THE MOX PLANT CASE

BETWEEN

IRELAND — Applicant

- and -

THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND — Respondent

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THE JAPANESE ROOM
THE PEACE PALACE
THE HAGUE
THE NETHERLANDS
WEDNESDAY, 18TH 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 SIX
(Revised)

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THE PRESIDENT: I would like to make a few remarks. The Tribunal wishes to emphasise, as I am sure you are well aware, that these hearings are particularly intended to enable the Tribunal to determine the appropriateness of the Provisional Measures requested by Ireland. For that reason, we would request the parties to confine their submissions to that aspect and, as far as possible, to avoid going into matters that may be dealt with in relation to the merits of the case. In particular, we would be grateful if the parties would endeavour to identify as precisely as possible the specific Provisional Measures to which their arguments are directed. In view of the short time available, I am sure that you will all agree that this is the best way to enable the Tribunal to respond meaningfully to the submissions that are made by both parties.

Thank you very much. I will now give the floor back to Professor Sands to continue his submissions.

PROFESSOR SANDS: Thank you very much, Mr President and Members of the Tribunal. I am grateful for those clarifications and we will, of course, fully endeavour to give effect to them.

Before getting back to the issue of the Provisional Measure that we request in relation to assessment, can I just deal briefly with some preliminary matters, including a response to the question that was put yesterday afternoon. The first point, our request for provisional measures does not deal with the time element. The Tribunal has indicated that it is suspending this proceeding until no later than 1 December. It is unclear what will happen at that date or what will happen thereafter, and no further proceeding, has been indicated for understandable reasons, at this time. We do not understand that there is to be scheduled a full Merits hearing at that time nor, as the Tribunal has heard, can the possibility be excluded that developments in other places could lead to a further extension of time. But at the very least we cannot imagine that a rescheduled merits hearing could be heard much before the beginning of the next year, and that would be on an expedited schedule, so we proceed on the basis that our request for provisional measures is not limited to the period between now and 1 December. We are not minded to put ourselves in a situation where we need to come back to you at that date or shortly after that date or regularly thereafter; in our submission, the sensible approach - and we would invite you to consider this approach - is to prescribe provisional measures which would in principle cover such period until the Tribunal gives its award or adopts such order as definitively brings to an end the proceedings. So it is on that basis that we proceed and that of course informs our response, including in relation to the question posed by Sir Arthur yesterday.

A second preliminary point is that we proceed on the basis, as indicated by the Tribunal, that the Tribunal has decided that it has prima facie jurisdiction. We understand that prima facie jurisdiction to apply to the entirety of the dispute that has been submitted by Ireland and that it extends both to those parts of Article 290, paragraph 1, which relate to provisional measures to preserve Ireland's rights and provisional measures to prevent serious pollution. The reason Professor Lowe and I yesterday went, perhaps, a bit further than the Tribunal may have wished in identifying our rights, was precisely because it was the first opportunity that Ireland had had, orally anyway, to set out what its rights are. So our

request for provisional measures is premised on those two points.

The third point, coming to the question by Sir Arthur Watts. To paraphrase, he asked why we could not on our side live with the assurances offered by the United Kingdom in its letter of 13 June 2003 why they would not be sufficient. I propose now to deal with that, subject to one point of clarification. There is one part of that letter that is plainly covered by confidentiality issues, so I would propose to return to that in closed session and not address that part of my response now, but I proceed on the basis that the other part of the letter, namely that which deals with reprocessing contracts at THORP, is not within confidentiality and I am free to engage in a response. I pause just to check that that is the case. Very good.

It is probably worth going to that part of the letter to set out what it offers. He says: "Further, given the emphasis Ireland places in this case on the potential for new THORP contracts, the United Kingdom confirms that there are no current proposals for new contracts for reprocessing at THORP or for the modification of existing contracts so as to reprocess further material. No decision to authorise further reprocessing at THORP would be taken without consultation in which Ireland would be invited to participate."

A first point, of course, is that Ireland appreciates the recognition by the United Kingdom that the subject of reprocessing contracts is one that probably falls within this dispute, because it is, of course, connected to the operation of the MOX plant. Subject to that preliminary point, the offer is one - and I hope I will be forgiven for expressing the view - which we treat with a degree of scepticism. Let me now explain why that is, and why it reinforces precisely the request for Provisional Measures in relation to assessment that we have sought. Just to remind you, the request that we have sought is not for an order for the plant not to operate pending any decision on Ireland's rights under an assessment, but simply, effectively, to send out a signal that the United Kingdom is not entitled to take steps or decisions which might preclude full effect being given to any future assessment which might be ordered by this Tribunal. It is a very limited request in that sense. You can compare the assurances offered by the United Kingdom with the request which we have made, which is at paragraph B(i) which is entitled "Cooperation" and which, of course, is made on the basis that any information contained would be treated confidentially by Ireland. Our request is as follows:

"In the event of any proposal for additional reprocessing at THORP or manufacturing at MOX (by reference to existing binding contractual commitments), the United Kingdom will notify Ireland, provide Ireland with full information in relation to the proposal and consult with, and consider and respond to issues raised by, Ireland."

You will note the material differences. The United Kingdom limits itself to THORP contracts. We are concerned with both THORP and MOX contracts. Secondly, the formulation in relation to consultation and cooperation, coming back to Professor Lowe's points yesterday, is far broader than the UK formulation. Let me explain why that is.

Firstly, we note the use of the formulation by the United Kingdom, "No current proposals for new contracts". It appears straightforward. We invite the United Kingdom to explain to us what is

meant by the word "current". Are there earlier proposals which have been suspended and which might be revived, so to speak?

Secondly, in relation to the word "contracts", we have a number of questions. What is meant by the word "contracts"? Is it to be narrowly construed or is it to be broadly construed? Let me explain that by reference to a document which you have in today's bundle at Tab 11. I apologise that you are going to have to use both yesterday's bundle and today's bundle. We are starting with tab 11 of today's bundle. That document is the public domain version of the ADL report. Of course, you will appreciate that Ireland has now for more than two years been seeking to obtain a full copy of that report and has brought proceedings in another place to obtain a full copy. The United Kingdom has very firmly resisted Ireland's application and considers that all of the matters set forth in the report, which should be redacted, are subject to commercial confidentiality.

At page 485, you will see figure number 7, volumes covered by "contracts", "heads of agreement" and "letters of intent/support". It indicates sources by reference to geographic provenance and then the type of arrangement characterised in three ways, "contracts", "heads of agreement", "letters of intent and support". One thing that one can read into that text is that the United Kingdom plainly distinguishes between those three categories of instruments.

You will also note that all the information there is blocked out. There is no information which has been made available by the United Kingdom in relation to who the customer is, in relation to the volume of MOX fuel that is to be produced, and so on and so forth. You get there a clear indication of why Ireland has certain questions about what is meant by "contracts": does the word "contracts" in the letter of 13th June 2003 include or exclude heads of agreement and letters of intent and support? We would welcome clarification of that aspect of the letter from the United Kingdom. You will also note, of course, that, having resisted in those proceedings to providing Ireland with any information at all in relation to the contracts, a degree of scepticism on the part of Ireland that in relation to this new assurance, we would get anything more than we have previously been given in other contexts. It would indicate a fairly far-reaching about turn by the United Kingdom.

We note also in the United Kingdom's letter of 13th June, the final sentence, "no decision to authorise further reprocessing a THORP would be taken without consultation in which Ireland would be invited to participate." Again, we note that those words are very carefully drafted. It does not say "The United Kingdom would engage in consultations with Ireland". It does not exclude the possibility that there would be yet another public consultation at which Ireland would, once again, join the queue with hundreds of others, individuals, non-governmental organisations and trade unions, and be invited to express any views. Professor Lowe took you yesterday to the relevant correspondence. It indicated very clearly that Ireland was unable to obtain responses to specific questions. Is that the type of consultation that is intended? What guarantees does Ireland have that the United Kingdom would actually participate in meaningful cooperation with Ireland, would provide it with sufficient information and would take account of Ireland's views, as well as respond to issues and requests for further information? None of that is addressed in this assurance. On that basis, of course, it is very difficult to imagine proceeding on

the basis of such a text.

I would also make the point that this letter perfectly encapsulates the arguments made by Professor Lowe yesterday. This letter explained very clearly why we need your order to be crafted with precision and clarity, in order to assist the parties avoiding these types of difficulties in the future.

