High Level Radioactive Wastes
31 On Board Ships. This sets out mandatory requirements concerning the carriage of radioactive
32 materials. This is called the INF Code.

33
34 The INF Code applies to all new and existing ships engaged in the transport of INF Code
35 materials. Specific regulations in the code cover a range of issues including damage, stability,
36 fire protection, temperature control of cargo spaces, structural considerations, cargo securing
37 arrangements, electrical supplies, radiological protection equipment and emergency planning.

38
39 I turn finally to the OSPAR Convention. That is a regional convention for cooperation in
40 respect of the law of the sea of the kind contemplated in Article 197 of UNCLOS. Mr
41 Plender will return to this tomorrow. This is not primarily concerned with regulation of
42 radioactive emissions but Article 1(4) of Annex 1 says this:

43
44 "When adopting programmes and measures in relation to radioactive substances,
45 including waste, the contracting parties shall also take account of (a) the
46 recommendations of the other appropriate international organisations and agencies:
47 (b) the monitoring procedures recommended by these international organisations and
48 agencies."
49

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

5 I turn now to the second of the four main issues and that is the long history of the process of
6 authorization of the MOX plant. It is an eight-year process during which at every step the
7 United Kingdom has, as a matter of course, ensured that all the environmental and other
8 requirements for the construction and operation of the MOX plant have been satisfied.
9

10 Much of the history this Tribunal already knows. Let me just take you briefly through the
11 steps in the authorization process and when I have done that I want just to go back and look
12 at some of the material in more detail. I will address the arguments of Ireland in that context.
13

14 With regard to step 1, in 1993, BNFL sought permission to construct the MOX plant. It
15 presented its Environmental Statement as required by European and national law. Permission
16 was granted in early 1994. With regard to step 2, the Article 37 General Data was submitted
17 by the United Kingdom, the Opinion of the European Commission – a favourable opinion –
18 was given in early 1997. Then step 3, also in 1997, BNFL made an application to the
19 Environment Agency in relation to the justification of the MOX plant as required under the
20 Euratom Directives. Then step 4, a first round of public consultation, lasting eight weeks,
21 was conducted by the Environment Agency. Step 5, in response to concerns that there was
22 insufficient information on the economic case for the MOX plant, the Environment Agency
23 commissioned an independent consultant's report. That report was released for public
24 consultation in December 1997, subject as you have heard to the excision of certain
25 commercially confidential information. Step 6, a second round of public consultation then
26 took place then took place in early 1998. Step 7, following that, in October 1998, the
27 environment Agency issued its *Proposed Decision* to the effect that the plutonium
28 commissioning and full operation of the MOX plant was justified. This is an important
29 document. I will have to return to it. You may just like to note now that Ireland is listed as
30 one of the consultees. Steps 8 to 11 I summarise, further rounds of public consultation took
31 place in September 1999, March 2001 and August 2001, with a further independent report on
32 the economic case being commissioned by the Secretaries of State. Step 12, on 3 October
33 2001, the decision authorizing the commissioning of the MOX plant was made.
34

35 It is obviously an important document. You will find it at Annex 4 to our written
36 submissions. It shows how the concerns raised in the public consultation were considered
37 and responded to. Can I just identify, so that when you look at the document you can see it,
38 the areas that were covered: environmental issues (Annex 1, paragraphs 6 to 14); health and
39 safety issues; implications for plutonium and uranium; security issues (terrorist attack and so
40 forth); transportation issues; wider nuclear issues; local issues; economic issues; the
41 assessment of the independent consultant; trust issues (and that relates particularly to the
42 falsification episode of which you have heard); international and other issues and issues
43 relating to the decision making process. These are the issues of concern to Ireland.
44

45 By way of postscript I should add that an application for judicial review of the decision was
46 made to the High Court in London by two environmental organisations, Friends of the Earth
47 and Greenpeace, which advanced arguments not dissimilar at least to some of those
48 arguments now advanced by Ireland. That was dismissed on 15 November of this year
49 although it is subject to an appeal later this month.
50

1 As to the history, a history of the implementation of European and national regulations, with
2 that in mind can I now turn to my third main issues, the results, as it were, of implementation
3 of the MOX plant as shown in the Environmental Statement, the Commission and other
4 documents.

5
6 I want to make two central points. First, the operation of the MOX plant has been the subject
7 of detailed and rigorous scrutiny by the national and international bodies who are charged to
8 assess its safety and, secondly, it has been shown and indeed I will say the case that the plant
9 poses no risk whatsoever to the marine environment of the Irish Sea.

