THE MOX PLANT CASE

BETWEEN

IRELAND — Applicant

- and -

THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND — Respondent

- - - - - - - -

THE JAPANESE ROOM
THE PEACE PALACE
THE HAGUE
THE NETHERLANDS
THURSDAY 12TH JUNE 2003

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BEFORE:
THE TRIBUNAL:

HE JUDGE THOMAS A MENSAH (President)
Prof JAMES CRAWFORD SC
Maitre L YVES FORTIER CC QC
Prof GERHARD HAFNER
Sir ARTHUR WATTS KCMG QC

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PERMANENT COURT OF ARBITRATION:
Ms Anne Joyce (Registrar)
Mr Dane Ratliff (Assistant Legal Counsel)

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PROCEEDINGS DAY THREE
(Revised)

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THE PRESIDENT: Please, Dr Plender

DR PLENDER: Mr President, Members of the Tribunal, In the course of his speech yesterday, Mr Sreenan made a few statements which may be of interest far outside this room. I am bound to correct them, but I shall try to do so briefly.

Mr Sreenan suggested that the United Kingdom was reluctant to face up to Ireland's case on its merits. That is not the case at all. The United Kingdom has submitted a detailed counter memorial, and a rejoinder, dealing with each of Ireland's allegations. These are supported by 42 annexes, which include reports by eminent specialists and international organisations. Nearly all of this information is available on the web. The United Kingdom stands ready to defend its case, and is supported by distinguished witnesses.

But the United Kingdom respects it international commitments. One such commitment is to refrain from submitting disputes concerning the application of Community law to methods of settlement other than those provided for in the Community's treaties. From the outset, the United Kingdom has been conscious of the jurisdictional problem in Ireland's case. We have repeatedly drawn that problem to the attention of Ireland, and of the appropriate tribunals, because it is our duty to do so.

It is not right to say that, in the course of this litigation, the United Kingdom's arguments have changed significantly. It is not right to say that our argument on Article 282 of UNCLOS has been virtually abandoned. On the contrary, I am about to advance just such an argument. Our essential argument has remained constant (if significantly enlarged) and our submission on Article 282 is maintained. Nor is it right to say that the United Kingdom failed to take the jurisdictional objection before the OSPAR Tribunal. Mr Sreenan was simply in error in stating otherwise, but he has to be excused for that error because he was not there. The United Kingdom did take the point before the OSPAR Tribunal, vigorously and in writing, as well as orally, but that can easily be checked by consulting part 3 of the counter memorial in that case.

At heart, the jurisdictional issue presented in this case is not one of exceptional difficulty. Annex IX to UNCLOS, read with the Community's Declaration, provides that the Community shall exercise rights and perform duties on matters relating to which competence has been transferred to the Community. It adds that Member States shall not exercise those rights or perform those duties. In relation to third States, the Community is the bearer of the relevant rights and duties. As between one Member States and another, it makes no more sense to speak of reciprocal rights and duties under UNCLOS than it would to speak of reciprocal rights and duties under UNCLOS between Ontario and Quebec.

Member States owe to each other, and to Community institutions, the duty to implement Community Directives so as to give effect to the Community's obligation under UNCLOS. They also owe to each other a duty of loyal cooperation under Article 10 of the EC Treaty and the corresponding provisions of the other binding treaties. These duties are governed by Community law. They are justiciable in the European Court. In this case, the provisions of UNCLOS on which Ireland relies are,

with one narrow exception, provisions of Community competence. The rights in Community law relating to those matters of Community competence are justiciable in the European Court of Justice.

The United Kingdom has been fortified to see that the view that it takes on these matter has been endorsed in public by a number of others whose views should command the respect of this Tribunal. We have drawn attention to a number of the publications of eminent authors, commenting on the jurisdictional problem in this case. They are set out in our memorial and I shall not trouble the Tribunal with repetition of them at this stage.

I do refer to one recent publication, which has appeared too recently to have appeared in the memorial, that is by Colson and Hoyle and it is at tab 27 of the Tribunal's folder that has been provided. But I say no more about that now. I simply note a brief passage in that article.

We attach particular significance to a Parliamentary statement dated 15th May 2003. This is a statement by the Commission of the European Community. The Tribunal will now be familiar with that statement, but it is worth referring to it in some detail and it is at tab 6. It may be helpful if Members of the Tribunal look at that tab. In that statement the Commission made public its view that the provisions of UNCLOS on which Ireland relies in these proceedings - and, incidentally, in the OSPAR proceedings - must be regarded as provisions of Community law to the extent that they fall under Community competence. The wording of the Commission's statement is careful and merits emphasis. In the third paragraph of the answer to the question, the Commission stated that the provisions of UNCLOS form part of Community law "to the extent that the provisions of those Conventions invoked by Ireland fall under Community competence". It is, therefore, inaccurate to attribute to the Commission the sweeping claim that all provisions of UNCLOS form part of Community law. That is not what the Commission says. Such a sweeping statement would be manifestly untenable. The provisions of UNCLOS relating, for example, to States' powers to determine the extent of territorial waters do not affect the Community's common rules. They are not matters of Community competence. What the Commission's statement does here is to pick up the wording of the Declaration made by the Community when depositing its instrument of formal confirmation of UNCLOS. So far as it is material, and we shall, of course, have to look at the Declaration in detail in a few moments, this states that the Community has competence to the extent that the provisions of the Convention affect common rules established by the Community.

The Parliamentary statement raises the real possibility that the European Court of Justice may be seised of the very jurisdictional issue that now confronts this Tribunal. The essential question is whether the provisions of UNCLOS on which Ireland relies are matters relating to which competence has been transferred to the Community. If they are, it must follow that Ireland lacks standing to bring this claim in this Tribunal.

I now turn to consideration of the two central documents for the Tribunal in consideration of this issue, Annex IX to UNCLOS and the Community's Declaration of Competence.

Annex IX together with the pertinent articles of the Convention, is contained in the Judges' folder at tab 1.

Article 1 provides in paragraph 2.2 an answer to a short question raised by Professor Crawford

yesterday morning. It provides, "The Convention applies mutatis mutandis to the entities referred to in Article 304, paragraphs 1(b) (c) (d) (e) and (f), which become Parties to the Convention in accordance with the conditions relevant to each and to that extent [the words] □States Parties' refer to those entities".

A reference to "State Parties" may apply mutatis mutandis to the entities referred to in Article 305.

Article 305(1)(f) of UNCLOS provides that it is open for signature for "international organisations, in accordance with Annex IX". Articles 306 and 307 provide for formal confirmation and accession by such organisations. The distribution of rights and obligations under UNCLOS between the Community and its Member States is governed by Annex IX to UNCLOS. It needs no evidence from me, I think, to demonstrate to this Tribunal that Annex IX was drafted specifically with the European Community in mind.

Article 1 of Annex IX defines an "international organization" to mean an intergovernmental organisation constituted by States to which its member States have transferred competence over matters governed by this Convention, including the competence to enter into treaties with respect of those matters. The transfer of competence is the essential element of the relevant international organisation.

Article 2 provides that at the time of signature an international organization shall make a declaration specifying the matters governed by UNCLOS in respect of which competence has been transferred and the nature and extent of that competence.

Article 3 provides that an international organization's instrument of formal confirmation shall contain the undertakings and declarations required by Articles 4 and 5.

Article 4 is perhaps the most important for present purposes. It reads:

"1. The instrument of formal confirmation or of accession of an international organization shall contain an undertaking to accept the rights and obligations of States under this Convention in respect of matters relating to which competence has been transferred to it by its Member States which are Parties to this Convention.

"2. An international organization shall be a Party to this Convention to the extent that it has competence in accordance with the declarations, communications of information or notifications referred to in Article 5 of this Annex." I here emphasise the words "to the extent" for these will become relevant in a few moments in my argument.

Article 4.3 states: "Such an organization shall exercise the rights and perform the obligations which its member States which are Parties would otherwise have under this Convention, on matters relating to which competence has been transferred to it by those member States. The member States of that international organization shall not exercise competence which they have transferred to it."

Article 5(1) then provides that the instrument of formal confirmation of an international organization shall contain a declaration specifying the matters governed by UNCLOS in respect of which competence has been transferred". Article 5(2) provides for the Member States of an international organization to make a similar declaration. Article 6 provides that responsibility for failure to comply with obligations under UNCLOS shall be incumbent on Parties which have competence under Article 5.

Article 7 provides that Part XV of UNCLOS concerning the settlement of disputes applies mutatis mutandis to any dispute between UNCLOS Parties, where one or more of the Parties are international organizations.

At this point the Tribunal may have noted that no distinction is drawn in the Annex between "competence", "exclusive competence", "mixed competence" and "shared competence". What there must be is a declaration in respect of which “competence” has been transferred. I hope to show in a moment that it complicates matters very considerably to apply apothegms and qualifications to the word "competence" save where the Community has found it necessary to apply the adjective for a reason which I hope appears clearly but can in any event be explained.

On 1st April 1998 the European Community deposited its instrument of formal confirmation of UNCLOS. A copy of that instrument is contained in Tab 2 to the Tribunal's Folder. By the second paragraph the Community stated:

"By depositing this instrument, the Community has the honour of declaring its acceptance, in respect of matters for which competence has been transferred to it by those of its Member States which are parties to the Convention, of the rights obligations laid down for States in the Convention and the Agreement. The declaration concerning competence provided for in Article 5(1) of Annex IX to the Convention is attached."

Together with the instrument, the Community deposited a Declaration concerning its Competence. The Declaration begins, so far as is material, by listing the Treaties establishing the European Communities, including the EC Treaty (and the Tribunal) will note the Euratom Treaty.

It seems to be common ground between the parties that the Community's declaration under Article 5(1) is the authoritative statement on transfer of competence so far as Member States are concerned the Member States' declarations under Article 5(2), which were in common form, refer to the Community declaration which is, in any event, made by the Council of which the Member States are parties.

PROFESSOR CRAWFORD: Just to clarify, your position is that, although the Member States of the international organisation have not made separate declarations in these terms, pursuant to Article 5(2), the statement by the Council amounts to the Member States having done so?

DR PLENDER: The way I prefer first to put it, Professor Crawford, is that the Member States have themselves made brief declarations in common form, which refer to the Community's declaration. They thereby endorse and adopt the Community's declaration. I add, as a matter of fact, in any event, the Community's declaration is made by the Council of which the Member States are parties.

PROFESSOR CRAWFORD: It is agreed between the parties that no point is taken that the Member States have not acted in accordance with Article 5(2)?

DR PLENDER: That is what I understood to be Ireland's position, as explained by Mr Sreenan yesterday, and it is certainly the United Kingdom's position.

The various Community treaties to which reference is made in the declaration themselves contain provisions in relation to the matters on which the Community has competence and they form a

basis on which common rules have been adopted. Provisions in respect of which the Community has competence are found in Chapter III of the Euratom Treaty at tab 9, comprising Articles 33 to 39. Article 35 provides for the Commission to have access to the facilities that Member States are to establish at nuclear sites in order to carry out the continuous monitoring of radioactivity in the air, water and soil and to ensure compliance wit basic standards (which are themselves to be laid down in accordance with the procedure of Article 35). In accordance with that provision, the Commission does, in fact, have access to the Sellafield site and does, in fact, verify the operation and efficiency of the standards of monitoring.

Article 37 provides for the Commission to deliver an Opinion before the implementation of any plan for the disposal of radioactive waste in any form, so that the Commission can determine whether this is liable to result in the radioactive contamination of the water, soil or airspace of another Member State. In practice, the Member States will not implement the plan unless it is cleared by the Commission.

The Community's declaration (at tab 2) continues, having identified the treaties, by identifying the current Member States which, of course, include Ireland and the United Kingdom, and states:

"In accordance with the provisions referred to above, this declaration indicates the competence that the Member States have transferred to the Community under the Treaties in matters governed by the Convention and the Agreement. The scope and the exercise of such Community competence are, by their nature, subject to continuous development, and the Community will complete or amend this declaration, if necessary, in accordance with Article 5(4) of Annex IX to the Convention".

I here interject that, in common with Mr Sreenan, I know of no completing or amending document from the Community.

It continues, "The Community has exclusive competence for certain matters and shares competence with its Member States for certain other matters."

It is here for the first time that use is made of the term "exclusive" competence. In my submission, it is clear from the context that exclusive competence simply means competence of the Community to the exclusion of the Member States. It is competence that Member States have wholly transferred to the Community.

The declaration then contemplates two circumstances in which the Community is taken to have that competence.

First, it has exclusive competence in respect of matters under the hearing "Matters for which the Community has Exclusive Competence"; for instance, conservation and management of fishing resources and parts of the Convention relating to commercial and customs policy. In respect of these matters, the Community's competence or exclusive competence is established without reference to the principle in the ERTA case (to which I shall come) whereby the Community has competence to the extent that the provisions of the Convention affect common rules established by the Community. The first is simply a category for which it is not necessary to refer to the ERTA principle.

Second it has exclusive competence in respect of matters under the heading "Matters for which the Community Shares Competence with its Member States". Contrary to an argument advanced by Mr

Sreenan yesterday, this is not the antithesis of Matters for which the Community has Exclusive Competence. As the wording shows, the Community acquires competence (to the exclusion of the Member States) in respect of matters falling within the second category once the ERTA principle comes into play. Exclusive competence is acquired to the extent that the provisions of the Convention affect common rules established by the Community.

The point appears from the very wording of the indent. I quote, "With regard to the provisions on maritime transport, safety of shipping and the prevention of marine pollution contained, inter alia, in Parts II, III, V, VII and XII of the Convention, the Community has exclusive competence only to the extent that such provisions of the Convention or legal instruments adopted in implementation thereof affect common rules established by the Community". It goes on to say, "When Community rules exist but are not affected, in particular in cases of Community provisions establishing only minimum standards, the Member States have competence, without prejudice to the competence of the Community to act in this field. Otherwise competence rests with the Member States".

It is necessary to concentrate for a few moments on that wording. In my submission, it is clear, when one reads it, in my case, at least, twice - and perhaps to Members of the Tribunal immediately. What I have to do first is to underscore a statement made a moment ago. It is not right to regard the second paragraph as the antithesis of exclusive competence. Rather, if I recall correctly, Professor Crawford put the point correctly in a question yesterday, when he asked, "Is it right to say that there is shared competence which at a point becomes exclusive competence?" I accept that formula and we would say that there is shared competence which, or part of which, becomes exclusive competence once the ERTA principle comes into play; that is to say that it becomes exclusive to the extent that the provisions of the Convention or the legal instruments adopted in pursuance of them affect common rules.

The declaration goes on by clarifying the preceding sentence. It emphasises that common rules have actually to be affected. Unless they are affected, the ERTA principle does not come into play. When they exist, but they are not affected, then the Member State has competence without prejudice to that of the Community. A particular case in which Community rules may be unaffected, although they continue to exist, is where they establish only minimum standards.

Let me take a simple example which I hope will illustrate the correct application of these words.

Suppose that Community legislation requires Member States to apply certain safety standards to vessels on their registers, while leaving them free to apply more stringent rules, if they so choose. Such legislation does establish common rules. In respect of the standards, even the minimum standards, there are common rules. But those common rules are unaffected by the provisions of a treaty made pursuant to UNCLOS - perhaps made pursuant to Article 184 - whereby more stringent standards are applied. In so far as more stringent standards are applied they do not affect the lower common rules. The wording then goes on to say. "This is, however, without prejudice to the competence of the Community". That is so because the Community may later adopt legislation establishing more stringent standards still; or in the interests of avoiding distortions of competition it may apply the same standards, but it may apply those standards without permitting member states to go above them. That is the meaning, and I submit

the natural meaning, of this wording.

No matter how it is established, whether it is established under the first of these paragraphs or under the second, by reference to the ERTA principle or without it, the Community's competence of which we are here speaking, is exclusive of the powers of Member States. Thus, in the South-Eastern Pacific Swordfish Case a special chamber of ITLOS was requested to adjudicate on the respective rights of the European Community and Chile under Articles 116 to 119 of UNCLOS. The relevant rights and duties were those of the Community, although the fishing activities were conducted by member states flying the members states flags.

In an appendix to its Declaration, the Community set out a "list of relevant Community acts".

PROF CRAWFORD: Could you just take us to the last sentence in that paragraph that you have analysed. "Otherwise competence rests with the member states". Is that referring to the competence that member states have and have not transferred to the Community or is it referring to that component of shared competence which they continue to have in the circumstances set out in the previous sentence?

DR PLENDER: I hesitate to answer because I am not certain that the question poses what I take to be a correct antithesis. It certainly reflects the competence which member states do have: their own competence, where the treaty affects that competence. I readily accept that this is a residual provision so that to the extent that the competence of the Community is not established, competence remains with the member states.

PROF CRAWFORD: The point of the question, and you should formulate it obviously in your own way, but the point of the question was this: if we take a subject in which, by virtue of the application of the preceding sentences, the member states' action does not affect common rules, for example a minimum standard situation is perhaps the one you mentioned, is that covered by the last sentence, so that in such a case we would say competence rests with the member states?

DR PLENDER: Yes, it does.

PROF CRAWFORD: So you have a declaration of the EU saying that in respect of such a matter competence rests with the member states. Would it not follow from that that the competence had not been transferred to the Community?

DR PLENDER: Yes, that is all consistent. I hope this point may become a little clearer when I come, as I shall in a dew moments to the opinion in the ILO case, which is the locus classicus on minimum standards.

The appendix to the declaration sets out a list of relevant Community act. It now occurs to me to emphasise the word "relevant", if only because in responding to one of Mr Sreenan's arguments I may make the point which I hope is not too much a jury point. No purpose would be served by the inclusion of certain of these provisions were his argument correct. They are relevant to the attribution or transfer of competence.

The Community's declaration acknowledges that the list is incomplete. It is to be completed or amended in accordance with Article 5(4). This might present an inconvenience for States not belonging to the Community; although a Member State must be taken to know what legislation the Community has

adopted that may be affected by the provisions in UNCLOS.

Some assistance can be obtained from the appendix; but the central feature is the statement that the Community has exclusive competence to the extent that provisions of UNCLOS or measures adopted in pursuance of it affect the Community's common rules. Indeed, in their book on The External Relations of the European Communities, enclosed in the bundle but the relevant text of which I have set out in my speaking note, MacLeod, Hendry and Hyett write:

"As a matter of Community law, a mere declaration of competence by the Council and the Commission cannot override the legal position under the Treaties, and in the case of a dispute, it is ultimately for the Court to decide where competence on a given matter lies. The terms of a declaration of competence will be a helpful indication, but not decisive. In practical terms, where a matter is included within the scope of Community competence in a declaration of competence, it will be harder for the Member States to deny the Community a locus in such matters or to claim that the matter is exclusively for them."

I endorse first of all the last of those sentences. It must be hard for a member state to say that where a matter is included within the list the entire contents of that directive are a matter of exclusively national competence or member states competence. Also I endorse the statement of the authors that it is ultimately for the court to decide where competence lies. In that context the authors plainly meant the European Court of Justice

I should at this point interject a word about terminology. Mr Sreenan yesterday explained his terms as follows: "Mixed competence, or what we also refer to as shared competence, refers to a situation where both Member States and the Community are competent in relation to a certain matter. They share competence. Exclusive competence refers to a situation where either the Community or the Member State exclusively has competence in relation to that matter. Mr Sreenan is entirely at liberty to use the English language to mean whatever he chooses it to mean, but I should note that his use of the term does not coincide with the Community's declaration. The declaration does not use these two terms as antitheses. It points out, under the heading "Matters for which the Community shares Competence" that in respect of certain matters the Community has exclusive competence. In the language of the declaration, a matter or subject, such as marine transport, is one of shared competence in this sense, that part of the competence in relation to marine transport is for the Community and part of the competence in relation to marine transport is that of Member States. I am not speaking of competence which is shared in the sense of requiring joint action. Indeed, there are only very rare provisions of Community law, wholly irrelevant to the present proceedings, in which such shared or joint competence arises. Having mentioned it, Members of the Tribunal may safely put it from their minds.

Within the subject of marine transport, in so far as it is governed by UNCLOS, the Community has exclusive competence to the extent hat the provisions of UNCLOS affect the Community's common rules. I am afraid that it confuses matters to say "The Community does not say that the matters with which we are dealing are matters for which the Community has exclusive competence. These are matters for which the Community shares competence". That is simply inconsistent with the wording of

the declaration, which states that "Where the Community shares competence with the Member States on certain matters, the Community has exclusive competence with regard to certain provisions once the necessary conditions are met."

I must now turn to a consideration of what is meant by "affecting common rules".

In stating that the Community has competence in so far as the provisions of UNCLOS "affect common rules established by the Community", the declaration adopts the well-known wording of the European Court of Justice in the ERTA case in 1971. A copy of the report is at tab 10 of the Tribunal's folder. This case, as some Members of the Tribunal will know very well indeed, arose from a dispute between the Commission and the Council about the conclusion, through the United Nations Economic Commission for Europe, of an agreement on European road transport, which covered in particular drivers' hours. The Commission contended that, since the Community had adopted legislation in Regulation 543/69, and the rules established by that legislation were liable to be affected by the agreement, the agreement could be concluded only by the Community and not by the Member States. The Court agreed. It is useful to read paragraphs 15 to 19 and 30, familiar though they may be.

Beginning at 15, the Court said, "To determine in a particular case the Community's authority to enter into international agreements regard must be had to the whole scheme of the treaty no less than to its substantive provisions. Such authority arises not only from an expressed conferment by the treaty, as in the case with Articles 113 and 114 for tariff and trade agreements and with Article 238 for association agreements, but may equally flow from other provisions of the treaty and from measures adopted within the framework of these provisions by the Community institutions".

I here pause to note that the two categories of cases in which the Community's authority to enter into international agreements may be established corresponds with the two categories at which we were looking a moment ago in the Community's declaration.

The Court continues, "In particular, each time the Community with a view to implementing a common policy envisaged by the treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules. As and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community's legal system. With regard to the implementation of the provisions in the treaty, the system of internal Community measures may not, therefore, be separated from that of external relations".

I here pause to say that that principle is commonly summarised in the Latin, "in foro interno, in foro externo".

At paragraph 30, the Court comes to its conclusion, "Since the subject matter of the AETR [or in the English ERTA] falls within the scope of Regulation 543/69, the Community has been empowered to negotiate and conclude the agreement in question since the entry into force of the said regulation".

The crucial words are, of course, those at paragraph 17.

In the course of his speech yesterday, Mr Sreenan invited the Tribunal to conclude that the

provisions of UNCLOS on which Ireland relies did not interfere with, or adversely affect, the directives cited in the memorial and reply. In the ERTA case, the Court did not suggest that the international agreement would affect the Community's rules adversely or would conflict with them. It affected them in the sense that the agreement was concerned with an area forming the subject of the Community legislation.

It is true that there was a time, as recently as 1986, in which there was some support for the proposition that the word "affect" as used in the ERTA case had the meaning for which I understood Mr Sreenan to contend yesterday, that it is adversely affect or obstruct. In an article by John Temple Lang, which I have set out at tab 25, but quoted from sufficiently in my speaking note, the author canvassed two possible meanings of the word "affect"

(i) that the Community has exclusive competence externally over subject matter corresponding to the subject matter of internal measures, irrespective of the terms of the convention applying to that subject matter; and

(ii) that the Community has exclusive competence only if the proposed convention is likely to conflict or interfere with the operation of the existing Community rules - or even future rules.

It is now very clear that the first of those is correct.

This has been established most recently in the leading series of cases in the European Court, the "Open Skies" litigation. Here the point at issue was whether various Member States had acted inconsistently with the Community treaty by concluding Air Services Agreements with the United States of America, so-called "Open Skies Agreements".

The Advocate General concluded that they had done so because the Air Services Agreements affected the rules laid down by Community legislation. He was very clear in saying that they affected them in the sense that they fell to a large extent within the same area. It is of some importance to be directed at the wording which is at paragraph 70 of his Opinion, and I shall then be coming to the judgment. He reviews a substantial body of case law with which I shall not trouble the Tribunal and then comes to the summary at paragraph 70.

"In these precedents, as may readily be observed, the Court did not stop to examine whether there was specific reasons for which the assumption of an international obligation could, in fact, impinge in some form on the Community provisions. For the Member States to be precluded from undertaking obligations of this kind, the Court deemed it sufficient, to use its own expressions, that the obligations [fall] within the scope of the Community rules; that they are concerned with an area which is already covered to a large extent by Community rules; that they are in the spheres covered by those acts of that the matters covered by the [agreements] are already the subject of internal legislation. All this is so, I would repeat, simply because the common rues thus adopted could be affected within the meaning of the AETR judgment if the Member States retained freedom to negotiate with non-member countries [on the same matters] (Opinion 1/94) and irrespective of the content of the agreements to be negotiated and of any conflicts that might ensue as between them and the common rules.

71. It must therefore be concluded that, in principle, in matters covered by common rules, the

Member States may not under any circumstances conclude international agreements even if these are entirely consistent with the common rules, since any steps taken outside the framework of the Community institutions would be incompatible with the unity of the common market and the uniform application of Community law."

The Court of Justice agreed (see paragraphs 81 and 82 of the judgment further in the same bundle).

The court said:

"81. It must next be determined under what circumstances the scope of the common rules may be affected or distorted by the international commitments at issue and, therefore, under what circumstances the Community acquires an external competence by reason of the exercise of its internal competence.

82. According to the Court's case-law, that is the case where the international commitments fall within the scope of the common rules 9 or in any event within an area which is already largely covered by such rules (Opinion 2/91, paragraph 25). In the later case, the Court has held that Member States may not enter into international commitments outside the framework of the Community institutions, even if there is no contradiction between those commitments and the common rules (Opinion 2/91, paragraph 25 and 26).

PROFESSOR CRAWFORD: Reference to the "latter case" in the second sentence is a reference to the "covering the field" situation.

DR PLENDER: Yes.

PROFESSOR CRAWFORD: So in the case where the commitments fall within the scope of common rules, it is still possible for Member States to enter into international commitments on their own account?

DR PLENDER: No, on the contrary. According to the court's case law, where international commitments fall within the scope of common rules, Member States may not enter into international commitments outside the framework of the Community institutions and they may not do so even if those commitments are entirely consistent with common rules.

PROFESSOR CRAWFORD: Why were the words "in the latter case" necessary?

DR PLENDER: I think that "the latter case" is referring to the second part of the first sentence "or in any event within an area which is already largely covered by such rules".

PROFESSOR HAFNER: I apologise for interrupting. I have one question. You cited in particular the ERTA case and you cited a new practice of the European Court. You did not cite the opinion of the Court concerning the Cartegana Protocol. If you have a look at the UK position in this case, and may I read two sentences ...

DR PLENDER: Yes, it is in the bundle. Professor Hafner knows that I do have a particular familiarity with the United Kingdom’s position in that very case.

PROFESSOR HAFNER: So you will come to that?

DR PLENDER: I was not proposing to come to the United Kingdom's position. I was certainly proposing to come to the judgment.

PROFESSOR HAFNER: Thank you.

DR PLENDER: I say that the touchstone for the formation of common rules is this. Once the Community has legislated to establish such rules, Member States are no longer free to conclude international agreements in matters covered by those rules, since any steps taken outside the framework of the Community institutions would be incompatible with the uniform application of Community law.

The proposition that Member States may not enter into international commitments outside the framework of the Community institutions where those commitments fall within an are largely covered by the Community's common rules is by no means a novel one. That indeed appears from the extract which I have just quoted. As the Advocate General's Opinion shows, it was established by Opinion 2/91 on ILA Convention to which I promised we would come. The European Court reiterated that proposition in Case 13/00, Commission v Ireland (Tab 17) at paragraphs 14 and 16.

I now come to Minimum Standards.

The ILO Convention case is also authority for the proposition that where the Community rules lay down only minimum standards, they may be unaffected by an international agreement. That is typically the case where the international agreement establishes more stringent rules than those prescribed by Community rules. The proposition established in that case is well known among Community lawyers; and I venture the opinion that it is little more than an expression of common sense. ILO Convention 170 on safety of chemicals at work required Contracting Parties to take certain steps for the protection of employees, for instance, by providing employers with information about the dangers of dealing with certain chemicals. The question arose whether the Convention was a matter of exclusive Community competence or one of mixed or shared competence. The case for arguing that it was exclusive competence was that under Article 118a of the EC Treaty as it then stood, the Council was empowered to lay down by directive minimum standards for the protection of employees. As the Court observed, any minimum standards laid down pursuant to that Article might be either less stringent or more stringent than those in such a directive. If they are less stringent than manifestly the rules so established would not affect the Community's directive. If, on the other hand, they were more stringent, they would be consistent the directive.