Coming specifically to why this relates to the question of why we need an order on assessments, can I take you to tab 57 of yesterday's bundle? This is an extract from the British Government's White Paper on the Liabilities Management Authority. It was published in July 2002 and it is to be supplemented or followed by a draft Bill, the publication of which is imminent. It sets out the conditions under which, amongst other things, the ownership of the MOX plant and the THORP plant will be transferred out of BNFL and back into the hands of the British Government. At the top of page 324, you see paragraph 5.19. This is in relation to THORP. "Any proposals for new contracts will similarly require approval by the Secretary of State. In the event that any such proposal was received, the Government will look in detail not just at the circumstances of the specific case, but, in the light of the Bergen Declaration" - the Bergen Declaration commits the United Kingdom to consider alternatives to reprocessing - "would also review the range of issues which will be involved in increasing the current volume of fuel to be reprocessed through THORP. Decisions would be taken in the best interests of the UK as a whole in the light of advice from the LMA and on the basis of that approval would only be given if the contract were consistent with clean-up plans for Sellafield and in the LMA's view would to cut across implementation of those plans. It was expected to make a positive return to the taxpayer after allowing for operational costs, business risks and any other costs which might be incurred as a result of the contract, including any additional clean-up costs, and consistent with the UK's environmental objectives and international obligations".

It is the last part of the last sentence that has triggered our request in relation to the order on assessment.

The position adopted by the United Kingdom throughout the 1990s and currently before this Tribunal is that its international obligations do not extend to an obligation to carry out an assessment for the THORP plant in relation to future contracts. That is the position that they have taken. On that basis, of course, they are of the view that it would not be inconsistent with the United Kingdom's environmental objectives and international obligations to proceed to new contracts without a further environmental assessment. We, of course, dispute that view. You do not have to decide that at this stage. All we seek to do is to preserve our rights by incorporating in some appropriate form a recognition of the possibility that the Tribunal could order an assessment of these contracts and, if it were to order an assessment of the implication of those contracts, such assessment could not be trumped by any new contracts which had been concluded or which were to be concluded in the period between now and any award that the Tribunal might give. We are realistically faced with a period of three or four years. On a worst case scenario, if the European Commission were to initiate proceedings and if the matter were to go to the European Court of Justice, it could remain there for many years. So one cannot exclude the possibility that these proceedings could be suspended until 2006 or 2007 and we wish with

this request to cover that period. It would send a signal. There is, of course, nothing to stop the United Kingdom hence forth from making its own fresh assessment in relation to the THORP plant. It has resisted doing that since Ireland first wrote in 1993. It is free to do that. The issue could very adequately be addressed in principle by the United Kingdom proceeding on that basis.

The final point that I make, just before I come to that point, in this respect, we have already indicated on our side that we do not think it is appropriate or consistent with international law to carry out an assessment of the environmental consequences of individual contracts. The sensible approach is to assess the totality of foreseeable contracts needed to fulfil the 2,400 tonnes of production of MOX, and that would then cover each and every contract and we would not find ourselves in the situation, potentially (which presumably this Tribunal would relish as little as we would) of having to come before you in the event that a future contract is concluded without the benefit of a prior environmental assessment. That is what we are trying to avoid.

The final point that I make is that even in the context of these proceedings, the non Ospar proceedings if we may call them that, the United Kingdom has resisted providing contractual information. The United Kingdom now says in its letter of assurance that it would hold consultations in which Ireland would be invited to participate. It is unclear on what basis the consultation would take place, it is unclear whether Ireland would have access to sufficient information in relation to the contracts to be able to make a meaningful response to a request to consult and to co-operate.

To illustrate that, can I take you to tab 21 of yesterday's folder. At tab 21 you will find the first document is Annex 152, letter from Ireland to the Agent for the United Kingdom. Over the page, at page 86, there is a reference to Mr Rycroft's first witness statement in these proceedings. In his witness statement Mr Rycroft makes assertions as to the contents of the contracts for reprocessing in THORP and existing MOX contracts for the MOX plant. That is at the Counter-Memorial, Annexes Volume 2, tab 10, pages 7 and 8. However, his statement is not accompanied by supporting documents, even though Mr Rycroft's assertions are relied upon in the Counter-Memorial. "I would be grateful if you could supply complete copies of all the THORP contracts and the existing MOX contracts to which reference is made. As publication of parts of these documents may raise issues of commercial confidentiality, Ireland is willing for the documents to be tendered on the basis of Article 12(3) of the Tribunal's Rules of Procedure."

I pause for a moment. Ireland fully recognises the need to maintain commercial confidentiality. We wanted to see the contracts solely for the purpose of these legal proceedings and, of course, would fully respect such confidentiality.

The responses from the United Kingdom are set over on the next page, Annex 155 from Mr Wood to Mr O'Hagan. "I refer to your letter of 4th February 2003 ..." Then the second paragraph: "You also request complete copies of all the THORP contracts and the existing MOX contracts to which reference is made. I am informed that these documents are private commercial contracts, are subject to contractual confidentiality obligations and are commercially confidential. Their content is not in any way relevant to the present proceedings. These contracts are not documents in the possession of the

Government of the United Kingdom. In these circumstances, I regret that I am not in a position to provide copies of such contracts."

In relation to the assurance now offered by the United Kingdom. if we were to ask for information as to the contracts would we receive the same response? Would we be told they are not the UK Government's contracts, they belong to BNFL? Would we be told that they are commercially confidential so we cannot tell you about the volumes? Would we be told that they are commercially confidential so we cannot tell you whether or not there has been a requirement that any implementation of these contracts is dependent upon a proper and complete assessment of the effects of the THORP plant? These are all questions to which we do not have answers, and they are important questions because, of course, in this business of reprocessing and MOX fuel operation, a contract entered into in this year might not actually be put into effect for 15 or 20 years. Just earlier this year, a contract entered into with an Italian company in 1975 arrived for reprocessing at the THORP plant in April 2003, so one needs to recognise the implementation of contractual requirements today or on 1 January can have consequences fifteen, twenty, twenty-five years down the line. We think that underscores precisely why it would be helpful to both parties to avoid further difficulties by addressing now the question of environmental assessment. I hope that fully addresses the question that was raised on assessment.

PROFESSOR CRAWFORD: Thank you, President. Professor Sands,

the actual request for a provisional measure in relation to assessment reads: "The United Kingdom shall ensure that no steps or decisions are taken or implemented which might preclude full effect being given to the results of any environmental assessment that the Tribunal may order to be carried out ...." etc.

What you are saying now would be more consistent with a request for a provisional measure in relation to assessment that said the United Kingdom shall ensure that no approval is given to any future contract without an environmental assessment having been carried out. Is that fair comment?

PROFESSOR SANDS: It could be fair comment, it depends what

one means by the word "approval", because as we have seen, in the United Kingdom as in all industrialised countries, an approval at one level might nevertheless be subject to further regulatory requirements and approvals later down the line. So we focused on that issue and we were concerned to avoid a situation in which the United Kingdom might not, for example, be able to give an in principle nod to some future contract, subject to issuing, if you like, a warning that, further down the line the contract may be stopped in its tracks.

The difficulty with the reformulation, Professor Crawford, that you have proposed is that it focuses very much on what one means by the word "approval" and we felt it might be more appropriate to avoid discussions of that kind and effectively leave it to the United Kingdom to take such steps as it considers appropriate, having regard to the possibility that this Tribunal may in the future order a proper assessment of THORP.

PROFESSOR CRAWFORD: The problem that I would have, speaking from a practical point of view, as the United Kingdom in relation to this request, is that I would not know on the face of it what steps or decisions might preclude full effect being given. I mean, it is very general.

The second point to make is that if indeed Ireland takes the view - and the arguments you expressed a few moments ago seemed to indicate this - that no or at least no substantial or long term contracts should be issued without an assessment - if we in effect cover that disagreement up by general language, we might well be in the same situation in December. If the United Kingdom proposes to issue a long term contract, you come back and say, yes, but you have not done an assessment, we are in effect postponing the problem. You may say there may be no such contract and therefore we can postpone the evil day, but you have already said we want a set of robust provisional measures that will survive a reasonable period of time. That is not the case if, on the very first occasion that a contract comes up for approval, we are going to have to have another provisional measures hearing.

