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2001

Public sitting

held on Tuesday, 20 November 2001, at 15.15,

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

Uncorrected
Non-corrigé

Present:	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 *ad hoc*	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,

a*s Advisers.*

CLERK OF THE TRIBUNAL: All rise, veuillez-vous lever.

THE PRESIDENT: I give the floor to the Agent of Ireland.

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

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

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

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

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

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

Their defence, as will be apparent from their Written Response and their submissions made here, has been meticulously prepared. They have had clearly enormous assistance from experts and yet no attempt is made to attack any of the data in the STOA Report and particularly the figures I referred you to. Not one figure has been contradicted and we submit that in those circumstances that evidence remains intact. We submit that the only inference to be drawn from the United Kingdom approach is that they accept that the data is accurate and are not in a position to dispute it. We, therefore, ask you to treat that evidence accordingly.

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

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

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

With regard to the comments of the United Kingdom's Attorney General yesterday, the transcript will show that Ireland made no allegation of personal bad faith against Secretary of State Beckett. Any such suggestion was not and is not part of Ireland's

case. The parties have agreed that a further letter dated 15 November 2001 delivered by hand yesterday in Dublin should be admitted into evidence; delivered to us in Dublin by the United Kingdom yesterday when we were here. That should be admitted into evidence. The Tribunal is invited to read and consider this letter together with the letter of 24 October 2001 and draw such conclusions as it considers appropriate from them. In reading this brand new letter which arrived on 19 November 2001 the Tribunal might ask itself why the information contained in it was not, together with the information in the Freshfield letter, included in the letter from the Secretary of State of 24 October last.

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

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

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

Finally, Mr President, you raised the question regarding publications verifying the assertion that the Irish Sea was the most radioactive sea in the world. I can refer you to two publications; firstly, *Radionuclides in the Oceans – Inputs and Inventories* published by *Institut de Protection et de Securite Nucleaire (1996)*. This is a study of different seas, their radioactive content. Comparison of the results of the studies gives one the conclusion that the Irish Sea is the most radioactive in the world.

The second document which I can refer you to is a United Kingdom House of Commons Select Committee Report. This is a report of a House of Commons Select Committee of a session back in 1985 before the THORP plant was commissioned, before the MOX demonstration facility was started and before the MOX plant was presumably thought of. I must say this document turned up as a result of your request, and I am grateful for that request. We will submit to the Committee the full report, of course, as requested. It contains a statement which is on the screen and I will just read the highlighted part, "Disposal at the moment has taken the form of discharge of huge volumes of low-level liquid waste from the Sellafield pipeline. The result of this is that at least a quarter of a tonne of plutonium has been deposited in

the Irish Sea which has become the most radioactive sea in the world". I attach significance to this document which was only brought to my attention within the last hour because here we have, from a United Kingdom document, verification of the STOA Report which an attempt has been made to rubbish.

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

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

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

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

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

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

Then, in the autumn out of the blue, the matter proceeds at a far greater pace. A further consultation takes place in which it is not even proposed to make available the ADL Report. That ultimately is made available and it leads to a quick decision on 3 October 2001, a decision I should say, that was taken right in the shadow of the

events of 11 September whilst other countries, the United States were prohibiting all international movements of radioactive materials. The United Kingdom was taking the opportunity to authorize new ones and new activities. Until that decision was taken on 3 October 2001 there was no decision to challenge. There had been no authorization. Quite simply if we had come to you a year ago or two years ago we would have been told that we were premature.

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

I move on to my second major point. We say the substantive and procedural rights which Ireland claims are related to the protection of the marine environment from radioactive pollution. This is not a case about the protection of human health. The United Kingdom has been deft in seeking to recharaterise this case about human health, not the protection of the marine environment. We should be alert to the way in which they have done that. The United Kingdom say that under UNCLOS the only rights we have is the right not to be subject to harmful health effects from the operation of the MOX plant. If you read our claim it goes far more broader than health effects. We say we are entitled not to be subject to pollution which will have impacts upon – and here I take the language of Article 1, paragraph 4, of the Convention – which will have impacts upon living resources and marine life or marine activities, or quality for use of the sea, or reduction of amenities. It is far broader. We are not just concerned about health and reducti9on of amenities is significant. It includes, for example, loss of tourism as the result of the construction of the operations at Sellafield.

The entire United Kingdom strategy is to shift attention away from the sea, away from the marine environment and on to human health. We were presented with an extremely polished performance about the infinitesimally small additional doses and tiny risks to human health, almost too small to measure it was suggested.

In the light of correspondence and the history of the dispute, we leave it to you to judge for yourselves what this dispute is about. Is it about health, as the United Kingdom says, or is it about the marine environment, with all that implies, as Ireland says?

We do not have to show that on 20 December some dramatic event is going to happen which is going to cause harm to human health in any way. Our case is not related to that issue. All we have to show is that there is a prospect that there will be new and additional pollution, which will violate our rights under the Convention. I identified the provisions of the Convention. It is exactly the same claim as we made on 30 December 1999: namely, the United Kingdom was proposing to authorise activities which were going to be harmful to the marine environment without having considered the impacts on the marine environment. That is what our case is.

I think it is clear who is playing strategies in this court room. You are not the International Tribunal for the Protection of World Health. You are the International Tribunal for the Law of the Sea. That is your function. So it is all very interesting to hear about sieverts and millisieverts and microsieverts and millionths of this or that, but it is irrelevant to this case. It is totally irrelevant to this case.

Our case is a simple one. It has been confirmed by the United Kingdom. There is not a single document which indicates that they ever took into account amenities in Ireland, the protection of marine and living resources and so on. They do not even pretend to claim that they have taken it into account. That is why what they seek to do is recharacterise the matter as being about human health. But of course harm can be viewed in two ways. You can have harm to human health, which both sides are concerned about, obviously, and you can also have harm to the environment, which they are evidently not concerned about, but we are deeply concerned about. With regard to human life, it is of course appropriate to consider radiation by reference to doses, to individuals or groups.

We heard yesterday that those dose levels were quite low, and we have not challenged that fact.

THE PRESIDENT: May I interrupt you? The interpreters are finding it difficult to translate this into French. Would you slow down the tempo of your presentation?

MR SANDS: Harm to the environment in terms of radioactive pollution is measured in a different way, and we have not heard anything about that. It is a reflection of the amount of radioactive substances that contaminate the environment. These amounts are measured in units of radioactivity which are called becquerels. You will have seen them in the European Parliament report. You will have not heard anything about becquerels from the United Kingdom because the United Kingdom does not want you to focus on concentrations in sediments or in marine species or so on and so forth. It is undisputed that after 20 December there will be increased discharges into the marine environment from the MOX plant and becquerel levels will increase.