The suggestion made on behalf of Ireland yesterday was that minimum standards are incompatible with exclusive competence. That in my submission is ill-founded. Where minimum standards are established the Community has competence to the extent of those standards. Member States remain free to impose more stringent standards, acting individually or even collectively. That is the deduction to be drawn from of Opinion 2/91, the ILO case. It appears particularly from paragraph 18 of that case. This is at tab 12. That is what is implied in paragraph 18 of the Court's opinion. It is also implied in the language of the Community's declaration that we looked at earlier. The Community has exclusive competence to the extent that its common rules are affected.

Another example of the imposition of more stringent standards by member states appears in a case helpfully included in Mr Sreenan's bundle yesterday, though he did not take the Tribunal to it. It is tab 17 of his bundle and it is the case of Fornasar. The European Court of Justice ruled in that case, at

paragraph 51, that Article 1(4) of Directive 91/689 on hazardous waste did not prevent Member States from classifying as hazardous waste substances additional to those listed in the applicable instrument. It may establish minimum standards which are binding up to the extent of its application, but beyond that extent member states have competence.

An example of the imposition of more stringent standards by the conclusion of international agreements is given in Directive 98/18/EEC on safety rules for passenger ships which is at Tab 41. That Directive implements the SOLAS Convention 1974 as it stood in 1998. It prescribed minimum standards in respect of various safety features on board vessels. Under Article 7 of the Directive, Member States remain free to adopt international legal instruments imposing higher standards. This is among the measures included in the Community's Declaration. It is a measure which establishes minimum rules, but minimum rules may be affected by UNCLOS, through precisely the test which the Declaration commands has to be applied to an instrument of this kind. Where you have an instrument establishing minimum standards you have to look carefully to ask whether the common rules are affected. They are not affected beyond the extent of the Community competence.

PROF CRAWFORD: I asked Mr Sreenan yesterday, and perhaps I did not understand his reply; it may have been my fault. One can understand the relationship between a minimum standard EC regulation of a certain sort and a requirement to have a more stringent standard under some treaty. But what happens if the treaty just imposes a general obligation, and obviously there is a question of the measure of assessment, but it does not impose any specific standard at all. For example if you had this directive and then you had a general obligation in a treaty to take all appropriate measures to save life at sea or something like that. A general obligation. You cannot say that it imposes a higher or a lower standard, it simply imposes an obligation to save life at sea. How would such an obligation relate to such a directive?

DR PLENDER: In the first instance it may not relate to the directive at all, it may be that it has no bearing on it. But in so far as it is argued, and therefore must be presumed to be the case, that the general treaty is informed by and therefore takes on something of the meaning of the directive, you have to assume for the sake of that argument that there is a congruence between the two, and in so far as that congruence there is an effect. It falls largely within the same area. I am grateful for the question because I think it is a question which comes to the heart of the way in which Ireland puts its case.

It was Directive 98/118/EEC, among many others which I had in mind when I emphasised the word "relevant" at an earlier moment. This is among the relevant instruments included in the Community's Declaration. If it were the case that no measure imposing minimum standards could be affected by Community rules this would be irrelevant, there would be no purpose in putting it there at all.

Among the other measures listed in the Community's Declaration which lay down minimum standards are Directive 93/75/EEC on minimum requirements for vessels carrying polluting goods. I do not ask the Tribunal to look at it though it is there at Tab 36. There is Directive 93/103/EEC on minimum safety and health requirements for work on board fishing vessels (Tab 37); and Directive

95/21/EC on the enforcement of international standards for ship safety and pollution prevention (Tab 39). In all these cases there are common rules and minimum standards, particularly for the purpose of safety. All are included in the Community's declaration because all are relevant to the application of the test which the declaration prescribed. Ireland argued yesterday that all the directives on which it has relied in the present proceedings establish only minimum standards. From this it drew the corollary that there is no exclusive competence in relation to provisions of UNCLOS for which those directives were cited. That submission I must say, and I hope without causing any discomfiture at all, contains a series of fallacies and one has to disentangle them and look at them separately.

The first part of it was based on Articles 174 and 176 of the EC Treaty. These are at tab 8. On the basis of these articles it was argued that the Community cannot have competence to enter into agreements on environmental matters. I was not quite sure that I should believe my ears when I heard this said yesterday but I have checked on the transcript and it is there on more than one occasion. "The European Community does not have exclusive competence in environmental matters". In support of that proposition, reliance was placed on Articles 174(4) and 176 of the EC Treaty.

174(4) provides "Within their respective spheres of competence the Community and the member states shall cooperate with third countries and with the competent international organisations. The arrangements for Community cooperation may be the subject of arrangements between the Community and the third parties concerned, which shall be negotiated and concluded in accordance with Article 300. The previous paragraph shall be without prejudice to the Member States' competence to negotiate in international bodies and to conclude international agreement". Article 176 provides that "the protective measures adopted pursuant to Article 175 shall not prevent any Member State from maintaining or introducing more stringent measures. Such measures must be compatible with the treaty. They shall be notified to the Commission."

Before I go any further at all, Members of the Tribunal will of course have noticed for themselves the obvious omission of any mention of Article 175. The omission becomes all the more striking when one turns over the page to look at it, for it is Article 175 which, in its first paragraph, provides for the Council, acting in accordance with the procedure referred to in Article 251, to decide what action is taken to achieve the objectives referred to in Article 174. I will come to that in just a moment.

In the first place, far from suggesting that the Community does not have exclusive competence in environmental matters, Article 174, paragraph 4, acknowledges, by express words, the respective competences of the Community and the Member States in respect of such matters. In providing that Community cooperation may be the subject of arrangements between the Community and the third parties concerned, without prejudice to Member States' competence, Article 174 protects the respective spheres of competence of the Community and the Member States. Likewise, there is absolutely nothing in the language of Article 176 to exclude Community competence in the environmental sector. On the contrary, the language of Article 176, as you will now have appreciated, simply adopts that of Opinion 2/91 on ILO Convention 170. It contemplates exclusive Community competence to the extent that

minimum requirements have been established.

Ireland's case on these two paragraphs ignores the context. It ignores Article 175. Now we come to Opinion 2 of 2000 on Biosafety, which is at tab 48.

The relevant paragraphs are 43 to 45. In that Opinion, the Court of Justice established that the proper basis for the conclusion by the Community of international agreements on environmental matters is Article 175, read with the ERTA doctrine. Article 175 authorises the Council to decide what action is to be taken in order to achieve the objectives of article 174. On that basis, the Community may have exclusive authority to enter into international agreements. It may. I will read the wording of the paragraph, "As the Court of Justice has already held (see Peralta and Safety Hifi) Article 174 EC defines the objectives to be pursued in the context of agricultural policy, while Article 175 constitutes the legal basis on which Community measures are adopted. It is true that Article 174(4) specifically provides that the arrangements for Community cooperation with member countries and international organisations may be the subject of agreements negotiated .... In accordance with Article 300. However, in the present case, the protocol does not merely establish arrangements for cooperation regarding environmental protection, but lays down, in particular, precise rules on control procedures relating to trans-boundary movements, risk assessment and management, handling, transport packaging and identification of LMOs. Consequently, Article 175 is the appropriate basis for the conclusion of the protocol on the Community. It is thus necessary to consider whether the Community holds competence under Article 175 to conclude the protocol, because secondary legislation adopted within the framework of the Community covers the subject of biosafety and is liable to be effected if Member States participate in the procedure for concluding the protocol. (See the ERTA judgment)."

It would be difficult to find a clearer and more recent statement of the applicability of the ERTA principle to this very sector of Community law. This, by the way, entirely accords with the academic sources to which you were referred yesterday. It is wholly consistent with the declarations referred to in Vaughan's Law of the European Community and copied at tab 20 of Ireland's Book of Authorities. The editors refer to what was then Article 130(4), now Article 175(4), as suggesting that the Member States had agreed to derogate from the ERTA doctrine. It was for this reason - there was some suggestion of derogation from ERTA - that declarations were attached to both the Single Europe Act and the Treaty on European Union. The declarations made clear that the subparagraph does not affect the principles coming from the ERTA case. The passage from MacLeod, Hendry and Hyett, quoted by Mr Sreenan, is actually positively unhelpful to him. According to the very passage that he cited, the authors state that the Community's power to enter into environmental agreements is exclusive to the extent that it affects common rules adopted by the Community. That is the United Kingdom's case precisely. The passage from Kapteyn and Verloren van Themaat cited by Mr Sreenan takes the matter no further forward. It observes that in various areas, including the environmental areas, there is no complete cessation of competence to the Community. Quite so. That is why we are in the second limb of the Community's declaration entitled "matters for which the Community shares competence with its Member States". Exclusive competence exists only to the extent that common rules are affected.

Final confirmation comes from the UNCLOS declaration itself. Marine pollution is expressly stated to be an area where "the Community has exclusive competence only to the extent that such provisions of the Convention or legal instruments adopted in implemented thereof affect the common rules established by the Community." If the submission made by Ireland yesterday were correct, this environmental area could not possible affect the Community's common rules.

Accordingly, it is in my submission, clear beyond doubt that neither Article 174(4) nor Article 176 supports the conclusion, for which Ireland contended, that the Community does not, and cannot, have exclusive competence to enter into international agreements on environmental matters.

THE PRESIDENT: In think that this would be a convenient point to have a break. The hearing is adjourned for 15 minutes.

(Short Adjournment)

DR PLENDER: Mr President, members of the Tribunal, Ireland argues that all the Directives on which it has placed reliance establish only minimum standards. Mr Sreenan took the Tribunal through a number of Directives, arguing that each and every one of them established only minimum standards. I shall not respond to the submissions made in respect of each Directive individually because in our submission the exercise was misconceived. Even where a measure does establish minimum standards, as you heard me say more than once, there may be exclusive jurisdiction to the extent of the standard. That is implied by the terms of the Community's Declaration as well as by Opinion 2/91 (Tab 12). Moreover it is not helpful for present purposes to enquire whether a measure as a whole establishes minimum standards. What is of interest is to enquire whether the provision on which Ireland relies and the aspects in which Ireland relies upon it establishes a minimum standard. In the third place, a harmonising measure designed to establish uniform standards for the prevention of distortions of competition cannot be a provision establishing minimum standards. Several of the provisions establishing common rules which are in our submission liable to be affected by the provisions on which Ireland relies, though not cited by Ireland, are by their express terms harmonising measures. I refer very briefly to those that may be found at Tabs 30 and 31.

The first is Council Directive 74/464 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community. The Tribunal will see from the first two recitals in the right hand column of the first page of the report that the objective is to remove disparities between the provisions of the member states because these may create unequal conditions of competition, and it seems necessary for the approximation of laws to be accompanied by Community action.

A similar observation applies in relation to Directive 84/360 where the second preamble on the right column contains similar words: disparities between the provisions concerning air pollution from industrial installations are liable to create unequal conditions of competition and thus have a direct effect on the functioning of the Common Market. If the measures are read in extenso they will be found to be very far from being minimum standards.

PROF CRAWFORD: Could you take us to Ireland's claim in relation to this directive. Ireland obviously does

not rely on the directive, but your position is that this is an example of a directive which does not merely establish minimum rules which is liable to be affected by Ireland's claim?

DR PLENDER: Yes. There are a very large number of such directives and we have included and there is at tab 47 a table to which I will refer the Tribunal which marries as best we can each of Ireland's allegations with each of the Community measures liable to be affected.... I am not proposing to take the time to deal separately with each allegation and each measure, otherwise we shall be here for three weeks or so on that exercise alone.

PROF CRAWFORD: I was not asking you to do it for each, I was asking you to do it for one.

DR PLENDER: I can do it for one. I think that will be helpful when I get to the table. What I would like to do at this stage is to concentrate upon the three principal measures on which I most heavily relies. In its memorial Ireland relies on Article 2(1) of Directive 85/337 on environmental impact assessments. it claims that this is "a source of the legal obligation and part of the context for the interpretation of article 206."

Ireland alleges that the environmental assessment of 1993 was inadequate and that the United Kingdom had not conducted a fresh environmental assessment meeting the standards of that Directive. Ireland now argues - that is yesterday - that prior to its amendment, Article 13 of that Directive 85/337 established minimum standards because it allowed Member States to lay down stricter rules regarding scope and procedure when assessing environmental effects. The argument proceeds on the premise that the amendment was occasioned by the entry into force of Article l30t of the EC Treaty, now Article 176; and it was contended that by virtue of Article 176 Member States automatically had the power to impose more stringent standards. I have already, I hope, exposed one error in that submission. Article 176 does not convert all environmental measures into minimum standards.

But there is another and simpler point. Article 13 of Directive 85/337 has nothing to do with the provision on which Ireland relies. Ireland's argument in the Memorial was based on Article 2(1) of the Directive. Indeed, Article 13 could not and does not assist Ireland's case on the merits. Ireland does not complain of a failure of the United Kingdom to lay down stricter rules in than those prescribed by the Directive. And even if Ireland did so, this would not advance a case on UNCLOS; for on the premise that Directive 85/337 implements and UNCLOS obligation, it could not implement an UNCLOS obligation through Article 13, which simply allows the imposition of higher standards.

With regard to Directive 90/313 on access to information on the environment (Tab 40) Ireland relied on this in its Memorial in support of the proposition that it was entitled to be supplied with the material excised (on grounds of confidentiality) from the PA Report. There are many difficulties, in our submission, with that argument, but that is the argument as we have to take it. It was contended yesterday that as it was based on the precursor of Article 175 of the EC Treaty it did no more than to establish "basic rules or a floor below which no Member State can go" The United Kingdom does not accept that this directive establishes "minimum standards" in the sense in which that expression was used in Opinion 2/91 on lLO Convention. In that case the minimum standards that the Court was speaking of were dose limits for chemicals. It is not a minimum standards Directive. But in any event, if Member

States are free to impose more stringent requirements than those contemplated by Directive 90/313, this would be without relevance to the aspect on which Ireland relies.

Ireland relied heavily on Directive 96/29 Euratom in its Memorial. It contends that this Directive requires the provision of sufficient information to enable the recipient to gauge the justification for a process falling within its terms. The United Kingdom accepts that in respect of dosage, minimum standards are set by this directive. For example Article 13 of the Directive specifies a quantitative dose of 1 mSv per year, but this is not the principle upon which Ireland relies. The principle on which Ireland relies is a principle of justification. In this respect, Ireland relies on the procedure prescribed by Article 6 of the directive. Like the Directive on Environmental Impact Assessments, this can be characterised as providing a harmonised procedure for ensuring justification for new practices involving exposure to ionising radiation.

The last example provides a neat illustration of a single instrument, where the line could be drawn between what is or is not a minimum requirement. It also illustrates how intricate and delicate a task it is.

Ireland raised a subsidiary point about Euratom. It contended that, as Euratom is not a party to UNCLOS, no relevance can be attached to Article 193 of the Treaty, or to any of the directives made under the Euratom Treaty. In considering that submission, the Tribunal will immediately notice two features which may cause it to hesitate. If Ireland were right, it would have been anomalous for the Community to refer to the Euratom Treaty in the declaration that it made when depositing its instruments of formal confirmation of UNCLOS. On the same premise, the Commission would have been in error in its Parliamentary statement when it singled out for special mention Council Directive 96/29 of Euratom.

The situation presents a certain element of curiosity, even intricacy, but can be resolved.

Where Member States have enacted common rules under the Euratom Treaty, then, as is exactly the case with the EC. Treaty, Member States, acting individually or even collectively, no loner have the capacity to engage in international engagements which affect those rules. That simply follows from the ERTA case. It is standard, basic European Community law. If they are to enter into any such engagements, therefore, they can do so only on behalf of Euratom. As between two Member States, the relevant obligation is justiciable only in the European Court of Justice.

PROFESSOR CRAWFORD: I am sorry, I am learning fast, but I am a bit slow. The fact that Euratom is not a party to UNCLOS has absolutely nothing to do with it?

DR PLENDER: That is correct. There is a case of the European Court of Justice, which I would have cited had I been able to get hold of it at the requisite hour last evening, and that is Cornelis Kramer, which does shed more light on the point and which we can, should the occasion arise, supply to the Tribunal without further comment. Cornelis Kramer, as some may recall, concerned the application of Community's fisheries rules in a transitional period, but it contains a helpful passage on the duty of cooperation between Member States which is referred to, but in a stringently condensed terms, in the ILO case.

SIR ARTHUR WATTS: I am a bit slow on the uptake as well, I am afraid. A moment or so ago you referred to the Commission having referred to the Euratom Directive in its Parliamentary reply of a few weeks ago.

It did, indeed, do so, but on the quick reading that I have given to the relevant paragraph, it seems to me that all the Commission is doing - it is in the third paragraph of the answer - is to repeat what Ireland had invoked in its statement of claim rather than, itself, the Commission, relying n or invoking that directive.

DR PLENDER: May I first say that, when both Professor Crawford and Sir Arthur Watts tell me that they are slow on the uptake, I am only reminded of Lord Reid remarking that he knew rather little about the Scottish law of real property! Gentlemen, Sir Arthur's comment is, of course, factually correct. The Commission is referring to the provisions on which Ireland relies, but there must be some relevance in it doing so. It refers to the instruments of Community law which are pertinent to the dispute, it says. In this context it refers to the provisions upon which Ireland relies and goes on to say that questions relating to the interpretation or application of Community law must not be submitted to means of settlement other than those foreseen in the Treaty. That is what it says in the context of the institution of the present proceedings before this Tribunal. It is, I submit, clear from the Commission's answer that the Commission considered that, in relying upon a Euratom Directive in these proceedings, Ireland was acting in breach of the rule whereby questions relating to the interpretation or application of Community law may not be submitted to means of settlement other than those foreseen in the treaty. We may perhaps return to this matter a good deal later.

I now turn to the case advanced by Ireland in order to show how it is built upon provisions of the Law of the Sea Convention for which the European Community has competence to the exclusion of the Member States. Now is the point that we come to our tab 47, which is our attempt to produce in tabular form the case as advanced by Ireland, paragraph by paragraph, and the Community measures which are most immediately affected by it.

Professor Crawford asked me particularly to refer to the case of Directive 74/464. As may be seen, our table shows that this is in our assessment one of the measures, which, while not expressly cited by Ireland, is liable to be affected by the Law of the Sea Convention on the premise that the Law of the Sea Convention has the construction for which Ireland relies in the course of its case.

At paragraph 6.39 of its reply, Ireland makes the point that the United Kingdom acted in breach of the provisions of UNCLOS in respect of the measures that it took in protecting the marine environment. We therefore turn, among other matters, to Directive 74/464, which is at Tab 31. Directive 74/464 has as its precise subject, the prevention of pollution caused by certain dangerous substances discharged into the aquatic environment of the Community. As Article 1 makes clear, the aquatic environment includes territorial waters, as well as internal coastal waters. Article 2 requires Member States to take appropriate steps to eliminate pollution from dangerous substances listed in the annex. Among the substances listed in the annex are substances in respect of which it has been proved they possess carcinogenic properties. There is in the list a reference to “Substances belonging to families of substances, the limit values have not been determined”.

Taking Ireland's case as Ireland presents it, there would be, according to Ireland, a discharge of pollution within the meaning of Article 1(c). It would arise, according to Ireland, from the discharge of substances from the MOX plant, it would arise from those discharges into territorial waters, and so, as a

minimum, the provisions of UNCLOS on which Ireland relies would fall within the same area or fall within largely the same area as those in respect of which common rules have here been established. These common rules are plainly harmonised common rules.

Our table is designed to demonstrate the extent to which Ireland's case does depend upon the attribution to the provisions of UNCLOS of meanings which would affect the Community's common rules. As can be seen from the table, each of the submissions made by Ireland, save those relating to the physical security of the MOX plant and transport, affect the common rules established by the Community. Ireland's case, as the Tribunal is aware, falls into three broad chapters. The first case is the claim that the United Kingdom failed to make an environmental impact assessment for the MOX plant or an adequate environmental impact assessment or a new environmental impact assessment. In chapter 7 of its memorial and chapter 6 of its reply, Ireland pleads that this constituted an infringement of Article 206 of UNCLOS.

The allegation of breach of Article 206 is based heavily upon Community legislation. At paragraph 7.50 of its memorial, Ireland reiterates its claim that the Environmental Statement does not comply with the relevant requirements of EC Directive on Environmental Impact Assessment. That is a plain allegation of a breach of a Community directive. This is a reference to Directive 85/337, as amended, which is among the directives listed in the Declaration appended to the Community's instrument of formal ratification of UNCLOS. It is one of the relevant instruments for the purposes of determining the Community's competence. At paragraph 6.19, among other places, Ireland states that this Community legislation is relevant because it shows how the general obligations in UNCLOS are to be interpreted and applied.

PROFESSOR CRAWFORD: Let us assume that we reject that argument. It is a slightly odd argument in a way, because it says that the interpretation of a general provision in a multilateral convention is to be applied in a particular region by reference to a regional standard without any specific mandate. That argument has, of course, nothing to do with EU law. It is an international law argument.

DR PLENDER: Yes.

PROFESSOR CRAWFORD: Let us assume that we say that the provisions on assessment in the Law of the Sea Convention are to be given a uniform, universal meaning, unrelated to anything in EU law, and that, again hypothetically, let us say that, interpreting those provisions as they stand, what the United Kingdom did was not an assessment. Would that affect the EU legislation if that was the causal reason?

DR PLENDER: No, I do not say that it then would. But we have to address Ireland's case as Ireland's case has been presented. The whole difficulty with which the United Kingdom is presented, and which it appears to me the Tribunal may be presented, is that we have at this stage to approach the Law of the Sea Convention upon the premise that it is to be "informed" by the instruments on which Ireland relies and has the meaning for which Ireland contends. Were we to conduct an entirely different exercise, that is to say were we to look at the Law of the Sea Convention in abstract from Ireland's case altogether, we may find that the extent to which provisions of the Law of the Sea Convention affect common rules is much less marked than appears from the way in which we are obliged in the course of these proceedings to

address that point.

PROFESSOR CRAWFORD: Perhaps to put the same point another way, you might say that it would be odd if we only had jurisdiction over Ireland's complaint on the premise that we reject one of its arguments.

DR PLENDER: Well, I had not thought of it that way, but I wish I had.

What matters for present purposes is that Article 206 of the Law of the Sea Convention affects the common rules laid down by Directive 85/337 (as amended). In so far as it concerns environmental statements, Article 206 is 'concerned with an area which is already covered to a large extent by Community rules'. To revert to Professor Crawford's observation, if on its proper construction Article 206 is not concerned with environmental statements, then the difficulty disappears, but then so does Ireland's case. But to the extent that it is concerned with environmental statements it is a matter of Community competence. Any rights and duties flowing from Article 206 are rights borne by the Community in relation to third States.

That must be right; for otherwise the uniform application of Community law would be put in peril.

The second main part of Ireland's case is the claim that the United Kingdom failed to co-operate as required by Articles 123 and 197 of the Law of the Sea Convention. It is particularly in this context that Ireland relies on Directive 96/29 on justification of new classes or types of practice resulting in exposure to ionising radiation (Tab 40) as well as Council Directive 90/313 on freedom of access to information (Tab 34) and on the OSPAR Convention which itself embodies common Community rules (Tab 42). The Tribunal will note that the OSPAR Convention, though not itself included in the Annex, will be found obliquely referred to for the Annex to the Community's declaration does include among the instruments which are relevant to the determination of Community competence the Paris Convention from which the OSPAR Convention was derived.

Ireland's allegations of non-co-operation are expressed very generally; but they seem to break down into seven categories. Allegations in respect of: (i) the MOX Plant consultation; (ii) failure to supply full and unedited copies of the PA and ADL Reports (the subject of the OSPAR arbitration); (iii) allegations about failure to suspend the authorisation of the MOX Plant pending the outcome of the OSPAR arbitration; (iv) allegations about the quality of the environmental impact assessment; (v) allegations about marine transports; (vi) allegations about the terrorist threat; and (vii) allegations about the protection of the marine environment.

The first and third categories affect the common rules established by Directive 96/29 on the justification for certain nuclear activities; and to a subsidiary extent, Directive 90/313.

The second category (failure to supply of full and unedited copies of the PA and ADL Reports) affect common rules established by Directives 90/313 and 96/29; although the emphasis is on the former.

The fourth category of allegations of non-cooperation about environmental assessment, affects the common rules established by Directive 85/337.

The fifth category concerns marine transports. This is not wholly a matter of Community

competence. For example, the security arrangements adopted for the return shipment of mixed oxide fuel from Japan to the United Kingdom are clearly beyond the competence of the Community. On the other hand there is a body of Community legislation regulating other aspects of marine transports. Several of these are listed in the Community's Declaration. In particular there is Directive 2002/59 nowadays which replaced Directive 93/75 establishing a Community vessel traffic monitoring and information system.

The sixth category of complaints (in respect of terrorist threats) is not a matter of Community competence.

In the case of the seventh and final category of complaints (about protection of the marine environment) the Community has extensive competence. It has adopted a series of instruments laying down common rules. These include Directive 76/464 which we looked at a moment ago; Directive 82/501 on the major-accident hazards (Tab 46); and Directive 84/360 on the combating of air pollution (Tab 32); and more recently Directive 2002/59/EC (Tab 44). To the extent that Articles 123 and 197 of UNCLOS prescribe co-operation in respect of matters governed by those instruments, they affect the Community's common rules.

I now turn to the third chapter of Ireland's case, which concerns allegations of pollution. This is a matter extensively regulated by Community law. The claim that the United Kingdom has failed to take all measures consistent with UNCLOS to prevent, reduce and control pollution from the Irish Sea, contrary to Article 194 of UNCLOS amounts to an assertion that this Article of UNCLOS has a meaning which would affect Council Directive 2000/60/EC (Tab 43). The declared purpose of that Directive is to achieve:

"enhanced protection and improvement of the aquatic environment, inter alia, through specific measures for the progressive reduction of discharges, emissions and losses of priority substances and the cessation or phasing-out of discharges, emissions and losses of the priority hazardous substances" and "achieving the objectives of relevant international agreements, including those which aim to prevent and eliminate pollution of the marine environment". The instruments referred to are precisely the same as those to which Ireland refers in its pleading.

The same submission also affects Directive 76/464 on pollution as I have shown, and the remaining submissions made by Ireland in relation to pollution rest on Article 194(3) of UNCLOS, Article 123, Article 217 and Article 220. These provisions, in the aspect in which Ireland invokes them, affect the common rules established by Directive 76/464 (Tab 31); Directive 84/360 (Tab 32); Directive 96/29 (Tab 40), Directive 93/75 (Tab 36); Directive 95/21 (Tab 39) and Directive 2000/60 (Tab 43) as well as Directive 92/3 on the supervision and control of shipments of radioactive waste between Member States and into and out of the Community (Tab 35); Directive 94/57 on the relevant activities of maritime administrations (Tab 38); and Directive 2000/59 on port\reception facilities for ship-generated waste and cargo residues (Tab 44).

Ireland's Memorial and Reply, together with the antecedent correspondence, illustrate vividly the fact that the provisions of UNCLOS on which Ireland relies affect, assuming them to have the

meaning for which Ireland contends, affect common rules established by the Community. The frequency with which Ireland invokes those common instruments to "inform" the meaning of UNCLOS demonstrates the fact that the provisions in question, assuming that they have the meaning for which Ireland contends, are concerned with an area which is already covered to a large extent within Community rules.

The upshot is that far the greatest part of Ireland's case is built upon such provisions. The only true exception are parts of Ireland's case which are concerned with physical security.

I now turn to the Jurisdiction of the European Court.

PROF CRAWFORD: Dr Plender, are you going to address at some point the question if we accepted your submission on this point that a very large proportion of Ireland's case was covered by common rules, but that there were some exceptions. Are you going to address the question what we should do as a matter of international law if as it were a small fraction of the claim is within jurisdiction? Or is someone else going to address that?

DR PLENDER: It is possible to address that very easily. I think probably the best point at which to address it is at the conclusion of my speech.

The European Court of Justice is the proper tribunal to adjudicate on any allegation that the United Kingdom has failed to implement the Directives which implement, at the Community level, the provisions of UNCLOS on which Ireland relies. In the event of a dispute between Ireland and the United Kingdom as to the allocation of competences between the Community and the Member States, the European Court of Justice is again the proper forum. The treaties establishing the European Community and Euratom contain provisions to invest that Court with appropriate jurisdiction.

In accordance with those treaties, if the Commission, or a Member State, considers that another Member State has acted in a manner inconsistent with the obligations owed by the Community towards third States under UNCLOS, it has a remedy in the European Court. Member States have the duty under Article 10 of the EC Treaty to take all appropriate measures to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community.