10
11 I should add up front that the material that I will direct the Tribunal's attention to has not
12 been prepared for the purposes of this hearing. It is material in the public domain that Ireland
13 has had access to for many years. It is no answer for Ireland to hide behind assertions that the
14 information on risk is inadequate or out of date. It has had many years to check the key data
15 on radioactive discharges and to validate or contradict those figures. It has not done so. The
16 fact that it still does not do so is the clearest indication, we would submit, that the data is
17 correct.

18
19 As I go through the key documents, I will try to highlight where the data may be found so
20 that the Tribunal can see it is there, out in the open, and has remained unchallenged for so
21 long.

22
23 In essence Ireland's argument has five steps: manufacture of MOX fuel is a dangerous
24 process; the MOX plant is next to the sea and there will therefore be related transports by
25 sea; operation of the MOX plant will lead to harmful discharges; operation is due to
26 commence around 20 December 2001; and provisional measures are therefore needed to stop
27 the discharges.

28
29 It follows that Ireland's case really is about harmful radioactive discharges. The Tribunal is
30 not concerned with other forms of pollution. Ireland's case on the facts goes nowhere unless
31 it can show that the manufacture of MOX fuel involves harmful radioactive discharges, that
32 harmful radioactive discharges make their way into the sea. It must show both of those but
33 Ireland can show neither.

34
35 Let me start with the question: does the manufacture of MOX fuel at the MOX plant involve
36 harmful radioactive discharges? The short answer is: it does not.

37
38 Of course my starting point in the operation of the plant, like any other nuclear installation in
39 the United Kingdom, is subject to stringent regulation. That applies equally of the transport
40 of the MOX fuel to the end customer.

41
42 As I have said, as a first step in order to obtain permission to construct the MOX plant, BNFL
43 had to prepare an environmental statement. The statement is at Annex 6 to the United
44 Kingdom's written response. It shows – and this is what has been in the public domain since
45 1993 – low level, radioactive, liquid discharges from MOX will be negligible (para. 4.37 and
46 5.49); low radioactive gaseous discharges from the MOX plant will be insignificant (para.
47 5.50); overall, the radiological impact of discharges from the MOX plant will be
48 insignificant. There will be an insignificant effect on flora and fauna. Fourthly, transport of
49 the MOX fuel is to be in containers subject to tests, including a rigorous regime of impact on
50 to an unyielding target followed by an all-engulfing fire (during which the containment

1 system must remain leak-tight to the limits prescribed by the International Atomic Energy
2 Agency).

3
4 It follows that at the earliest stage the issue of whether or not the MOX plant would lead to
5 harmful radioactive discharges was being considered in the context of both plant operations
6 and transport of MOX fuel. These are the two issues on which Ireland now focuses, as if they
7 had never been given any consideration before. I know that Ireland says the Environmental
8 Statement is inadequate or out of date. I will come back to that. But what it does not say is
9 that the Environmental Statement, which contains a considerable amount of data on the
10 discharge of radioactive emissions, is wrong, and yet it has had eight years to find the flaws.

11
12 I move on the next important stage in the regulatory process, the Article 37 approval. The
13 Commission has to consult the “Group of Experts” They are scientific experts appointed by
14 the Scientific and Technical Committee under Article 31 of Euratom, and Ireland has an
15 expert on this Committee.

16
17 The “General Data” provided by the United Kingdom under Article 37 of Euratom is at
18 Annex 10 of our written response. It contains again data on radioactive discharges. The data
19 have not been challenged by Ireland.

20
21 Ireland says that the assessment of the impact of the MOX plant has been adequate. It says
22 that there has been no examination of accidents or of issues such as topology of the Sellafield
23 site, its geography, its geology and seismology, hydrology, meteorology. If one turns to the
24 United Kingdom’s Article 37 “General Data” at Annex 10 of our written response, you see:
25 “Geographical and Topical Situation of the Site”; “Geology – Seismology”; Hydrology”;
26 “Meteorology and Climatology”; and “Natural Resources” – all of the issues are dealt with.

27
28 At section 6 of the General Data, the United Kingdom sets out data on what is called
29 “Unplanned releases of radioactive effluents”. That is precisely a section dealing with the
30 consequences of accidents at the MOX plant, including consideration of what are called
31 euphemistically “Extreme External Events”, including earthquakes and aircraft impact. The
32 impact of a reference accident is looked at in detail, and I quote, “It is the worst case potential
33 fault condition (having the greatest release of radioactive material) which is considered
34 credible”. As appears from page 36 of the General Data, the radiological consequences of the
35 reference accident were considered with specific reference to Ireland.