The key to this part of the proceedings is what the case is really about. As we say, it is about protecting the marine environment and addressing the issue of concentration in the Irish Sea of becquerels, of radionuclides.

We are astonished that at this stage in the proceedings the United Kingdom has ignored entirely its obligation to reduce concentrations of radionuclides. You have not heard anything from the United Kingdom about that. That is an obligation which emerged in 1998 and which we say informs Article 194, 207 and so on.

Once MOX is commissioned after 20 December, there will be large discharges into the Irish Sea. The UK again sought to downplay this but they did not deny that those discharges which would occur would have irreversible effects. They cannot. Plainly, once you open the pipe and let the radionuclides in, whether it is on 21 December or 2 January, it will enter the sea. Some of it will reach Ireland and it will be there to all

intents and purposes for ever. That is why we say our rights will be violated on 20 December.

What does the United Kingdom say? The United Kingdom says it too has rights. What is the right that the United Kingdom is claiming? Really the right that the United Kingdom is claiming is nothing less than the right to continue polluting the Irish Sea, which they have done for 40 years. They say they have that right because they do not have to take into account the marine environment. All they have to do is look at human health. That is what Lord Goldsmith effectively said to you: we have the right to discharge this stuff into the Irish Sea and we have the right to do it in order to make money, because that is what it is about. We heard a lot about money from that side. And, said Lord Goldsmith, we do not have to cooperate with you about that; we do not have to assess that; we can just keep on discharging it.

Oh, gentlemen on the Tribunal, if for some reason you decide you are going to prescribe provisional measures, perhaps Ireland might compensate us for the end of our right to discharge? That is what you are being asked to do. Frankly, after 40 years, it is unacceptable, it is completely unacceptable. Our rights are set forth and have been set forth by us in absolute detail and with precision in this case. Most of our arguments have been ignored entirely in the context of an effort to recharacterise this as a minor matter of nuisance with no harm to human health: tiny discharges, nothing to worry about, go home, leave us alone.

Much was made of the 1997 Euratom opinion. We want to thank the United Kingdom for putting that opinion in and for relying on it so extensively because it actually confirms our case. It does two things. If you read it very carefully, and you will have noticed that certain readers of it did not read to so carefully, although I am grateful to Mr Plender who was entirely accurate throughout his readings of that provision, firstly, it confirms that there will be contamination of the water, soil or air space of Ireland. It does not say that is not going to happen. Nothing in the opinion says it is not going to happen. But, it says, the second point, such contamination is not liable to result in radioactive contamination significant from the point of view of human health. That is all it does. The reason it only does that is that the European Commission simply is not charged with the task of looking at the effects on the marine environment, on loss of amenity, on uses of waters and so on. That is not their function. Under the relevant chapter of the European Atomic Energy Treaty, all they can do is look at human health, but it is apparent that something which is not harmful to human health could nevertheless cause harm to the marine environment.

Again, we note that, notwithstanding the fact that we asked for a reassessment of the authorisation process by reference to the new standards relating to concentrations which emerged after 1998, there is no reference to any such attempt. It is ignored and everything has been authorised by reference to standards which existed in 1993 and 1996. It is true that, in assessing impact on human health, current standards may have been taken, but we are not interested in human health. This is the Law of the Sea Tribunal which is concerned with the protection of the marine environment. It is not an organ of the World Health Organisation.

I mention a couple of other matters that were not referred to. Nothing was said about Article 123, we noted with great interest this morning. A number of people in

this room know the importance of Article 123. There is nothing that needs to be added, except to say that that silence speaks louder than anything I can say about the United Kingdom's attitude, the *voisinage*, neighbourhood and the responsibilities of literal states.

Let me turn now, in conclusion, to what all this means for the standards that you are to apply in deciding whether or not to prescribe provisional measures. For the purposes of Article 290, you have to show the possible existence of rights which need to be protected, which Ireland holds, and we went into that in some detail yesterday, or you have to show serious harm to the marine environment, and we maintain both aspects of that because we say that discharge of any radiation into the marine environment constitutes pollution. The United Kingdom has not denied that it constitutes pollution, and pollution by radiation is always serious. It can never not be serious from an environmental perspective.

The discharges which will happen after 20 December and the new movements which will occur, unless of course the United Kingdom is going to give us an undertaking in relation to movements, violate our rights, rights, the United Kingdom says, we do not have. But what becomes clear after 80 pages of argument, and four hours of impressive and detailed presentation, is that there is a genuine dispute there. There truly is a dispute about the nature of the rights. The United Kingdom may be right; it may be that it is nothing more than human health or we may be right to say that it is broader and it is about environment and amenity and uses of water, but plainly there is a dispute. We cannot escape that fact.

Disputed rights are capable of protection under Article 290. That is the purpose of the first limb. The situation in fact in which we find ourselves today is not a new one. These arguments are made every time there is a provisional measures application.

I think the best thing I can do is to refer you to the leading commentary on provisional measures: Mr Justice Collins's Hague lectures of 1991, which have been re-published by Oxford University Press in 1993, and I know you have a copy in your library because we have dealt with this in the *Saiga* provisional measures phase, and in particular pages 177 to 181. We say that is all you need to deal with this case. Those pages are entitled "The Merits of the Claim", which is what our friends from the United Kingdom have spent about 86 per cent of their time dealing with. Mr Justice Collins, as he now is, refers to almost all of the same cases that we referred to yesterday and he notes, and I quote, that "the prevailing view is that the merits of the underlying claim are irrelevant", although of course he recognises that if a state were to bring an apparently hopeless claim, it would not obtain an order for interim measures. Well, the United Kingdom has said many things about our presentation, but "apparently hopeless" is even too far for them. Of course, ultimately it is for you to judge whether what you have heard is apparently hopeless. We think that it is not.

Mr Collins notes in particular the nuclear test cases, which I referred to yesterday, and he quotes the very same test which I referred you to and which I do not need to go into – again, the question I posed. Then he says: The International Court of Justice was not swayed by a French claim that Australia's own National Radiation Advisory Committee had concluded that fallout from the French tests did not

constitute a danger to the health of the Australian population – very similar to the situation we have had today. Substitute Australia for the Radiological Protection Institute of Ireland and you have an identical situation. The Australian Government, for understandable reasons, do not want to frighten their populations about what is going on, but that does not mean that they cannot also address the environmental consequences. But of course the United Kingdom is completely silent about the case.