After reviewing the case-law, MacLeod, Hendry and Hyett conclude, at page 147 of their book on The External Relations of the European Communities (Tab 19):

"The basic principle is therefore clear: in all aspects of the negotiation, conclusion, and implementation of a mixed agreement, the Member States and the Community are required to cooperate closely and to act in close association."

Dr Ehlermann expresses a similar conclusion at pages 20-21 of his essay published in O'Keeffe and Schermers on Mixed Agreements (Tab 21); as does Joni Heliskoski in his recently published monograph Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States (Tab 22). At page 52 the author writes of the European Court:

"The Court regards itself as the sole final arbiter of the division of legal authority as between the Community and the Member States and this it seems only to be willing to decide ex post facto".

PROF CRAWFORD: Dr Plender, this morning you described the assertion that as between members states the ECJ has exclusive jurisdiction with respect to any dispute arising under a mixed international agreement as extreme.

DR PLENDER: Yes.

PROF CRAWFORD: But does it not follow from the quotation that you have just read associated with the obligation of cooperation, if in all aspects of the implementation of a mixed agreement the member states in the Community are required to cooperate together, would it not follow from that that the ECJ had exclusive jurisdiction over all questions of interpretation of such an agreement?

DR PLENDER: This illustrates the danger of extracting a short passage from a work. It had not occurred to me that the passage (which I believe to be representative of the context for the purpose for which I invoked it) might be used as a source for an entirely different train of thought. In my submission the proposition that the Court of Justice has jurisdiction in relation to the whole of a mixed agreement is extreme, and indeed so extreme as to be untenable. It would be easy to think of examples which would illustrate the questionability of any such proposition. I gave one, I hope, earlier in this speech, when I stated that the provisions of the Law of the Sea Convention governing the competence of member states to delimit territorial seas cannot be a matter of Community competence. It would be extraordinary if, say, a dispute between the United Kingdom and France over the Channel Approaches were justiciable only in the European Court of Justice, and in the course of long running litigation on that point I have never heard any such suggestion made. Likewise it would be possible to have a mixed agreement in which only relatively small parts are matters of Community competence, and large parts, matters of Member State competence. It would be an extraordinary and, perhaps, unwelcome development were the Court of Justice to be required to adjudicate upon such matters.

I do not believe that when McLeod, Hendry and Hyett's book is read in its context, it would support the broader propositions suggested by Professor Crawford.

PROFESSOR CRAWFORD: Well, suggested for the sake of argument. I was not advocating them.

DR PLENDER: I entirely appreciated that this, like other interjections of Professor Crawford, are put forward for the purpose of testing arguments and are not opinions of his own. It is the normal judicial function.

The procedure to be followed in the event of disputes between Member States is set out in provisions of the Community Treaty which are well known and to which I need not take Members of the Tribunal. The procedure ordinarily followed, if one Member State is dissatisfied with the conduct of another, is that it consults the Commission and invites the Commission to investigate the matter and to obtain satisfaction. There has been no such consultation of which we are aware in the present case. If such consultation does not satisfy the Member State concerned, it is then open to the Member State concerned to institute proceedings against another Member State. It is open to the Commission to institute proceedings against the Member State which it considers to be in default of its obligations and it is open to the complaining Member State to institute proceedings against the Commission for failure to act. None of these remedies has been invoked in the present case.

Once proceedings are properly instituted by the European court, that Court does have

jurisdiction to interpret international agreements to which the Community is a party, including the United Nations Convention on the Law of the Sea, to the extent that provisions of such conventions are matters of Community competence. In the words of that Court "every international agreement entered into by the Community becomes from its entry into force an integral part of Community law".

In this Tribunal, as before the Law of the Sea Tribunal, the United Kingdom relies upon Hauptzollamt Mainz v Kupferberg, which is at tab 11. This is another of the leading cases of the Court of Justice. At paragraph 14 of its judgment in that case, the Court said,

"It follows from the Community nature of such provision that their effect in the Community may not be allowed to vary according to whether their application is in practice the responsibility of the Community institutions or of the Member States and, in the later case, according to the effects in the internal legal order of each Member State which the law of that State assigns to international agreements concluded by it. Therefore it is for the Court, within the framework of its jurisdiction in interpreting the provisions of agreements, to ensure their uniform application throughout the Community."

Contrary to Mr Sreenan's understanding yesterday, we do not invoke that case "in support of the very wide proposition that Member States may not invoke the dispute resolution procedures of an international agreement as that agreement becomes part of Community law as soon as the Community signs up to it". The case is cited in support of that proposition that the European Court of Justice has jurisdiction to interpret provisions of international agreements to which it is a party to the extent that such provisions form parts of Community law. In the case of the relevant UNCLOS provisions, the extent to which it does so corresponds with the extent to which such provisions affect the Community's common rules.

Ireland also misunderstands the United Kingdom's submissions on Hermes and Christian Dior and the significance of those cases.

PROFESSOR CRAWFORD: Dr Plender, you give that qualification from that paragraph by reference to the phrase "within the framework of its jurisdiction in interpreting the provisions of the agreement".

DR PLENDER: I do, but I readily acknowledge that the issue of the extent of Community's competence which arises in this case was not before the Court of Justice in Kupferberg.

The cases of Hermes and Christian Dior are cited because, by contrast with Kupferberg, they demonstrate the jurisdiction of the Court of Justice to interpret parts of mixed agreements corresponding to the Community's competence. In Hermes, the European Court interpreted the TRIPS agreement, concluded pursuant to the WTO Treaty, observing that this agreement corresponded with Community competence. The Court adopted similar reasoning in Christian Dior. Incidentally, the fact that the court assumed jurisdiction in respect of international agreements in these cases, following the Kupferberg principle, shows that Kupferberg was not a special case by reason of being decided on the basis of an association agreement. An association agreement is special. The WTO agreement certainly is not.

Gentlemen, there is a formal differences between the jurisdictional issue arising in this Tribunal and the issue that would arise were the problem presented to the European Court of Justice. In this Tribunal, the jurisdictional issue arises under Article 282 of UNCLOS. In the European Court of Justice,

it arises under Article 292 of the EC Treaty and Article 143 of the Euratom Treaty, but, in essence, the issue is one and the same. The question is whether the European Court of Justice has exclusive jurisdiction. If the International Tribunal for the Law of the Sea had appreciated that provisions of the Convention on the Law of the Sea are part of the Community legal order, justiciable by the European Court of Justice, it might have given a different response to the United Kingdom's submission on the request for provisional measures. Indeed, it seems that counsel for Ireland failed at that stage to understand the United Kingdom's submission. Their response, recorded at paragraph 45 of the Tribunal's order, and accepted by the Tribunal at paragraph 50, is that the present dispute concerns the application or interpretation on the Convention of the Law of the Sea and not the EC or Euratom Treaty. But that misses the point. Of course, this case is concerned with the Convention on the Law of the Sea, but, since the Community is a party to that Convention, its provisions are part of the Community legal order to the extent that they affect the Community's common rules. Judge Wolfrum appears to have been under the same misapprehension. After quoting Article 292 of the EC Treaty, he states: "This does not suggest that the Court of Justice of the European Communities will decide on issues concerning the interpretation and application of the Convention".

As we have seen, the European Court of Justice does, indeed, interpret the Convention. He continued:

"It is well known in international law and practice that more than one treaty may bear upon a particular issue. The development of a plurality of international norms covering the same topic or right is a reality."

This is, of course, true. the Judge was paraphrasing paragraph 52 of the Award of the Annex VII Tribunal in the Southern Blue-Fin Tuna case. There the Tribunal observed "There is frequently a parallelism of treaties, both in their substantive content and in their provisions for settlement of disputes arising thereunder".

The question of parallelism was relevant in that case, for the Annex VII Tribunal had to consider, among other matters, Japan's submission that the 1993 Convention on the Conservation of Southern Blue-Fin Tuna constituted a lex specialis, eclipsing or discharging obligations under UNCLOS. But that is not this case. This Tribunal is not asked to consider whether the provisions of a regional convention eclipse or discharge those of the Law of the Sea Convention by reason of the similarity of terms. Rather it is required y Annex IX of UNCLOS to determine whether the rights and obligations asserted by the Claimant are those of Ireland and the United Kingdom or those of the Community.

If Judge Wolfrum had drawn the proper conclusions from the fact that UNCLOS is a mixed agreement, he could not have suggested that the Court of Justice has not jurisdiction to interpret UNCLOS (for it is plain that the Court of Justice is competent to interpret mixed agreements). Likewise, if he had drawn the proper conclusions from the fact that the Law of the Sea Convention is a mixed agreement, he would not have seen the need to cite judgments showing that, when the court has to consider two treaties with different wordings, it must interpret each according to its language and context. Of course, that is true, but the problem presented by a mixed agreement is that of distributing

rights and duties as between the international organisation and the party.

Judge Anderson was surely right in saying that "On the basis of the limited materials before it, the Tribunal has to take a prima facie view of the question of the arbitral tribunal's jurisdiction. Applying the test of Judge Lauterpacht, the question is whether Article 282 amounts to a qualification 'obviously excluding' the jurisdiction o the arbitral tribunal".

He was also right in adding his own reservations about the Tribunal's reasoning on the issue presented to it under Article 282 of UNCLOS. Referring that Article, he stated, "in retain doubts, on the basis of the factual materials presented, about some of the reasoning".

The International Tribunal for the Law of the Sea concluded, after a very short hearing convened under conditions of great urgency, that the jurisdiction of this Tribunal was not "obviously excluded". It would not be inconsistent with that conclusion for this Tribunal to find, after hearing full argument not he point, that the rights under the Convention asserted by Ireland are not its own and that the obligations under the Convention that it imputes to the United Kingdom are not those of that State. They appertain instead to the Community.

I now come to Article 282 of UNCLOS. The text of the article is set out for convenience at tab 1 of the Tribunal's folder. It provides, "If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such a dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this part, unless the parties to the dispute otherwise agree."

We may ignore for present purposes the words "or otherwise". They were taken at the time of the adoption of the text to refer to declarations adhering to the Optional Clause of the Statute of the International Court of Justice. We should however note the mandatory words of Article 282. Where there is a relevant regional agreement providing for a binding procedure, that procedure shall apply in lieu of the procedures prescribed by Part XV, unless the parties otherwise agree.

The editors of the Virginia Commentary, a copy of the relevant extract of which is tab 30, comment as follows:

"The text of Article 282 reflects the prevailing view that parties would normally prefer to have the dispute settled in accordance with a procedure previously agreed by them".

They then set out in a footnote a reference to Article 292 of the EC Treaty. The reference acknowledges the obvious relevance of Article 282 to the procedures established by Article 292 of the EC Treaty for the resolution of disputes concerning the interpretation or application of this treaty.

By concluding the EC and Euratom treaties, the United Kingdom and Ireland did agree that any dispute concerning the interpretation or application of provisions of an international agreement to which the Community is a party and for which the European Court of Justice has exclusive jurisdiction shall not be submitted to any method of settlement other than those for which those treaties provide.

Not only have the parties so agreed, but, in the case of the present dispute, the methods of settlement prescribed by Community law are manifestly more convenient than the procedure upon which

Ireland has embarked. If this Tribunal is to resolve the present dispute, it will be obliged to determine whether the European Community or its Member States have competence, in respect of provisions on which Ireland relies in the aspect upon which Ireland invokes them. To do so, it will have to embark on an enquiry into the principles of European Community law governing the transfer of competences.

In addition, it may well have to engage into other enquiries into European Community law. For example, it is likely to have to grapple with Ireland's repeated but, in our submission, mistaken assertion that the procedure for an Opinion under Article 37 of the Euratom treaty is confined to questions of human health; and it may well have to address Ireland's claim to derive assistance from Community legislation, to which Ireland attaches a contentious interpretation, including the directives laying down common rules in respect of environmental impact assessments, justification and transboundary movements of radioactive wastes.

Moreover, if this Tribunal embarks on this course, it may well be doing so at a time when the European Court of Justice could be seised of the same issue, in proceedings instituted against Ireland by the Commission. The proceedings which the Commission may institute would, according to the Commission's Parliamentary statement, be based on Article 292 of the EC Treaty. This provides,

"Member States undertake not to submit a dispute concerning the interpretation or application of this treaty to any method of settlement other than those provided for therein".

To determine whether this dispute concerns the interpretation or application of the EC and Euratom treaties, the Tribunal would have to enquire whether the points on which Ireland relies are matters of Community law. To the extent that any award of this Tribunal may conflict with a judgment of the Court of Justice, it will not assist in the resolution of the present dispute. It was to avoid inconveniences of just this kind that the framers of UNCLOS inserted into it the provision now found in Article 282.

PROFESSOR CRAWFORD: What is the extent of our competence - competence in respect of a matter arising under Article 282 which is within the exercise of the jurisdiction of another court?

DR PLENDER: I am conscious of the logical problem which the question poses, but I am driven to the conclusion that logic must not be so construed as to produce an insoluble and irremediable stalemate. This case has been brought to this tribunal. There is a challenge to jurisdiction raised by the United Kingdom. Conscious as I am of the logic underlying Professor Crawford's question I submit that this tribunal must have the competence to determine its competence.

PROF CRAWFORD: I suppose there could be two solutions to the logical problem. One would be to say whether or not the tribunal is competent to determine ultimately the question of European law which is an incidental question for your purposes of Article 282, it is competent to cognise it, to take cognition of it, at least where it is clear. So where there is a clear proposition of European law which is essentially straightforward we are not deciding it, we are simply acknowledging its existence and that is possible; if the consequence of that is that Article 282 applies then we are competent to determine that.

DR PLENDER: That may be an attractive way of expressing it. Another may be to think of the consequences were the tribunal to take la decision on jurisdiction either way. If the tribunal were to

reject my submissions and find that it has jurisdiction then it would logically follow that (assuming the Tribunal to be correct) it has the competence to interpret the provisions of Community law here in issue. Conversely if the Tribunal finds in favour of my submissions, and that it does not have jurisdiction, then cadit quaestio.

SIR ARTHUR WATTS: Could I just ask another question which although I thought about it a moment or so ago it fits very neatly with what you have just said. Is it your view that Community law, although it flows from treaties, is not included in the rules of international law which this tribunal is to apply to cases brought before it?

DR PLENDER: The short answer is probably is Yes, and a longer one will be given by Mr Bethlehem when I sit down. The question posed by Sir Arthur raises among other points what one means by "applying" other rules of international law. In the sense of Article 31 of the Vienna Convention upon the Law of Treaties it seems to me that other rules of international law, particularly rules such as good faith, can of course be applied, that is to say taken into account, by the Court of Justice in the application of UNCLOS. I would not even exclude Community law from that exercise. It may be that where a court has to interpret a word appearing in UNCLOS it might derive assistance from the interpretation given to the same word, albeit in a different context, by the Court of Justice of the European Community. That I do not resist.

But we do resist the broader attempt that Ireland makes to apply other rules of international law in the manner in which it has. Mr Bethlehem will enlarge on that submission.

PROF CRAWFORD: The United Kingdom and the Republic of Ireland are not schizophrenic when it comes to EU law and international law. There is a legal person and it is the same legal person which is the subject both to international law and European law. All that Article 282 requires is that these two states before us, which are the same states as they would be if they are in the European Court of Justice, have agreed something. If they have agreed it in a form which is binding on them - I would say for myself under any legal order - then Article 282 applies. In other words we do not have to classify European law as international law or not for the purposes of Article 282; if it is the case that Ireland and the United Kingdom are bound under European law, whether it emanates from the treaty or some other European obligation, to submit this dispute to the ECJ, then Article 282 applies.

DR PLENDER: That is exactly in accordance with the United Kingdom's submission and also in accordance with the note appearing in the Virginia Commentary. My response to Sir Arthur's question which I took to be in a different context was not intended to imply the contrary.

PROF CRAWFORD: I think Mr Sreenan, and he will correct me if I am wrong, actually conceded that yesterday. He does not accept the premise of the question because he does not accept that the ECJ has exclusive jurisdiction over this dispute, but I think he accepts that if it did under European law have exclusive jurisdiction over this dispute then Article 282 would be triggered.

DR PLENDER: It is for Mr Sreenan to say whether he accepts that, but my submission is that he ought to.

In the light of my submissions on Article 282 it is really not necessary for this tribunal to refer to Article 281 of UNCLOS, but I do so for completeness. It reads as follows:

"If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for by this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure."

The premise of this Article is that the parties have agreed to seek settlement of the dispute by a peaceful means of their own choice. In such an event Article 281 excludes recourse to procedures for which Part XV provides, subject to two conditions. The First is that no settlement has been reached by such means. The second is that the parties' agreement must not exclude the applicability of any of the further procedures for which Part XV of the Convention provides.

Nothing in the wording of Article 281 requires that the dispute must have crystallised before agreement is reached on alternative means of settlement. Indeed it is implicit in the award of the Annex VII Tribunal in the Southern Blue-Fin Tuna Case that the agreement providing for alternative methods of settlement may have been reached before this tribunal crystallised. At paragraph 54 of that Award the Tribunal found that the relevant agreement to seek settlement of the dispute by alternative means was formed in Article 16 of the agreement of 1993. The dispute crystallised in 1998.

I acknowledge that in his dissenting Opinion in the Southern Blue-Fin Tuna case Sir Kenneth Keith expressed the view that the procedure in Article 281 proceeds on the premise that an agreed procedure has failed. He cannot be taken to have meant, however, that Article 281 is excluded where one party simply fails or refuses to make use of the alternative peaceful means that it has agreed to use. Such an interpretation of his words would be inconsistent with Article 280 of UNCLOS, which provides that nothing in Part XV impairs the right of any States Parties to agree at any time to settle a dispute concerning the Convention by any peaceful means of their own choice.

Mr President, I wonder if this would be a convenient moment to sit in camera.

THE PRESIDENT: This is a very convenient point for us to sit in camera. Following the procedure we agreed yesterday would all those who are not included in the definition of legal team please withdraw.

(For proceedings in camera see separate transcript)

THE PRESIDENT: Mr Bethlehem, please proceed.

MR BETHLEHEM: Mr President, Members of the Tribunal, it is a very great honour indeed for me to be representing the United Kingdom in this case before such a distinguished Tribunal. You heard full argument yesterday from Mr Sreenan on the EC point, followed by a relatively short submission from Professor Lowe. Dr Plender has addressed the EC element in response. My task is to deal with issues raised or, should I say not raised, by Professor Lowe. I should say that it is always a pleasure to listen to Professor Lowe develop an argument. The clarity and simplicity of his exposition is quite appealing and the logic is seductive. I am afraid, however, that, unless Professor Lowe was engaged in a masterly and dignified retreat from Ireland's written pleadings, a point that I would not altogether discount, his presentation masks a multitude of difficulties that run throughout Ireland's case. I am afraid that, if I do not address these, they may be overlooked or they may be taken as acquiescence to the United Kingdom's disadvantage.

When the Attorney General, Lord Goldsmith, indicated yesterday that we may need a day to set out our stall on the issues addressed by Ireland in almost a full day of argument yesterday, the was something of a sense that we ought not to need quite that long. I am certainly mindful of the point, and will not detain you longer that is necessary on these issues. My submissions are, however, somewhat fuller than those of Professor Lowe. Let me say also that they are all points that go to jurisdiction and admissibility, or perhaps justiciability, that run throughout our written pleadings. There is no novel point here. I will draw the threads together. It is, however, important that I tease out some points of detail that might not otherwise be apparent. I should say that we had contemplated developing this part of the argument rather more fully in our substantive case. However, as the Tribunal thought it sensible to hear argument from both parties on the jurisdictional issues at this stage, it seems sensible for us to develop the points, albeit rather more briefly now. I cannot imagine that it would be helpful for your consideration of these issues only to hear in the middle of next week some further quite detailed submissions on jurisdiction and admissibility.

You should have in front of you something which I suppose euphemistically is termed an outline of submissions, which runs for about 50 pages. I should say that the length of the outline will not reflect the amount of time that I propose to spend on it. I will need to go through in some detail at least the earlier parts of the statement, but, when we get to the latter parts, I will be able to skip through quite a lot of that fairly quickly.

I hope that I will be comfortably within the period this afternoon on these submissions.

The principal issues, in a nutshell, are that we think that Ireland is truing to shoe-horn into UNCLOS, for a decision by the Tribunal, a raft of non-UNCLOS measures which are not properly justiciable in this case and in respect of which, however Professor Lowe might seek to dress up the point, Ireland is in fact seeking a declaration of breach from this Tribunal. Further, we also consider that, in respect of the vast bulk of Ireland's case, articles 281 and 282 of UNCLOS operate to preclude jurisdiction in favour of exclusive and binding dispute settlement procedures under the OSPAR Convention and the EC and Euratom treaties. Dr Plender addressed just before lunch the application of Article282 and Article 281 as a residuary point in respect of the EC element. I am going to come back to those aspects in so far as they are relevant in particular to OSPAR. So my submissions to some extent run parallel to Dr Plender's; independently of them they are, however, equally material on the EC points and on the OSPAR points.

Mr Sreenan tried to suggest yesterday that both parties wanted a decision from this Tribunal on the merits of the case. That is not quite correct. Both parties have necessarily made submissions to this Tribunal on jurisdiction and admissibility, although, clearly, in rather different terms. On the merits, as the Attorney General, Lord Goldsmith said yesterday and Dr Plender has reiterated today, the United Kingdom is fully prepared to argue the case. The matter is, however, for the Tribunal.

At the same time, however, the United Kingdom considers that there is something quite fundamentally wrong with the way in which Ireland has pleaded its case and with its conception of dispute settlement under UNCLOS. It considers that these issues need to be addressed by the Tribunal

as an initial point. I will come back in a moment to put my submissions into a more coherent order and give you something of a roadmap through them. I suppose the nomenclature of roadmaps is unfortunate, but, nevertheless, I hope to give you something of a guide through my submissions. Broadly, I will address various points going to jurisdiction and admissibility initially and then proceed to address applicable law and the meaning of article 293(1). Let me begin, however, by addressing a point that came out in the question put to Professor Lowe by Sir Arthur Watts yesterday, that was drawing attention to paragraph 7.6 and 7.55 of Ireland's memorial and enquiring - and these are my words rather than reflecting the transcript - whether it was not, in fact, the case that Ireland was contending that the United Kingdom had violated an obligation under a non-UNCLOS agreement. Professor Lowe did not, in my respectful submission, fully address the point. Let me return to that idea and take you back to Ireland's statement of claim and written pleadings. The examples that I would like to take you to are illustrative examples of Ireland's approach. There are a multitude of others, but, with deference to time, I will take you simply to a few. I would like, if I may, to start with the statement of claim which is at tab 14 of the bundle of documents that you have before you. I should say, Mr President and Members of the Tribunal, that my intention here in highlighting a number of articles and a number of paragraphs, is not to engage in a minute discourse of the meaning of those paragraphs, it is simply to draw to your attention the absolute centrality of certain non-UNCLOS provision to the way in which Ireland has developed its argument and to indicate that, in effect, what Ireland is doing, however this point may be dressed up by Professor Lowe, is inviting the Tribunal to take a decision leading to a declaration that the United Kingdom is in breach.

That declaration in Ireland's conception may at the end of the day be dressed up as a declaration relating to an UNCLOS provision , but, because of the way that the case has been pleaded, it will inevitably flow back into the non-UNCLOS aspects.

The first paragraph in the statement of claim that I would like to draw to your attention is paragraph 26.1, which is the first paragraph under the heading of "Legal grounds". I will simply read through this very briefly. "Ireland's position is that the dispute relating to UNCLOS arises from inter alia the United Kingdom's failure, number one, to take all measures necessary to prevent control and reduce pollution, including the requirement that concentration of artificial radioactive substances in the Irish Sea be reduced to ‘close to zero' by 2020, as required by Articles 192 and 194 of UNCLOS, taking into account the 1998 Central Ministerial Statement of OSPAR members."

In my respectful submission, this goes quite a long way beyond mere interpretation, the point that Professor Lowe addressed. There is no renvoi to international law in the UNCLOS articles referred to here, Article 192 and Article 194. That is something that we will get to at a later stage, if that is the inclination of the Tribunal. Take into account that the language of the alleged breach reduce to ‘close zero’, the language of the Sintra statement, is not found anywhere in UNCLOS.

The next paragraph, just to punctuate the point again, is paragraph 30, which is a little bit over the page. That paragraph comes under the heading "Pollution from Land-based Sources and Vessels". Simply for the sake of brevity, I come to the bottom of that paragraph, indicating that the United

Kingdom violates, inter alia, articles 207(1) and (2) of UNCLOS, taking into account, inter alia, the requirements of the 1998 Sintra Ministerial Declaration to reduce concentrations in the environment to close to zero for artificial radioactive substances by the year 2020 as well as the precautionary principle".

Paragraph 31, which deals with the obligation to assess the potential effects of its activities, the paragraph immediately following, I do not need to go through the whole of the paragraph, but at the end of that paragraph there is, again, the point, "failing to give effect to the obligation imposed by the 1998 Central Ministerial Statement."

We have from the outset of Ireland's case in its Statement of Claim a rather firm indication that Ireland has set out its stall and is going to be relying upon non-UNCLOS, as it calls it, obligations.

There are additional points in the Memorial. I have listed six there. I do not propose to take you to all of them. They derive from each of the three main substantive chapters of Ireland's pleading. Paragraphs 7.6 and 7.12 deal with environmental impact assessment. Paragraph 7.6 was the subject of Sir Arthur Watts' question to Professor Lowe yesterday. I do not propose to take you to that. I would take you, however, briefly to paragraphs 8.166 and 8.167. This is in the Memorial. It is page 176 of Ireland's memorial. I read from 8.166.

"The United Kingdom is also bound by the obligations set out in other agreements, notably the 1980 Convention on the Physical Protection of Nuclear Material (CPP) and the International Atomic Energy Agency Guidelines for Physical Protection of Nuclear Material in Nuclear Facilities Guidelines, the 1994 Convention on Nuclear Safety and the 1997 Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management". Then we move to paragraph 8.167. "These instruments are relevant in two ways. First, as a guide to the interpretation of the duties imposed by UNCLOS." Professor Lowe's statement yesterday. "Second, as instances of what UNCLOS Article 293(1) refers to as ‘other rules of international law not incompatible with this Convention’, which the present Tribunal is directed to apply in the case before it".

There is a further example given in my speaking note drawn from the cooperation chapter, paragraphs 8.220 and 8.221.

The next one that I would like to take you to, because I am going to be coming back to this in rather more detail a little bit later in my submissions, are the paragraphs drawn from the pollution allegations by Ireland, paragraphs 9.43 and following. I should say that, in my submission, it is instructive simply to look at what Ireland has done in the pleading, because it is evident simply on the face of the document that the OSPAR Convention and the Sintra Statement are all over Ireland's case. Paragraph 9.43. "The 1992 OSPAR Convention regulates the discharge of radioactive substances into the marine environment from land-based sources, including the MOX plant." Then the pleading takes the Tribunal through the preamble. It then refers in paragraph 9.44 to article 2.1.A of the Convention. I am going to take you to the Convention in detail a little bit later. It refers to appendix 1, which is rather material. It then refers to annex 1 which commits the parties to use best available techniques and best environmental practices, and there is also a reference to appendix 1, where best available techniques and best environmental practices are defined for purposes of OSPAR. At the bottom of that page, the whole

of appendix 1 is set out in the pleading.

Then in paragraph 9.46, and you will forgive me if I read this paragraph in full, Ireland says, "Of particular note is the provision common to the definitions of both 'best available techniques' and 'best environmental practices', to the effect that they are concepts which are not static and set in time, but which, in relation to the operation of the MOX plant 'will change in time in light of technological advances, economic and social factors, as well as changes in scientific knowledge and understanding'." That is a reference to appendix 1 of OSPAR.

Let me just interpolate here before moving on to the rest of that paragraph, "best available techniques" and "best environmental practices" are not terms found anywhere in UNCLOS. The UNCLOS term is "best practicable means". Professor Lowe yesterday spoke to us about using non-UNCLOS conventions as an aid to interpretation where there were common terms and simply looking by way of analogy to see how these terms were defined elsewhere. That is not evident on the face of the pleadings.

The paragraph goes on "As explained below, it is a central part of Ireland's case that the United Kingdom has taken no account of this requirement, by authorising in 2001 (and without reference to these [OSPAR] requirements) a MOX project which was inadequately assessed in 1993 in an assessment exercise which applied the outmoded technologies and environmental standards of 1993."

It is a central part of Ireland's case. There is no resiling from this point. Here is OSPAR writ large in Ireland's pleadings.