PROFESSOR SANDS: These are practical issues that certainly require attention, we do not run away from that. What we have sought to do with this formulation - and it may be that another formulation might be more felicitous - is, to put upon the United Kingdom the burden of informing its own authorities, who might be faced with one or more approval decisions, and those private contractors, who may be wishing to enter into such a contract, to put them on notice that it will not be open for them to rely on those contracts in the face of any requirement to carry out a future assessment. Our concern here, as has been said on other occasions in these proceedings and at the International Tribunal for the Law of the Sea, that, if the Tribunal were to prescribe certain Provisional Measures or adopt an order, that would have dramatic effects on existing contracts and existing practices. That was said by the United Kingdom at the Tribunal for the Law of the Sea and we wish to avoid that situation, not by stopping the operating of the plant now, but by focusing on this question and ensuring that those who are in a position to authorise and that those who might be minded to enter into contracts or letters of intent of memoranda of agreement are on notice that there is a live issue in which Ireland has raised the question of its rights to an environmental assessment and there is a possibility that this Tribunal might order such an assessment to be carried out. That is, effectively, what we are seeking to achieve and we are, of course, open to suggestions, including from our friends for the United Kingdom, as to other ways to achieve that. We are not wedded to this formulation. I think that you have understood what it is that we are trying to achieve and it may be that there are alternative ways of getting there.

PROFESSOR CRAWFORD: In the Great Belt case, the Court basically said, "We are not going to stop the building of the bridge, but we might do it when we get to the merits, in which case the respondent takes the risk of that". Is that not enough in relation to contracts? Obviously, we are dealing only with the question of assessment. That case was dealing with the question of right of passage, which is a somewhat different context. But let us assume that the Tribunal were eventually to order that there had to be an assessment of MOX/THORP and that, having regard to all relevant circumstances, the result of that assessment was significant in curtailing or even in the cessation of operations. Would that not be like the building of the bridge, that it would then be for the respondent to comply with that and to take the commercial consequences of contracts that had to be cancelled?

PROFESSOR SANDS: What we would say is that there is one material difference between that case and this. In this case, the contracts could be put into effect and could result in discharges of radioactive substances into the marine environment, which would be an irreversible act. In the Great Belts case, you would not

be faced with that situation and the problem can be remedied by an order to dismantle the facility and pay money damages. In this context, we are in a different situation. Money damages cannot adequately repair discharges. That is the conundrum in which we find ourselves. We have tried to find a sensible way in which to deal with this pragmatically. I say again that we are open, of course, to suggestions as to how this problem might be addressed. You have, if I may say so, Professor Crawford, hit the nail right on the head. We are dealing here with discharges not just from MOX, but THORP, which even the United Kingdom recognises are significant, which are irreversible in terms of their potential and likely effects on the environment.

The other question that I will come back briefly to, if I may, right at the end in a camera session.

If I can now turn, having regard to the Tribunal's comments at the beginning of today's session, to conclude that part of this presentation that deals with Ireland's requests for Provisional Measures in relation to assessment. I had got to the part where I was going to address the violations by the United Kingdom of its obligations to carry out an assessment. I can deal with this very briefly by taking you to tab 23 of yesterday's folder. That should include extracts from the report of Mr William Sheate of Imperial College London. He is an expert on environmental assessment who has reviewed the 1993 Statement and, rather comprehensively, we say, has indicated a view on the inadequacies of that assessment.

The United Kingdom has not taken issue with the contents of this report. It has, however, questioned its relevance to this Tribunal.

Ireland thought that it would be useful to obtain a wholly independent view on environmental assessment. At p.201 of the document, at the bottom, you will see that Executive Summary and you will see there that, in addition, "The Environmental Statement was compared both to a UK Environmental Statement undertaken for an insinuator plant authorised in the early 1990s for a more or less contemporary assessment process comparison to a US MOX plant currently undergoing an extensive EIO process at Savannah River in South Carolina for comparison with the international standards applicable at the time that the Sellafield SMP was finally authorised". He then sets out in summary form his concerns with the Environmental Statement for the MOX plant. "The review of the 1993 Environmental Statement against the review criteria reveals considerable inadequacies and, in particular, the inadequate treatment of key areas which the Environmental Statement could legitimately be expected to have addressed in some detail". He then sets those out. He then says, "The MOX Environmental Statement is shown to be quite inadequate even for the standards prevalent at the time in the early 1990s and especially given the nature of the proposal". He then says something about comparisons with other environmental statements.

Over the page, and this is what is of particular relevance for this Request for a Provisional Measure, he says, "It is of particular concern that the relationship between MOX and THORP would appear to have never been subjected to an environmental assessment. No EIA was required for THORP which preceded legal requirements, nor did the MOX Environmental Statement address the close

relationship between these two facilities. The consequential indirect accumulative effects associated with this relationship, especially those relating to transportation of spent plutonium fuel to THORP to supply MOX, radioactive discharges associated with THORP and the generation of radioactive waste at all stages of the MOX process, including from THORP, have not, therefore, been addressed. The SMP Environmental Statement addresses only a very narrowly defined set of effects with inadequate baseline and description of assessment methodologies".

We say, on the basis of that view, which we additionally would say covers the entirety of the assessment process, there is a very real risk that Ireland's rights under Article 206 of the Convention will be found by this Tribunal to have been violated. It therefore justifies a precautionary Provisional Measure.

PROFESSOR CRAWFORD: I am sorry, Professor Sands, I am going to have to push you again. Precisely what things do you want the United Kingdom to refrain from doing in order to preserve your rights to an assessment? You have made the Irish case about assessment very clear. You have made it very clear that it relates not just to the assessment of MOX, although the Irish view is that the MOX assessment was, itself, inadequate, but that it requires an assessment of the relationship between MOX and THORP. The question is, for the purposes of Provisional Measures, what precisely is it that the United Kingdom should not do for the next six months or six years or whatever intervening period it turns out to be?

PROFESSOR SANDS: We hope that it will only be six months, but, of course, it may not, so we need to look much further. The purpose of Provisional Measures is to protect Ireland's rights. Ireland's rights include the right to expect the United Kingdom to carry out a proper assessment of all aspects of the MOX plant, including THORP. Ireland would not wish the United Kingdom to take any steps which would frustrate any future order that this Tribunal may make in relation to environmental assessment. It may be free to enter into contracts for future THORP reprocessing, but it could not give effect to those contracts, put them into operation, actually reprocess further spent nuclear fuel at THORP, without having subjected them to an environmental assessment that is Ireland's case.

In order to preserve that right, the consequences of a violation of which would be irreparable, we say, if they were to proceed to discharge even a single radionuclide from a THORP contract which had not yet been obtained into the Irish Sea, without an assessment, would effectively be an irreversible loss of Ireland's rights in the event that this Tribunal was to order an assessment.

There is a second area, it is not just contracts. I am coming in the later part of my presentation to the question of abatement technology. There is a big issue on abatement technologies between the parties and I am not going to require you to look at or settle any views on that, but we do currently find ourselves in a situation in which the Environment Agency of the United Kingdom is considering further abatement technology requirements, particularly in relation to the THORP plant. I will briefly come back to that later. It may well be that the United Kingdom, through its Environment Agency or through some other agency, would be minded to adopt a particular decision on, let us say, abatement technology A, which would be less clean than abatement technology B, but three years down the line, pursuant to an order of this Tribunal and pursuant to a fresh environmental assessment, the assessment might actually

identify a technology which was available and which was consistent with the United Kingdom's international obligations, which would mandate the use of technology B, which may or may not be more expensive. Ireland would not wish the United Kingdom, in this intervening period, to take steps in relation to the choice of technologies which would preclude the possibility of the technologies mandated by a new assessment being put into place in due course. It is another example of the same issue, and I think it will become clearer later on after the break when I say a bit more about abatement technologies, but it is essentially the same point and the same principle.

SIR ARTHUR WATTS: Professor Sands, I am not sure that you have answered Professor Crawford's question, which I think is extremely relevant to Ireland's application. In this context, what does Ireland seek from the Tribunal, what kind of order?

PROFESSOR SANDS: I am trying to think of another way of putting that which I have put, obviously with insufficient clarity.