The Court was in effect saying that the case was arguable, and we say that our case is arguable. He concludes this magisterial piece by considering the opinion of Judge Shahabudeen in the *Great Belts* case, of which we have heard quite a lot today, and in which Judge Shahabudeen concluded, not that the applicants must show a *prima facie* case on the merits, but that it must, and I quote, "establish the possible existence of the rights sought to be protected". That is all we say you have to do.

You have plenty of material. It is said that we have not provided sufficient facts, that we have noted with interest the considerable effort expended by the United Kingdom in trying to undermine, unsuccessfully we say, the European Parliament's report, and, at the end of the day, all we have to do is rely on their own documents because their documents prove that there will be discharges, and that is the end of the matter. There will be increases in radionuclide concentrations in the Irish Sea as a result of the activity they have authorised and which will start very shortly. We say you need do no more than rely on their very own documents and admissions and your job is done.

The final point I can deal with very quickly. That concerns whether or not our rights need to be protected. We say that it is self-evident that radioactive pollution which is discharged after 20 December can never be removed from the Irish Sea. We say that environmental impact assessment becomes meaningless, for obvious reasons, and we say that no account can, in a meaningful way, be taken of our interests if the plant begins to spew out its radioactive pollution after 20 December. Our case is as simple as that.

MR LOWE: My task is to deal finally, in wrapping up the Irish case, with the jurisdictional points that were made by our friends on my left this morning. Some of those points we accept. It was said that provisional measures are an exceptional measure, and that, of course, is true. Not every case needs them and they should not be given in every case. Where they are needed, they should be indicated.

The fact that the International Court has not indicated them in any case like the present simply reflects the fact that the International Court has not had before it any case like the present in which it would have been appropriate to indicate provisional measures. The closest case, the *Great Belt* case, is one where Denmark volunteered an undertaking of exactly the kind that we seek from the United Kingdom, and so, unsurprisingly, the International Court decided that it had no need to indicate provisional measures in that case.

The United Kingdom has refused to give an undertaking of that kind although it may be that this morning the United Kingdom was volunteering an undertaking that there will be no shipments until the summer of 2002, so that the relief that is sought in

paragraph 150 subparagraph (2) of our statement of claim would be covered by an undertaking. We would invite our friends to indicate this afternoon whether they were giving that undertaking and, if so, to define what exactly they mean by "the summer of 2002".

But let me turn to Mr Plender's three basic hurdles that he says stand between us and the remedy we seek from you: Articles 282, 283 and 290.

As far as Article 282 is concerned, I explained yesterday that the OSPAR and Annex VII applications are patently and visibly different. Mr Plender asks you to put aside the evidence of your own eyes when you look at the statement of claim because his point is that this claim could and should have been brought by Ireland before the OSPAR or the EU case.

I repeat that that is not possible. The OSPAR Tribunal does not have jurisdiction that extends to all of the matters claimed in this case now. I shall give you one instance of that. Article 123 of the Law of the Sea Convention prescribes particular rights and duties of states in semi-enclosed seas. That was a provision not mentioned at all by the United Kingdom this morning, which seemed to be stuck on Articles 197, 192 and 194. Article 123 of the Law of the Sea Convention has no parallel in the OSPAR Convention, whose general obligations apply broadly to more than half of the North Atlantic.

If a state chooses to frame a case in terms of OSPAR or EU obligations, it must use the OSPAR or EU procedures to handle that case. But disputes do not arise with legal labels already pinned on them. Disputes begin not as OSPAR or as EU disputes; they begin as disputes over pollution; over non-cooperation and as factual disputes. States then look for the legal remedy, which allows them to protect their interests in that dispute. The freedom of a state to invoke whatever legal rights it might have under any international legal instrument is one which is not subject to any limitation of the kind that the United Kingdom would have you believe here. How could an Annex VII arbitral tribunal say to Ireland, "You must go to OSPAR. You must settle for the more limited rights that you have under that Convention and not seek to come before us and claim the wider rights that the 1982 Convention gives you. The only possible circumstances in which Ireland could be sent away from the Annex VII Tribunal would be if the two claims were identical, as they were in all material respects in the *Southern Bluefin Tuna* case. That is not so here.

I also raise another point. If it is the case, as Mr Plender suggested, that this is truly a matter of jurisdiction and not a matter of admissibility – that point is crucial to his argument on Article 282 of the Convention – the OSPAR Tribunal might equally decline jurisdiction and say that this is a matter which should go to the Law of the Sea Convention. There is no pre-determined wisdom that says that it would be the Annex VII Tribunal that would decide that its jurisdiction is limited there.

However, in any event, Mr Plender is plainly not right. The OSPAR and Article VII cases are plainly and purposely different. There is no authority that has been cited, nor even any serious argument from the United Kingdom, as to why Ireland should not frame its legal case exactly as it thinks proper. Indeed, I remark in passing that if the United Kingdom's contentions were correct, that would have the effect that all

regional fisheries and pollution conventions would sweep every dispute which might be brought under one of those Conventions under the scope of Part XV of the Law of the Sea Convention. That is plainly not something which was ever contemplated by the drafters of that Convention.

As regards Mr Plender's point on the EU mixed agreements, I will not trouble you by reading out now the terms of the European Community's declaration made when it ratified the Law of the Sea Convention. However, you will see from paragraph 2 of that declaration that it is simply not arguable that every aspect of the Irish case is covered by the terms of the Community's exclusion.

I turn to Article 283. The allegation there is that Ireland has not exchanged views. It was curious that the Attorney General suggested this morning that Ireland could have taken the dispute to the Law of the Sea procedures two years ago, shortly after it raised the Law of the Sea concerns in the 1999 letters. But, because Ireland had chosen instead to press on with its attempts to find a solution through meetings and correspondence with the United Kingdom, it had now become barred from doing so because it had failed to exchange views. The suggestion makes no sense whatever.

It is true that the Irish exchanges did not explicitly identify themselves as exchanges for the purposes of Article 283, but tribunals have never required that negotiations must comply with particular formalities. We read very briefly an extract from the judgement of the International Court in the 1962 South West Africa case where this exact question as to whether a dispute could be settled by negotiation arose. I have taken the extract from the publication on the court's website. That states:

> "In the court's view the fact that a deadlock had been reached in the collective negotiations in the past and the fact that both the written pleadings and oral arguments of the parties had clearly confirmed the continuance of this deadlock, compelled a conclusion that no reasonable probability existed that further negotiations would lead to settlement."