Let me move on to paragraph 9.49, where Ireland goes further into the SINTRA statement and there is some discussion of the SINTRA statement in a rather long paragraph setting out the operative paragraphs of the SINTRA statement. Then in the middle of page 217 Ireland says as follows:

"It is a central part of Ireland's case" - the same language again - "that the decision to authorise the MOX plant and to extend the life of the Thorp plant is highly inconsistent with the commitments undertaken by the United Kingdom just three years earlier" in the SINTRA statement.

So here we have all the way through the key allegations of Ireland in the Memorial, these non-UNCLOS allegations.

I take you, simply for the completeness of it but also to show that this is something that runs through Ireland's case from statement of claim all the way through, to one or two aspects of the Reply. The paragraph I would take you to is the first on the list, paragraph 3.21, and I should say that after that the reference to paragraph 3.22 is in fact a mistake, it should be paragraph 3.24. I simply read those two paragraphs to you. Paragraph 3.21.

"On its face the United Kingdom's direction to the Environment Agency is inconsistent with its SINTRA commitment. This appears to have provided the basis for subsequent decisions by the Environment Agency and the approach taken in these proceedings: the Counter Memorial abounds with references to 'discharge limits' and 'best practicable means'. But it makes no reference to the United Kingdom's authorization of the MOX plant having been undertaken in the context of a recognised commitment to 'progressive and substantial reduction' of discharges, or to the use of 'Best Available

Techniques'". Once again we find the language of OSPAR and the SINTRA statement coming into Ireland's allegations.

The last paragraph I will take you to is paragraph 3.24. There are others but this is the last one I will read out.

"The arbitral tribunal will form its own view as to the extent of the United Kingdom's commitment to meet its SINTRA objectives."

That is nothing if not an invitation to the Tribunal to form a view on what Ireland says is a commitment by the United Kingdom under SINTRA. It runs all the way through Ireland's allegations. It really would be virtually impossible in our view to separate these aspects of Ireland's case from the pure UNCLOS aspects, and that is a point I will come back to in a moment, because when we look at the detail it will become apparent how impossible that is.

If I may, and with the very greatest of respect, just take you to one last text, and I will not ask you to turn it up. This punctuates the point and brings it right into this hearing. The opening submissions of Mr Brady the Attorney-General for Ireland on Tuesday. There is a prominent heading in the index to his submissions referring to the SINTRA declaration 1998 which is at .7. He did not for reasons of time get to the point of reading this out. If I may with the greatest of respect simply read out the point for him. He says at paragraph 7.01 of his statement.

"In 1998 the United Kingdom and Ireland joined with other contracting parties to the OSPAR convention in adopting the SINTRA ministerial declaration in relation to the protection of the marine environment of the North East Atlantic. The Ministers declared inter alia as follows", and then we find the reference to the text. The Attorney-General then goes on at paragraph 7.02: "The emphasis of this declaration was on reduction of concentrations. Ireland therefore considers that the United Kingdom is not acting in accordance with the SINTRA declaration. The decision to authorise the MOX plant and to extend the life of the Thorp plant is we contend inconsistent with this commitment undertaken by the United Kingdom." We have again a non-UNCLOS commitment which is, if I can use the words I began with a moment or two ago, shoe-horned into UNCLOS for decision by the Tribunal. There is no getting away from the point. The non-UNCLOS provisions stand at the very core of Ireland's case. These are not limited to, but, nonetheless, the core examples are the OSPAR Convention and instruments that they are under and the EC and Euratom treaties adopted thereunder. Try as he might to characterise Ireland's reliance on these provisions as an "aid to interpretation" or simply as a "renvoi", this analysis does not stand up to scrutiny. The only way that it could stand up to scrutiny was if Professor Lowe was, in fact, masterly and with dignity retreating on Ireland's behalf from the case stated in its written pleadings. If this is so, we accept the retreat. I rather think, however, that the brevity and simplicity of his presentation was an attempt to paper over the point in the hope that the Tribunal would not address these in the context of jurisdiction and admissibility. And we would urge the Tribunal not to take his implied invitation. There are a number of quite fundamental problems that arise in consequence of Ireland's approach.

PROFESSOR CRAWFORD: You say that, if Professor Lowe was conducting a sort of orderly retreat from

Moscow or from some other geographical location, you accept it. Are we to infer from that that, if Professor Lowe was to stand up this evening and say, "Well, in fact, Mr Bethlehem got it right", that there would be no problem in this respect?

MR BETHLEHEM: I think that it would certainly help a great deal if Professor Lowe, no doubt on instructions, were to stand up and make that point. That is not the end of the matter, because there is a point to be pressed home on our side, and that point really goes to what is left of Ireland's case. Our submission is really that there is nothing left of Ireland's case when you begin to tease out the EC points and the OSPAR points, even leaving aside Dr Plender's argument. Ireland's case on UNCLOS is not pleaded out. That is a point that I would like to take you to in some detail, because I think that it is rather important to the decision that you will be faced with.

I turn now to a rather more systematic treatment of these issues. I hope that you will indulge me, Mr President and Members of the Tribunal, if I go quickly through a number of hoops that we all know are there. In my submission, this is a little bit like an exercise of joining the dots. One point may not seem terribly significant, but it sets the contours of the overall picture which, in my submission, is rather important. I will first turn to issues of jurisdiction and admissibility and thereafter to applicable law. In the interests of time, I will try to limit the number of documents that I take you to, but they are there in the judge's folders.

On issues of jurisdiction and admissibility, there are five broad headings that I will address as follows. First, some rather general observations on the jurisdiction of a court or tribunal established under part XV of UNCLOS. Second, the United Kingdom's position on the relationship between UNCLOS and other international agreements. You heard Dr Plender a little bit on this. Third, the impact on the UNCLOS dimension of Ireland's case of the way in which it has pleaded its case. I think that that will bring me very sharply to the point that Professor Crawford raised in his question to me. Fourth, the application of articles 281 and 282 of UNCLOS, touching upon the exclusive and binding nature of the dispute settlement provision in the non-UNCLOS agreements. Fifth and in some ways this is perhaps one of the most interesting points, but masked by the rather innocuous title, the availability of more appropriate procedures elsewhere which would entail a binding decision. Just to lift the veil on that point for just a moment, it is not simply that I would suggest to you that there are more appropriate procedures elsewhere which would entail a binding decision, but what I would like to do is to suggest to you why the procedures elsewhere are more appropriate, because, in our consideration, they certainly are.

I would like then to turn to the rather more systematic approach to jurisdiction and admissibility. I would turn, first of all, to dispute settlement under part XV of UNCLOS. The peaceful settlement of disputes where necessary and appropriate through third party adjudication has been a cornerstone of developments in international law over the past 60 years. This period has witnessed a proliferation of international treaties on virtually every imaginable subject, many of which contain provisions on the settlement of disputes. These range from exhortative clauses contemplating the settlement of disputes by negotiation to binding dispute settlement mechanisms and arrangements. Part

XV of UNCLOS is one amongst those mechanisms. It is rather detailed, setting out provisions on the settlement of disputes concerning the interpretation and the application of the Convention. It is rather detailed by comparison with most dispute settlement clauses, not surprisingly because UNCLOS is a rather wide-ranging agreement and there is a potential web of interaction between UNCLOS and other treaties dealing with the same subject, many of which contain dispute settlement clauses. Part XV of UNCLOS at one and the same time sets out principles for the management of overlapping dispute settlement arrangements covering the same or similar matters in a number of treaties, as well as establishing its own procedures for binding dispute settlement. These arrangements are the cornerstone of the Convention.

Subject to the overriding obligation on states in article 278 to settle disputes concerning the interpretation and application of UNCLOS by peaceful means, the scheme of part XV shows a good deal of flexibility. Article 280 permits State parties to agree at any time to settle disputes concerning the interpretation or application of UNCLOS by a procedure of their choice. Mr President, Members of the Tribunal, if I can put it in these terms, UNCLOS, in other words, is not possessive about disputes in which its terms are or may be in issue. It is not possessive about them. The priority is that such disputes are settled by peaceful means, whether through a procedure laid down in UNCLOS or in some other treaty which governs the subject matter to which the parties to the dispute have agreed.

I turn then to the jurisdiction of the court or tribunal established under part XV of UNCLOS and continue the point. Just as UNCLOS is not possessive about disputes engaging its terms, it also contemplates the possibility in which parties to a dispute may wish to refer to an UNCLOS procedure a dispute concerning the interpretation or application of another international agreement, an agreement other than UNCLOS, but related to its purpose. The default jurisdiction in UNCLOS pursuant to articles 286 and 287 is in respect of disputes "concerning the interpretation and application of this Convention". This is the language of article 286, which opens section 2 of part XV concerning compulsory dispute settlement procedures. The phrase "concerning the interpretation or application of this Convention", namely UNCLOS is repeated in article 287, paragraph 1. It is found also in articles 279, 280, 281(1), 282, 282(1), 284(1) and 295. The overriding focus of part XV is quite clearly on disputes concerning the interpretation and application of UNCLOS. UNCLOS part XV does not purport to be a compromissory arrangement of wider application. The point is put beyond doubt in the one article that I left out in that recitation, which is the critical article, the express language of article 288(1), which, under the heading, "Jurisdiction" provides a court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this part."

While the overriding focus of part XV is in respects of disputes concerning the interpretation and application of UNCLOS, the second paragraph of article 288, which is paragraph that we have not heard much about from Ireland, makes it clear that wider disputes engaging the interpretation and application of non-UNCLOS instruments may also be submitted to UNCLOS dispute settlement procedures in circumstances in which this is expressly agreed. The provision is well known. I have in

my speaking notes the comment that it would, nevertheless, be appropriate to have a look at it. I do not propose to take you to it, but simply to read it out. Article 288, paragraph 2, under the heading of "Jurisdiction", reads, "A court or tribunal referred to in article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention which is submitted to it in accordance with the agreement".

Paragraph 2 of article 288 really does two things. First, and expressly, it provides that a court or tribunal referred to in article 287 and, for shorthand, I am simply going to refer to this as an UNCLOS court or tribunal, it provides that an UNCLOS court or tribunal will have jurisdiction in respect of disputes concerning the interpretation or application of an agreement other than UNCLOS where the dispute is submitted to UNCLOS in accordance with the terms of that agreement. The second element of article 288, paragraph 2, the implied element, and it is a necessary implication, in our submission, affirms that the default jurisdiction of an UNCLOS court or tribunal is in respect of disputes concerning the interpretation and application of UNCLOS and of UNCLOS alone.

Article 288 is one way in which part XV seeks to manage and reconcile parallel and overlapping dispute settlement arrangements in a number of treaties covering broadly the same ground. The parties to a dispute are free to seek settlement of the dispute through any procedure of their choice. There are other reconciling mechanisms, if I can put it in those terms. Articles 281 and 282 of UNCLOS, to which Dr Plender took you just before the break, address a further dimension of parallel or overlapping dispute settlement arrangements and they have the same broad overall object. They are what might be termed deference provisions. Where the parties to a dispute concerning the interpretation or application of UNCLOS have agreed to seek settlement of the dispute by some other means, and those means are either exclusive, as is required by article 281, or entail a binding decision, as is required by article 282, those other means of settlement will prevail. In my submission, articles 281 and 282 are also illustrative of the non-possessive character of part XV of UNCLOS when it comes to the settlement of disputes.

There are, of course, exclusive and binding mechanisms of dispute settlement that apply between the parties in the OSPAR Convention and in the EC and Euratom treaties. The question is whether they are engaged in the present case. The critical point is whether the present dispute is one concerning the interpretation or application of UNCLOS which the parties have agreed should be settled by some other procedure, pursuant to articles 281 and 282. We contend that it is such a dispute and I will come in just a moment to address that. Dr Plender has, obviously, addressed that in respect of the EC dimension.

I would like, in addressing this question of the character of the dispute, to address also the more general question of the United Kingdom's position on the relationship between UNCLOS and other international agreements. In so doing, I propose to take you to aspects of the award of the Tribunal in the Southern Blue Fin Tuna case, which, as you will be aware, is the only case to come before an Annex VII Tribunal so far. I think that Dr Plender has made the point that there may appear on first reading of the two cases to be similarity between them. They are, however, quite different, particularly as regards

the central issues which require a decision. A copy of the SBT award and the dissenting opinion, or partially dissenting opinion of Sir Kenneth Keith is at tab 2 of the folder. In fact, as I go through my observations, I will not, in fact, have to ask you to turn up the text, because the relevant extracts are in my speaking notes, and that will, perhaps, be a convenient way of addressing them. But let me begin with a word or two of background on the Southern Blue Fin Tuna case, simply so that my subsequent remarks are properly framed.

In SBT the respondent, Japan, objected to jurisdiction and admissibility on a number of grounds, notably that the dispute between the parties was in reality a dispute over the interpretation of the 1993 Convention on the Conservation of Southern Blue Fin Tuna and was not a dispute concerning the interpretation or application of UNCLOS. It further contended that in view of the agreement of the parties as reflected in the 1993 Convention to submit any disputes under the 1993 Convention to a particular dispute settlement procedure, dispute settlement under part XV of UNCLOS was excluded by operation of article 281 of UNCLOS. Of relevance in the SBT case was article 16 of the 1993 Convention, which addressed dispute settlement, and required the parties, in the first instance, to "consult among themselves with a view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice".

If the dispute was not resolved through that process, then but "with the consent in each case of all parties to the dispute", the matter was to be referred for settlement to the International Court of Justice. So reference of the dispute to a compulsory procedure entailing a binding decision was ultimately dependent on the agreement of the parties in the SBT case. Australia and New Zealand, the applicants, contested these claims.

As this brief description indicates, the key issue in contention in SBT was the relationship between UNCLOS and the 1993 SBT Convention. The key issue in this case - at least, in this part of this case - is the relationship between UNCLOS, on the one hand, and the OSPAR Convention and the EC and Euratom Treaties on the other. That is where the similarities end. Unlike the position of the respondent in SBT the United Kingdom does not seek to segregate or ringfence UNCLOS from other international agreements which address related subjects. We do not say that the present dispute falls outside the framework of UNCLOS. The case clearly does raise questions concerning the interpretation or application of UNCLOS. On this point the United Kingdom accepts as entirely correct the conclusion of the SBT tribunal rejecting Japan's contention that the 1993 SBT Convention somehow ousted UNCLOS on grounds of lex specialis. Dr Plender has referred to that point earlier today and I will not take you to the text, but you will find it in paragraphs 51 and 52 of the SBT award. Perhaps I should read the concluding phrase.

"The tribunal concludes that the dispute between Australia and New Zealand, on the one hand, and Japan on the other, over Japan's role in the management of SBT stocks and particularly its unilateral experimental fishing program, while centred in the 1993 Convention, also arises under the United Nations Convention on the Law of the Sea. In its view, this conclusion is consistent with the terms of UNCLOS Article 311 (2) and (5), and with the law of treaties, in particular Article 30(3) of the Vienna

Convention on the Law of Treaties."

Adopting this position, it is not therefore the United Kingdom's case that the present dispute falls solely within the scope of various non-UNCLOS agreements and instruments. Subject to Mr Plender's submissions, we do not object to jurisdiction and admissibility per se. We do, however, contest jurisdiction and admissibility in respect of those aspects of Ireland's complaints, and I have three headings.

We contest jurisdiction and admissibility in respect of those aspects of Ireland's complaint:

First, which Ireland lacks standing to bring, and in respect of which the United Kingdom is not the correct respondent, notably in consequence of the transfer of competence from Ireland and the United Kingdom to the European Community, and that is the point that Dr Plender addressed in some detail earlier on.

Second, we contrast jurisdiction and admissibility in respect of those aspects of Ireland's complaint which are properly the subject of agreement between the Parties to pursue exclusive or binding settlement by some other peaceful means as contemplated by, respectively, articles 281 and 282 of UNCLOS;

And third in respect of those aspects of Ireland's complaint which **in reality** concern the interpretation or application of any international agreement other than UNCLOS, disputes in respect of which are unambiguously outside the Tribunal's jurisdiction pursuant to article 288(1) and (2).

I come now to the essence of the point raised by Professor Crawford in his question to me. The purely UNCLOS heads of allegation by Ireland, were there to be any, would of course be justiciable before this Tribunal. I refer here to the possibility that Ireland might, or does, seek to recast its case as one which hinges on UNCLOS alone, and perhaps we will hear from Professor Lowe a little later on. Or that the Tribunal might consider that it could achieve this object by itself stripping away the non-UNCLOS elements in the course of its deliberations. Such a case would be justiciable before this Tribunal. It would, however, in our submission, suffer from an overwhelming defect which suggests that such an avenue, even if juridically feasible, is not a practical possibility.

Let me turn to this point before I come back to the application of Articles 281 and 282. The way in which Ireland has pleaded its case has in many instances meant that its contentions are totally dependent on the incorporation into UNCLOS of rules and standards derived from non-UNCLOS agreements. Once these are stripped away, as they must be given the tribunal's lack of jurisdiction to address such matters, once these non-UNCLOS elements are stripped away the substance of Ireland's contentions on the residual UNCLOS dimension of the complaint is both uncertain and insufficiently particularised. An example from Ireland's allegations on pollution will illustrate the point.

Ireland opens Chapter 9 of its Memorial, which deals with the "Prevention of Pollution", with a number of pages setting out the various UNCLOS provisions which address these matters. It goes on thereafter to identify a wide range in other international instruments which address, in its words, "the prevention of radioactive pollution of the marine environment". Moving beyond those that it refers to as part of the "General Background", Ireland identifies a number of international agreements which it says

impose rules, standards and recommended practices and procedures "which the Annex VII Tribunal is required by UNCLOS Article 293 to apply". These include in particular the OSPAR Convention, and various instruments adopted thereunder, as well as other conventions such as the London Dumping Convention, but I propose to focus my remarks on the OSPAR Convention. I simply highlight one aspect here. The terms of these instruments and agreements, the non-UNCLOS agreements and instruments, are set out in detail in this part of Ireland's pleading. For example, the provisions of Appendix 1 of the OSPAR Convention dealing with best available techniques and best environmental practices are set out in detail in that part. UNCLOS does not refer to those provisions and, as I mentioned a moment ago, taking you to paragraph 9.49 of Ireland's Memorial, Ireland itself characterises SINTRA and aspects of the UK's obligation as a central part of Ireland's case. It is certainly true that this element is a central part of Ireland's case. It resurfaces again and again in the pleadings.

In similar vein, we see references to OSPAR. One particular example which I highlight but will not take you to in any detail is Ireland's fifth allegation on pollution, that the United Kingdom has failed to implement international rules and standards to prevent, reduce and control pollution of the Irish Sea. Ireland here refers to ten non-UNCLOS commitments, including those under OSPAR concerning best available techniques and best environmental practices. And it goes on to allege that the United Kingdom is in breach of each of these commitments.

Mr President, members of the Tribunal, the point is simple. Once the non-UNCLOS dimension of Ireland's allegations is stripped away - as must necessarily be the case - any residual content of Ireland's case under UNCLOS, ie, that part of Ireland's case that is justiciable before this Tribunal, emerges as both uncertain and insufficiently particularised.

What is Ireland's case under UNCLOS Article 194.1 where the language is best practicable means, when the way in which Ireland has pleaded its case is by reference to OSPAR and the language of best available techniques and best environmental practices. It is not altogether clear. Ireland has relied so heavily on non-UNCLOS agreements that all too often its case under UNCLOS, the case that would be justiciable before this Tribunal, is not adequately pleaded out.

To return to the point with which this excursus began, purely UNCLOS heads of allegation by Ireland would be justiciable before this Tribunal. There would, however, be serious doubts about whether Ireland's allegations under UNCLOS were sufficiently clear and particularised to allow them to engage the functions of the Tribunal.

I turn, then, back to the question of whether Articles 281 and 282 of UNCLOS are engaged in this case. The SBT case provides an interesting backdrop on the present proceedings on this point. As I mentioned a little while ago the issue of controversy Southern Blue Fin Tuna was whether Article 16 of the 1993 SBT Convention - which did not contain a binding mechanism for the settlement of disputes and was not, by its terms, explicitly exclusive of any other procedure - nevertheless engaged the operation of article 281 of UNCLOS. The majority of the SBT Tribunal held that article 281 was engaged on the ground that the SBT Convention was, on a proper construction, exclusive of any further procedure.

Sir Kenneth Keith dissented on this point. What is significant for present purposes is that all the members of the Tribunal, including Sir Kenneth Keith, evidently agreed that, had the 1993 SBT Convention contained a compulsory dispute settlement procedure which entailed a binding decision, this would have engaged the operation of article 282. The relevant paragraphs are 19 and 20 of the extract of Sir Kenneth Keith's dissent. I simply read them out, I will not take you to them. Sir Kenneth Keith observed:

"19. The need for clear wording to exclude the obligations to submit to the UNCLOS binding procedure, beyond the wording found in Article 16, is further supported by other particular provisions of Part XV and by the pivotal role compulsory and binding peaceful settlement procedures played and play in the preparation and scheme of UNCLOS."

Then he says.

"20. Article 282, the very next provision to that at centre stage, does indeed give preference to another agreed peaceful settlement procedure over Part XV". The juxtaposition of these two paragraphs makes it quite clear that really what Sir Kenneth Keith was doing was accepting that where there is a compulsory and binding mechanism of dispute settlement Article 282 is engaged, and we therefore have a consensus of that tribunal on that point. But it goes further. The issue in the present case is precisely that which all of those involved in the SBT case, all of the members of the tribunal and all of the parties - because this runs through the pleadings of Japan, of Australia and New Zealand - all of the parties and all of the members of the tribunal acknowledged would engage the operation of Article 282.

As Mr Plender has noted, Article 292 of the EC Treaty and Article 193 of the Euratom Treaty do indeed contain compulsory, binding and exclusive dispute settlement procedures. These engage the operation of both article 281 and article 282 of UNCLOS. The same argument applies in respect of the OSPAR Convention.

Mr President, members of the Tribunal, I would here like to take you to the OSPAR Convention because it really runs through Ireland's case and it would be helpful to turn the pages on that.

You will find the OSPAR Convention at tab 3 of the folders. I will run through some of the provisions that are mentioned there. Turning to the preambular paragraphs, I would highlight three towards the middle of that page. Paragraph 7 is the first one which begins recalling, towards the middle of that page, the contracting parties recalling the relevant provisions of customary international law reflected in the UNCLOS, and in particular Article 197, global and regional cooperation for the protection and preservation of the marine environment. So we have a reference to UNCLOS and cooperation.

The following paragraph: considering that the common interests of states concerned with the marine area should induce them to cooperate at regional and sub-regional levels. Again we have a cooperation point.

And then skipping the one below: convinced that further international action to prevent and eliminate pollution of the sea should be taken without delay as part of progressive and coherent measures to protect the marine environment.

So we have a number of preambular paragraphs which set the scheme of the OSPAR Convention. Let me take you to one or two elements of Article 1, just to punctuate the scope of the OSPAR Convention so that you will appreciate, I hope, really that it does overlap here with UNCLOS. For the purposes of this Convention Article 1 paragraph (a), the maritime area means, and there is a rather detailed description and I do not read that out; but it is common ground between the parties - this was not in issue in the OSPAR case - that the maritime area includes the area of the Irish Sea which is the subject of Ireland's allegations.

Then Article 1 paragraph (d) gives a definition of pollution. The definition of pollution in the OSPAR Convention is marginally different from the definition of pollution in UNCLOS, in article 1.1(4). Much of the lack of similarity, if I can put it in those terms, comes from the fact that in OSPAR there is a definition of the maritime area, whereas in UNCLOS there is a definition of the marine environment. There are other marginal differences in the definition, but essentially the definition of pollution in OSPAR is rather broader than the definition of pollution in UNCLOS. One omission in the OSPAR definition which is an important feature of the UNCLOS definition is the reference to such deleterious effects in the UNCLOS definition, but not in OSPAR.

We then turn over the page and, if I may, I will take you to article 2, which is the general obligations. Article 2, paragraph 1, the contracting parties shall, in accordance with the provisions of the Convention, take all possible steps to prevent and eliminate pollution and shall take the necessary measures to protect the marine area against adverse effects of human activity so as to safeguard human health and conserve marine ecosystems and, where practicable, restore marine areas which have been adversely affected.

We then go into article 2, paragraph 2 and paragraph 3. You will see that there are references to the precautionary principle of the polluter pays principle, both of which are referred to in Ireland's pleadings and relied upon. Then subparagraph 3(ii), to this end they shall take account of the criteria set forth in appendix 1 defined with respect to the programme and measures, the application, inter alia, of best available techniques and best environmental practices. Here we have the explicit OSPAR language which is picked up in the UNCLOS pleading. I would simply take you very briefly to one or two more articles. The next one is article 3. This is rather material, because it deals with pollution from land-based sources. It provides the contracting parties shall take individually and jointly all possible steps to prevent and eliminate pollution from land-based sources in accordance with the provisions of this Convention in particulars provided for in annex 1. The reality is that but for what we contend are really marginal aspects of Ireland's case on pollution, the whole of Ireland's case on pollution comes within these provisions.

I turn then over the pages just to take you to the dispute settlement provisions, if I may. The first one is article 21, which I will take you to simply for completeness so that you see the scheme of dispute settlement under UNCLOS. Article 21 contains a dispute settlement clause which is specifically focused on the transboundary pollution.

Paragraph 1 of that article provides that, when pollution originating from a contracting party is

likely to prejudice the interests of one or more of the other contracting states to the Convention, the contracting parties concerned shall enter into consultation at the request of any one of them with a view to negotiating a cooperation agreement. At the request of any contracting party concerned, the OSPAR Commission shall consider the question and may make recommendations with a view to reaching a satisfactory solution.

As I say, I draw that to your attention for reasons of completeness. I pass over it rather briefly because it is not material for our case. In a sense, article 21 of OSPAR is a little bit like article 16 of the SBT provision.

I will then take you, if I may, to article 32 of OSPAR, which is on page 434 of the extract. That deals with dispute settlement and there are two paragraphs that I would like to draw to your attention. The first one is paragraph 1. Any disputes - and I underline the first word - "Any disputes between contracting parties relating to the interpretation or application of the Convention which cannot be settled otherwise by the contracting parties concerned, for instance, by means of inquiry or conciliation within the Commission, shall at the request of any of those contracting parties be submitted to arbitration under the conditions laid down in the article". Here we have a compulsory mechanism for dispute settlement.

Then, if you turn to subparagraph 10(a), which is two pages further on in the same article, article 32, it says that "the award of the arbitral tribunal shall be accompanied by a statement of reasons. It shall be final and binding upon the parties to the dispute".

Article 32(1) and 32(10)(a) are the binding compulsory dispute settlement mechanism which really engages the application of article 282 of OSPAR. There is an irony here, if I may put it in these terms, because Ireland, as we all know in this room, commenced proceedings under precisely this article in respect of another matter, where we are awaiting an award. Ireland, in fact, is fully engaged in this dispute settlement process. It has simply chosen to sidestep it in this particular case.

PROFESSOR CRAWFORD: Your submission is that by itself, and leaving aside the EU point, the OSPAR Convention is enough to trigger article 282 in this case?

MR BETHLEHEM: Yes, and I would go further than that. Leaving aside Dr Plender's arguments on the EC point, that the EC is part of the Community legal order, it is not only article 32 of OSPAR that would trigger this, but also article 292 of EC and article 193 of Euratom, independently of the competence points. They would trigger that. I suppose that it is always an overwhelming temptation of counsel to adopt a sort of belt and braces approach, but, in my submission, it is not only article 282 that it engages, it is article 281 as well, because, in our submission, the reference here in paragraph 32(1) to any dispute is, in fact, an exclusive dispute resolution mechanism. A dispute that arises under UNCLOS must be brought under article 32, paragraph 1 of OSPAR.

We would contend, if you like, that there are a number of avenues here. There is Dr Plender's argument which in a sense is the overwhelming argument. There is then the argument by reference to article 32 of UNCLOS and article 292 of the EC treaty and 193 of Euratom, which also engages article 282 of UNCLOS. And there is also the engagement of article 281. I should say that there is one element which I have not established and that is that this is a dispute in respect of the interpretation and

application of UNCLOS. I think that I have taken you all the way there, but I have not quite, if you like ...

PROFESSOR CRAWFORD: I am sorry, of UNCLOS or OSPAR?

MR BETHLEHEM: Of UNCLOS.

PROFESSOR CRAWFORD: Before you do that, is there any question of logical priority between the objections made by Dr Plender this morning, which require us, in effect, to second guess or to first guess the European Court of Justice, and the objections that you are making now. Obviously the objection in relation to OSPAR as such is the relationship between two treaties and would not present the same difficulty.