PROFESSOR CRAWFORD: One of the reasons for the insufficient clarity, if I may say so, is that we are dealing with hypotheses, we are dealing not just with one hypothesis but a series of hypotheses, and it may be that in the context of provisional measures one would look more for a form of procedural remedy, that is to say notification of major work intended to be done - for example, the installation of a major new abatement process - which would enable Ireland to make its views known in relation to that process. But at least if one could define it in those terms the United Kingdom will actually know what it has to do. There is a slight problem in that you are saying on the one hand there have been difficulties with earlier references to contracts and so on, and you are sceptical, on the other hand you want to give them what is a very open-ended formula on a key point. Is there not an intermediate solution which would relate to information and the opportunity to comment, and I am not suggesting comment in the context of a public procedure but comment on a government to government basis?

PROFESSOR SANDS: It may be that there would be an intermediate solution and perhaps the thing for us on this side is to reflect a little further on both your questions. Of course, the concern we would have is simply putting it in terms of a notification requirement would, effectively, merely delay the problem, because if we were then to be notified that the following month a new contract was going to be entered into and fast-tracked into actual reprocessing, we would then be bound to return to this Tribunal and invite you to stop that from happening without an assessment being carried out. It may be the Tribunal is comfortable living with that situation, but the procedural formulation that has been suggested would put us in that situation, and it would put us in that situation as soon as we were aware on this side that a new contract was proposed and about to be entered into. We would be bound on our side to take prompt measures to ensure that any private party engaged in such a contract, and the United Kingdom was on notice that we intended to stop that activity from occurring without a full and proper environmental assessment, but perhaps the sensible thing for us to do is to reflect further on this. We will have an opportunity to come back to this in our short second round and we will also, of course, have had the benefit of having heard from the United Kingdom which may of course come up with an alternative approach to dealing with this issue. We think it is a real issue and we are of course open to suggestions as to how to deal with it.

On environmental assessment, to conclude, I was simply going to address, and I can mention them briefly, our view that, plainly, these activities at MOX and THORP are planned activities, that the

THORP future reprocessing contracts are not hypothetical in this sense: the United Kingdom has adopted a decision in October 2001 to produce 2,400 tonnes of MOX fuel. That will require future THORP contracts. That is, in our view, not a hypothetical activity and the final point, nor can it be said that the United Kingdom did not have reasonable grounds for believing that the MOX plant or the THORP plant may cause substantial pollution of the environment. Those are Merits questions which you may have occasion to address on another occasion.

Can I then, just to conclude on environmental assessment, make a number of concluding points, one of which is in relation to the irreparability of harm and particularly the question of irreparability of harm in relation to procedural rights?

We say that there should be no distinction between the question of irreparability of harm in relation to procedural and substantive rights. If discharges occur without the benefit of a prior environmental assessment there is both a violation of a substantive right not to cause pollution, but there is also a violation of the obligation to carry out a prior environmental assessment, and in both cases the damage to the right is irreparable.

In this regard we have noted Judge Mensah's conclusion, in his separate opinion in the ITLOS Order, where he said: "I do not find that any irreparable prejudice to Ireland has occurred or might occur before the constitution of the Arbitral Tribunal." Of course, in that process we were in a situation where we just had two, three or four months before the constitution of the Tribunal, following the adoption of the ITLOS Provisional Measures Order.

Our view is that the words utilised by Judge Mensah cannot be said to apply to the present situation, with radioactive discharges now under way from the MOX plant and into the Irish Sea, and with the real possibility of future THORP reprocessing contracts being addressed.

On the issue of the irreparability of procedural violations we have put into the materials, and I do not need to take you to it but it is at judge's folder, tab 25, a recent decision of a United States Federal Court of Appeals. It is yesterday's folder, I should say. That case is a case of *Davis v Mineta*. Just to be clear, we are not relying on this as applicable law, we rely on it solely to indicate what a Tribunal is to do, faced with an application for injunctive relief at a preliminary phase such as this. We would draw your attention in particular at page 10 of that document, in the bottom left hand corner, to a reference to a US Supreme Court judgment, *Amoco Production Company*. "The Supreme Court gave some guidance to evaluating harm connected with violations of substantive environmental statutes and stated that substantive environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration."

That is the approach taken in the United States and in other jurisdictions. The court here, the US Federal Court of Appeals Tenth Circuit, went on to give an injunction in relation to a failure to require an environmental impact statement. So we have here a situation in which coming off the back of a desire to achieve substantive protections, injunctive relief does lie in relation to a procedural obligation in relation to environmental impact assessment. We refer to it solely to illustrate one approach, which we think might commend itself to this Tribunal and to deal squarely with the suggestion that there can

never be irreparable harm in relation to a violation to carry out an environmental assessment. We do not accept that and we think it would be a matter of real concern if this Tribunal were to indicate that that was in fact the case.

PROFESSOR CRAWFORD: There is, of course, an important difference between the situation confronting that court where the road, as I understand it, had not been built, and the case where the plant is already there. It may be that there is a further problem in that UNCLOS came into force part way through the process, but it is one thing to be faced with a situation, as the International Court was in the *Gabcikovo* case, where they said you had to take a fresh look at the situation, and another thing to have a requirement of the law that there be an assessment which has not been properly carried out before work starts.

PROFESSOR SANDS: I had hoped that I had dealt with that yesterday by taking you to the relevant provisions which indicate the distinction between construction and operation and the established principles in various nuclear safety conventions which recognise that distinction. As in *Gabcikovo,* Ireland can have no objection and probably no rights for the mere construction of the MOX plant or the mere construction of the THORP plant; the issue for Ireland is the operation. Rather like the operation of variant C, and of course the International Court said that that was the point at which Hungary was entitled to take certain steps, possibly. But the mere construction of the plant is not sufficient.

What we are concerned with here would be the future THORP reprocessing contracts and, of course, future MOX contracts, and we think there is no distinction and that the approach taken by that court is directly analogous to the situation in which you find yourselves.

We have also put in the judge's folder of yesterday, tab 1, the order of provisional measures of the International Court of Justice in the Nuclear Tests cases, and we draw your attention to that order simply to remind this Tribunal that there is authority for an International Tribunal, principal judicial organ of the United Nations, ordering a State to avoid taking measures which would cause the deposit of radioactive material across a national boundary. There is authority for an international tribunal, the principal judicial organ of the United Nations, ordering a State to avoid taking measures which would cause the deposit of radioactive fallout (in this case on the territory of another State). In that Order, as one can see at paragraphs 28 and 29 - and I apologise we have got this from a Lexis printout and the paragraph numbers seem to have gone a bit askew, there are two paragraphs 28 and two paragraphs 29) - in the second paragraph 28, you will see the position put by New Zealand. I will read from half way down:

"New Zealand has repeatedly pointed out in its correspondence with the French Government the radioactive fallout which reaches New Zealand as a result of French nuclear tests is inherently harmful. There is no compensatory benefit to justify New Zealand's exposure to such harm and that the uncertain physical and genetic effects to which contamination exposes the people of New Zealand causes them acute apprehension, anxiety and concern and that there could be no possibility of the rights eroded by the holding of further tests could be fully restored in the event of a judgment by New Zealand".

There is similar language at first paragraph 29 from Australia. The Court then goes on to order a general measure.

"Each party shall ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court or prejudice the rights of the other party in respect of the carrying out of whatever decision the Court may render in the case and, in particular, the French Government should avoid nuclear tests causing the deposit of radioactive fallout on Australian territory".

It may be that in that language are seeds which could assist the Tribunal in addressing this question of the formulation of dealing with what Professor Crawford has called a hypothetical situation. We would hope that this Tribunal could go a little further than the generality of talking about actions which might aggravate or extend the dispute. That is not what they are concerned with in relation to this request. It is the next part of the formulation, "Prejudicing the rights of the other party in respect of the carrying out of whatever decision the Court may render in the case". In that line, we think that there is something which may provide assistance to this Tribunal in dealing with the tricky issue of assessment.

Mr President, Members of the Tribunal, that concludes the arguments on assessment. I wonder, rather than kick off briefly for ten minutes or so on pollution, whether this might be a sensible moment to take a pause. Then I can have a clean run through on pollution and, hopefully, finish much before one o'clock, having regard to your introductory comments.

THE PRESIDENT: Your latter remark provides an added incentive for us to break now! We will break now for 15 minutes.

(Short Adjournment)

THE PRESIDENT: Professor Sands, you may proceed.