The respondent having contended that no direct negotiations between it and the applicants had ever been undertaken, the court found that what mattered was not so much the form of negotiation as the attitude and views of the parties on the substantive issues of the question involved. There can be no doubt that in this case the correspondence shows that the attitude and views of the parties on the substantive issues in question were in dispute.

That, too, accords with the approach taken in the Southern Bluefin Tuna case, to which I referred yesterday. This is an important point. It goes to the heart of the utility of the Part XV procedures. Negotiations are not normally conducted by lawyers; they are conducted by technical experts. If they try in good faith to find a practical solution to a practical dispute, and they fail, that should be enough to satisfy the requirements of Article 283.

The real core of the United Kingdom's case is that we were not good enough. They say that our objections were unparticularised; that they had insufficient specificity; and that we did not explain what our concerns were. That point was repeated this morning. You have the correspondence. You will read it and form your own view.

Cooperation and consultation are two-way processes. It is not enough for the United Kingdom to say, "Here we are; consult us". Ireland has no nuclear industry. It has no body of commercial experience in running nuclear plants as a business. We think that we spelled out our concerns: that the Irish Sea is being polluted by the Sellafield complex, and that the problem will get worse as a result of the commissioning of the MOX plant, of whose intended operations we have only the most incomplete picture. We think that we spelled this out perfectly clearly. We indicated also how we might pursue those concerns in law. What more do they want?

I am told, Mr President, that the interpreters are having difficulty. It seemed that I was to address this to you, but I suspect that the remark is addressed to me.

You will note also from the Secretary of State's letter of 15 November submitted in evidence this morning that the decision to give the green light to the MOX operation was taken on 3 October and that, as they say, any further steps are a matter for the regulators. It is plain that in any event there was no room for negotiation after 3 October. Britain's position had already been defined.

If Ireland's claim is entirely without merit, as Mr Plender says, the Annex VII Tribunal will say so and Ireland will accept that result. What Ireland now ask is that the United Kingdom do nothing that will prejudice the execution of the Annex VII Tribunal's award if it upholds Ireland's claim.

That brings me to my final point, which is the question of urgency. The Tuna case was cited against us. There, they say, it was common ground that tuna stocks were seriously depleted. That is so, but the parties were diametrically opposed on the question of whether the modest catches under the Japanese scientific fishing programme would make the situation significantly worse. In the face of that diametric opposition, this Tribunal prescribed provisional measures. We are in the same position here.

It is, I hope, common ground that Sellafield has already made the Irish Sea the most radioactively polluted in the world. The only division between us is over whether the consequences of MOX will make it significantly worse. Mr Sands has explained the basis of our case on this. I recall too that our application is not based solely on the substantive polllution of the Irish Sea. Ireland also invokes procedural rights to consultation, cooperation and co-ordination of activities with the United Kingdom. Even today it seems that they have not understood this point. Mr Plender said this morning that if the Irish Minister had waited for a reply from the Secretary of State to his letter, the United Kingdom would have learned the precise nature of Ireland's views and would have responded. Again, we hear the idea that the United Kingdom had it all covered and that the only need was for Ireland to explain its fears and that it would be reassured by the United Kingdom that it had all been anticipated and taken into account.

That is not consultation or cooperation; that is condescension. One wonders if there is not, from time to time, a certain blurring of the United Kingdom's international responsibilities as a state with its interests as a shareholder in BNFL. If the plutonium commissioning goes ahead next month, Ireland's procedural rights will have been defeated. It will always then be possible for states to justify failures to

consult or cooperate on the ground that no harm has been caused by their failure. An entire body of legal mechanisms which is intended to introduce rationality and fairness into the actions of states will be reduced to nothing more than a matter of courtesy and convenience.

The United Kingdom says that the plant could be decommissioned. It stresses the losses of tens or hundreds of millions of pounds if we delay. There has been no evidence given for those figures. But it is important finally to come back to the reality of the situation. We seek a short delay and no commissioning until the Annex VII Tribunal can be constituted and take a view. This is absolutely not a stratagem. I can assure the United Kingdom that we look forward keenly to the merits phase in this case, where our real remedy is sought. We are looking for a delay of weeks, not years. If the United Kingdom is concerned by this delay it could ask the Tribunal to limit the provisional measures to, say, six months with the possibility of reapplying for an extension if some unforeseen circumstances made that necessary; but no. The United Kingdom's position is that the plant must go ahead and that we, Ireland, will learn in due course from the decision of the Annex VII Tribunal that we never had the rights that we claimed anyway.

That concludes our submissions, Mr President. I would ask you to invite the Irish agent to make our final formal submissions.

THE PRESIDENT: Thank you. Mr O'Hagan?

MR O'HAGAN: Mr President, Mr Vice-President, Members of the Tribunal, Ireland requires that ITLOS prescribe the following provisional measures:

(1) That the United Kingdom immediately suspend the authorization of the MOX plant dated 3 October 2001; alternatively take such other measures as are necessary to prevent with immediate effect the operation of the MOX plant;

(2) that the United Kingdom immediately ensures that there are no movements into or out of the waters over which it has sovereignty or exercises sovereign rights of any radioactive substances or materials or wastes which are associated with the operation or, or activities preparatory to the operation of the MOX plant;

(3) that the United Kingdom ensures that no action of any kind is taken which might aggravate, extend or render more difficult of solution the dispute submitted to the Annex VII Tribunal. (Ireland hereby agreeing itself to act so as not to aggravate, extend or render more difficult of solution); and

(4) that the United Kingdom ensures that no action is taken which might prejudice the rights of Ireland in respect of the carrying out of any decision on the merits that the Annex VII Tribunal may render. (Ireland likewise will take no action of that kind in relation to the United Kingdom).

THE PRESIDENT: Thank you, Mr O'Hagan. The hearing is adjourned until 1715 hrs.

(**The hearing adjourned until 1715 hrs**)

THE PRESIDENT: I now ask the Agent for Ireland whether he would like to add anything to what he has already said.

MR O'Hagan: Mr President, Mr Vice-President, Members of the Tribunal, I should like to refer to the three questions which were sent from the Tribunal to the Irish Agent and to counsel this afternoon. I advise the Tribunal that the Irish delegation will have ready tomorrow the replies to the questions. With the permission of the Tribunal we intend to submit a written response tomorrow.