MR BETHLEHEM: I think as I started off my submission, I indicated that really my submissions were in parallel to the submissions made by Dr Plender. They do not cut across them. They would certainly support them in the sense that they provide an additional foundation. I suppose that there would be a question which goes to your earlier question to Dr Plender, and that is in respect to the competence de la competence issue and article 288(4). It is easier to see how that aspect would be engaged comfortably by reference to OSPAR. There is also the added dimension which is that, in respect of Ireland and the United Kingdom, European Community law in a sense operates rather differently because it is the over arching umbrella. I suppose that, if pressed, my response to you would be that you have to go to Dr Plender's EC point before you come to this, but, if for any reason Dr Plender's EC point is not persuasive, my proposition is that this is persuasive.

The point, as I have just suggested, that I really have taken you but have not finally put a full stop on, if I can put it in these terms, is whether this dispute is, in fact, a dispute concerning the interpretation and application of UNCLOS, because that is the triggering phrase in Article 281 and Article 282 of UNCLOS.

I think that our submissions, unsurprisingly, are rather straightforward on this matter. In so far as the present dispute engages both UNCLOS and the OSPAR Convention, it is a dispute concerning the interpretation and application of UNCLOS. The necessary corollary of the finding of the SBT Tribunal that UNCLOS was not segregated from and had not been ousted by the 1993 SBT Convention was that they were not two separate disputes, but rather a single dispute arising under both Conventions. Indeed, that is what the SBT Tribunal concluded. The extract from the SBT award is set out on page 18 of my speaking notes. If I may just read the point briefly.

"... the parties to this dispute - the real terms of which have been defined above - are the same parties grappling not with two separate disputes but with what in fact is a single dispute arising under both Conventions. To find that, in this case, there is a dispute actually arising under UNCLOS which is distinct from the dispute that arose under the 1993 SBT Convention would be artificial".

I simply pick up and adopt that conclusion for our purposes. In this case, the parties are the same, the factual issues in dispute are the same, the cause of action is the same. It is formulated slightly differently under UNCLOS than it would be under the OSPAR Convention, because the allegations necessarily track the language of the UNCLOS provisions. But for all intents and purposes, it is the

same dispute. Any other conclusion would be entirely artificial.

I think that I can simply for reasons of time skip over the following passages of my submission and come to what I presaged at the beginning of my submissions as being, perhaps, a rather innocuously phrased point, but one which is rather interesting and important. That is the availability of more appropriate procedures elsewhere, which would entail a binding decision.

Let me start off here simply by coming back to a point which the Attorney General, Lord Goldsmith, has made and which Dr Plender has made. That is that the United Kingdom here is objecting to jurisdiction and admissibility in this case. It is not doing so, however, for a moment to seek to avoid any airing of these issues before a Tribunal competent to render a binding decision. Quite to the contrary. IT has from the outset been open to Ireland to pursue allegations before an appropriate forum, notably the European Court of Justice or the OSPAR Convention. Indeed, Ireland has threatened publicly on occasion to initiate proceedings before the European Court of Justice and, in respect of one aspect that is also in issue in this case, it did commence proceedings under the OSPAR Convention. The award is pending in that case. The United Kingdom does not shrink from binding proceedings before the appropriate forum. It does not shrink from an airing of the issues of substance. It is not, however, the task of dispute settlement under section 2 of Part XV of UNCLOS to act as a magnet for the settlement of disputes tat are properly brought elsewhere.

There is an important point to follow here. It is not simply a point of formality that Ireland ought to have proceeded elsewhere but did not. There are important substantive repercussions from that. One of the substantive repercussions is one which you will already be alive to, because it has pervaded the proceedings so far, and that is the systemic issue of the relationship of UNCLOS dispute settlement to dispute settlement elsewhere.

There is, in my submission, an even more fundamental point which goes to the Tribunal's ability to decide the issues that are put before it with a necessary degree of authority and finality.

Mr President, Members of the Tribunal, you will understand that I mean no disrespect at all to this Tribunal when I say that this Tribunal is not in a position to determine definitively questions of internal EC law going to the division of competence between the Community and its Member States. There are other aspects of the non-UNCLOS dimension of this case that would also pose considerable difficulty for the Tribunal in this respect, because (a) they have not been properly pleaded out by Ireland or (b) that they are technical and ought to be left to the Tribunal constituted pursuant to the agreement under the framework of which these issues are being addressed or (c) the point is unresolved in the forum which is properly competent in the area, such that a decision of this Tribunal would run the risk of imposing clarity in a quite inappropriate fashion. I would like to illustrate all three of those propositions by reference to one example which runs through Ireland's case.

I have drawn your attention to the centrality of the Sintra Statement to Ireland's case. I drew attention to the express statement, one of a number, in paragraph 9.49 of Ireland's memorial where, referring to the Sintra statement Ireland says:

"It is a central part of Ireland's case that the decision to authorise the MOX plant [in 2001] and

to extend the life of the THORP plant is wholly inconsistent with the commitment undertaken by the United Kingdom just three years earlier [in the Sintra Statement]."

So Sintra is central. The United Kingdom has contended up to this point that the tribunal does not have jurisdiction to address Sintra. But for the purposes of this part of my submission assuming, arguendo, that the tribunal did have jurisdiction to address these matters, could it do so by reference to Ireland's case as pleaded. I would like to take you to the Sintra statement. I need only take you to those aspects of the statement that are set out in the speaking note, because I think the wonders of modern technology mean that photocopying manages to reduce the size of text and if you have a look at tab 4 it is difficult to read.

I will take you straight in to the relevant paragraphs. Radioactive substances is dealt with at heading 4 of the Sintra statement, and paragraph 2 says. The ministers "agree in addition, to prevent pollution of the maritime area from ionising radiation through progressive and substantial reductions of discharges, emissions and losses of radioactive substances, with the ultimate aim of concentrations in the environment near background values for naturally occurring radioactive substances and close to zero for artificial radioactive substances. .. ."

Then we come to paragraph 3 and this is really the paragraph that is the sharp edge of Ireland's allegation against the United Kingdom under Sintra. That reads as follows:

"We shall ensure that discharges, emissions and losses of radioactive substances **are reduced by the year 2020** to levels where the additional concentrations in the marine environment above historic levels, resulting from such discharges, emissions and losses, are close to zero and shall pay particular attention to the safety of workers in UK installations."

Apart from the reference to 2020 let me highlight two other references "additional concentrations in the marine environment above historic levels" - that is one element. "Resulting from such discharges, emissions and losses, are close to zero" is the other.

Then referring to paragraph 4 of the Sintra statement which indicates that the Commission will undertake the development of environmental quality criteria for the protection of the marine environment from adverse effects of radioactive substances and report on progress by 2003. This is the year 2003 and in fact almost as we speak there is an OSPAR meeting taking place. This all looks clear enough. There is a commitment to ensure that discharges of radioactive substances are reduced by 2020 to levels where the additional concentrations in the marine environment above historic levels, resulting from such discharges, emissions and losses, are close to zero.

What could be simpler than that? Unfortunately it is not quite so straightforward. First, as is evident from the face of the statement itself, an essential element of what I will for shorthand reasons simply refer to as the close to zero commitment, as an essential element of this commitment the OSPAR Commission was required to undertake the development of environmental quality criteria for the protection of the marine environment from adverse effects of radioactive substances and report on progress by 2003. It was required to report by this coming meeting. The meeting is taking place almost as we speak. The Commission is some way from developing the environmental quality criteria for the

protection of the marine environment.

In the following paragraphs, and I do not propose to --

SIR ARTHUR WATTS: I am sorry to interrupt you there, but I wonder whether you could clarify whether in your submission the Sintra statement is a document which gives rise to legal rights and obligations, whether because it is treaty or in some other way.

MR BETHLEHEM: I will try and do so, Sir Arthur. Let me take a step back and put a Sintra in context. It was adopted by Ministers at a meeting within the framework of the OSPAR Commission. It was characterised as a "Statement". If you have a look at the OSPAR Convention itself it talks about the decisions and recommendations, and this was characterised rather differently, it was characterised as a "Statement". It sets out a policy framework that the OSPAR members committed themselves to. This framework is being filled out by detailed action within the Commission and also within a number of specialised committees, and I propose to take you to some of the work of those committees in just a moment. The United Kingdom is fully committed to fulfilling the objectives of Sintra in good faith, and it has taken detailed steps to do so. I would simply go one stage further and say that there is debate about the status of Sintra. That debate is unresolved. I have here a rather full academic comment on the matter which says "in addition to the non-binding political declaration in the Sintra statement". So if I may I would simply leave it in those terms.

SIR ARTHUR WATTS: Thank you for your answer.

M,R BETHLEHEM: There has to be a moment of levity at the expense of counsel in every proceedings!

This all looks clear enough - I refer of course to the substance of what Sintra said rather than its status. It is not quite so straightforward, and as I was going to say the following parts of my speaking note draw attention to a number of stages of consideration within the framework of OSPAR which have been undertaken since 1998 to try and give a rather more specific content to the Sintra close to zero commitments. What the Commission was supposed to do by 2003. I do not propose to take you to those, I think it is set out fairly clearly in the speaking note and the documents are in the folder. I would simply say that the various steps that were envisaged in 1998 to imbue Sintra with more specific content are still unfolding and that the OSPAR Commission really still has to report definitively on it and perhaps that will elucidate a little on my response a moment ago.

There are two small but important elements which I have not yet touched upon in respect of Sintra. The first one is the temporal element. The focus of the Sintra statement is 2020. For some reason it seems to come naturally to say that Ireland with perfect vision predicts a breach and seeks to secure its redress preemptively. 2020 just seems to lend itself to that. Within the scheme of international dispute settlement, and I mean no disrespect at all to my friends on the other side of the room, this must surely qualify as one of the most audacious allegations ever to surface. The prediction of a breach that will take place at some point in the future towards 2020.

There is another element of uncertainty which is rather more complex. It is this other element that I have been leading up to, going to the point of whether the Annex VII tribunal in this case can actually take a decision on the matter. The operative paragraph of Sintra, paragraph 3, provides:

"We shall ensure that discharges, emissions and losses of radioactive substances are reduced by the year 2020 to levels where the additional concentrations in the marine environment above historic levels, resulting from such discharges, emissions and losses, are close to zero."

Two significant points of uncertainty are apparent with regard to this text, both of which are central to any assessment of the United Kingdom's obligations under Sintra if you were come to address that. That is what is meant by the term "historic levels"? And, what is meant by the term "close to zero"?

These elements have been the subject of consideration discussion within OSPAR, within the OSPAR radioactive substances committee and within other OSPAR committees. As regards "historic levels", there are a number of proposed interpretations and I highlight some of them:

- Historical levels may be measured levels in a particular year or years in the recent past;
- Or elements of measured levels at any time calculated to result from the legacy of past discharges rather than from ongoing inputs.

There are a range of definitions and I would not volunteer to try and lift the veil on these at the moment.

Then as regards close to zero again there are a range of proposed interpretations:

- An additional concentration that cannot be distinguished statistically from a historic level;
- less than a certain fraction of the historic levels of concentrations for each particular compartment of the marine environment,

and so on.

I would like again to reinforce this point to take you to a document at tab 9 of the bundle. The document at tab 9 of the bundle is the summary record of the meeting of the OSPAR Radioactive Substances Committee in January 2001. I would like to take you to page 8 of that record, if I may.

Paragraph 3.10 in that Summary Record: In the discussion of a sub-group and a subsequent discussion the following views were expressed. “Historical levels”, and then we see a number of definitions of historic levels. “Close to zero”. And a number of definitions of close to zero.

I would like to take you to the paragraph indented under (e): and this is in the context of the discussion of the meaning of close to zero. The delegation of Ireland expressed the view that close to zero should be defined as being less than a certain fraction of the historic levels of concentrations for each particular compartment of the marine environment. After extensive discussions the delegations of Belgium, France, Spain, Germany, the United Kingdom strongly expressed the opposition of the contracting parties against the view of Ireland. And then there is some further discussion relating to the definitions.

Mr President, Members of the Tribunal, I suppose that I may be forgiven for making the observation that Ireland in these proceedings, in a rather unparticularised form, because we do not see anywhere in its pleadings its preferred interpretation of the detail of Sintra, but Ireland in these proceedings is advancing what appears on the face of the record to be a minority view on the meaning of one critical aspect of Sintra, in the hope - and do forgive me if this is an inappropriate way of putting it -

of enlisting the support of this tribunal and getting its implamatur.

Just to touch a little further on this point, as is evident from my following paragraphs, 71 and following, there has been a good deal of discussion in all of these elements. The United Kingdom has in fact advanced or has submitted a rather detailed paper on historic levels and close to zero on the definitions of historic levels and close to zero. There has been engagement at the sharpest edge within the technical OSPAR committees as to what the meaning of Sintra is. We have not seen these elements pleaded out in the memorial. Ireland says virtually nothing about what the Sintra commitments actually entail. Nowhere does it develop a case on the interpretation of Sintra. Yet the allegation is that the United Kingdom is in breach of Sintra and that allegation is everywhere in the pleadings. Mr President, Members of the tribunal, the point here is that Ireland has not even begun to plead out its case.

Assuming arguendo that disputes over the interpretation or application of the OSPAR convention and the Sintra statement are justiciable before this tribunal, and I put forward submissions that they are not, but assuming arguendo that they are, the question is how would this Tribunal decide the point. Could it decide the point? In the United Kingdom's submission, even if the Tribunal had jurisdiction to decide these issues, it would be faced with insurmountable obstacles doing so. These aspects of Ireland's case have not been properly pleaded out, or even pleaded out at all. The United Kingdom has had no case to answer on these points. The Tribunal can have no basis for reaching a decision on them. These issues are also both technical and complex and are currently the subject of discussion in expert fora within OSPAR. If they are to be addressed in an adjudicative context, in our submission it should be in the forum that is otherwise competent in these matters. In these circumstances, any decision of this Tribunal may well bring a modicum of clarity to the issue but, with all due deference to the distinguished composition of this Tribunal, such clarity would be premature, may be short-lived and, given the unresolved nature of these issues in an OSPAR context, would be quite inappropriate.

Mr President, members of the Tribunal, I am going to skip the temptation to summarise my submissions on jurisdictions and admissibility and return to applicable law. As I indicated at the outset I think that this aspect of my pleading can go relatively quickly, but I wonder whether this would be an appropriate point to break?

THE PRESIDENT: We will have a break for 15 minutes and then resume.

(Short adjournment)

MR BETHLEHEM: Mr President and Members of the Tribunal, I completed jurisdiction and admissibility just before the break and the Registrar asked for an indication of time, as to how long I am likely to go on for. Without wishing to be tied down to the moment, I do not anticipate being terribly long on questions of applicable law, but there are one or two points that I would like to address. There are a number of general heads in my speaking note. I have identified four issues to address. The relationship between jurisdiction and questions of application law; the treatment of other rules of international law in UNCLOS; the wide appreciation of these issues; and the meaning of article 293, paragraph 1 of UNCLOS. In fact, I propose really only to touch upon three of those and even then I will be rather brief. On the topic of the wide appreciation of these issues, you will see a fairly substantial element in my

written note. I will simply make one or two observations on what is otherwise some pages of argument.

On the question of the relationship between jurisdiction and applicable law, and obviously this brings me squarely to Professor Lowe's argument yesterday, jurisdiction and applicable law are, of course, distinct concepts. I can give Professor Lowe that much. The link between them is, however, immediately apparent from Ireland's pleadings. Both ultimately describe or circumscribe the competence of a tribunal to act in any given case. Given that these issues are invariably addressed in the context of treaties where there are expressed compromissory clauses and applicable law clauses, it is very difficult to generalise from one treaty to a system, although I will at least attempt to make one broad general proposition. That is that a State cannot rely on a wide conception of applicable law as a means of enlarging jurisdiction in the face of an express limitation on the latter. I know that on the other side of the room the immediate cry is, "Well, that is not what we are trying to do. We are simply urging that other instruments are looked at for purposes of interpretation", but, as I have already suggested, I think that that is an erroneous submission. I would simply very briefly just like to look at this question of whether one can rely on applicable law to somehow enlarge the jurisdiction of a tribunal. In would take you to two cases very briefly. The first one is the Fisheries Jurisdiction case between Spain and Canada that was heard just down the hall in the Peace Palace a number of years ago. I do not propose to take you to the judgment of the court itself, but I will refer you in just a moment to the separate opinion of Judge Koroma. I will simply read out into the record the relevant parts. To put this in context, the case concerned the jurisdiction of the International Court of Justice in respect of a dispute between Spain and Canada in consequence of the seizure by Canadian vessels of a Spanish fishing vessel, the ESTAI. Spain objected that Canada had exceeded its jurisdiction and was in breach of international law and initiated proceedings relying for the purposes of jurisdiction under Canada's optional clause declaration. Canada objected to jurisdiction on grounds that the dispute was excluded from the court's jurisdiction by an express clause in its optional clause declaration.

The interesting element of the case for present purposes is that Spain responded to Canada's objection by characterising the dispute, inter alia, as one relating to Canada's lack of entitlement to exercise jurisdiction on the high seas rather than a dispute which came within the terms of Canada's reservation. The case before the court was thus in large part pleaded out on the question of the nature of the dispute between the parties and whether it came within Canada's optional clause declaration and reservation. Spain essentially developed an argument that sought to circumvent the jurisdictional limitation in the optional clause declaration by reference to wider principles of applicable law to general international law.

The court rejected the contention that by reference to rules of international law more generally its jurisdiction could be enlarged beyond the expressed terms of the optional clause declaration. Interestingly, for present purposes, Judge Koroma entered a separate opinion and it is that that I would like simply to take you to. The relevant paragraph is paragraph 4. His separate opinion is very short. It is three pages. The relevant paragraph is paragraph 4. I introduce that paragraph simply by reading the first couple of sentences of his opening paragraph. Judge Koroma says, "For Spain the core of this

dispute is whether Canada is entitled under international law to exercise is jurisdiction over foreign vessels in the high seas. This Spain claims moves the dispute away from the domain of reservations made by Canada, when it accepted the compulsory jurisdiction of the court into the area of a major principle of international law."

Then at paragraph 4, Judge Koroma says:

"On the basis of these basic principles [of jurisdiction] I reach the conclusion that since Canada had excluded from the jurisdiction of the court disputes arising out of or concerning conservation and management measures, the question of whether the court is entitled to exercise its jurisdiction must depend on the subject matter and not on the applicable law or the rules purported to be violated. In other words, once it is established that the dispute relates to the subject matter defined or excluded in the reservation, then the dispute is precluded from the jurisdiction of the court, whatever the scope of the rules which have purportedly been violated". There is some further discussion.

The analogy here is, of course, not perfect. The case there was concerned with the interpretation of an optional clause reservation and that is not really a point that is in issue here. The underlying principle is, however, sound. The submission that we make is that it is not permissible to rely on a broad conception of applicable law to expand or enlarge the jurisdictional basis of the Tribunal. In essence, that is what we are contending Ireland is trying to do. The backdrop to all this, of course, are the myriad of provisions that I drew to your attention at the start of my submissions, in which Ireland explicitly draws attention to other rules of international law and alleges a breach.

The same point emerges from a different perspective from the Nicaragua case, Nicaragua against the United States. I do not propose to take you to that judgment. I think the point in this case is so well known that, I hope, Mr President and Members of the Tribunal, that you will simply agree that this can be dealt with as a matter of judicial notice. In that case, Nicaragua instituted proceedings against the United States, citing various allegations concerning the use of force, contrary to the United Nations Charter. It also raised a dispute under a bilateral treaty of friendship, commerce and navigation, although, for present purposes, this element is not material. In respect of its main claims, Nicaragua sought to found jurisdiction on the optional clause declarations of the parties.

The United States optional clause declaration contained, as is very well known, a multilateral treaty reservation. The Court ultimately found itself precluded from examining the UN Charter issues on the grounds that they were precluded by the reservation. The court went on to consider that it had jurisdiction under the optional clause but only by reference to customary international law.

The point is that the court did not say, once jurisdiction was established, "Well, jurisdiction is now established, ah well, we can now turn to applicable law, Article 38 of the statute of the International Court of Justice and bring in the wider corpus of international law". It could not have done so. There would have been no question of such an approach. The jurisdiction of the court there extended to customary international law and to customary international law alone. That circumscribed the competence of the court to deal with the issue on the merits.

In our submission, really what Ireland is proposing to do is to try to reverse this analysis by

seeking to incorporate into UNCLOS and have applied other rules of international law. I do not propose to try to summarise or restate Professor Lowe's argument. I am sure that it is all still very, very fresh in our minds. Ireland, in our submission, is not saying simply that the Tribunal must apply secondary rules of international law relevant to interpretation of treaties or the law on State responsibility. It is not saying "Here is a term in UNCLOS which is also found in another international agreement, let's see whether the Tribunal can get any guidance". In fact, the terms that it is looking for in other agreements are rather different from the terms that it is seeking to interpret in an UNCLOS context. What Ireland is saying, in our submission, to give an example, is, "Look, Members of the Tribunal, at article 206 of UNCLOS. This is the foundation of our case on environmental impact assessment. It is a case under UNCLOS". They are citing article 206. "The fact that article 206 makes no reference at all to other rules of international law, such as those in the Espoo Convention or in EC Directive 85/337, is of no significance. The article, in truth" so goes Ireland's argument, "is simply a conduit for the application of all other rules of international law relevant to environmental impact assessment and this follows from article 293 of UNCLOS." In our submission, that does not work.

Another illustration. Ireland alleges a breach of article 194 of UNCLOS concerning pollution. As I have already touched upon today, that requires States to use best practicable means at their disposal to prevent, reduce and control pollution. Best practicable means is a term of art. Ireland does not define it. Rather having got through the jurisdictional door by reference to article 194 it skips rather lightly to the OSPAR Convention and it says that best practicable means, drawing on OSPAR, in fact, means something entirely different. “You can ignore the words in UNCLOS”, it is effectively saying. “The standard is really best available techniques or best environmental practices”. There are other examples and certainly one given in my speaking note.

In my submission, this is Ireland's case. It is trying to use applicable law as a device for enlarging what it could not do through jurisdiction.

The question then really begins to focus on what, in fact, is the meaning of article 293. I am going to come back explicitly to deal with article 293 in just a moment, but I would like to do it via another route which we think is rather important. That is the route of the context in which it is found, the wider context of UNCLOS, because we do not for a moment seek to denude article 293 of any content. On the contrary, we consider that article 293 is terribly important. But we do consider that it must be interpreted in the light of the wider treatment of rules of international law in the convention as a whole.

I turn very briefly to the point. The point is simply this. If one looks through UNCLOS, there are references to rules of international law, international standards and international organisations, throughout the convention, throughout the substantive provisions of the convention. They take a variety of forms. I do not propose for a minute that the categorisation that I am about to propose is in any way scientific, but it is just an attempt on our part to try to understand the way in which international law is dealt with in UNCLOS.

There are substantive provisions of UNCLOS which refer to international law in passing. There are general references. There are provisions which urge or require the elaboration of international rules.

There are references that contemplate the application of incidental or secondary rules of international law. In fact, there are, for example, specific provisions which relate to State responsibility. There are incidental provisions which talk about immunities. There is not a code on immunities in UNCLOS, so one has to look more generally to international law. There are provisions which require the application of specific rules of international law - require the application -notably, for example, when it comes to maritime delimitation. Articles 74 and 83 of the convention specifically require the application of other international law rules relating to maritime delimitation. Paragraph 4 of each of those articles, in fact, specifically requires the application of other international agreements if they exist when it comes to delimitation of the exclusive economic zone or the continental shelf.

Interestingly, there are also provisions which would be construed as restricting the application of non-UNCLOS rules of international law. Then, of course, there are some provisions, as Professor Lowe has referred to, which contain a renvoi to rules of international law.

Finally, there are different references to international organisations throughout the treaty, some of which are addressed in terms of the "competence international organisation", talking in terms of a definite article. The reference there in common understanding is a reference to the International Maritime Organisation, given its special status. Elsewhere there are simply references to competent international organisations more generally.

You will see in my speaking note, in fact, seven sub headings giving examples of all of these various kinds of usage of international law. I do not propose to take you to them, largely for reasons of time, but because, really, I think the point is sufficiently made. Really, the only point for our purposes is that there is no uniformity of approach in UNCLOS towards international rules and standards or the corporation into and application of such rules within the framework of UNCLOS. The approach varies. In some cases there are references; in other cases there are not.

Two propositions emerge from this review. First, the substantive articles of UNCLOS themselves address the relationship between UNCLOS and other relevant rules of international law. Where the drafters of the convention contemplated the incorporation of non-UNCLOS rules of international law into the convention and their application in the convention, they said so explicitly. Articles 74 and 83, dealing with maritime delimitation, are rather good examples of that.

There are express terms which address the matter.

The second proposition to emerge from this is that by reference to the substantive provisions of the convention, there is no uniformity of approach. Article 293 addresses the competence of the Tribunal in respect of applicable law in general. In our submission, article 293 must be read in the context of the other provisions, not only of part XV, the relationship between applicable law and jurisdiction, but also in the light of the substantive provisions that are in issue in this case.

I have set out in my speaking note some references to a rather substantial document produced by the International Maritime Organisation which addresses the implication of UNCLOS for the IMO. In fact, although this is not in the folders, we will make that available and I have already provided a copy to Professor Lowe. I do not again propose to take you to this, but simply to make the point that in our

view the analysis of the International Maritime Organisation from the very special privileged position that the IMO finds itself in as regards UNCLOS is really consistent with the view that I am expressing more generally, and it emerges in the context of the IMO's discussion of dispute settlement under UNCLOS and the application of UNCLOS dispute settlement to IMO conventions. It stands quite firmly on the language of article 288(1) and 288(2) dealing with jurisdiction. IMO conventions or non-UNCLOS conventions may be referred to an UNCLOS tribunal if the parties so agree. Even in the context of the International Maritime Organisation and its special and privileged position, our contention is that there is an appreciation that those conventions are only, if you like, justiciable, in an UNCLOS context, if they are properly referred to an UNCLOS tribunal in terms of its jurisdiction.

There is also a reference to an article by Augustin Blanco-Bazan from the IMO which to some extent actually provides some further gloss on this. Once again, I do not propose to take you to it.

I move then very, very briefly in summary form to the next topic, which is the wider appreciation of these issues. I simply do so because there is a part of Ireland's pleading, notably in its reply, where, largely in the footnotes, one sees references to WTO articles and cases. One is particularly interesting and it is an article on the subject of the World Trade Organisation by Professor Joost Pauwelyn, which appeared in the July 2001 edition of the American Journal of International Law. For convenience, I have provided a copy at tab 13 of your folders. Ireland cites the article in a footnote in its reply to reflect that "... the fact that the substantive jurisdiction of WTO panels is limited to claims under WTO covered agreements does not mean that the applicable law available to a WTO panel is necessarily limited to WTO covered agreements".

That is all very well - and I hope I will be forgiven for putting it in these terms - but the reader of Ireland's reply, familiar with the Pauwelyn article, might be forgiven for thinking that the author of the reply had failed to read all the way through the article. Because that is not really what the article says. Professor Pauwelyn addresses the jurisdiction of the WOT panels and he says:

" ... no claims of violation of rules of international law other than those set out in WTO covered agreements can be brought before WTO panel. Similarly, a WTO panel does not have jurisdiction to consider claims under WTO rules other than those included in WTO covered agreements".

Then he goes on to say, "Nor does a WTO panel have jurisdiction to rule on claims of violation of non-WTO rules, such as environmental human rights conventions or general rules of international law."

He then goes on in some other detailed discussion. It is a very commendable article, a very interesting article on the subject. He then goes on to talk about applicable law. He accepts a WTO panel may, in fact, address non-WTO issues of international law. But what is the context in which he accepts that or in which this has happened? The issues, in fact, are set out at page 559 of the article - and I have extracted them at paragraph 115 of my note - and what he says is that the applicable law before a WTO panel is delimited by four factors. The first factor is that he says that only legal claims under WTO covered agreements may be brought before a WTO panel. He then goes on to indicate that applicable law before a WTO panel or non-WTO law before a WTO panel may be invoked by reference to a

defence invoked by the defending party; issues of, if I can put it in these terms, relevant rules or incidental secondary rules, and then there are wider issues of international law which relate to conflict rules in the WTO treaty, general international law and other non-WTO agreements.

As one goes through the rest of the article, we really see that the analysis, which is a very comprehensive analysis indeed, accepts that wider issues of international law can be relied upon in a WTO context, when they are invoked by a Defendant, because, essentially, in most circumstances the Defendant is setting up a plea of a conflict of obligation (and that is an important issue for a Tribunal to consider); they can be considered when they arise incidentally because they are secondary rules or rules of interpretation; and they can be considered and have been addressed in the context of rules of reconciliation where there are conflicting provisions. But time and again he comes back to the point that a WTO panel is not competent to consider a claim which is based on non-WTO rules of law, and that is really the point with which we are faced here.