36
37 How then did the Commission respond? On 25 February 1997, the Commission gave its
38 Opinion. It is a particularly important document and I would like you to turn to this Opinion,
39 if you would, in the Annexes at tab 3 in the first volume of the Annexes to the Written
40 Response, or look at the document, if you would be so kind, later.

41
42 Let me just go through the conclusions one-by-one. Conclusion (a):

43
44 *“The distance between the plant and the nearest point on the territory of another*
45 *Member State, Ireland, is 184 km”.*

46
47 This shows that Ireland was being considered up front by the European Commission.

48
49 Conclusion (b), and I quote:

50

1 *“under normal operating conditions, the discharge of liquid and gaseous effluents*
2 *will be small fractions of present authorized limits and will produce an exposure of*
3 *the population in other Member States that is negligible from the health point of*
4 *view”.*

5
6 That deals with liquid and gaseous effluents under normal conditions but there is no shade of
7 ambiguity about those conclusions. The discharges are small fractions of authorised limits;
8 the exposure to other Member States (notably Ireland) is negligible.

9
10 Conclusion (c) deals with solid wastes. Again, there is no suggestion of a problem here:

11
12 *“low-level solid radioactive waste is to be disposed to the authorized Drigg site*
13 *operated by BNFL. Intermediate level wastes are to be stored at the Sellafield site,*
14 *pending disposal to an appropriate authorized facility”.*

15
16 We have dealt with normal conditions but conclusion (d) deals with accident situations:

17
18 *“in the event of unplanned discharges of radioactive waste which may follow an*
19 *accident on the scale considered in the general data, the doses likely to be received by*
20 *the population in other Member States would not be significant from the health point*
21 *of view””*

22
23 The Opinion was therefore comprehensive. It dealt with liquid emissions, gaseous emissions,
24 solid wastes, accident conditions and in each case, it found that there was no risk to other
25 Member States. I therefore turn to its overall conclusion. It is so important that I read it in
26 full, although it is only a few lines.

27
28 *“In conclusion, the Commission is of the view that the implementation of the plan for*
29 *the disposal of radioactive wastes arising from the operation of the BNFL Sellafield*
30 *mixed oxide fuel (MOX) plant, both in normal operation and in the event of an*
31 *accident of the type and magnitude considered in the general data, is not liable to*
32 *result in radioactive contamination, significant from the point of view of health, of the*
33 *water, soil or airspace of another Member State”.*

34
35 There is no significant radioactive contamination from the point of view of health, of water,
36 soil or airspace of another Member State. That opinion could not be more at odds with
37 Ireland’s allegations of risk to the Irish Sea.

38
39 As I have said, the European Commission’s opinion does not represent the end of the story in
40 so far as the regulatory process is concerned.

41
42 I have already referred to the justification exercise. I want to dwell for a moment on the
43 proposed decision of October 1998, taken within the context of that exercise, to the effect that
44 the plutonium commissioning was fully justified.

45
46 The proposed decision is important for three reasons. First, it shows how the United
47 Kingdom considered and addressed the issues raised in the preceding public consultations,
48 including issues raised by Ireland. Second, it sets out in a readily accessible way the
49 applicable regulations in terms of radioactive discharges, and then evaluates the discharges in