PROFESSOR SANDS: Thank you, Mr President. I turn now to Ireland's Requests which relate to the prevention of pollution. It is probably appropriate for you to begin by my taking you to Ireland's Request itself and briefly reminding you of what it is that Ireland seeks. I will then come back to it by way of conclusion.

The specific Requests are set out on page 2. The ones with which I will deal, and there is some overlap with what Professor Lowe said yesterday, are at section A, headed "Discharges",

Ireland seeks from this Tribunal a Provisional Measure Order which would require "the United Kingdom to ensure there are no liquid waste discharges from the MOX plant at Sellafield into the Irish Sea."

Secondly, "The United Kingdom shall ensure that annual aerial waste discharges of radionuclides from MOX, and annual aerial and liquid waste discharges of radionuclides from THORP, do not exceed 2002 levels."

Then in relation to the matters addressed under Cooperation", which of course do also raise issues of pollution prevention, at subsection B, "Cooperation", the first one relates to reprocessing. I have already addressed that in relation to environmental assessment. I have made the points that Ireland wishes to make and I do not propose to return to that unless the Tribunal wishes further clarification.

At the bottom of that page at point (iii)

Ireland seeks that "the United Kingdom shall ensure that Ireland is promptly provided with

(a) Monthly information as to the quantity (in becquerels) of specific radionuclide discharges in the form of liquid and aerial waste discharges arising from the MOX plant and separately from the

THORP plant, and the flow sheets relating to environmental discharges liquid and aerial referred to ... in Mr Clarke's first statement".

(b) Monthly information as to the volume of waste in the HAST tanks and the volume [which has been] vitrified during the previous months".

Then at paragraph (d)

"Full details of any reportable accidents or incidents at the MOX or THORP Plant or associated facilities, that will be the subject of a report to the United Kingdom's Health and Safety Executive (or any other public body with responsibility for health and safety at the Sellafield site)."

Then at (e)

"Access to, and the right and facility to make a copy of Continued Operation of Safety Reports (including the Probabilistic Risk Assessments) and associated documents relating to the Sellafield site."

In relation to everything under "Cooperation", Ireland fully respects the need to maintain confidentiality and, of course, undertakes that any information received pursuant to these orders, if granted, would be subject to full confidentiality. There are other aspects of the request that, of course, have implications for pollution prevention and Professor Lowe dealt with those yesterday. In am very happy to come back to those during the course of the remaining part of this morning if you have any further questions on them.

I begin by addressing what are Ireland's rights under pollution prevention. This has not been addressed thus far by Ireland. I certainly do not intend to go through the minutiae of each and every one of the obligations which Ireland says that it has. These have been fully set out in the written pleadings, both in the Memorial and in the Reply. I simply want to highlight in a non-exhaustive way what is Ireland's case as to the essence of its rights and then to indicate why we say their violation would be irreparable and would occur if these or equivalent orders from the Tribunal were not granted.

The rights with which Ireland is concerned are substantive rights. They coalesce around the obligations under Articles 192 and 193 of the 19982 Convention - the United Kingdom's obligations to protect and preserve the marine environment. Articles 192 and 193 require active measures, as the Virginia Commentary puts it. These active measures are reflected throughout the text of Part XII of the 1982 Convention. The rights upon which Ireland relies, and some of them have already been considered by the Tribunal, are set forth in particular, but not exhaustively, in Articles 194, 207, 211, 212, 213, 217 and 222. In our Memorial and our Reply, we identify by reference to nine categories the violations of those rights which we say have occurred and continue to occur as a result of the conditions under which United Kingdom has authorised the operation of the MOX plant and its consequences for THORP and the management and storage of waste as well as transports. I do not intend to go back through each of those nine categories. You have the material there set out. But I think that it is worth identifying in broad terms the four distinct heads under which these claims are essentially made.

The first distinct head is really flowing from Article 194 of the Convention which, as we discussed yesterday, sets forth a number of juridically distinct obligations for the United Kingdom and which creates a number of juridically distinct rights for Ireland. There are two in particular upon which

Ireland focuses.

First, we say that Ireland has the right to require the United Kingdom to take all measures necessary to ensure that the MOX plant does not cause damage by pollution to Ireland and to its environment. That is a right that arises under Article 194, paragraph 2, and it is a right which we say has been violated.

Separately, under Article 194, paragraph 2, is the distinct right, which Ireland has, to require the United Kingdom to take all measures necessary to ensure that pollution from the MOX plant "does not spread beyond the areas where it exercises sovereign rights". Of course, the important distinction between the two is that the first requires a demonstration that damage may occur; the second does not. In relation to the second head, it is sufficient for Ireland to demonstrate that pollution has arisen and that it has or will or is likely to enter into areas beyond where the United Kingdom exercises sovereign rights. I do not propose to come back today to the discussion on pollution, but, of course, at the heart of that issue is the question of the definition of pollution. You heard what we had to say about that yesterday.

We say that the obligations under Article 194 are binding obligations, a point which the United Kingdom does not disagree with, although the United Kingdom appears to argue that they are not such as to give rise to a cause of action. We do not think that you have to settle that issue in this stage of these proceedings, but, of course, we do not agree with that and we rely, in particular, in Article 194(3) for these purposes on the language which indicates that radionuclides are toxic, harmful or noxious substances (are pollutants) and which are, therefore, actionable as pollutants under Article 194, paragraph 2.

The second broad head concerns UNCLOS Articles 207 and 213. This addresses pollution from land-based sources. These provisions are of central importance to this case.

Article 207 restates and amplifies, to take the words of the Vienna Commentary, the obligation enunciated in Article 194(3)(a) and, with Article 213, imposes three distinct legal obligations on the United Kingdom. Firstly, under Articled 207, paragraphs 1 and 2, Ireland has the right to require the United Kingdom to adopt laws and regulations and take other measures as may be necessary to prevent, reduce and control pollution of the Irish Sea as a result of the authorisation of the MOX plant and that such laws and regulations must take into account internationally agreed rules, standards and recommended practices and procedures. Ireland says that the United Kingdom has not done that and has already set out its arguments reasonably fully.

Secondly, we say that, by Article 207, paragraph 5, together with Article 194(3)(a), Ireland has the right to require the United Kingdom to ensure that such laws, regulations and measures - we stress the word "measures" - include "those designed to minimise to the fullest extent possible the release of radioactive substances into the Irish Sea". Our argument, in simple terms, is that there has been no such minimisation. The United Kingdom, simply put, has adopted the wrong standard in authorising the MOX and THORP plant.

Thirdly, under this provision, Ireland has the right to require that the United Kingdom

implements applicable international rules and standards to prevent, reduce and control pollution of the Irish Sea. This, in a sense, may emerge as the heart of the case at a later stage. We have already had ample opportunity to exchange views on both sides and with the Tribunal as to what these requirements of Article 207 and 213 actually are, particularly having regard to the manner in which obligations arising outside UNCLOS may be integrated into the UNCLOS system. You have heard Ireland's position, it is one that we say is consistent with that taken by the International Maritime Organisation, consistent with the one taken by leading academic authorities such as Professor Oxman, consistent also with the position adopted by the United Kingdom delegation at UNCLOS 3, and you have references to that in the written pleadings.

The third distinct head is in respect of pollution from or through the atmosphere, where gaseous releases of radionuclides are caught by Articles 212 and 222 of UNCLOS. Of course, these are not poured directly into the Irish Sea, but a proportion of them, and possibly a very significant proportion of them, end up in the Irish Sea and in parts of the Irish Sea which are beyond the territorial limits of the United Kingdom. We say that the provisions prohibiting such pollution, which are set forth in Articles 212 and 222, are applicable, and they are in effect the mirror image of the provisions dealing with land-based sources, I do not need to read them out to you.

Finally, the fourth category is in relation to pollution from vessels, and our concern here principally is with the steps which have not been taken, we say, by the United Kingdom to minimise to the fullest possible extent or as necessary the risks of radiation harm caused by incidents and, in particular, the failure to provide Ireland with appropriate information such that Ireland can take appropriate remedial measures in the event that an incident or an accident occurred. these are set forth at Articles 211 and 217 of UNCLOS, together with Articles 194 (2) and 194 (3)(b). We say that these provisions are applicable, not only to transports of MOX fuel but also to transports of feed stock, spent nuclear fuel, to THORP, which are intended to be transformed into plutonium dioxide, to be fed into the MOX plant.