I would simply make two more observations on the Pauwelyn article and then move on to the final part of my submission. The first one is set out at paragraph 113 of my speaking note and it addresses the issue of jurisdiction. I come back to it because Professor Pauwelyn rather intriguingly grapples with the difficulty with which this Tribunal is faced. He considers there the jurisdiction of a WTO panel in respect of a dispute mainly concerning non-WTO matters, and he postulates two possible approaches. He says, first, notwithstanding the wider non-WTO dimension of the case, he suggests that the panel may decide the WTO portion of the claim, and the language that he uses there is the language of "salami slicing"; that the panel can effectively try and slice up the claim between the WTO and the non-WTO issues.

He then goes on to postulate a second proposal, and he says in extreme cases, it might be said that the dispute "no longer genuinely concerns WTO claims (even though such claims could technically be made) but, rather, other rules of international law that the WTO claims are inextricably linked to and that these WTO claims are dependent on to be decided".

In these extreme claims he concludes: "In such extreme cases it could then be submitted that the history, past procedures, and substantive content of the dispute indicates that the real issue of the case (ie, the genuine object of the claim) is related to non-WTO claims as to which a WTO panel does not have jurisdiction. On these grounds, the WTO panel could either decide that it does not have substantive jurisdiction over the dispute or find that it does have jurisdiction but does not consider it appropriate to exercise this jurisdiction." I simply leave that point in the ether.

The final point on this I would make and it is set out in paragraph 121 of my speaking note, and it is a point that is conveniently made by reference to the Pauwelyn article, but a point I would otherwise make by reference to a general proposition, and that is that there is also the inclination by our friends on the other side of the room to try and use article 31.3 of the Vienna Convention on the Law of Treaties to draw in all other rules of international law through the medium of interpretation, and of course it is rather well known that article 31.3 has three subparts in respect of interpretation which permit the taking into account of subsequent agreements, subsequent practice and other relevant rules of international law.

The important aspect there which Professor Pauwelyn makes in relation to the WTO agreement is that those subparts refer to subsequent agreements or subsequent practice etc by reference to the parties, and that the reference to the parties are the parties to the agreement as a whole rather than the parties to a dispute. The point here in our submission is rather important and it is again a point that has been made throughout our written submissions in response to Ireland's proposal to rely on OSPAR provisions for purposes of interpreting UNCLOS clauses, and that is that the cope of UNCLOS provisions cannot evolve through a subsequent agreement adopted at a regional level - and in this case in respect of the OSPAR Convention. That is not a sound interpretative methodology.

Mr President, Members of the Tribunal, I come now to the final part of my submissions and I will be no longer than another five or ten minutes, and this is the meaning of article 293.

I spent a good deal of time developing my submissions on this question, and the starting point in the understanding of the interpretation of article 293 is that there is no uniform approach to the incorporation or the application of wider rules of wider rules of international law in an UNCLOS context. It essentially turns on the text of the substantive clauses in issue.

I have also made the point that applicable law clauses cannot be relied upon to enlarge the jurisdiction of a court or tribunal. Against this background, the question is what does article 293(1) mean. Ireland has set out its stall on the matter. In our view it is unsustainable. What is our view? Our view is as follows.

First, pursuant to article 288(2), which is the enlarged jurisdictional clause, the jurisdiction of an UNCLOS court or tribunal may extend to disputes concerning the interpretation or application of non-UNCLOS international agreements, where they are referred to an UNCLOS tribunal in accordance with the terms of the agreement. There is therefore the scope for an UNCLOS tribunal to have to adjudicate on issues which go beyond UNCLOS by agreement. That is found in article 288 paragraph 2. Some of the IMO treaties may be relevant in those circumstances where the dispute is referred to UNCLOS.

That is one element of what may be termed an enlarged jurisdiction of an UNCLOS tribunal which would require it to take into account wider rules of international law.

The second proposition is that as I have shown there are a number of substantive UNCLOS provisions that themselves require the application of wider rules of international law, such as in respect of maritime delimitation.

As can be seen, whether by operation of the substantive clauses of UNCLOS or by operation of Article 288(2) on jurisdiction there will be circumstances in which a court or tribunal will be required to apply non-UNCLOS rules of international law. In the first instance therefore in our submission article 293(1) ensures that there is symmetry between the jurisdiction of the tribunal and the law that it is required to apply.

A second aspect of article 293(1) is that it avoids what may otherwise be an unnecessary and damaging debate, and one which we have seen in the context of the WTO, of quite what the role of incidental and secondary rules of international law is. By reference to article 293(1) - and this is a point

we have made throughout our pleadings - we accept that incidental and secondary rules of interpretation may betaken into account. There we have our interpretation of Article 293.

My concluding observation really is this. When we look at Ireland's allegations in detail we go through the UNCLOS Convention and we try and tie down Ireland's allegations precisely. We see a number of UNCLOS articles referred to. In fact there are 12 articles which are referred to throughout the pleadings and in our contention there are allegations of breach only in respect of six of them. But however one looks at Ireland's pleadings, whichever articles are cited, none of the substantive provisions relied upon by Ireland require the application of the rules of international law. There are two, to give Professor Lowe his point, which involve a renvoi to rules of international law, but that really takes us to the text of the article itself, and there is no suggestion in those articles, in article 213 and in article 222, there is no suggestion in those articles at all, that this wider corpus of international law is simply brought into UNCLOS and applied and becomes justiciable before this tribunal and which forms a basis on which you can make it bring a finding of breach.

Mr President, Members of the Tribunal, that really brings my submissions on these points to an end. I have tried to keep them within a reasonable time so that we can move back to the timetable that was envisaged. I do thank you very much for your patience in what was a rather long and perhaps rather quickly spoken presentation.

SIR ARTHUR WATTS: Mr Bethlehem, earlier today I asked Dr Plender a question about European Community law and its relation to article 293(1) and he kindly said that you would be providing the answer, but I do not think I have yet heard it. Perhaps I was not paying sufficient attention. Let me repeat the particular part of the question that I am interested in. Both parties have addressed the tribunal with considerable arguments about what European Community law says about this, that or the other, and in particular what it says about questions of community competence. What interests me is the extent to which, if at all, this Tribunal is competent by virtue of the reference to international law in article 293(1) to apply those rules of community law which the parties have explained so clearly.

MR BETHLEHEM: Forgive me for not coming back to that directly. I thought it might have emerged between the lines. I would put it in these terms. The first point is that the Tribunal obviously is competent to look at European Community law for purposes of determining your own competence. It is the 288(4) point, and it also is material when it comes to Articles 281 and 282. So in the first instance I think there is no question that for purposes of jurisdiction you can have regard to these issues. In respect of article 293, paragraph 1, I think the principle of our argument is that European Community law is no different from other rules of international law for purposes of the operation of article 293. It is not in a specially privileged position which allows you to somehow interpret and apply those rules in circumstances in which you could not where those rules emanate from the OSPAR Convention. So I would put European Community rules on a par with rules of other Conventions.

But that having been said I would simply return to the answer that Dr Plender gave to you earlier today, and that is that it is no part of the United Kingdom's case to say that where there is a provision in UNCLOS which finds feature in some other system, whether OSPAR or European

Community law or Japanese law or South African law or any other law that you cannot look to that law for purposes of analogy and elucidation. If "best practicable means" is found there and is found in European Community law we would say it is perfectly sensible to have a look at European Community law for purposes of seeing if there is anything you can draw from it. Where we would draw the line is on the proposition which we think is the way that Ireland has pleaded its case, and that is that you can look to European Community law for changing the nature of the obligation under UNCLOS, or OSPAR or anything else.

SIR ARTHUR WATTS; Thank you very much.

THE PRESIDENT: The situation now is as agreed; Ireland has the opportunity to respond, and after that we will give some time to the United Kingdom by way of rejoinder. But my understanding is that Ireland is still able at least in part to respond this evening. Is that correct?

MR SREENAN: Yes, sir. Mr President, gentlemen, I propose to very briefly respond to part of Dr Plender's argument. In the course of the argument by my friends Dr Plender and Mr Bethlehem the case being made by Ireland in terms of its substantive case has received a certain characterisation with which we do not agree and we say that it has been misunderstood by the United Kingdom, and clearly we need to reply to that, although not extensively. We would note that the Tribunal would wish to hear our response to that.

What I propose to do is reply briefly to Dr Plender's presentation with the exception of paragraph 71 to 88 which cover parts of the substance of our case, and then I will ask Professor Sands very briefly over the space of some ten minutes to address paragraphs 71 to 75 and 84 to 88 of that submission, and then Professor Lowe will also briefly respond to Mr Bethlehem, and in the course of that will respond to the paragraphs 76 to 83 of Dr Plender's submissions. Between the three of us we do not propose to take a significant period of time in order to reply to the United Kingdom.

Can I start by perhaps briefly identifying what it appears to me that Dr Plender has not done in the course of his presentation. Firstly he has not asked for an adjournment of this case. He has not asked that the European Commission be invited to express a view, but has left it to the tribunal to decide whether or not it would extend the invitation. In my submission he has not established that what we are dealing within terms of Community law are common rules as distinct from Community measures. He has identified various measures or rules of Community law, but in my submission he has not established how those rules would be affected by the provisions of UNCLOS.

He has not established in my submission that the rules to which he made reference are not rules which establish minimum standards, indeed he accepted that the majority of the rules were rules which established minimum standards. The exception if I recollect correctly was directive 90/313 which he did not accept established minimum standards, but the tribunal will remember that directive 90/313 which is referred to at tab 18 of our judges' book was adopted under article 130S of the treaty which is now article 175, and accordingly pursuant to article 176 the member states have the competence to introduce more stringent measures.

One then looks at what Dr Plender has done. Once again he has submitted the question of

jurisdiction to this tribunal for its decision. Once again he has affirmed the power of the European Court of Justice to determine issues where it has exclusive competence, where the Community has exclusive competence. He has agreed that if common rules are unaffected then the Community does not have exclusive competence.

He has agreed that if rules set minimum standards then they are not affected. he accepts that to the extent that the member states have competence it has not been transferred to the Community, and indeed it is clear from the declaration that the transfer takes place only unexceptional circumstances where common rules are affected and then not where these are minimum rules. Indeed he went further and said that for the European Court to have jurisdiction to interpret the whole of a mixed agreement is to extreme as to be untenable and I would invite the tribunal to bear that observation in mind when it comes to consider another document that we dealt within an earlier session.

PROF CRAWFORD: On that point assume that that extreme claim was made, and was in some context submitted to the European Court of Justice, it is not really open to the two parties and to counsel as it were to concede that it is incorrect, is it?

MR SREENAN: Absolutely not.

PROF CRAWFORD: It is either correct or not as a matter of European law.

MR SREENAN: Absolutely.

PROF CRAWFORD: You might both think it is extreme but the day after the judgment what you think will be irrelevant, if I may say so with great respect.

MR SREENAN: Absolutely, and I have no difficulty in accepting that proposition and it would not be the first time that I or I am sure Dr Plender have been surprised by a judgment, but in so far as the submissions before this tribunal are concerned certainly counsel on both sides are at least of one mind on that particular argument.

PROF HAFNER: You have put some emphasis on the meaning of common rules. Can you please explain to me what do you mean by common rules, taking particularly into account the statement of the European Court in the AETR case where it says "common rules irrespective of their form".

MR SREENAN: I think that the Tribunal will get some assistance on the meaning of "common rules" from some of the other cases to which I intend to briefly refer, but, in my submission, common rules are a state of legislation within a particular field of the community which is less than a common policy, which is established by the treaty, but, nevertheless, means that Community legislation throughout that field is so harmonised, so uniform, that one can say that there are no common rules of the Community in that particular field, but, in the absence of harmonisation, which is something that would apply to many fields of Community activity, where the law would not be harmonised throughout the Community, when then does not have common rules, one simply has a number of different measures, which, nevertheless, do not reach the standard of common rules.

PROFESSOR HAFNER: That means that, in your view, secondary legislation of the European Community might amount to a common rule, but not necessarily?

MR SREENAN: Yes. If I could move very briefly from there so as not to delay on anything, and, perhaps,

address an issue which is relevant to Professor Hafner's question, namely what does affecting common rules mean? The most useful case, in my submission, that answers that question is the ILO case. That convention was described in paragraph 65 of Dr Plender's submission as "where the court was speaking of dose limits for chemicals". Now, it is important for this Tribunal to realise, and I am just handing to the Tribunal a copy of the ILO convention 170 - that ILO Convention 170 was not a convention that was setting dose limits for chemicals. It was quite an extensive convention, as the members of the Tribunal will see, which dealt with matters such as the right to information, the assessment of risk, the power to prohibit or restrict the use of certain hazardous chemicals, the labelling of hazardous chemicals, a large range of different provisions, and, notwithstanding the breadth of ILO Convention 170, the European Court held that Community common rules were not affected. If I could just go to the judgment, which is in my friends' bundle of authorities, and indeed in mine as well, but it might be more convenient to refer today to my friends' book, at tab 12. In my book it is in the book of authorities rather than in the judge's book. It can be found on tab 12 of the book of authorities. If I could refer very briefly then to the judgment, starting at paragraph 16, where it says, "Under Article 118A of the treaty, Member States are required to pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers and to set as their objective harmonisation of conditions in this area, while maintaining improvements made. In order to help achieve this objective, the Council has the power to adopt minimum requirements by means of directives. It follows from article 118A(3) that the provisions adopted pursuant to that article are not to prevent any Member State from maintaining or introducing more stringent measures for the protection of working conditions compatible with the treaty. The Community thus enjoys an internal legislative competence in the area of social policy. Consequently convention number 170, whose subject matter coincides moreover with that of several directives adopted under article 118A falls within the Community's area of competence. For the purposes of determining whether this competence is exclusive in nature it should be pointed out that the provisions of convention number 170 are not of such a kind as to affect rules adopted pursuant to article 118A. If, on the one hand, the Community decided to adopt rules which are less stringent than those set out in the ILO convention, Member States may, in accordance with article 118A(3) adopt more stringent measures for the protection of working conditions or apply, for that purpose, provisions of the relevant ILO convention. If, on the other hand, the Community decides to adopt more stringent measures than those provided for under an ILO convention, there is nothing to prevent the full application of Community law by the Member States under article 19(8) of the ILO constitution, which allows Members to adopt more stringent measures than those provided for in the conventions or in recommendations adopted by that organisation".

It then goes on to refer to an argument by the Commission. "The Commission notes, however, that it is sometimes difficult to determine whether a specific measure was more favourable to workers than another. Thus, in order to avoid being in breach of the provisions of an ILO convention, Member States may be tempted not to adopt provisions better suited to the social and technological conditions which are specific to the Community. The Commission, therefore, takes the view that, in so far as this

attitude risks impairing the development of community law, the Community itself ought to have exclusive competence to conclude convention number 170. That argument cannot be accepted. Difficulties such as those referred to by the Commission, which might arise for the legislative function of the Community, cannot constitute the basis for exclusive Community competence. Nor for the same reason can exclusive competence be founded on the Community provisions adopted on the basis of article 100 of the treaty, such as, in particular, Council Directive 81/1107 of the EC on the protection of workers from the risks related to exposure to chemical, physical and biological agents at work and individual directives adopted pursuant to article 8 of directive 80/1107, all of which lay down minimum requirements."

Those paragraphs are of core importance in my submission on the analysis of the question of what affects the Community or what affects common rules, because there the Community was saying, notwithstanding the fact that both the treaty and subordinate legislation within the European Community dealt with the same area, approximately, protection of workers from chemical hazards. Because of the fact that minimum standards were set down by the Community rules, they were not affected by this very extensive convention, ILO convention 170, dealing, as it did, with the provision of information, assessment - all the sort of things that we are concerned with here. In so far as it might be suggested that merely because a provision is harmonising that it gives exclusive competence, the court puts an end to that suggestion, because the Tribunal will be aware that article 100 of the treaty was the article under which laws were approximated or harmonised and it is quite common nowadays in the Community for harmonisation to take place by way of minimum standards. What the court is saying there in paragraph 21 is that exclusive competence cannot be founded on the basis of provisions adopted on the basis of article 100, if they lay down minimum requirements. That is quite inconsistent with any suggestion that, if the Community lays down minimum requirements in a piece of legislation, that it has exclusive competence up to the minimum level, and that somehow there is some type of competence that then kicks in for the Member States above that minimum level. Because what the court is saying here is that, if there is a minimum level, you have to look at whether or not these are affected and these rules which set down minimum standards in the Community are not affected by these extensive obligations which clearly also involve the Member States obligations under Community law up to the minimum standard in Community law. What the court was saying was that those obligations can exist harmoniously side by side, both can be honoured by the parties. Accordingly, such rules, in so far as they are common rules, are not affect.

THE PRESIDENT: In light of what you have said, if there were a Community rule setting the minimum standard and if a State Party then accepts a convention or an agreement which sets a higher standard, you are saying that, in that situation, the Community's minimum standards are not affected?

MR SREENAN: Yes.

THE PRESIDENT: Does it mean that, if the State Party fails to fulfil the obligations of both the minimum standards and the EC rule, and the standard is higher at the international level, then the EC will not be able to call the Member to account for failing to fulfil the minimum standards?

MR SREENAN: No, it does not. The EC is able to hold the Member to account for failing to observe the minimum standard because the Member State has an obligation under the treaty to comply with the Community measure. That says nothing about competence, it is simply an obligation of the Member State to comply with the law. But, in so far as the Member State, in exercise of its external competence, incurs or assumes a higher obligation or an obligation to a higher standard in international law, pursuant to an international agreement, if it breaches both the minimum standard and, by definition, the higher standard under international law, then it is liable to consequences both in the Community for breaching the minimum standard and internationally for breaching the higher standard.

On that topic, can I also refer to the decision in the Open Skies case which is in my friends' book of authorities at tab 16, because there are comments there in the opinion of the Advocate General which are also quite helpful in terms of the analysis of this issue. On page 31 of the internal pagination, the first section of that, which contains the opinion of the Advocate General, he says at paragraph 75, "That said, I must point out that between the situations mentioned so far which may be regarded as extreme of agreements which are clearly in conflict with common rules and are thus unlawful in any case and agreements which cover the same subject matter as that governed by common rules and are thus clearly unlawful on the basis of the ERTA judgment, there is a considerable area between consisting of agreements which, while they do not fit either of those situations, may also fall within the scope of that judgment in so far as they are liable to affect the common rules. Without claiming to undertake here the difficult task of defining this area, I will simply mention by way of example agreements which concern aspects which are contiguous, so to speak, with those governed by the common rules or agreements, while they concern a matter which is to a large extent covered by common rules relate however to aspects not or not yet regulated by those rules. In such instances, clearly the question whether or not the agreement affects the common rules must be assessed in the light of the particular circumstances of each case."

In other words, a specific assessment is required in each case to determine if the agreement conflicts in some respects with the common rules or if it could otherwise in any way impinge on their correct application or alter their scope. So that, in order to carry out the jurisdictional exercises, my friends bear the burden of establishing by way of such a specific assessment and analysis of each UNCLOS obligation and each Community provision which they say is going to be affected, such a specific analysis must take place to show that it will be affected. It is not sufficient to say that it simply exists. It is not sufficient to say that, well, there is a minimum standard so it must be affected up to that minimum standard. The exercise must be done. To determine jurisdiction, if this Tribunal is going to determine jurisdiction on the issue of competence, the exercise must be done by this Tribunal, but it is assisted, of course, by the fact that the burden of proof is on my friends. If they fail to establish that it is affected, then this Tribunal has the authority to conclude that competence has not been transferred pursuant to the declaration under UNCLOS.

Then going on to paragraph 76, it says, "For present purposes, such an assessment is required in particular in cases in which the Community measures adopted internally are limited to regulating a given

activity when it is carried on by Community nationals within the Community. While international agreements govern the same activity, when carried on by Community nationals in third countries, or by third country nationals within the Community. In those cases the agreements concern situations different from those regulated at Community level and it cannot, therefore, be assumed that they automatically affect the common rules. However, given the obvious relatedness of the subject matter, careful analysis is required to ascertain if their provisions could impinge on the correct application of common rules or alter their scope or even conflict with them. If such is the case, it must obviously be concluded that the agreements are liable to affect the common rules within the meaning of the AETR judgment".

The finally he says at paragraph 77, "I must point out, however, that in order to establish that the common rules are affected, it is not enough to cite general effects of an economic nature which the agreements could have on the functioning of the internal market. What is required instead is to specify in detail the aspects of the Community legislation which could be prejudiced by the agreements."

To use that test, my friends must carry out the analysis and satisfy this Tribunal that certain identified aspects of Ireland's UNCLOS claim could prejudice Community rules, which is almost presumptively not the case in the case that the Community rules are minimum rules. Turning then to the judgment of the court, if I may, which will be found in the latter part of that tab, starting at paragraph 77, and really all of this is relevant from 77 right up to paragraph 100 - I will not read it all, but if I could highlight one or two passages. In paragraph 77, it says "The court has already held in paragraphs 16 to 18 and 22 of the AETR judgment that the Community's competence to conclude international agreements arising not only from an express ... confirmed by the treaty but may equally flow from other provisions of the treaty and from measures adopted within the framework of those provisions by the Community institutions, that in particular each time the Community with a view to implementing a common policy envisaged by the treaty adopts provisions laying down common rules. Whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations towards non-Member countries which affect those rules or distort their scope."

Just to pause there, that reference to whatever form they may take clearly refers to whether they are regulations, directives or decisions.

It goes on:

"And that as and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations to its non-Member countries affecting the whole sphere of application of the Community legal system." That is the important qualification, affecting the whole sphere of application of the Community legal system.

Then, going on to paragraph 79, the Tribunal will see that in that case the court was concerned with what were common rules. They were adopted under article 84 of the treaty, which is a section headed "Common Rules".

SIR ARTHUR WATTS: I have just a quick question, Mr Sreenan. What system of law determines whether a particular prescription is a common rule or whether it is affected by some other legal provision?

MR SREENAN: I think that I would have to accept that it is the jurisprudence under Community law that

determines that and, to that extent, this Tribunal is in a similar situation as a domestic tribunal. I think the example was given by Professor Lowe, an English court that has to consider a German law. It considers German law essentially as a matter of fact. It accepts arguments by the party and it applies it. That does not mean that a German court might not come to a different decision. It does not mean that there is some right of appeal from the decision to a German court. It does not mean that there is a right to refer it to the German court. There may ultimately be a conflict. I think that the Attorney General said in a different context that that is a fact of life. We have heard that the OSPAR Tribunal is about to deliver a decision within a very short period of time, where the identical issue, we are told, has been raised by Dr Plender. The OSPAR Tribunal could conceivably be in such a situation. It has not decided to withhold its judgment. It has indicated a date when the judgment will be given. It is a risk - I say that it is a small risk, but, nevertheless, it is a risk that tribunals routinely take. If I could just divert from that, there is in ways a practical solution to all this, which is adopted by tribunals time after time again. They look at the issue of jurisdiction; if they are satisfied that they have jurisdiction, they say, "Well, we have jurisdiction as far as we are concerned. But, if you want to, you can go off to the German court or you can go off to the European court and you can apply for an injunction to stop us delivering our award. We are going to proceed with the case, issue an award which will deal with both jurisdiction and merits and in the meantime you have plenty of time to get an injunction in order to prevent that award being delivered". Indeed, in the present case, I think that Dr Plender referred to the dog that did not bark, but in ways the United Kingdom is the dog that has been barking for over a year, but has never bitten. It could have gone off to the European court and brought an action against Ireland. It could have got interim relief and it is provided for in article 243 of the treaty.

PROFESSOR CRAWFORD: Mr Sreenan, it seems to me that the analogy of domestic courts does not really work, if I may say so. First of all, this is not a domestic court. This is an international court. Secondly, the European Court of Justice, - though, let us say for the sake of argument, there is, of course, a debate in the literature about how you classify the European Union - let us assume for the sake of argument that it is not an international court, but, under public international law, it is, nonetheless, neither a domestic court. It is sui generis. The fact is that it is, to put it at its lowest, unseemly for courts at the international or transnational level to be enjoining each other from giving decisions. There may be situations in which that happens, but it is to be avoided if possible. It is certainly, one would think, appropriate for international courts to act in such a way as to reduce rather than increase the likelihood of conflict. The analogy of a domestic court is flawed in one other respect. The parties to this case are two States. As I said this morning, they are not schizophrenic. They are the litigants before us and this decision will be binding; they would be the litigants before the European Court of Justice and their decision will be binding. If there is a possibility of a conflict between those two decisions, exactly the same legal person may be required to do and not to do X and required to do or not to do X vis-a-vis the same other legal person. I do not think that any legal system or any institution which had regard to the systematic aspects of its position would want to encourage that. There may be a situation - and we can think of situations where there have been conflicts, but I do not think that any conflict has been quite as

extreme as that. There is a recent case where two different tribunals reached opposite conclusions on exactly the same dispute, but the parties were not the same. Of course, on our hypothesis, it could well be that the parties were the same or, at least, virtually the same.

MR SREENAN: Can I just take this up in this sense, Professor Crawford? In terms of the parties being the same, firstly, the United Kingdom could long before we arrived here at the start of this Tribunal have brought its proceedings in the court which is specifically designed for litigation between Member States as well, albeit not an international court in the same sense as the International Court of Justice. It could have brought its claim there. If it had not been determined, it could have applied for interim relief against Ireland whereby this issue of jurisdiction would never have arisen before this Tribunal. Far from doing that, it itself raised the issue of jurisdiction. If it was now to look for some type of interim relief, if, for example, and certainly Ireland would have no objection to this, the Tribunal decided to proceed to hear the matter and to give an award dealing with jurisdiction and merits, but say that it would not issue its award for a period of at least six months, thereby giving the United Kingdom the power to take appropriate steps, the steps it would take would be not to apply for any injunction against this Tribunal. Of course, the European court could not even entertain such an application, but it would be an injunction against Ireland, presumably, restraining it from taking up the award, pending the determination of the issue. It has that opportunity. If it does not want to put this argument before the European court, it has not done so to date, then it may be that there is another body who within that period of six months would have adequate opportunity to make such an application and then it would not be litigation between the same parties.

I divert there on that issue, but, moving maybe back to the decision in the Open Skies case, going up as far as paragraph 81, it says that "it must next be determined under what circumstances the scope of the common rules may be affected or distorted by the international commitments at issue and, therefore, under what circumstances does the Community acquire external competence by reason of the exercise of its internal competence". In other words, it is not in every case where the Community exercises an internal competence that it acquires an exclusive competence. It is only in circumstances where the common rules are going to be affected and the meaning of "affected" has light shed on it by use of the words "or distorted" which come immediately after it.

Again, in the next paragraph in the second section it says that "The court has held that Member States may not enter into international commitments outside the framework of the Community institutions, even if there is no contradiction between those commitments and the common rules." It is referring there in my submission to a situation where a Member State would unilaterally go off and make a bilateral agreement, for example, in the context of an Open Skies Agreement, as Denmark did with the United States. But here we have an agreement made which is made within the framework of the Community institutions. The European Community has joined with all of the Member States bar Denmark in ratifying UNCLOS. It is the Community that has filed with the United Nations the detailed declaration of competence to which the Member States then refer. This is not an international commitment acquired or undertaken outside of the framework of the Community institutions.

Then in paragraph 84, it says "The same applies even in the absence of any express provision authorising its institutions to negotiate with non-Member countries where the Community has achieve complete harmonisation in an open area, because the common rules thus adopted could be affected within the meaning of the AETR judgement". It refers there again to Opinions 194 and 292. In other words, normally where one is talking about common rules, one is talking about a situation where there has been complete harmonisation achieved in a particular area. That is identified there, paragraph 96 of Opinion 194.

Then the court goes on in paragraph 85 to say "It follows from the reasoning in paragraphs 78 and 79 of Opinion 194 that any distortions in the flow of services in the internal market which might arise from bilateral Open Skies Agreements concluded by Member States with non-Member States do not themselves affect the common rules adopted in that area and are thus not capable of establishing an external competence in the Community."