THE PRESIDENT: Thank you. You have our permission. I now give the floor to the agent of the United Kingdom.

MR WOOD: Mr President, Members of the Tribunal, Mr Wordsworth and Mr Plender will respond on behalf of the United Kingdom. I shall then read out the United Kingdom's final submissions. I invite the Tribunal to call Mr Wordsworth to address the Tribunal.

MR WORDSWORTH: Mr President, Members of the Tribunal, it is an honour to appear in front of you today. We have heard a lot this afternoon about Ireland's case; how clear it is and how clearly it has been set out. It is said that Ireland's case is that there will be pollution which will be harmful to the marine environment in the absence of any assessment of the relevant facts. It is said that the MOX harm will be added to by the increased use of the THORP facility due to the MOX plant operation. It is said that it is clear who is playing strategies. By that, it is meant that the United Kingdom are playing strategies.

Members of the Tribunal, neither of the above allegations are in Ireland's statement of claim. By Ireland's statement of claim I refer specifically to the document in respect of which provisional measures are sought before the Annex VII Tribunal. I do not refer to the statement of case, which is the written submissions prepared for today's hearing. The Annex VII Tribunal can only decide the case, the dispute, on the basis of the statement of claim. It follows that this Tribunal can only have jurisdiction in respect of that dispute, ie the dispute that is before the Annex VII Tribunal.

We made that point clearly at paragraph 94 of our written response. We said that there had been no allegations of harm in the statement of claim. We said that the Tribunal can only prescribe provisional measures with reference to the dispute that is before the Annex VII Tribunal. We made the same point yesterday and Ireland has not responded.

What about THORP? Is there an allegation that the MOX plant, together with the increased operation or the increased economic activity at the THORP plant will lead to harm? Do we see that in the statement of claim? So much reliance has been placed on that this afternoon and yesterday morning. The answer to that is that the

THORP plant gets one mention in the statement of claim, and one mention only, in paragraph 6. I invite the Tribunal to turn to that paragraph in its deliberations and see what Ireland is saying to the Annex VII Tribunal in relation to THORP. Is the allegation that was being made before you today or yesterday being made before the Annex VII Tribunal? I submit that it simply is not. It is not we who are engaging in strategies, it is Ireland.

I turn to the evidence of harm. This is the key point to which Mr Bethlehem referred in his presentations this morning. What of the evidence? Ireland suddenly welcomes the Article 37 opinion. This is the opinion of the European Commission. That is surprising. Apparently, the Article 37 opinion shows how wrong the United Kingdom is. So, it is rather odd that the Article 37 opinion was not relied on by Ireland if it really supports its case. Apparently it is now said that the Article 37 opinion supports the proposition that the United Kingdom has only ever looked at issues of human health. The United Kingdom, it is said, has forgotten all about the environment; the dispute before you is all about the environment. Human health, we are led to believe, is an entirely discrete topic and the United Kingdom has focused solely on that discrete topic.

Unfortunately at this juncture the Article 37 opinion has to come back up on the screen. (**Shown on screen**). It states:

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

Is the Article 37 opinion solely about health? It clearly is not. Health is one facet but it is only one facet. Is Ireland right otherwise? Is this just one example that I have managed to pick up? Has the marine environment been ignored by the United Kingdom? Of course, it has not. Environmental issues specifically are considered in every single one of the documents that we rely on. They are considered in the 1993 Environmental Statement; in the Article 37 general data and in the 1998 proposed decision and, of course, they are considered in the key decision of 3 October 2001.

The environmental issues here are considered right upfront. They are considered at paragraphs 6-14 of Annex 1 of the decision. At paragraph 9 of Annex 1 of the decision it is concluded that there would be a negligible impact on wildlife. Paragraph 10 goes into details of discharges and, indeed, uses Ireland's new favourite measurement, the becquerel. Paragraph 10 is now on the screen. (**Shown on screen**). It states:

> The Agency concluded that radioactive discharges to the air from the SMP would contribute less than 1 per cent to the total discharges to the air from the Sellafield site. Annual discharges from the SMP are estimated to be 0.0566 Gigabecquerels … of plutonium-241 …, 0.00268 Gbq of plutonium alpha … and 0.000512 Gbq of americium-241 … With regard to liquid radioactive discharges from the SMP, the Agency concluded that these will contribute

less than 0.0001 per cent to the total annual liquid radioactive discharges from the Sellafield site of these radionuclides. Annual discharges from the SMP are estimated to be 0.0113 GBq … and 0.000102 GBq of Am-241."

What does that show? Clearly, it shows that the relevant bodies have been looking at issues of discharge in terms of the measurement of the becquerel, and it has also been looking at it in terms of the sievert about which Lord Goldsmith spoke so compellingly yesterday. It also shows that the measurements, the doses, in terms of becquerels or Gigabecquerels, are just as infinitesimally small. That, of course, is not surprising.

Mr President, Members of the Tribunal, it is not just that Ireland is splitting hairs when it says that we must talk about negligible discharges measured in becquerels instead of microsieverts; it is that Ireland is wrong. Whatever the measurement, the United Kingdom is within fractions of thousandths of a per cent of the legally binding discharge limits; limits that are legally binding as a matter of European and national legislation.

Those infinitesimally small discharges are now common ground. Mr Sands said that Ireland did not challenge the figures that Lord Goldsmith put before you yesterday. It is common ground that the MOX plant will lead only to radioactive discharges measured in thousandths of a per cent of applicable limits. In that light, I have no idea what Mr Fitzsimons seeks to gain from referring to the figures in the WISE Report. They were not relevant before because they did not apply to the MOX plant. They are not relevant now as the tiny discharges from the MOX plant are agreed. Mr Sands says that he has enough to get him home; it is enough that there be any discharges, even if the doses are less than a few seconds in an aeroplane.

Mr President, Members of the Tribunal, the answer to that is very simple. As Mr Bethlehem amply demonstrated this morning, Mr Sands is simply applying the wrong test. As Mr Bethlehem showed this morning, the threshold is high. The threshold is one of irreparable prejudice, ie irreparable harm or serious harm to the marine environment. That is the wording and the phrase expressly laid down in Article 290(1) of UNCLOS. Ireland has skated over that fact, but there it is.

There is no question in this case of serious harm on what are now admitted facts as to the levels of discharge, even if measured in dose of those doses from the MOX plant. They are infinitesimally small, and on the basis of those admitted facts Ireland simply cannot get home in terms of the requirements of Article 290(1).