In relation to these four categories - general obligations, land-based sources of pollution, pollution through the atmosphere and pollution through vessels - each imposes substantive environmental obligations on the United Kingdom which Ireland is entitled to rely upon. We say that at the very least their existence affirms the United Kingdom does not have a right to pollute the Irish Sea, it does not have the right to put a single radionuclide into the Irish Sea unless it meets the conditions of the United Nations Convention on the Law of the Sea, and it is for the United Kingdom to demonstrate in application of a precautionary approach that it is meeting those conditions.

The obligations set forth upon the United Kingdom are to prevent and reduce discharges or releases from all sources including unintended sources. That would encompass also the risk of accident and the risk of terrorist incident, and we say that the entire approach of Part XII of UNCLOS is precautionary in character.

I am not now going to take you to other rules of international law which fill out the content, I think we have had adequate discussion about that. You know the core of Ireland's arguments. I would

simply mention one aspect to which Ireland has some considerable attachment and that is reliance on the precautionary principle or the precautionary approach. It may in fact be that the United Kingdom and Ireland are not that far apart, the United Kingdom recognises for example that principle 15 of the Rio Declaration is a generally accepted expression and the United Kingdom itself claims to be guided by the precautionary principle and "is content for reference to be made to the Community formulation." That is at the United Kingdom Counter-Memorial, paragraph 7.59.

So in this case, although there may be differences as to what it means in application and in practice, this Tribunal does not need to say anything about what its status is, in our view it can simply go ahead and, on its interpretation of approach, give effect to precaution. In areas such as this where the signs indicate a degree of uncertainty, we say a high degree of uncertainty, it is entirely appropriate to have regard to a precautionary approach or, as the International Tribunal for the Law of the Sea puts it, prudence and caution, although one hopes that at some point some international tribunal somewhere may be willing to make the leap from prudence and caution into precaution.

The UK's approach to all of this is to say that it has indeed applied the right standard, that it has indeed taken the right approach, and that the discharges into the Irish Sea from the MOX plant are so small as to be completely irrelevant, vanishingly small is the formulation that is used. The United Kingdom's approach is of course also to salami slice the MOX plant away from the THORP plant; they recognise that their arguments become untenable when you take THORP discharges into account, and they make no real effort to run the argument that the pollution or the discharges from THORP do not amount to pollution. So once you establish as a Tribunal the connection between MOX and THORP, we say that that is the end of the matter and the whole of the project falls within the UN Convention on the Law of the Sea.

The United Kingdom says in relation to MOX but not in relation to THORP, because it says it does not have to at this stage, that it has taken full account of all these international obligations. I took you yesterday to the steps of the authorisation process, the six steps. There is not a single reference in any of those documents to the United Convention of the Law of the Sea, or to any of the obligations which I here have referred you to, nor do we say, to the correct approach to the other applicable rules of international law which filter through UNCLOS and create UNCLOS-based obligations for the United Kingdom.

The United Kingdom's approach is in a sense reflected in its Strategy for Radioactivity Discharges 2001-2020. Before saying a little bit more about that, can I just preface that yesterday I mentioned the context in particular of the commitment undertaken by the United Kingdom in 1998 at Sintra in Portugal to substantially and progressively reduce its discharges with a view to ensuring that by 2020 concentrations in, amongst others, the Irish Sea, we say, would be close to zero, according to historic levels. So that, we say, is the overall context against which Ireland's rights fall to be assessed.

The United Kingdom has failed to take adequate steps to give effect to substantial and progressive reductions, which would lead to concentrations of close to zero by 2020 at that level. They would not be complying with their Sintra obligation and we say, of course, because that is all you have

jurisdiction over, they would not be complying with their UNCLOS obligation.

What is a matter of considerable puzzlement for Ireland is how it is that the United Kingdom could, just three years after it had committed to that obligation, just four years after it had ratified and become a party to the UN Convention on the Law of the Sea, authorise a plant for the production of MOX fuel which would lead to discharges, not only from MOX but substantial additional discharges from THORP; that all of that was done on the basis of the application of a standard, best practicable means, which we say was the wrong standard, and which would lead to increases in discharges as against levels set in 1998 or levels applying as of 1998. That has happened, we say, in the context of technologies which are available to the United Kingdom which would have permitted very substantial decreases in discharges. The 1998 Sintra commitment of the United Kingdom is proposed to be implemented, according to the 2001-2020 Strategy - that is at Annex 166 of Ireland's Reply, volume 3(1), and I will take you to one part of that shortly.

Just before I do that, at tab 6 of today's folder we have just got extracts from the report from Mr Killick, whom Mr Lowe mentioned yesterday, and I just want to, through his words, summarise what Ireland says is the correct approach to understanding what the United Kingdom has in fact committed to.

At paragraph 2.40 it is his conclusion that, "The UK strategy indicates noticeable departures from the Sintra obligations.

2.41. "The UK Strategy concentrates on doses to humans as the criteria of success. The Sintra obligation of achieving concentrations in the environment of close to zero is nit mentioned as part of the UK Strategy.

2,42. "The requirement of the Sintra obligations for sustained and progressive reductions is not addressed. The UK Strategy makes certain claims in respect of total alpha and beta reductions, but these are simply a consequence of the ending of magnox fuel reprocessing and do not reflect any additional effort to reduce discharges."

2.43 over the page: "Sintra requires best available techniques and best environment practice; the UK Strategy instead relies on best practical means and best practical environmental option. These both place cost in the forefront, with repeated emphasis throughout the UK Strategy on costs, an aspect absent from the Sintra obligations."

Again, I am not proposing to get into it today, but the essential difference between the two standards focuses on costs and to what level, amongst the various factors, a State is entitled to take cost considerations into account in deciding which of different technologies ought to be imposed by the regulatory authorities.

All of the standards commit some degree of cost obviously to be taken into account, but greater weight is given in the standards applied by the United Kingdom. Those are not issues that you need to get into at this stage, but we simply refer you to his conclusion.

2.44 "Discharges from decommissioning or dealing with historic wastes are excluded".

A rather strong critique of the United Kingdom's approach which, of course, is proposed at the very same time that the UK decides to authorise an entirely new source of discharges, MOX, and

additional discharges from THORP.

What is the UK actually intending to do? You can see that from Plate 7 of Annex 166. It is to be found at tab 7 a hard copy which is not in colour, but black and white.

The figure is interesting for a number of reasons. This is a figure which the United Kingdom did not include in its Counter Memorial. The United Kingdom submitted, amongst its annexes, the report setting forth the Sintra strategy, but it left out all of the tables. We put them into our Reply. Figure 7 is just one amongst several. It is intended to show projected liquid discharges for 1996 to 2030 from the nuclear reprocessing sector. The nuclear reprocessing sector in the United Kingdom is almost (not quite the whole) of all discharges from the United Kingdom. You see two columns, firstly, "Discharges" at the top", "Total Alpha Discharges" and at the bottom "Total Beta Discharges". You have got then along the bottom a scale showing the various years in which the discharges scenarios are expected to run. The first bar shows the period 1996 to 2000. Of course, slap bang in the middle of that was the 1998 Sintra commitment and the 1997 entry into force of the Law of the Sea Convention for the United Kingdom. What you see on the figure is a virtual doubling of discharges from reprocessing at THORP. I should be clear in explaining that these figures show both Magnox discharges and THORP discharges. Magnox is not part of this case. That does not show all of the discharges from THORP and MOX. It is more than that. What it shows is that rather than commit to substantial and progressive reductions either of alpha or beta discharges, the United Kingdom has embarked on a course of increasing its discharges. In relation to alpha discharges, it is only by 2026 that alpha discharges from reprocessing will be below 1996 to 2000 levels. We, on our side, do not understand that to be a commitment to a substantial and progressive reduction nor do we see how it is consistent with the reduction of concentrations in the Irish Sea to close to zero, according to historic level. It is rather better on beta discharges, but, even on beta discharges, you see that by 2010 the discharge levels are the same as in the period 1996 to 2000. The reductions only begin subsequently.

There is another element of this which is of material interest. At the bottom of the chart it also provides further bits of narrative information. In particular, it says "2012 B 205 shutdown". B 205 is Magnox. So after 2012 Magnox has shut down and, presumably, is no longer discharging. We, therefore, assume that everything after 2012 must be THORP related, because that is the only reprocessing activity which is taking place at Sellafield. Those discharges, presumably, are the discharges which are to come from these future reprocessing contracts which, we say, are to be obtained from additional MOX contracts which require the reprocessing of spent nuclear fuel.