If I can go from there, as it refers to Opinion 194, to that opinion which can be found at tab 13 of my friends' book, there, dealing with the WTO agreement, in paragraph 77 of the judgment, the court says, "However, even in the field" - and these are the paragraphs that were cited with approval in the ILO judgment - "of transport" - even in the field of transport - "the Community's exclusive competence does not automatically flow from its power to lay down rules at internal level. AS the court pointed out in the AETR judgment" - and it then quotes that paragraph that we have seen before - "However, not all transport matters are already covered by common rules. The Commission asserted at the hearing that the Member States continuing freedom to conduct an external policy based on bilateral agreements with non-Member countries will inevitably lead to distortions in the flow of services and will progressively undermine the internal market. Thus it argued that travellers will choose to fly from airports of Member States which have concluded an Open Skies type of bilateral agreement with a non-Member country and its airline enabling them to offer the best quality, price, ratio of transport. The Commission further claimed that, as a result of the existence of an agreement between Germany and Poland exempting German road haulage operators from having to pay any transit tax, whereas the corresponding agreement between Poland and the Netherlands imposed a tax of 650 deutschmarks on Netherlands hauliers, distortion had arisen in competition between Netherlands hauliers and German hauliers in relation to traffic bound for Russia, Belorussia and Baltic countries".

What was the response of the European court to this argument, saying, if competence is to be shared between us, it could be very difficult and, accordingly, Community rules would be affected? It was not sympathetic. It effectively said "So what?" That does not mean that common rules are affected.

Paragraph 79 says in reply to that argument, "Suffice it to say that there is nothing in the treaty which prevents the institutions from arranging in the common rules laid down by them concerted action in relation to non-Member countries or from prescribing the approach taken by the Member States in their external dealings. moreover, that possibility is illustrated by several regulations on transport cited by the Commission in its reply to the court's third written question." That approach has been cited time and time again by the European court.

Then going on to paragraph 96, finally, in that judgment, the court said, "The same applies in any event, even in the absence of any express provision authorising its institutions to negotiate with non-Member countries, where the Community has achieved complete harmonisation of the rules governing access to a self-employed activity, because the common rules thus adopted could be affected within the meaning of the AETR judgment if the Member States retain freedom to negotiate with non-Member countries."

It is linking there the question of common rules with complete harmonisation.

In the same judgment, paragraphs 88 to 89, the court makes it clear that an unexercised power to harmonise does not equate to common rules. It says, "AS regards article 100A, it is undeniable that, where harmonising powers have been exercised, the harmonisation measures thus adopted may limit or even remove the freedom of the Member States to negotiate with non-Member countries. However, an internal power to harmonise which has not been exercised in a specific field cannot confer exclusive external competence in that field on the Community".

Paragraph 89 is to the same effect.

Could I then turn to the Fornasar judgment which I included in our book of authorities. I did not open it yesterday. Dr Plender referred to it in reply. It is just one paragraph. It can be found at tab 17 of Ireland's book of authorities. The paragraph to which I would wish to refer is simply paragraph 46, which takes that principle one step forward into the environmental field and says, "In that connection, it must be observed that the Community rules do not seek to effect complete harmonisation in the area of the environment. Even though article 130R of the treaty refers to certain Community objectives to be obtained, both article 130T of the EC treaty, now article 176, and directive 91/789 allow the Member States to introduce more stringent measures. Under article 130R of the treaty, Community policy on the environment is to aim at a high level of protecting taking into account the diversify of situations in the various regions of the Community".

There we have a complete succession of cases which says that complete harmonisation equals common rules, the potential that they can be affected, not so where minimum rules apply, and, in the environmental field, we do not have complete harmonisation. It is noteworthy that the court does not use the term "common rules" in relation to the environment. It uses the term "Community rules".

Can I then turn to another case which was partially opened by my friend just to draw the Tribunal's attention to one passage on it? It is in my friends' book at tab 48. It is the case about the Cartegana Protocol. If I can turn to the very last page of that, and the court, of course, was considering the issue as to whether or not the Community had the exclusive competence to ratify the Cartegana Protocol. The Commission claimed to have that competence on the basis that it said that it concerned the common commercial policy, common policy, ie exclusive competence, and the court said, no. My friend, Dr Plender, did draw the attention of the Tribunal to paragraphs 43, 44 and 45, which point out that article 175 and not article 174 is the appropriate legal basis for the adoption of the protocol, but he stopped short of opening paragraph 46, which is a particularly important paragraph. In paragraph 46, the court said, "It need only be observed in that regard that as the United Kingdom government and the

Council correctly state the harmonisation achieved at Community level in the protocols field of application covers in any event only a very small part of such field (see directive 92/129)" and it cites the others.

"It follows from the foregoing considerations that the Community and its Member States share competence to conclude the protocol". So the conclusion of the court's reasoning is harmonisation that has been achieved in that field is only very limited. Accordingly, no common rules, accordingly no exclusive competence. The United Kingdom's submissions on that which are cited in the judgment were accepted, of course, by the European court.

In relation to OSPAR, before I forget it, can I just reiterate, having checked the matter both with my colleagues and my team and the pleadings, the United Kingdom did not raise a jurisdictional objection before OSPAR. They said that Ireland had a remedy before the European courts in so far as the United Kingdom might be said to be in breach of any European directive, but it did not say to the OSPAR Tribunal "We are objecting to your jurisdiction". Indeed, if they did, it follows that their jurisdictional objection before OSPAR was rejected and that the Tribunal proposed to proceed and deliver its decision, notwithstanding such an objection. I will just hand for completeness - I do not intend to open it - the relevant chapter from the UK's pleadings before OSPAR.

Turning now to Dr Plender's argument that the competence referred to in Annex IX is not described as exclusive and it simply talks about competence being transferred, the point, in our submission, is that to the extent to which the Member States have competence, it has not been transferred to the Community. He refers to article 1 of Annex IX and links that to article 4.3. His argument as to what article 4.3 then means when it talks about transfer of competence is essentially, of course, an argument about the interpretation of UNCLOS. In so far as he raises this argument about the interpretation of UNCLOS, it is this Tribunal that should be interpreting article 4.3 of UNCLOS and deciding what it means. It should not defer that task to the European court. We say that the declaration makes it manifest that the only situation in which competence is transferred is where the Community has exclusive competence. That is the situation where the Member States transfer their rights and obligations to the Community. The Community, having identified fisheries as being an area of exclusive competence, goes on to talk about shared competence and identifies then that the competence is transferred to the Community only where common rules are affected, but that does not apply in the case of minimum rules, otherwise competence rests with the Member States.

In those circumstances, we say that the Member States retain competence and, if my friend was correct to the effect that, once a minimum standard rule sets a minimum standard, the Community had exclusive competence below the minimum standard or any international commitment entered into by a member state would automatically affect the commitment below that minimum standards because it overlapped with it, then all the Community had to do by way of a declaration was to say these are the areas of legislation that we have covered, the member states have no competence in those areas within the scope of that legislation.

PROF CRAWFORD: Dr Plender this morning made a distinction between the position as between member

states of the EU so far as transferred competence is concerned and the position of third states. He noted that the Community has not made a subsequent declaration such as was envisaged in its initial declaration under the law of the sea convention. On the other hand Ireland being internal to the European Union is in effect bound by any development. If an objective judgment which is ultimately that of the ECJ is that there has been a transfer of competence the fact that it has not been declared as such in the EU declaration, I interpret him as saying would not mean that it should not be applied. You are bound by it even if a third state might not be.

MR SREENAN: I would think the principle is that Ireland as a member state of the Community would be bound as a matter of internal Community law by the true existing state of the exclusive competence of the Community, and in so far as it breached that exclusive competence, for example by taking on an external commitment, then it would be in breach of Community law and would be liable to the appropriate enforcement mechanisms before Community courts. Before this tribunal this tribunal as an international tribunal looks to the declaration. The Community has a mechanism for supplementing the declaration, the Community cannot do it on its own. The Council would have to authorise the additional instrument to be lodged which would prescribe the increased area of competence of the Community. In so far as my friend seeks to indicate that there is any additional area of competence he has been in a position to advance his argument by referring to instruments which are not listed in the Community's declaration and he has done so.

Can I go back to one point that I omitted to deal with and that was the question as to whether or not Euratom is a party to UNCLOS. Just to refer to the Community's declaration my friend in my respectful submission misunderstands the affect of what the Community is saying. The declaration is in tab 20 of our judges' folder, the blue one, and it is in my friend's bundle at 2. It starts off headed Annex 2, The European Community's instrument of formal confirmation, and it is expressed in the singular. It is the individual Community. It then goes on to say The European Community presents its complements and goes on on the next page and it is headed declaration concerning the competence of the European Community again in the singular. It goes on in recitals to refer to the group of Communities and it says the European Communities were established and it refers to the three European Communities. There is the one now called the European Community but which used to be called the European Economic Community. That is the one we are concerned with in UNCLOS. There is the second Community, the European Coal and Steel Community, and the third Community, the European Atomic Energy Community. it is only the European Community namely that Community formerly known as the European Economic Community, which is party to UNCLOS. These recitals simply refer to the historical background to the existence of the Environment European Community and that point is reinforced by the fact that nowhere in the Annex will one find any instrument which refers to any piece of delegated legislation either from Euratom or the European Coal and Steel Community. In my respectful submission my friend is mistaken in that submission,

What I would reiterate to the Tribunal before handing the matter to my colleague Professor Sands, who will address the tribunal very briefly, is once again there is a practical solution to this issue

which is address the issue of jurisdiction and if the tribunal is satisfied that Ireland has established jurisdiction prima facie and that the United Kingdom has not discharged its burden of proof of displacing it. There is in those circumstances a simple solution. We are here to have a case heard. Why are here with this conundrum now being raised as to whether jurisdiction should be decided by this tribunal or whether this tribunal should defer for a potentially indefinite period of time to see if the European Court decides it in another set of proceedings that may or may not be brought. We are here because of the fact that the dog barked but did not bite. We are here because the United Kingdom did not take steps that it could have taken. In those circumstances the balance of justice in our submission favours proceeding to considering the entire case, including jurisdiction and the merits, proceeding to write an award but holding that award for a period of say six months to enable either the United Kingdom or any other party that so wishes to bring appropriate proceedings to injunct Ireland from taking up the award. That is a course which has commended itself to many arbitral tribunals and I would also commend it to this tribunal. I would now propose to ask Professor Sands to deal with those brief passages of Dr Plender's reply that he is going to address.

PROF SANDS: Mr President, members of the tribunal, this is the first time I have appeared before you and I express as others have my privilege and honour to appear before you.

I am going to reply very briefly and preliminarily to the points raised by Dr Plender and Mr Bethlehem which effectively go to the merits of Ireland's case. We are in the curious situation that on Day 3 of this hearing you have heard Ireland's case put to you but you have not heard it from Ireland. You have had a summary put this afternoon which raised certain issues which we feel we need to respond to at this stage of the proceedings. I say preliminarily because what I think has become clear to this side of the room having heard Dr Plender and Mr Bethlehem during the course of the day is that the issues of jurisdiction are intimately connected with issues of substance. The entire thrust of Dr Plender's case and of Mr Bethlehem's case was that the jurisdictional issue turns in large part on what Ireland's claim is about. We have not yet had an opportunity to put that claim to you and we hope that we will have that opportunity and that you will then be able to proceed. I am not proposing now, and I hope not to take more than 20 minutes, to make Ireland's case. I simply want to do two things pending a later opportunity to address these arguments more substantively and fully. It is really to identify and clean up misunderstandings that may have crept in entirely honestly into the perception from our friends as to what Ireland's case is, and in particular to clarify aspects of Ireland's case in relation to two aspects, environmental assessment and pollution. When I have concluded, with your permission Professor Lowe will very briefly do the same in relation to issues of cooperation.

I was going to begin by referring you to part 3 of the United Kingdom's counter memorial in the OSPAR case and the question of whether the United Kingdom had argued this jurisdictional point in those proceedings. I did participate in those proceedings both in the written and the oral stages. The point was not argued as Dr Plender said today, and you have that text and you can form your own view. It is the text referred to by Dr Plender. The other reason for mentioning it is that the United Kingdom today has spent a great deal of time looking at directive 85/337 of the European Economic Community.

In many ways directive 85/337 is a not dissimilar provision to directive 90/313 on access to information on the environment. That later directive had an analogy in the OSPAR Convention, Article 9, a very sort analogy compared to that directive. Ireland's case was that it was free to elect whether to go under OSPAR dispute settlement or under European Community dispute settlement and the issues that have been raised in the course of these proceedings were not raised in relation to the OSPAR.

The OSPAR proceedings are helpful in another way. If you read the pleadings and the transcript in the OSPAR case you will note that it is the United Kingdom in that case which relied on directive 90/313 to inform the content of article 9 of the OSPAR Convention. So curiously we are in a converse type of situation. The United Kingdom's argument essentially was that you should construe article 9 in a manner which is consistent or draws upon directive 90/313, and in certain respects but not entirely Ireland's case in relation to environmental impact assessment is similarly based on various international instruments of which the directive on environmental impact assessment is but one of many examples to illustrate aspects.

These brief oral submissions are intended to invite you to go through the task of checking very carefully what was said during the course of this morning with what Ireland actually said. To give you an example, reference was made by Dr Plender this morning in paragraph 7 of his outline (I do not have the transcript and I have only the document that was handed out, but I think it was also said during his oral submissions) in relation to the view that the jurisdictional issues raised by the United Kingdom has been endorsed in public by others whose views should command the respect of the tribunal. Reference is made to an article by Colson and Hoyle at tab 27 in the tribunal's folder. Over lunch I have read that I did not see anything in it which supported the United Kingdom's case. I would invite you to read that article because on a careful reading one sees that it tends to support the approach taken by the International Tribunal for the Law of the Sea at the provisional measures phase in terms of the correct approach to be taken.

Before getting on to environmental assessment and pollution prevention let me also say one thing which underscores why Ireland is here. UNCLOS is an umbrella convention. Under UNCLOS Ireland has an opportunity to make connected arguments about environmental assessment, cooperation and pollution prevention. There is no other place that Ireland can make those arguments in that way. Ireland believes it cannot make those arguments before the European Court of Justice. Ireland does not believe that it is in a position to invoke the provisions on cooperation before the European Court of Justice, for the reasons that Mr Sreenan referred to. So if there is an element of surprise on that side of the room that we are in the wrong place, in terms of why we are here, I think the written pleadings make clear that it enables the tribunal and the parties to fully explore the interconnections between these issues.

Coming to what was said this morning about environmental assessment and related matters Mr Sreenan has already referred you to ILO Convention 170. Dr Plender said of that this morning at paragraph 65 of his note that it is a convention which relates to dose limits for chemicals. I obtained a copy of ILO Convention 170 and it does not refer to that matter. What it refers to is assessment and

information, the very same subject matter that is the subject of these hearings. And, of course, the European Court of Justice has held in express terms that that convention did not affect common Community rules. So we again need to take what is said and look at it with considerable care and attention.

At paragraph 73 of his arguments this morning Dr Plender said, and here I now turn to Environmental assessment, the allegation of breach of article 206 relies heavily on Community legislation laying down common rules. A number of paragraphs are referred to. I do not intend to take you to all of them but to give you a couple of examples to indicate what I think is properly characterised as a degree of exaggeration, no doubt unintentional. At paragraph 7.5 Dr Plender says of the Irish memorial that it reiterates its claim that the environment statement does not comply with the relevant requirements of the EC directive on environmental impact assessment. Of course that suggests that what we are asking you to do is find that the United Kingdom has violated that directive.

Paragraph 7.50 it is worth going to. Look what is actually said at that paragraph. it is merely a statement of fact. It says in 1994 Ireland communicated to the United Kingdom its views as to the inadequacies of the environmental statement, summarising its position as follows, concluding it does not comply with the relevant requirements of the EC directive of environmental impact assessment. That was 1994, Ireland has not pursued that claim in this forum. Ireland could pursue that claim in another forum but has chosen not to do so. So the citation simply does not support what it is used for.

Another example that is referred to is at paragraph 6.19. Dr Plender says of paragraph 6.19 "Ireland states that this Community legislation is relevant because it shows how the general obligations in UNCLOS are to be interpreted and applied. Of course the United Kingdom does not accept that the environmental statement for the MOX Plant was in any way inconsistent with Directive 85/337".

Then if one goes to paragraph 6.19 what one sees is that the reference there is a statement of fact. Mention may also be made of the Espoo Convention and you will see that we rely on the Espoo Convention as we do on the directive on environmental impact assessment not to invite you to find that the United Kingdom has or has not complied with that directive, we are not asking you to do that. We rely on it to show that the argument of the United Kingdom before this tribunal that the activity of constructing and operating the MOX plant is not one which is likely to have adverse harmful environmental affects is one which is inconsistent with the approach taken in that Convention. There is a gap between inviting you to have a look at it to form that view and inviting you to apply it.

SIR ARTHUR WATTS: In paragraph 6.19 there is a sentence towards the bottom of the paragraph, "European Community law also imposes specific obligations relating to various aspects of the MOX plant, including the requirement to carry out environmental impact assessments". What is the purpose of that reference to obligations and requirement?

PROF SANDS: it merely indicates that there are parallel obligations in relation to European Community law both with regard to environmental impact assessment, with regard to justification and with regard to trans boundary movements. It is a statement of fact. There are obligations under Community law which are pertinent but Ireland does not invite you to apply those obligations.

If I can move on to another example, paragraph 26 of this morning's presentation by Dr Plender, and this is something we will come back to when we come to the merits, again on environmental assessment. The United Kingdom makes much of an opinion that was granted in 1997 by Euratom on the implementation of BNFL's plan for the disposal of radioactive waste. That opinion it is said in this text was adopted "so that the Commission can determine whether this is liable to result in the radioactive contamination of the water, soil or air space of another member state". Of course it is there to indicate that effectively the European Community has rubber stamped this project. But material words are omitted from that quotation, I am afraid. The words that are omitted are the following. "significant from the point of view of health". The full text should read "liable to result in the radioactive contamination significant from the point of view of health of the water, soil or air space of another member state". As you will have read in Ireland's written pleadings and you will hear from our witnesses and from our oral submissions Ireland's case is precisely that the United Kingdom has had regard to a certain extent on potential human health impact but it has not had adequate regard to environmental impacts which are distinct from human health impacts. These may appear like minor points but they go absolutely to the heart of the merits of this case, to what extent have all the environmental consequences of the MOX plant, including in particular additional discharges from Thorp, additional potential risks from storage of radioactive waste, been considered. The opinion is an important opinion, but it did not address those issues, it simply addressed health issues and did not go anything beyond that.

Turning to the substance of what article 206 says, I think I heard my friend Mr Bethlehem say this afternoon - and I am afraid I do not have the written script in front of me - that article 206 according to the Irish case is rather like a conduit through which the whole of international law and European Community law becomes part of UNCLOS. With respect that is not our case and I do not think we ever state that that is our case. If we look to other instruments it is simply to obtain guidance as to what article 206 might mean. In certain respects Ireland has done nothing more, I think, than the task engaged in by the distinguished Special Rapporteur of the International Law Commission in drafting the rules on trans boundary impact, of reaching out and seeing what else is out there to get a sense of what the very limited words in article 206 actually mean. That is a very different thing from inviting the tribunal, which we are not doing, to apply through article 206 the Espoo Convention. EC directives, etc. We refer to those instruments to glean the common core of what the international community understands is required by an environmental assessment. We may be right on that, we may be wrong on that, but that is the exercise that we have engaged in and that is the only reason we have had regard to directive 85/337.

Turning briefly to pollution prevention, Dr Plender referred - and I should say that the examples on environment assessment are illustrative, not exhaustive - to submissions made by Ireland relating to pollution prevention under Article 194 para 3 and various other provisions of UNCLOS. Dr Plender says for example "These provisions, in the aspect in which Ireland invokes them, affect the common rules established by" and then he listed a number of directives. I am not touching on the question of whether or not they affect common rules, I simply want to say something about the pertinence of those directives. Directive 76/464 is at tab 31 of Dr Plender's tabs from this morning. It deals with pollution

caused by certain dangerous substances discharged into the aquatic environment of the Community. It is an EC measure, a European Community measure, it is not a Euratom measure. Ireland's understanding is that this directive does not in any way regulate discharges of radioactive substances. That is governed exclusively by Euratom law and not by European Community law. I must also confess an element of surprise at reliance by the United Kingdom on that directive, because if one looks at what it says, and indeed if it does govern radioactive substances, that would affect a very significant change in European Community law, and English law, because it requires amongst other things at article 4 zero discharges into ground water of the substances which Dr Plender said were listed. Ireland would be absolutely delighted if radioactive substance were to fall within that provision because that is effectively what Ireland hopefully may one day obtain. But with respect that directive is not applicable to all to radioactive substances, and is not relevant to this case.

To give another example at article 6 we see there the requirement to apply in relation to the substances that are listed - and Dr Plender says that they are listed, although we respectfully disagree - to apply best available technical means, and that is precisely what Ireland is seeking on the pollution prevention case. The heart of Ireland's case is that the United Kingdom has misdirected itself as to the right standard to apply. It has applied best practicable means, it has not applied best available techniques; and yet Dr Plender now is drawing our attention to a directive which he says is applicable which plainly the United Kingdom on its own case has not implemented in relation to discharges from the MOX plant. So these aspects have to be read with considerable care and attention.

Mr Bethlehem said that OSPAR was all over Ireland's pleadings, and that is to a certain extent true, and it is all over Ireland's pleadings for a variety of reasons, not least of which because it was not all over the United Kingdom's decisions authorising the operation of the MOX plant, or additional functions of the Thorp plant. Ireland's point is no account was taken of the requirements, and Ireland's simple point in this respect draws upon article 213 of UNCLOS. If I may it is worth having the text in front of you to get a sense and flavour of the argument that Ireland is making here.

Article 213 provides in part that states "shall ... take other measures necessary to implement applicable international rules and standards established through competent international organisations or diplomatic conference to prevent reduce and control pollution of the marine environment from land based sources".

It says the United Kingdom has to implement applicable international rules and standards, including OSPAR. We may be right or wrong on what article 213 requires, but it says what it says and there is plainly a discussion to be had on what article 213 requires. It has not previously been subject to adjudication but its language we submit is absolutely clear and it does allow Ireland to make the argument for example that the United Kingdom erred in failing to apply best available techniques and best environmental practices. Mr Bethlehem explained it is clearly set forth in the OSPAR Convention which we say they should have implemented and which on our case they have failed to do so. In fact on the UK's own case they have failed to do so. They have accepted that they did not apply, but they applied best practicable means. Put in its simplest terms that is the end of Ireland's case, we are home

and dry. On their own case they have not met the standard that the article requires.

PROF CRAWFORD: It maybe you do not want to deal with this now, but while you are talking about OSPAR Mr Bethlehem made an independent argument this afternoon based on article 32 of OSPAR, and by reference to articles 281 and 282 of UNCLOS. That is I take it to be dealt with at some point.

PROF SANDS: I was going to come to this but I can mention it now very briefly. The argument caught us somewhat unawares because it is not in the written pleadings. That is the first time we have heard that argument. So we are not with your permission able to respond to that at this point. We would like to consider once we have seen the transcript exactly what was said and then come back to you. But we think that that was probably an argument that had not previously been canvassed. I only had a brief opportunity to look at the counter memorial and the rejoinder and I was not able to find anything on it.

PROF CRAWFORD: It raises a fundamental question about the meaning when you have two different conventions of the phrase "dispute relating to the interpretation and application of the convention". That is the key phrase throughout UNCLOS. Including Articles 281 and 282, and mutatis mutandis it is the phrase in article 32 of OSPAR. Obviously the dispute you actually brought to OSPAR seems to have been a discrete one about a particular problem, in which there does not seem to have been any significant overlap with the dispute you brought here. But Mr Bethlehem made the point that you could have brought the substance of this dispute under article 32 and he interpreted article 32 para 1 as in effect requiring you to do so and thereby triggering article 282. I think it is something we need to deal with but I accept that you could do that tomorrow morning.

PROF SANDS: I can give a preliminary response. It comes back to a point I made at the introduction. The reason Ireland is before this tribunal is this is the only tribunal that can deal with assessment, cooperation and pollution. The OSPAR convention does not have a provision on assessment. The OSPAR convention does not have any provisions on cooperation. So we may have been able to litigate a part of the dispute before an OSPAR tribunal but it would have been in isolation of arguments on assessment and cooperation and of course that presents a real practical difficulty for a claimant state where you have got a series of interconnected legal arguments. What are the relative advantages and disadvantages of going one route rather than another route? I can say having been involved that that was an issue that was certainly given considerable attention. The end result - and we may have been wrong about that, I hope not - was that this was the only place where we could get the totality of the case before a single tribunal and that was a sensible option to take.

PROF CRAWFORD: Which would mean that your answer, although I do not want to pre-empt your answer tomorrow, but your answer would be that to the extent that the disputes you have brought here relate to provisions not contained in OSPAR then this is not a dispute concerning the interpretation or application of OSPAR, to that extent.

PROF SANDS: At the very least I would say there are large parts of this dispute that plainly are outside OSPAR. There is no question about that. Just to make the point about article 213, we heard quite a lot and for no doubt very good reasons, about the Southern Blue Fin Tuna case. I think it is important and I am sure the tribunal will be aware of it, that we are dealing here with protection of the marine

environment, not with fisheries conservation issues. The provisions in UNCLOS on fisheries conservation are different. There is no equivalent to article 213 for example in the relevant provisions dealing with fisheries conservation. If you look at article 61 para 3 of UNCLOS, conservation of the living resources. Paragraph 3 simply directs states to take into account generally recommended international minimum standards. So we are faced actually with a different situation from a fisheries dispute, because we have here provisions like article 213 and article 222 (which as we will elaborate I hope in our merits arguments) a direct interconnection under the umbrella of regional agreements and a global agreement which, effectively, calls on UNCLOS States to implement the regional agreement. In that regard - I do not think that you have a copy of it yet = can I just draw your attention to the document that I hope that you will get, at the photocopying expense of the United Kingdom rather than Ireland, that was referred to by Mr Bethlehem. The IMO report entitled "Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organisation 2003". We only got that document at quarter to two, but, browsing through it, it appears that there is much in that document which we are happy to rely on. I can just draw you to certain passages of that document. For example, at pages 5 and 6 - of course the IMO does not regulate land-based sources, but pollution from vessels and by dumping - so it is focusing on those provisions, but the argument here is directly analogous to land-based sources of pollution. It goes through all the provisions of UNCLOS which deal with pollution by vessels, pollution by dumping and then says, "These provisions clearly establish an obligation for State Parties to UNCLOS to apply IMO rules and standards. A specific form of such application relies to a great extent on the interpretation given by parties to UNCLOS to the expression “to take account of”, “to conform to”, “give effect to” or “implement' IMO provisions."

Then at page 39 at the bottom the report refers to pollution and relationship with port State control and special mandatory measures. It says, "Such subjects are regulated both by UNCLOS and MARPOL. Provisions in the two treaties, therefore, compliment each other and should be read together in order to ensure proper and uniform implementation."

Then a little later on, it goes on to say that international law as set forth in UNCLOS influences the enforcement of MARPOL. So there is a direct connection between the two which is envisaged and assumed.

At paragraph 53 we are told that the 17th consultative meeting of parties to the London Dumping Convention of 1972 "expressed their opinion that State Parties to UNCLOS would be legally bound to adopt laws and regulations and take other measures to prevent, reduce or control pollution by dumping. In accordance with article 210, paragraph 6 of UNCLOS, these laws and regulations must be no less effective than the global rules and standards contained in the London Convention".

Once again, the IMO's clear view is that you take these things as a package. That is entirely consistent, we would submit, with our position on the relationship between article 213, for example, and 222, which tie in with OSPAR. Then at page 64 of the document, specifically on dispute settlement, it says "Article 297, paragraph 1 of UNCLOS specifies situations where compulsory dispute settlement procedures entailing binding decisions also apply to disputes concerning the interpretation or application

of the convention with regard to the exercise by a coastal State of sovereign rights and jurisdiction." Then it goes on, "One such situation is where it is alleged that a coastal State, for example, the United Kingdom or Ireland, has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal State and which have been established by the convention or through a competence international organisation, such as the IMO".

The IMO's view is that Ireland is fully entitled to be here, for example, in relation to a claim under dumping or pollution from vessels, and we would say that there was no distinction to be drawn on land-based sources.

Can I in that regard also draw your attention to the most interesting article by Professor Oxman, in the 2001 American Journal of International Law. That is in Dr Plender's bundle at tab 28. Maybe it is worth having a look at it. It is page 299 of tab 28.

Of course, Professor Oxman has a particular authority on these issues because he was involved in the negotiation of these provisions on the delegation of the United States. Half way down at page 299, and it is the same point on article 297, paragraph 1(c), it says, "One of the achievements of the Law of the Sea Convention is that virtually all marine sources of marine pollution subject to a duty by the State with jurisdiction over the relevant activity, be it the flag State or the coastal State, to enforce minimum international safety and pollution standards. Many of these standards emerge in treaties and other instruments adopted by the international Maritime Organisation or negotiated under its auspices. The duty to comply with these standards is subject to compulsory jurisdiction under article 285 of the Convention."