MR PLENDER: Mr President, Members of the Tribunal, in closing for the United Kingdom, or delivering the United Kingdom's final speech, I must sweep up a miscellany of issues. The Tribunal asks three questions. First, you ask for additional information about the United Kingdom's statement that Ireland has made public its intention of initiating separate proceedings in respect of the United Kingdom's alleged breaches of its obligations arising under the EURATOM Treaty and the EC Treaty. We were then referring to statements by Mr Joe Jacob, The Irish Minister, dated 3 and 4 October 2001, which Miss Barratt will, in a moment, put on the screen.

In those statements he announced that Ireland was in the process of preparing for the institution of proceedings against the United Kingdom for infringement of directives – apparently those relied upon here – and adds that,

> "Papers have already been drafted and will centre on the justification of the facility … and violation of the obligations to subject the Plant to a proper environmental impact assessment."

The second statement will now be shown. We wait, of course, to hear from our Irish colleagues who know more about this than we do and what exactly Ireland proposes to do but Ireland has made clear, indeed to the public, its intention of ventilating before the European Court of Justice certain of the very complaints, particularly in respect of Environmental Impact Statements and failure to comply with Directives, which appear in the Statement of Case before this Tribunal.

The Tribunal's second question is primarily addressed to Ireland as it seeks further information on Ireland's assertion that independent scientific assessments of the state of the Irish Sea have concluded, "that as a result of radioactive pollution from Sellafield the Irish Sea is amongst the most radioactively polluted seas in the world". On this matter I would like to say only that for Ireland surely the most authoritative body is its own Radiological Protection Institute of Ireland (RPII). There will be on the screen pages of the report of that Institute on "Radioactivity Monitoring of the Irish Maritime Environment 1998 and 1999". This is a technical document and I regret the necessity of plucking from it a brief passage without being able to expand the full content but the report does say at page 4, "The primary source of radioactivity in the marine environment is of natural origin". It goes on to say at page 18 that "radiation doses to Irish people resulting from Sellafield discharges are now very low and do not pose a significant health risk to the public". I quote again, "it is emphasised that the levels of radioactive contamination which prevail at present do not warrant any modification of the habits of people in Ireland, either in respect of consumption of seafood or of any other use of the amenities of the marine environment". I emphasize the last words, "amenities of the marine environment". The concerns of the Institute are not confined to health alone but include the marine environment more generally.

The Tribunal's third question was to what extent would the commissioning of the MOX plant increase the transport by sea of radioactive materials to and from Sellafield.

First, I should emphasize a point which is no doubt at the forefront of the Tribunal's mind by now. Before summer 2002 (at the earliest) there will be no additional marine transports of radioactive material either to or from Sellafield as a result of the commissioning of the MOX plant. I shall revert to that subject in a moment in order to avoid any possibility of misunderstanding over the use of terms.

Thereafter, there will be shipments of radioactive material from the Sellafield MOX plant (namely MOX fuel assemblies) and shipments of spent nuclear fuel for reprocessing will continue. The extent, if any, to which the plutonium commissioning of the MOX plant would result in the long-term in an increase in the volume of import to the THORP plant of spent fuel for reprocessing depends upon the conclusion of

future contracts. It is, therefore, impossible at this stage to give a finite answer to the Tribunal's third question.

The question has, however, arisen as to how many transports of MOX fuel there would be each year from the MOX plant. The planned frequency of shipments is considered to be commercially confidential information although, as can be seen from paragraph 195 of the United Kingdom's Written Response, the United Kingdom has offered to discuss that information with the Irish Government on a confidential basis, and our offer has not yet been accepted.

Further, as we have seen from the judgement of Mr Justice Collins, if the MOX plant is not commissioned there will still be transports of separated plutonium belonging to BNFL's overseas reprocessing customers. If this is not returned in the form of MOX the plutonium would be returned to them as separated plutonium or would be sent to a third country for manufacture into MOX fuel or for some other treatment. It is BNFL's assessment that the number of shipments of separated plutonium that would otherwise be converted into MOX fuel in the MOX plant would be of the same order or even exceed the number of shipments there would be of MOX fuel derived from that plutonium.

Contrary to Mr Fitzsimons' cautiously expressed suggestion this afternoon there are at present no plans to move separated plutonium to Sellafield as a result of the commissioning of the MOX plant. Of course, it can be noted that all such transports will be undertaken in full compliance with the stringent regulatory requirements that were described by Lord Goldsmith so as to ensure they can be carried out safely and securely.

I turn now to the question of the Secretary of State's letter of 15 November. In the course of their speeches yesterday Mr Fitzsimons and Mr Sands made criticisms of the letter dated 24 October by the Secretary of State, Margaret Beckett, to her Irish counterpart. Yesterday the United Kingdom understood Mr Fitzsimons and Mr Sands (although not the Attorney General for Ireland) to suggest that Mrs Beckett was attempting deliberately to deceive Mr Jacob. As Lord Goldsmith explained, this was certainly not the case and Mrs Beckett's letter was entirely accurate.

I was, therefore, glad to hear this afternoon Mr Fitzsimons' confirmation that it is no part of Ireland's case to allege bad faith against Mrs Beckett. As he said, the parties have agreed that a further letter dated 15 November, which was delivered by hand yesterday in Dublin, should be admitted into evidence. I should say immediately I regret the delay of four days in the delivery of this letter. That should not have occurred. As our Irish friends will appreciate, and I hope the Court will accept, we have been under some pressure in the last few days and in other circumstances we would have hoped to attend to the matter more promptly. The first thing to note about the letter of 15 November is that it confirms the accuracy of the letter of 24 October. As it makes clear, further consents were required and so Mrs Beckett was right to say that the authorization had not been completed.

It is now said that the letter of 15 November shows that our criticism of Ireland for refusing to exchange views was misplaced. We take the diametrically opposite view on that point. It confirms the criticism we make. Until delivery of the Statement of

Case, Ireland's only identification of any disputes this year was a bare assertion of violation of Articles 192 to 194 of UNCLOS in the letter of 16 October. There was no identification of any other complaints or even a reference to the other articles now relied upon. The last omission is particularly surprising because these are allegations of non-cooperation which have formed such a large part of Ireland's complaint. It is not at all surprising that the United Kingdom wanted to understand and sought an exchange of views as it did in the letter of 18 October. Ireland provided some information in its reply of 23 October but this was still very sketchy and it refused to engage in an exchange of views without an undertaking on the part of the United Kingdom to suspend authorization of the plant. Plainly, by 21 October Ireland had discovered that what it now calls irreversible steps or later called irreversible steps would be taken on 23 November.