You will also note at the bottom a reference to 2024 THORP shutdown. It is not possible for us to know precisely how long their existing contractual commitments will take them, but it is probably not much beyond 2009/2010. We, therefore, have here a clear and unambiguous expression of the United Kingdom's commitment to extent reprocessing from THORP by 12, 14, maybe 16 years beyond what is presently intended. None of which, we say, would be possible without the MOX plant. If MOX did not exist, these THORP contracts would not exist. That is the simple connection that we make.

Finally, it is also worth explaining that there is a big exemption clause cut out of all this. At the

bottom it says, "Discharges arising from decommissioning activities are not included". Those activities, we understand, will lead to significant discharges from those decommissioning activities, above and beyond these identified increases. We have put this up to show the context in which this issue arises. This is a live and real dispute. The United Kingdom is embarked upon a significant increase in reprocessing activity. It is embarked on a programme to significantly increase discharges from THORP, 10, 12 or 15 years. None of that has been subject to an environmental assessment. None of that has been subject to compliance checks with the UN Convention on the Law of the Sea. In a nutshell, that is what this case is about and that is why Ireland says, on the UK's own information, Ireland's rights are in serious likelihood of being irreparably prejudiced by the project upon which the United Kingdom is presently embarking and it is why we ask the Tribunal to make clear in its order that this type of programme, to the extent that it is not compatible with Ireland's rights under the Convention, ought to be subject to appropriate Provisional Measures Orders. The context that we have indicated is rather restrained requests against that background.

What the evidence shows, and as is set forth in of our various materials, is that it is by now clear that the United Kingdom has simply disregarded non-MOX consequences. It has treated these as not being subject to pollution constraints at all. It has proceeded on the basis that no environmental assessment was required under Article 206 for any of these activities at all. It has proceeded on the basis that these activities are permissible by reference to discharge authorisations adopted in the United Kingdom in 1994 and then amended in 1999, with no regard given to the new requirements under UNCLOS. It has proceeded on the basis that all it has to consider is impacts upon humans, not upon the marine environment, an it has proceeded on the basis of an inadequate, we say, assessment of alternative technologies. In this regard can I draw your attention to an earlier matter which I was going to address in the environmental assessment, and that is the approach taken elsewhere? I would refer you in particular to the materials relating to the United States' proposed MOX plant, which you can find discussed at the report by Mr William Sheate, but which you will also find as volume 4 of your folders. That is the environmental impact report for the proposed US MOX plant at Savannah. You will find in that material that the proposed US plant will have zero liquid discharges. The technology is available to avoid any discharges into the Irish Sea at all from the MOX plant. You will find that in volume 4 at page 314. I do not propose to take you to that now.

There was some debate between both sides' experts as to whether that was really intended to be a zero discharge commitment. In fact, all the liquid wastes arising from the proposed US MOX plant were to be transferred to another site where they would be put into storage. Mr Clark indicated that that may lead to liquid discharges elsewhere. Even that possibility has now been extinguished.

If I can take you to yesterday's tab folder 26, this is a section a very much longer document. We have only put in part of the document. It is available on the web and we are happy to provide the Tribunal with a full copy. It runs to several hundreds of pages. It is the transcript of a meeting of the United States Nuclear Regulatory Commission's Subcommittee on Reactor Fuels. Concerns were expressed about the transfer of even small amounts of liquid discharges from one site to another. This

document, which is dated 10th April 2002, indicates that there are now to be no liquid discharges at all. At page 3, half way down, you have the introduction from Mr Hastings,

"Good morning, I am Peter Hastings, I am the licensing manager for Duke, Cogema Stone and Webster". He is then asked a question by a member of the Committee, I think Mr Persinko. That is at the bottom of page 3. He refers to a couple of changes to the proposed MOX facility. The second is a change in the waste processing regime at Savannah River for liquid high-alpha waste coming out of a MOX facility and the pit disassembly and conversion facility. Then he carries on at page 4, "The PDCF"- that is the equivalent activity, if it can be called that, to the production of the feedstock - "remains as part of the mission, as does the MOX facility." This is a different type of proposal. They do not use reprocessing of spent nuclear fuel. It is done through something called plutonium polishing which is a different activity, but it produces the feedstock that then goes into the US MOX plant. One of the things that you will notice at volume 4 is that the MOX equivalent activity is treated as an integral part of the project. The United States does not separate out production of the feedstock and then production of the MOX fuel. They are both subject to the same integrated environmental impact statement.

Then at the top of page 4, "This new waste solidification regime which we will go into in some detail will handled liquid high-alpha waste from both PDCF and the MOX facility".

Essentially, what it goes on to say is that the MOX facility liquid discharges will all now be subject to a waste solidification regime and there will be zero liquid discharges. The technology, we say, is available. At page 5, you can see two thirds of the way down another response from Mr Hastings. "As I said the high-alpha and also the strict uranium waste streams from the MOX facility in PDCF will be solidified by the Savannah River as opposed to going through the tank farm. This was a change that was made by the Department of Energy to minimise the risk associated with possible availability or unavailability of the tank farms in the future".

The simple point is that, if they did not want to put this into the Irish Sea, they ought at least to explore this as an alternative possibility in terms of treatment of these liquid wastes.

PROFESSOR CRAWFORD: Professor Sands, you have dealt with the disagreement between the experts as to what is exactly involved in the Savannah plant, but the question at present - and I am sorry to keep repeating myself - is Provisional Measures. Could you address the relationship between Ireland's claim with respect to discharge and the Provisional Measures sought?

PROFESSOR SANDS: I am sorry, I did not quite catch the beginning part.

PROFESSOR CRAWFORD: The crux of the point is this. We need to address the precise Provisional Measures you seek, which are precise, no liquid waste discharges at all from MOX, and 2002 values for aerial and liquid waste discharges from THORP.

PROFESSOR SANDS: In relation to number one, I think that it is self-evident. We say that under UNCLOS there is no right to pollute the Irish Sea; under UNCLOS there is an obligation to use best available techniques or minimise to the fullest possible extent. We understand that there are technologies available which would dispense altogether with the discharge of any liquid waste. If we are successful

on that, this Tribunal might order a halt to all liquid waste discharges. That may not happen until 2006 or 2007. Hopefully, it will happen much earlier. In the interim, the MOX plant will produce liquid waste and, on present intentions, it will discharge it into the Irish Sea. If we were to obtain from you such an award, we would not be able to repair the consequences of three, four or five years of discharges, and our request to you, therefore, is to order to immediate effect that there be no liquid waste discharges from the MOX plant at all until you have given your order.

We are also appreciative of the fact that the United Kingdom has for more than two years now indicated to us that these discharges pose no risk at all to human health or to the environment. The volumes we are talking about are 107 cubic metres.

PROFESSOR CRAWFORD: One hundred and seven cubic metres a year?

PROFESSOR SANDS: Per annum, yes. Those could be stored in terms of size, I do not know about safety, in tankers. Alternatively, they could be stored as discharges into one of the available HAST tanks which may or may not be available. Those are not issues, of course, which the Tribunal needs to take a decision on, but what we are not aware of is that the United Kingdom has taken any steps whatsoever to inform itself as to alternative regimes for these discharges and the order, effectively, requires them to do that.

I should explain that, in relation to the second order, we are not in a position to make that request in relation to aerial waste discharges, even though they are extensive, because we are not aware of technologies that are readily available to limit those discharges. That is why what we propose in respect of those discharges is governed by heading B(iii). "The United Kingdom shall ensure that Ireland is promptly provided with (a) Monthly information" as to discharges of liquid and aerial wastes from MOX and THORP. What we have in mind is this. It is essentially an accounting practice. At the moment we get no information at all. This project has gone ahead on the basis of estimates in a BNFL Environmental Statement of 1993. We do not know what has actually been discharged already from MOX. It may be that nothing has been discharged. It may be that there are greater amounts than 107 cubic metres already. We simply do not know. What we have in mind in relation to the gaseous discharges and also in relation to the liquid discharges from MOX and from THORP is that we ought to know what those discharges are in terms of quantities and in terms of radionuclide content in order that in due course account might be taken of what the quantities are for the purposes of avoiding irreparable harm to Ireland. What one might imagine, for example, is that, if this Tribunal was to find that Ireland was correct and that aerial discharges as a consequence which had occurred between 2002 and 2006, let us say, had unlawfully been released into the atmosphere, that volume of discharges might then be deducted from other discharges which the United Kingdom would be permitted to make, for example, in relation to Magnox or other discharges. So that at the end of the day, whenever it is, 2015, 2018, 2020, the total quantity of discharges into the Irish Sea would not be any greater than if the MOX plant had not existed. It could be said that Ireland would not then be in a worse position.