Then the footnote refers once again to article 297(1)(c). We say that that applies directly to and supports the argument that is being made by Ireland in relation to the relationship between UNCLOS and OSPAR or, indeed, some of the other instruments upon which we will rely in due course.

The suggestion that somehow there ought to be surprise or lack of merit to the argument that is put by Ireland that you are entitled to look, for example, at the OSPAR Convention, is prima facie at least plausible and one that is worth running.

Again, just on these issues, just to be absolutely clear about what Ireland is saying, Mr Bethlehem referred, in the course of his presentation this afternoon, to paragraph 9.129 of Ireland's memorial. I think that what he said, but I do not have the transcript, that we alleged a breach of the provisions there referred to. At paragraph 9.129 of the Irish memorial, you do get, as he says, a lengthy list of matters which Ireland considers the United Kingdom has failed to have regard to or failed to consider. They include various provisions under the OSPAR Convention. They include, for example, at paragraph (b) - page 238 of the Irish memorial, paragraph 9.129 - this is paragraph (b) under article 2(2) of the OSPAR Convention - to apply, amongst other things, best available techniques and best environmental practices in accordance with the criteria of the Convention. Our argument is not, as I think I heard him say, that they have breached that obligation, but that they have failed to implement it. It may be that that is a distinction that is too fine. The reason that we make the point is that we are

asking you to interpret and apply article 213 of UNCLOS. That is the dispute. Article 213 requires you, we say, to consider whether the United Kingdom has implemented the requirements of OSPAR. If they have not done so, they have violated article 213 of UNCLOS by failing to implement. We accept, of course, that that requires you to look at what these provisions of OSPAR say. It requires you to from a view on the facts and on the evidence as to what the United Kingdom has or has not done. It requires you to consider whether they have given effect to the requirements of those provisions of OSPAR. But your final conclusion relates to article 213 and only article 213. Of course, what we say on that example is that all the evidence before the Tribunal confirms that the United Kingdom did not apply best available techniques or best environmental practices. It will be my or my colleagues' task to explain what the difference is between best available techniques and best practicable means, which I certainly intend to do, and I certainly do not have time to do that now. But, if you are with us, your award relates only to article 213 and the failure to implement an applicable international standard.

PROFESSOR CRAWFORD: Nonetheless, Professor Sands, it must be the case that, if this Tribunal determined that there was a breach of 213 by reference to a failure to implement an applicable standard, the applicable standard being that in OSPAR, that as between these two parties there would be a res judicata on the issue arising under OSPAR. The very issue would have been litigated by a tribunal having jurisdiction over the issue and would have been decided and there would, therefore, be a res judicata. If, for some reason, there was a subsequent OSPAR proceeding with a tribunal under article 32, that tribunal would be bound to accept that decision as res judicata and in accordance with normal principles. I assert that. One can take that, if you like, as a question.

PROFESSOR SANDS: I will certainly come back on that point, but I think that it requires some reflection, particularly on the interrelationship between legal and factual aspects.

I have already mentioned the point on article 32, paragraph 10 of OSPAR in response to your question and can I just then conclude very briefly by reference to the Sintra statement. Mr Bethlehem asked, can this Tribunal take any decision on the matter? We say that you can take a decision in relation to UNCLOS and, taking a decision in relation to UNCLOS, may require you to have regard to the content and the extent and the nature of the commitment undertaken by the United Kingdom and Ireland. But, self-evidently, what we will argue, to give you a flavour, is that the Sintra Ministerial Statement, and it is a statement, not a decision, not a recommendation, contains an agreement by the United Kingdom to undertake substantial and progressive reductions in discharges. What we will show you at the merits arguments is that contrary to that agreement, and we will come back in due course to address its status and effect, the United Kingdom is planning to increase its discharges from reprocessing activities and, indeed, to increase them in relation to certain radionuclides on the basis of the discharges that were being made in 1998 for at least the next 20 years, by reference to that level.

We have not yet had an answer from the United Kingdom as to how that is compatible with an agreement by a United Kingdom minister to adopt substantial and progressive reductions, leading to a situation that by 2020 concentrations are close to zero by reference to historic levels. We accept entirely Mr Bethlehem's point that there is room for interpretation on what that requires. The evidence before the

Tribunal is contrary to that undertaking, that agreement; the United Kingdom is planning to do precisely the reverse and it is planning to do precisely the reverse off the back of the authorisation of the MOX plant and off the back of an extension of the life of the THORP plant which has never been subject to environmental assessment. That is merits issues and we will come back to those issues. It is important, I think, to leave you with a sense of what Ireland's case precisely is and how we hope to get you from A to B and C on our legal and our factual arguments. Unless I can help the Tribunal any further, that concludes my submission and I think that Professor Lowe has a very brief concluding submission on the cooperation.

THE PRESIDENT: We will take it. Professor Lowe, please.

PROFESSOR LOWE: Thank you, Mr President and Members of the Tribunal. To avoid any doubt over terminology, very brief in this context means about 15 minutes. Is that acceptable?

THE PRESIDENT: Yes.

PROFESSOR LOWE: There are two responses that I have got, one is to respond to Mr Bethlehem's points on jurisdiction admissibility and applicable law and the second is to respond to Dr Plender's points on cooperation.

As far as Mr Bethlehem's submissions are concerned, I think that we are moving towards a consensus. His submissions, as I understand them, come down to this: that references which are made to other instruments by Ireland in the submission of its case render this a non-UNCLOS dispute which needs the expanded jurisdiction under article 288 paragraph 2, and that the references which have this effect are those which fall on the other side of the line which he drew, where the instruments have the effect of changing the nature of UNCLOS obligations, which is my recollection of the terminology that he used.

Well, in fact, Ireland's submissions come down to two very simple points. The first is that, where UNCLOS provisions are unclear, we look elsewhere for aids to the interpretation of UNCLOS. Not to change it, but simply to decide what it means.

The second point is that, where UNCLOS provisions say that States are to implement other applicable rules of international law, we obviously have to look elsewhere to find out what those other applicable rules are. Again, no change.

So to the extent that you are persuaded of our case that we are not changing them, I think that the other side will accept our submission.

If I can take first the question of the aid to interpretation, as we might call it, there are three brief points that I want to make on that. First, to eliminate any doubt, Mr Bethlehem referred once or twice to the fact that Ireland was suggesting that we should look to other instruments where there are common terms. In fact, we go broader than that. We do not say that it is only in cases where UNCLOS uses a term such as “best available means” or whatever that we look for the identical term outside. We are saying that, where UNCLOS uses a term like “prevent pollution” or “take all necessary means” or whatever, in interpreting that general and imprecise phrase in UNCLOS, we can have a look at other instruments to see what kind of measures are contemplated elsewhere as measures to be taken to

"prevent pollution".

His second point is allied to it. He says that we are totally dependent on non-UNCLOS instruments and that our case would be uncertain and insufficiently pleaded if we were to rely on UNCLOS alone. Well, there is a simple answer to the suggestion that an Irish case pleaded on UNCLOS alone would be uncertain and insufficiently particularised, and that is that UNCLOS itself is uncertain and insufficiently particularised. We could perfectly well have come before you and argued simply that the United Kingdom was in breach of an obligation to cooperate. We could have come before you and said that it is self-evident as a matter of common sense that deliberate discharges from one of the largest nuclear power plants in the world into the sea amount to "pollution" for the purposes of UNCLOS. But it is, I suppose, the sort of déformation professionelle of lawyers to try to give some more substance and not rely on common sense in that way, and that is what we have been trying to do. We have been trying to say that, where the United Kingdom and the Tribunal is faced with a general provision obliging someone to "prevent pollution", you should look around and see what other instruments mean by that. When we say that the United Kingdom did not do it, our complaint is that they did not engage in this exercise either. They did not ask themselves what the real meaning of these UNCLOS were. They should have looked at instruments such as OSPAR in order to give it substance.

The third point on the aids to interpretation: Sir Arthur Watts has asked a couple of times what is, in essence, the same question that Professor Crawford also has asked, in referring to these instruments - are we not actually applying them and enforcing the other instrument, even though we are told that we are only applying UNCLOS? Now, I tried to answer this yesterday, so let me have one more attempt and do it by way of an analogy. Suppose that there is a contract between a consultant and a Ministry. The contract says that the consultant is entitled to the payment of a "reasonable mileage allowance" for expenses. Ireland's case is that in that analogous circumstance it is perfectly permissible to go, for example, to memoranda that are handed out by tax authorities, saying what a reasonable mileage allowance is, to internal memoranda that might go around in the Civil Service saying what a reasonable mileage allowance is. There may even be a statute that says somewhere a reasonable mileage allowance for cars of a certain size is so many euros per mile or whatever. Now, if the contract is interpreted to use that figure or one of those figures or a figure like the figures that are set out in these memoranda and other instruments, when the contract is enforced, you are not enforcing the statute, you are not enforcing the memoranda. You are not enforcing the tax advice or whatever, you are enforcing the contract, and it is simply going out to these other instruments to get a sense of what the contract meant when it referred to a right to a reasonable mileage allowance. That is our simple point. We are not asking for any determination of a breach of nuclear conventions or Sintra or anything of that kind. If you are with us, you will find that the UNCLOS provisions themselves have an effect of imposing an obligation which is of the same order, the same kind of strictness, the same kind of content as Sintra or the nuclear declarations have. If you are not with us on that, you will find that the UNCLOS provisions have some other level of strictness, some other content; and you will make your determination accordingly. But, whichever way you do it, you will be deciding on what the proper interpretation of UNCLOS is.

Those are the three points that I was to raise on the question of aids to interpretation.

The point on the renvoi provision, which I think our friends on the other side accept, has been largely dealt with by Professor Sands, who pointed out the IMO document, which is one of the most eloquent statements of the duties of UNCLOS parties to act under other instruments which are referred to as applicable international rules and standards. I would add only one point to that observation. Mr Bethlehem said that, when we do this, we cannot be allowed to expand the jurisdiction of this Tribunal so as to cover these other instruments. The simple response to that is that we are not extending the jurisdiction of this Tribunal. If this Tribunal refers under UNCLOS article 213 or 222 to another instrument, it has jurisdiction because it has jurisdiction in respect of disputes over UNCLOS article 213 and article 222. There is no expansion involved whatever.

Just before I conclude by referring to the cooperation provision, I should mention one point on the question of competence. The European Community law issue has been thrown in, and there have been repeated suggestions that it is too complicated for the Tribunals to handle. As my colleagues have said, this is certainly not true. Tribunals handle every day of the week questions of foreign law and everything else. I think that Dr Plender got it precisely right in his submission. He was referring to the interpretation of the Community's declaration made under UNCLOS and the fact that the scope of this declaration, as Professor Crawford suggested, is constantly changing as the Community adopts its new legislation. Dr Plender said this at paragraph 35 of his speaking notes: "This might present an inconvenience for States not belonging to the Community, although a Member State must be taken to know what legislation the Community has adopted that may be affected by the provisions in UNCLOS." The Tribunal is in the same position. It is in a position to know what legislation has been adopted. If our friends want to argue that our jurisdiction is excluded under article 281 or 282, they will come before you and they will produce the evidence of EC law and this Tribunal is as well placed as any State is placed to make that determination.

Well, let me close, sir, by making a few remarks about the cooperation issue. There are three points that I would like to make on that. The first is that we note with gratitude Dr Plender's acceptance (which you will find at paragraph 81 of his notes) that at least some part of Ireland's case on cooperation is certainly not a matter within Community competence and is, therefore, a matter within the jurisdiction of this Tribunal. That, at least, will give us all some work to do during the remaining two weeks of this arbitration. The second point that I would make is that, as far as his other observations are concerned, there are a number of points which, rather like my friend here, I would like to spell out. He refers to a number of EC directives, and Professor Sands has already referred to some of them. In paragraph 83, for example, you will find him referring to directive 76/464. 82/501, 84/360 and 2002/59. I looked at those. Directive 84/360 on air pollution from industrial plants, which you will find at tab 32 of his bundle, lists the plants to which it applies. I read through it for almost as long as I read through the Hound of the Baskervilles, trying to find the dog that did not bark (in fact, it appears in a rather different story by Conan Doyle) and it does not seem to apply to nuclear power plants at all. It simply does not apply to them. Directive 82/501 is concerned with major accident hazards at certain industrial activities. The

copy which you will find at tab 46 does not include the annexes. The annexes list the activities to which it applies. That, too, seems not to apply to nuclear plants or reprocessing activities. It is simply irrelevant. Directive 2002/59 touches on some aspects of maritime transportation, but it has nothing at all to say about many of the specific claims that Ireland has raised in its case for relief in the form of an order concerning cooperation with the United Kingdom. It is not raised at all or relied upon at all by Ireland. In fact, I make the general proposition that, if you will read through the Irish Reply, where we responded to the United Kingdom' claim that we had not pinned down our case against them with sufficient particularity, we pin down with great precision the nature of our claims on cooperation and there is not a single reference in that chapter to any instrument of European Community law.

The second point on the cooperation point is that the United Kingdom has not addressed at all the possibility, the argument which we, in fact, make that UNCLOS article 123 imposes special and higher duties of cooperation upon States around semi-enclosed seas than it applies in relation to the generality of State Parties to UNCLOS. That plainly gives a completely different dimension to the whole question of general provisions on cooperation.

My final point, sir, is that, as I am sure will now be evident, it is clear that these matters that do go to jurisdiction cannot really be understood without hearing the full submissions on the merits of the case. You have heard a representation of the Irish case, it is not the representation which Ireland would give and, in our respectful submission, the Tribunal needs to hear the submissions on the merits in order to make a proper determination on its jurisdiction.

Unless there is anything else that I can do to help, sir, that concludes my submission.

THE PRESIDENT: Thank you. Mr Brady, does that conclude Ireland's response?

MR BRADY: That concludes Ireland's response, with this qualification, that nothing new comes out of the reply from the United Kingdom. But the answer is, yes, it does.

PROFESSOR CRAWFORD: Professor Sands in response to a question from me said that he wanted to consider - and it is not a question for him individually obviously, it is a question for you - but there was the question of the application of article 282 to the OSPAR Convention.

MR BRADY: If I can answer that by saying that I am in admiration of your powers of recollection, because I had completely forgotten that, but that is an issue that has to be addressed, so, if I can perhaps ask Professor Sands when he will be in a position to address that. That issue which seems to me to be the only outstanding issue can be addressed tomorrow morning. That seems to be the only issue that will require to be addressed, but that should not prevent the United Kingdom I think dealing with the other issues.

THE PRESIDENT: We have been informed that the United Kingdom is willing, able and, perhaps, even anxious to make a little response. We are quite willing to listen to that, but I suggest that we have a break of about five or ten minutes and then come back.

(Short Adjournment)

DR PLENDER: Mr President, members of the tribunal, there is an assortment of issues which have been raised by the three counsel for Ireland who have addressed you, and I shall endeavour to deal with the principal points. if I do so with some brevity I hope that this will be regarded more as a courtesy to you

than a discourtesy to them.

In the course of his address Mr Sreenan reiterated a submission made obviously to which I did not then respond. That is that the burden of proof lies upon the United Kingdom to establish the jurisdiction of this tribunal. In my submission recourse to burdens of proof is inappropriate as the means of establishing the jurisdiction of an international tribunal. Even had there been no submission on the point the tribunal would want to be satisfied of its own jurisdiction and that for obvious reasons.

IN so far however as the submission raises a point of substance I merely observe that ordinarily one would expect an application before an international tribunal to satisfy the tribunal that the tribunal; has jurisdiction, and the fact that the international tribunal for the law of the sea did not find that the case was obviously beyond the jurisdiction of the tribunal should not of itself lead to any form of presumption.

Mr Sreenan stated early in his address that we have not established that we are concerned with common rules. I retort that Mr Sreenan has not established nor referred to any authority whatsoever for the proposition that common rules in Community law indicate something intermediate between a common policy and a mere provision in a directive. The suggestion put forward by Mr Sreenan that this is the case is both amorphous and incompatible with the language of the Court of Justice in the ERTA case. Whatsoever form these may take, said the court, and while of course that refers among other matters to a form such as regulation or directive or decision yet it remains the case that we are here speaking of common rules in some or all of those instruments. There is no qualification of a particular standard; nor indeed have we been offered authority for the point. Moreover, the proposition that there should be some such authority is to be contrasted with the words of the Community declaration which is here the principal governing matter. Certainly there is no support in that instrument for the proposition which, if I recorded him correctly, Mr Sreenan made when saying that the court associates common rules with harmonisation. On the contrary, as the Community declaration itself indicates there are two categories of Community competence which are envisaged, first there are cases which are common matters of Community policy, and secondly there are those where common rules are examined within the context of the ERTA rule.

Mr Sreenan's next point was that we have not shown how such common rules have been effected. I certainly endeavoured to address that point, and it would be found at paragraphs 39 to 47 of my speaking note. I did take the Court of Justice to the open skies case which is at tab 16. I observed that that case itself referred to and dwelt upon an earlier line of authorities and that it concluded at paragraph 82, that where international commitments fall within the scope of the common rules or in any event within an area which is already largely covered by such rules, there an effect is established,

Mr Sreenan did read to you paragraphs later in the same judgment but in understanding those paragraphs it is important to see the context. The court in the paragraphs which I quotes deals with the case with which we are now concerned, that is to say where the common rules are affected in the case of a comparison of an international agreement and Community legislation.

At paragraph 85 it makes it abundantly clear that it is turning to a new subject. It says on the

other hand it follows from the reasoning in paras 78 to 79 that any distortions in the flow of services in the internal market which might arise from bilateral open skies agreement concluded between member states and non-member countries do not in themselves affect the common rules adopted in that area. What the court is considering at the paragraphs quoted by Mr Sreenan is an effect arising from a distortion of internal rules. That is a matter far removed from the present case.

The suggestion that there should be more than the test established by the court in paragraphs 81 and 82 of that judgment was as I informed the tribunal a matter which was considered in the 1980s by Mr John Temple Lang, it was discussed but it was a notion rejected in opinion 291 and the court has never endorsed it.

Mr Sreenan stated that I had accepted that the majority of the rules with which this case is concerned establish minimum standards. I am not aware of having done so, nor even of saying that the subject is relevant. On the contrary at paragraph 61 of my speaking note I stated that this is not the appropriate question. It not being the appropriate question no investigation has been undertaken.

A misunderstanding appears to arise as to what I say of the ILO case. Both Mr Sreenan and Mr Sands understand me to have said that the ILO convention was about standards in respect of chemicals. Paragraph 65 of the speaking note refers to minimum standards and records: "The United Kingdom does not accept that this establishes "minimum standards" in the sense in which that expression was used in Opinion 2/91 on lLO Convention 170 (Tab 12) where the Court was speaking of dose limits for chemicals." If the tribunal will look at the relevant passage which is at tab 12 it will see that the court dealt with the minimum standard at paragraphs 24 to 25. The final sentence of paragraph 24, which is describing the ILO convention, says in addition and in contrast to the provisions contained in the directives, articles 6.3 and 7.3 of the convention regulate the transport of chemicals. 6 deals with dose limits and 7 admittedly deals with another matter which I did not specifically mention, and then the court goes on to say "While there is no contradiction between these provisions of the Convention and those of the directive mentioned it must nevertheless be accepted that part 3 of convention No. 170 is concerned with an area which is already covered to a large extent by Community rules progressively adopted".

I was therefore of course not characterising the ILO convention as a whole. I was identifying the provisions of the ILO convention of which the court was speaking at the point when it came to deal with minimum standards. And by the way the ILO convention is yet another illustration of that phenomenon that we have encountered on a number of relevant items of legislation and international regulation, that is to say an instrument which contains within it a provision on minimum standards. The question is whether a particular provision affects minimum standards, not how one would characterise the instrument as a whole.

Mr Sreenan's next submission as I got it was that in the environment sector the court does not refer to common rules but to Community rules. He was I think speaking of the Cartegana Protocol case, but it was a submission which I find difficult to reconcile with the wording of the judgment. The court will recall that I drew attention in the Cartegana Protocol case to paragraph 45 of the judgment which contains a reference to the ERTA principle. That is precisely the application of the Community's

common rules. Mr Sreenan claims to derive assistance from paragraph 46, which records the submission made by the United Kingdom, and I am happy to say accepted by the court, that harmonisation covers only a part of the field, a small part of the field. That is, indeed, the case. It is, however, the fact that in that paragraph, the court itself identified a small number of directives of harmonisation within the environment sector. It is difficult to see, therefore, how one could square with that fact, exceptional as it is, the proposition that in the environment sector legislation proceeds by way of minimum standards only.

It was said both by Mr Sreenan and by Professor Sands that I was incorrect in stating that a jurisdictional point was taken in the OSPAR case. I am grateful to my friends for providing a copy of our pleading. I simply invite the Tribunal to look now at paragraphs 3.13 and onwards. At 3.13 we pointed out a natural or legal person who is refused information pursuant to the domestic legislation had ample remedies in domestic law. In addition, it is open to any such person and, of course, to an EC Member State to complain to the Commission of a failure. Indeed, we pointed out that it is the duty of the Commission under article 211 to ensure that the provisions of the treaties and the measures adopted pursuant thereto are applied. We pointed out that, if the Commission took the view that the United Kingdom had failed properly to implement the directives, it could raise the matter at the administrative level and, if this failed, then it could institute proceedings against the United Kingdom in the Court of Justice. Then we pointed out that an EC Member State, such as Ireland, has its remedy in proceedings against the United Kingdom in the Court of Justice. Then we went on to point out that the remedies in the Court of Justice are exclusive. We refer to article 292 of the EC treaty. We said this also applied in respect of any failure to comply with obligations incumbent upon EC Member States by reason of the directive made pursuant to the treaty. We pointed out that Ireland had not availed itself of any of these remedies. And we then came to our conclusion that Ireland had no cause of action or, alternatively, that Ireland's claims are inadmissible as their claims must be brought before a different forum.

The difference is in the form in which the final word was put, admissibility. It is true to say that the point, the substance of which is similar to the point made here led, in our submission before OSPAR, to a different remedy, but that is because, in the case of OSPAR, there is no provision comparable with annex IX which is capable of being relied upon directly. It is true that we put it in terms of admissibility, in the absence of a provision such as Annex IX, and it is also fair to say that the energy and space devoted to this issue in the present proceedings is considerably greater than it was, but that is partly because of recent developments in relation to that matter which are now affecting the conduct of the present proceedings.

IN the case of our submissions on Euratom, there appears again to have been a misunderstanding on Ireland's part. Mr Sreenan understood the United Kingdom to say that Euratom is a party to UNCLOS. We are not aware of having said anything of the kind. Paragraphs 68 to 70 of our speaking note address the question. I hope that I have made myself clearer to the Tribunal than I have to my friends.

It remains necessary for me to deal with only one final point before leaving Mr Bethlehem to

respond briefly to the issues raised by Professor Sands and by Professor Lowe.

Professor Sands expressed dissatisfaction with the manner in which we had characterised Ireland's case. He contended that Ireland's case is not based upon any claim that directive 85/337 has been infringed and that we misunderstood the memorial as containing such an allegation. May I refer the Tribunal to the memorial at paragraph 7.12? In the middle of the paragraph we read, "for the MOX plant the specific conditions governing the preparation of the environmental assessment are determined by reference to the specific requirements of European Community law". The specific conditions are determined by reference to the specific requirements of European Community law. If what Ireland had intended by that paragraph was to convey the proposition that there is no inconsistency between the MOX plant directive 85/337 or no question arises of this Tribunal considering whether there might be any failure to comply with the conditions of directive 85/337, but merely the wording of directive 85/337 helps one better to understand article 206, then it appears that I have misunderstood my friends as gravely as I think that they have misunderstood me. But I do draw attention to the words "the specific conditions determined by the specific requirements".

I promised that that was my last point and in substance it is, but may I sweep up a number of details before sitting down.

Professor Sands did not find the passage in Colson and Hoyle which we say is of some assistance. For the note, I mention that it is at the top of page 76 and in a footnote. I mentioned Colson and Hoyle, however, only because it is not in our memorial and I was relying rather more particularly in my address this morning on the article by Judge Roses at tab 70. Professor Sands explained that Ireland believes that it cannot make in the European Court of Justice precisely the claim that it can make in this Tribunal, and that is why it is here. His understanding is correct and I hope that I fully understand his motivation. What he says is exactly true. It is true because the nature of the right is different. If my submissions are correct, then Ireland does not have rights against the United Kingdom deriving from UNCLOS. That is why there would be some difference in the nature of the right in the European Court of Justice. The fact that there is a difference in the nature of the right is rather a reason for declining jurisdiction than for admitting it in some discretion, were there some discretion, or otherwise.

In dealing with the opinion of the Commission under article 37 of the Euratom treaty, Professor Sands pointed out that I omitted in my account the crucial words "significant from the point of view of human health". So I did, because my point here was not to argue whether or not article 37 applies to environmental matters, rather my point was to say that it is just that issue which should not be determined by this court. I was not seeking to argue a case on the opinion based on article 37. I was seeking rather to identify a point which is not suitable for adjudication before this court.

Finally, I must sweep up the point made by Mr Sreenan, who says that the United Kingdom could have taken steps against Ireland in the Court of Justice. So we could, but the United Kingdom has chosen not to do so. Lawyers may regret that the United Kingdom does not wish to institute proceedings against a neighbouring State in the Court of Justice, but the United Kingdom has a number of reasons for not wishing to bring proceedings against Ireland. Ireland cannot establish the jurisdiction of this

Tribunal by referring to the failure of the United Kingdom to bring proceedings against it elsewhere. There is no right to be sued.

I now call on Mr Bethlehem to respond briefly to the points made, in particular by Professor Lowe.

MR BETHLEHEM: Mr President, Members of the Tribunal, I appreciate that it is a very late hour indeed and I am only going to make one point. I think that most of the points made by my friends on the other side were either addressed in my earlier remarks, and I do not want to restate them, or they are merits points and I will not get to them. This is really a courtesy to Professor Sands, because he still has to respond to Professor Crawford's question and I thought that he was edging towards a formal response saying that we have not made these arguments previously. Now, of course, had he made or were he to make a formal response, we would take issue with it very sharply because, of course, these issues of jurisdiction and admissibility are throughout our pleadings, but I can assist him so that he does not spend the evening reading them to try to find the point. Article 32 of OSPAR, in fact, is addressed in our counter memorial at paragraphs 7.39 and following. There is a little bit of a renvoi in our pleadings as well back to chapter 4, which deals with jurisdiction and applicable law. At paragraph 7.42 after referring to the argument that the Tribunal does not have jurisdiction to address OSPAR matters by reference to article 288 of UNCLOS, we then go at paragraph 7.42 to say that the same conclusion is warranted by reference to the provisions of the OSPAR Convention. Article 32 of the OSPAR Convention provides for dispute settlements relating to the interpretation and application of this convention in accordance with the procedure laid down in that article. In paragraph 7.44 we simply state that Ireland has chosen not to proceed against the United Kingdom in respect of its allegations of transboundary pollution under either article 21 or article 32 of the OSPAR Convention. It is entitled to decide not to do so. It cannot, however, circumvent the OSPAR Convention by choosing to proceed instead under UNCLOS. No doubt, Professor Sands will come back on those points tomorrow.

Mr President, Members of the Tribunal, that concludes the United Kingdom's submissions today. Thank you.

THE PRESIDENT: Thank you very much indeed. I think we can now conclude that the issue of jurisdiction has been addressed in the manner that we had all agreed, with the exception of the remaining answers to be given by Professor Sands to the questions posed by Professor Crawford. We anticipate that the proceedings tomorrow morning, which will be devoted to this, will last no longer than approximately half an hour. We hope that we are right on that. Thereafter the Tribunal will adjourn to deliberate on the submissions that have been made and we expect then to reconvene at 3 o'clock or around 3 o'clock, at which time we will indicate to the parties the decision that has been reached by the Tribunal with respect to subsequent proceedings. On that basis then, I adjourn the meeting and we will meet tomorrow morning at 9.45.

MR BRADY: Mr President, I know that you have to make your decision, but in the context of the convenience of witnesses, and obviously depending on what your decision is, is it intended, if you are to proceed, on which day would you reconvene your sittings, because it goes to the issue of witnesses in this

jurisdiction, witnesses travelling to here? I think that it would be a benefit to both parties if it could be indicated when you would next sit, subject obviously to your decision.

THE PRESIDENT: We do not anticipate to sit before Monday morning.

MR BRADY: That is very helpful. Thank you very much.

THE PRESIDENT: The hearing is adjourned.

(Adjourned until tomorrow morning at 9.45)