But is the key point to all this not as follows? Of course, Mrs Beckett had already made the statutory decision she had to make and to that extent she was *functus officio*. But the Government's role was not over. Further consents were required, as she said in her letter of 24 October and that must be right. Indeed, if the Government is incapable of doing anything now as a result of Ireland's concern, there would be little point in these proceedings.

If Ireland had agreed to exchange views the clarification that has been sought about this exchange of correspondence could have been achieved outside a court room and, in any event, there are measures which could be taken or information supplied which might have been offered if Ireland had followed its legal obligation to exchange views, which might have satisfied any reasonable person that a particular concern could be set aside.

Mr Fitzsimons mentioned yesterday a further item which has required a little research on our part. He referred to a bilateral agreement providing for a mutual exchange of information on nuclear matters. He alleged that the Foreign Office had in some way blocked renewal of the agreement and referred to this as "a further example of failure to cooperate" (see transcript, page 22, lines 47-50 and page 23, lines 1-4).

This was, as with so much else of the Irish Government's complaint, the very first we have heard of it, raised for the first time in this Courtroom. Even now we are not sure what is the agreement to which Mr Fitzsimons was referring. We assume he may have meant what is called "the arrangement for the exchange of information between the Health and Safety Executive of the United Kingdom and the Radiological Protection Institute of Ireland" signed by the two agencies in 1980. On hearing his allegation yesterday we contacted the Health and Safety Executive to discover the present position.

This arrangement is reviewed every three years, most recently in January this year. When the two agents decided to renew it, they also decided to update the written text. The Health and Safety Exercutive tell us that the new text is in draft form and they expect to have it finalised and signed by the two agents in the near future.

We are mystified by the suggestion that the Foreign Office has imposed a new procedure or blocked renewal of the arrangement, and we can only assume that the

information is based on some kind of misunderstanding. This arrangement is not a treaty. It is an operational arrangement between two agencies. The two agencies have, in practice, renewed the arrangement and continued their cooperation pending the signing of the updated text. The Chief Inspector of the Nuclear Installations Inspector of the Health and Safety Executive calls an annual meeting with his counterpart from the Irish RPPI to discuss matters of mutual interest. Indeed, this year's meeting is to take place next week, 30 November. Regular contacts at working level continue between the agencies as they have for many years.

The Health and Safety Executive consider that their relations with their Irish counterparts are excellent. They have told us of no dissatisfaction with the current arrangement. None have been expressed by either side to the other. In my submission this should be regarded as an example of successful cooperation between the United Kingdom and the Irish authorities. If the Irish Government's team should continue to believe otherwise we will be only too pleased to discuss with them the means of meeting their concerns. If the Irish Government's team should continue to believe other otherwise, we would be only too pleased to discuss with them the means of meeting their concerns.

In the course of his address today, Mr Sands dealt with the Environmental Statement submitted by NIREX UK for a rock characterisation facility in Cumbria. With a somewhat dramatic gesture, which members of the tribunal perhaps recall, he made the point that the report in relation to that is longer than the report produced for the Sellafield MOX plant. He suggested this is surprising, given the fact that it did not involve any radiological discharges or international transports of radioactive material.

As I said this morning, this is a comparison of chalk and cheese. There are significant difference between the Environmental Statement produced by NIREX in respect of rock characterisation and the Environmental Statement produced by BNFL in respect of the MOX plant. The NIREX statement dealt with a significant new development project which would have consequences for the landscape and environment in an area of outstanding natural beauty: the Lake District of north-west England.

The rock characterisation facility proposed by NIREX would not have involved radioactive material in the same way as the MOX plant (see paragraph 1.28 of the Environmental Statement). Accordingly, it does not deal with radiological issues at all, but the project would have been a wholly new development on a new site which would have involved significant impacts on the local physical environment and on the social and economic environment.

The proposal from NIREX can be contrasted to BNFL's proposal to construct the MOX plant, which would be one further building sited on BNFL's existing industrial plant at Sellafield. The suggestion that the Environmental Statement produced in respect of this added building was inadequate because it covered fewer pages than the rock characterisation facility, a new development in the Lake District, is one which is simply untenable.

I turn next to the Sintra statement, a point on which Mr Sands also made submissions. This is a ministerial statement communicated within the framework of

the OSPAR Convention. To the extent, if at all, that the objectives in it give rise to legally enforceable obligations on contracting parties, the ascertainment of that matter, as well as the content of the obligations, is a matter for the OSPAR process.

In any event, the key point, not always brought out by Ireland, is that the commitment is to reduce by the year 2020 radiation to levels where the additional concentrations in the marine environment above historic levels are close to zero.

Ireland has made no case, not even a *prima facie* case, that the MOX plant – a dry process – will in any way prevent the United Kingdom from realising that objective. The United Kingdom has recently published a draft strategy setting out how it proposes to meet the objectives set out in the Sintra statement, which it intends to finalise by early next year.

I shall, in a moment, have to say more about that.

Moreover, as paragraph 58 of the Decision of 3 October 2001 on justification makes clear, the objectives of the Sintra statement were reflected in that decision. Paragraph 58 says:

> "… the maximum permitted discharges to the air …. – which would include discharges from the [MOX plant] – and aerial and liquid discharges from the Sellafield site as a whole would be significantly lower in the future, even with the [MOX plant] in operation."

This afternoon Mr Fitzsimons produced a report of a House of Commons Select Committee on Radioactive Waste dated 1985. It is from this, we understand, that Ireland derives the statement that the Irish Sea is the most radioactive sea in the world. It would be more accurate to say it had been so characterised in 1985. What is important today is to look at the situation today. If this is done, it will show that the situation is very much improved.

As I pointed out this morning, and as I think is common ground with our Irish friends, the highest discharges of radioactivity in the Irish Sea took place in the 1970s. Since then, there have been marked improvements.

As Mr Sands suggested that figures should be given in bequerels, I shall do so. I can only do so, however, by referring to the document that I foreshadowed a moment ago, one that is prepared for publication but not yet published. It will appear early in the new year, entitled *"The Strategy on Radioactive Discharges 2001-2020"*, to be published by DEFRA.

The highest levels of beta emitting radionuclides in 1970 were 9,070 terabequerels in any one year. That was in the mid-1070s. In the year 2000, the level was 77 terabequerels, a 99.2 per cent decrease. As far as alpha emitting radionuclides (including plutonium) are concerned, the highest total discharges in any one year were 181 terabequerels. In 2000 the figure was 0.12 terabequerels, a 99.3 per cent decrease.