1 the light of those regulations. Third, importantly, it shows how data on radioactive
2 discharges has been in the public domain for years and has not been challenged by Ireland.
3
4 Let me just focus, if I may, on those last two points because it is crucial that the Tribunal
5 understand, if I may say so, that the European Commission's opinion is entirely consistent
6 with the objective facts. I must just introduce two technical terms: first, something called the
7 "sievert". That is a unit of measurement, as you may well know, of radiation doses. A
8 millisievert is of course one-thousandth of a sievert. A microsievert is one-millionth of a
9 sievert.
10
11 The second is something called the "critical group". That is the notional group of people who
12 would be most exposed to the relevant source of radioactivity.
13
14 With those two things in mind, the Proposed Decision shows a number of things. May I go
15 through these and perhaps conclude on this, Mr President?
16
17 First, the average yearly radiation dose to members of the United Kingdom population from
18 natural background sources is 2.2 millisieverts. That is 2.2 thousandths of a sievert.
19
20 Second, and I will come to the document that I have asked to be shown to you at this point, if
21 I may, the International Commission on Radiological Protection recommends that the
22 radiation dose to members of the public from man-made sources should not exceed 1
23 millisievert per year – one thousandth of a sievert. In so far as the United Kingdom is
24 concerned, this is less than one-half of the average yearly radiation dose from natural
25 background sources.
26
27 That recommendation, thirdly, was implemented in *Directive 96/29/Euratom* of
28 13 May 1996. The relevant parts of this Directive have been implemented in United
29 Kingdom legislation.
30
31 In fact, the United Kingdom standards are even more stringent because, pursuant to the
32 recommendations of our National Radiation Protection Board, the exposure to members of
33 the public from a single new source should not exceed 0.3 millisieverts, that is three-tenths of
34 a thousandth of a sievert.
35
36 How then does radiation from the MOX plant compare with these standards? Was the
37 European Commission right to conclude that the discharge of liquid and gaseous effluents
38 from the MOX plant would be small fractions of authorised limits?
39
40 The radiation dose from the MOX plant is so small that it has to be measured in small
41 fractions of microsieverts, i.e. fractions of a millionth of a sievert.
42
43 With respect to gaseous discharges from the MOX plant, the yearly radiation dose to the
44 critical group is 0.0002 microsieverts, that is two-thousandths of a millionth of a sievert. This
45 is less than one hundred thousandth of the United Kingdom standard.
46
47 A dose to the critical group from liquid discharges will be even smaller. The dose is
48 0.000003 microsieverts per year – three-millionths of a millionth of a sievert. This is
49 precisely one-hundred millionth of what the United Kingdom standard would allow. As
50 I have said, the United Kingdom standard is more stringent than the European standard.

1
2 You can see the document, which I asked to be put up on the screen, and I will read three
3 short passages from A3.13. This was produced in October 1998 and Ireland has had this
4 document and has had every opportunity to challenge, to contradict or to verify it, if it wishes
5 to do so.

6
7 *“MAFF has assessed the data and estimated the radiation dose to the most exposed*
8 *group for gaseous discharges to be two-thousandths of a microsievert per year ... and*
9 *the dose to the most exposed group for liquid discharges is estimated to be three-*
10 *millionths of a microsievert per year ...*

11
12 The Agency notes that the radiation doses assessed by MAFF are extremely small and
13 have negligible radiological significance.”

14
15 The final sentence of that paragraph reads:

16
17 *“It may be noted that the assessed dose due to gaseous and liquid discharges from the*
18 *MOX plant is less than one-millionth of that due to natural background radiation”.*

19
20 Mr President, Members of the Tribunal, that is the fact in relation to MOX. Ireland has had
21 every opportunity to dispel and dispute it and it has not done so. Perhaps I may make the
22 final point: what about the effect on Ireland? Those were all figures for the United Kingdom.
23 Ireland is 184 kilometres away.

24
25 The exposure to the critical group in Ireland to gaseous discharges from the MOX plant is
26 0.0004 microsieverts per year (four hundred thousandths of a millionth of a sievert). That is
27 one-fiftieth of the exposure of the UK critical group”. The exposure of the critical group in
28 Ireland to liquid discharges from the MOX plant is also considerably less than the exposure
29 to the United Kingdom critical group of three millionths of a millionth of a sievert per year.

30
31 We suggest that those figures dispose of Ireland’s case on the facts in all its aspects. I return
32 to my original question: does the manufacture of MOX fuel at the MOX plant involve
33 harmful radioactive discharges? The answer is clearly, “no”. There is no ambiguity, there
34 are no “maybes” and it follows that there is no serious risk of harm to the Irish Sea. Nor is
35 there any question of it withholding information on radioactive discharges, as has been
36 suggested today. Ireland has had this data for years.

37
38 I suggest that Ireland’s other complaints have to be seen in the light of those facts. I will
39 come to those later, but what sense do its allegations of non-cooperation, inadequate
40 assessment, pollution and harm retain once it is seen that the MOX plant emissions come
41 within hundreds of thousands of a fraction of the authorized limits?

42
43 Mr President, I will move on to what Ireland says about that, but you may feel that that would
44 be an appropriate moment to draw the drapes.

45
46 **THE PRESIDENT:** The hearing is adjourned until 9.30 am tomorrow.

47
48 **(The hearing adjourned at 6 pm)**