The United Kingdom is indeed making progress towards reducing discharges so that the additional concentrations in the marine environment above historic levels are close to zero.

I now turn to Mr Lowe's speech. Early in his address, Mr Lowe asked whether the United Kingdom would be prepared to give an undertaking to meet the second condition requested by Ireland. This refers to shipping "associated" with the MOX plant. The word "associated" is extremely imprecise, so it is important to make the position clear. Indeed, I am particularly requested by the Attorney General, Lord Goldsmith, to expand his comments on the point, lest there be any misunderstanding or misrepresentation of what he had to say on the point.

Much of Ireland's case, we know, is an objection to the THORP plant. Since the MOX plant will make use of derivatives from the THORP plant, it might be possible to say that shipments to the THORP plant are shipments associated with the MOX plant. It was precisely to avoid such ambiguity that the Attorney General, while of course now and again using such terms as "related" and "associated", took care to speak of transports arising from the commissioning of the MOX plant. It was to the latter that he was referring, as I hope, was perfectly clear when he spoke. He was not talking of shipments to or from the THORP plant.

You have also heard a certain amount about the falsification of data incident at the MOX demonstration facility. It is a matter of public knowledge that the MOX fuel, which was the subject of that incident, is to be returned. It will not be returned to the MOX plant but to a storage pool. It is presently not anticipated that this will be returned until some time late next year. It is a matter for agreement with the Japanese authorities, among others.

There will be no export of MOX fuel from the plant until summer 2002. There is to be no import to the THORP plant of spent nuclear fuel for conversion to the MOX plant within that period either. Indeed, the lead times for contracts of this kind are such that it is not likely to be anywhere near within that period.

I have been asked by my Irish friends to be more precise in the use of these terms. I have deliberately spoken of "summer" rather than giving a fixed date because all of this is anticipation, although in some cases rather confident anticipation, of arrangements yet to be made but I have been told this afternoon that if one were to read the word "October" for "summer" that would give acceptable greater precision.

In the course of his address, Mr Lowe responded to my comments that a case could be brought before the OSPAR tribunal or before the European Court of Justice in respect of each and every one of Ireland's present claims. He submitted that it was otherwise in the case of Article 123 of UNCLOS, which has no parallel in the OSPAR Convention.

I note that the Irish response was not that all of their complaints were suitable for this Tribunal and none were suitable elsewhere, but that they thought they could identify one provision which would not be justiciable under the OSPAR Convention. My initial view is that I agree that the OSPAR Convention would not be appropriate for the resolution of a dispute under Article 123 but the same cannot be said of the

European Community and Euratom treaties, given that these are mixed agreements in the area of Community competence.

Indeed, one cannot help noticing the extreme brevity with which Ireland has, even at this stage, responded to the United Kingdom's submission on the question of mixed competence .

Mr Lowe's submission, as I took it down this afternoon, was that it is not arguable that every aspect of the Irish case is covered by the accession of the European Communities. I do not find in his response so much as an averral that some or even most or perhaps all except Article 9 is a matter covered by EU accession. Indeed, there is one important development which we had expected our Irish friends to draw to this Tribunal's attention. We asked them this afternoon if they proposed to draw it to the Court's attention and showed them a document which we would draw to the Court's attention if they failed. Since there has been silence from the Irish counterpart, I must now say that it is our information, confirmed from an OSPAR meeting yesterday, that the Commission of the European Communities had itself taken up with the Irish authorities the complaint, that by instituting the present OSPAR proceedings, it has already traversed upon the proper jurisdiction of the European Court of Justice and, in the present view of the Commission, so to comply with the very obligation to which I drew this Tribunal's attention, namely the obligation to refrain from considering disputes arising under the Community treaties, other than in the manner for which Community law provides.

We may suppose that when the Commission has fully considered the Irish action in raising its further complaints before this Tribunal, including its complaints about Community Directives and its comments upon a Commission opinion, they may take the same view in relation to that matter.

No doubt, in responding to the Tribunal's questions, Ireland will consider whether it wishes to avail itself of its opportunity to expand on the position. We, when we have written confirmation with permission to release, will be very happy to release it to the Tribunal.

Members of the Tribunal, there is an author whom I think the Irish and the English claim as their own. He will be known to many of you – Sir Arthur Conan Doyle. One of his best known stories is *The Hound of the Baskervilles.* Some members of the Tribunal will remember the tail of the dog which did not bark in the night. The mystery was resolved by silence. Ireland's silence on the question of European Community law resonates like the non-barking dog in *The Hound of the Baskervilles.* It is eloquent and Ireland's failure to respond to this point gives this Tribunal a strong lead.

Unless I can assist further, members of the Tribunal, those are the submissions of the United Kingdom.

THE PRESIDENT: I call on the Agent of the United Kingdom.

MR WOOD: Mr President, members of the Tribunal, it only remains for me to read out the final submission of the United Kingdom.

The United Kingdom requests the International Tribunal for the Law of the Sea to reject Ireland's request for provisional measures and to order Ireland to bear the United Kingdom's costs in these proceedings.

THE PRESIDENT: I thank the Agent of the United Kingdom.

That brings us to the end of the oral proceedings. I would like to take this opportunity to thank the Agents and Counsel of both parties for the presentations they have made before the Tribunal over the past two days.

The Registrar will now address the parties in relation to documentation.

THE REGISTRAR: Mr President, in conformity with Article 86, paragraph 4 of the Rules of the Tribunal, the parties have the right to correct the transcripts of the presentations and statements made by them in the oral proceedings. Any such corrections should be submitted as soon as possible, but in any case no later than Friday, 23 November 2001.

In addition, the parties are requested to certify that all the documents that have been submitted and which are not originals are true and accurate copies of the originals of those documents. For that purpose, they will be provided with a list of the documents concerned.

THE PRESIDENT: The Tribunal will now withdraw to deliberate on these requests. The Order will be read on a date to be notified to the Agents. The Tribunal has tentatively set a date for the delivery of the Order and that date is 3 December 2001. The Agents will be informed reasonably in advance if there is any change in this schedule.

In accordance with the usual practice, I request the Agents to remain at the disposal of the Tribunal in order to provide any further assistance and information that it may need in its deliberations prior to the delivery of the Order.

The sitting is now closed.

(The hearing closed at 18.05 hours)