We do not think that you can at this stage get into the mechanics of any sort of accounting exercise, so all we ask for - and we think that it is eminently reasonable - is simply to be informed as to

what has been discharged in order that it can then be applied to any future accounting exercises which might take place. We do not want to find ourselves in a situation in 2005/2006 that, as presently happens, the United Kingdom or BNFL turn around say, "It is all mixed in together, MOX, THORP, Magnox, we cannot possibly tell you". We think that the United Kingdom is required in order to protect Ireland's rights to identify with precision and with clarity the radionuclides that are now being discharged and which will be discharged in order to avoid future difficulties and in order to ensure that irreparable harm to Ireland's interest does not arise.

PROFESSOR HAFNER: It is only, again, a point of clarification. Am I correct when I read this report on the Savannah plant ...

PROFESSOR SANDS: I am sorry, can you take me to which document to which you are referring?

PROFESSOR HAFNER: It is tab 26, the last document discussed. Am I correct in reading that it deals only with liquid high-alpha waste and not with the discharge of all liquid waste?

PROFESSOR SANDS: My understanding, sir, is that it deals with all liquid waste. There will be no liquid discharges from the US MOX Plant, but, if I may, I would like to get clarification from a technical expert before I give you a final answer on that. We will certainly come back to you in our second round to answer that question. That is my understanding of the proposed technical arrangements for the MOX plant in the United States.

SIR ARTHUR WATTS: Professor Sands, I have a couple of questions. You talked about the availability of alternative technologies which could ensure that there is no liquid waste disposal at all into the Irish Sea. Have you any idea what those alternative technologies might cost?

PROFESSOR SANDS: I personally do not have detailed knowledge of what those technologies might cost. We had expected in the course of these proceedings for the United Kingdom to provide that information as part of its written pleadings. It has not done so. We, I am afraid, do not have the human or technical resources to be able to identify that with complete precision, but what I can say is that we have done some homework on the abatement technologies ourselves. If I could take you to a tab in today's folder, it is tab 9. I am very conscious, sirs, that we are not expecting you to indicate any views on substantive choices between these very complex technologies. The only point that we make here is that there are alternative technologies; that cost is a factor (we accept that) although where it should be placed on the scale of factors is a matter of difference between the parties. At this tab you have a document entitled "Abatement technology options". This was produced by our colleague, Dr Colgan, from the Radiological Protection Institute of Ireland. I am very grateful to him for having done this. What you have are three columns. In the left column are some of the principal radionuclides with which we are concerned. In the central column, there are the views of the experts brought to this Tribunal by Ireland, essentially Dr Barnaby and Mr Killick. In the third column is the response of the United Kingdom's experts, Mr Clark and Mr Parker, to each of the abatement technology options which are identified. What you find, for example, in the first one, tritium, Ireland's experts express the view that this could be immobilised in solid waste form or concentrated and encapsulated in cement for long-term storage. The UK response is not that the technologies do not exist, but that additional abatement is not justified by the

substantial costs involved, but no detail is provided as to what sort of costs we are talking about. To put this in a broader context - and it is simply by way of background - we are dealing here with a company, British Nuclear Fuels, that is reported in the press this week to be about to announce losses for this year of £1 billion following on from losses last year of in excess of £2 billion, which is about to be put into, in relation to these two facilities, the ownership of the State. So you can appreciate, I think, why Ireland has a degree of concern that cost arguments are being made at a time when the company does not appear to be solvent and yet is effectively using the Irish Sea as a cheap means of disposing of wastes.

If you go through the list of these radionuclides, you will find that there is not a great difference between the experts on the availability of the technologies. It really does boil down to cost. Even in relation to some of the technologies which are identified, the UK experts do not make arguments as to cost. For example, in relation to carbon-14, the UK experts, according to this table, do not raise significant arguments. You can go through the list and form your own view.

SIR ARTHUR WATTS: Thank you for that. Could I go to a follow-up question? I think that what you were, in effect, saying earlier on is that, if this Tribunal were to order the United Kingdom to adopt one of these alternative technologies, and if at the end of the Tribunal's deliberations the Tribunal were to agree with Ireland's analysis of the rights and wrongs of the situation, Ireland would then have been vindicated.

But what if the outcome is different; if the Tribunal were to order the United Kingdom to adopt one of these technologies, at considerable expense, let us say, without trying to pinpoint how much, and if, the United Kingdom having done that, the Tribunal were at the end of the day not to agree with Ireland, what then is the situation? Is it that Ireland should expect to compensate the United Kingdom for the costs which it may unnecessarily have incurred, and would you say that that is a loss which is compensatable, whereas the damage that you are trying to avoid at the provisional measures stage is an irreversible damage which cannot be remedied by compensation?

PROFESSOR SANDS: I hope that it is clear, and if it is not let me make it clear: Ireland is not seeking from this Tribunal at this stage an order that you require any particular abatement technologies beyond the use of what we understand to be existing facilities at low cost to the United Kingdom of storing liquid discharges from the MOX plant. So we do not, I think, get into the scenario that you very understandably have raised because we do not think it would be appropriate for the Tribunal to make any order having that magnitude of cost on the use of abatement technologies. All we seek is the preservation of our rights. If the Tribunal rules against us on these matters, then of course we will respect that and that will be the end of the matter, but if it rules for us, whenever it does, our rights will have to be protected before that time. That is all we seek.

It brings me back also to the point that we had in relation to the discussion with Professor Crawford and Mr Fortier about environmental assessment, because we are more or less in the same territory here and it may be that you can be more creative than we can in coming up with a formulation which preserves both parties' rights without imposing the types of costs with which you are, understandably concerned, and which we do not seek at this stage.

SIR ARTHUR WATTS: Thank you very much.

PROFESSOR SANDS: That really covers, I hope, in answer to Professor Crawford, the request that we made in

relation to discharges, and explains why, in relation to THORP, we are content with an order which would simply freeze the present situation and not permit discharge levels to exceed 2002 levels, having regard to what we say are our rights under the Convention.

It also explains the rationale for our request at B (iii) to which we attach very considerable importance. It may not seem like a great deal, the provision of information on what is actually being discharged, but it is not information that we currently obtain in relation to discharges or what is in the HAST tanks, what is being vitrified, and we think not only would it assist Ireland in the intervening period, but we think it would avoid future difficulties, depending on any award that the Tribunal may give in the future.

If I can turn, just to conclude, to the two final requests that are made in relation to pollution prevention (iii) d and (iii) e: "Full details of any reportable accidents or incidents at the MOX or THORP plant or associated facilities." Mr Lowe yesterday gave the analogy of the detective; we are really at the mercy of the news services, of web sites and other scraps of information that we can pick up. We think it really would assist in relations between the two States if some sort of sensible means could be found, if only to alleviate unnecessary concerns of the Irish Government and of the Irish public as to what happens, because very often incidents which may be very minor incidents are blown out of proportion and raise issues and concerns that may more easily be dealt with if there were sensible and suitable information sharing between the two States.

In relation to (iii) e, "Access to, and the right and facility to make a copy of ... [in particular] the Probabilistic Risk Assessment .." The issue there is, of course, we have seen the Probabilistic Risk Assessment, the reason we want to be able to use it is to assist ourselves in taking appropriate measures to maximise the prospects of any emergency response. It is really nothing more than that and it would, of course, be received, as would all of this, in the conditions of strictest confidentiality within the Irish government. We think that that measure too would go some considerable way in enhancing the relations between the two States and putting them on a more co-operative footing.

THE PRESIDENT: Professor Sands, may I ask, if you could please explain a little further why you believe you need to have access to documents relating to the Sellafield site as a whole when, as you have previously indicated, your claims do not relate to the Sellafield site as a whole?

PROFESSOR SANDS: The answer to that is that we think it is sensible not to assume that an incident at the MOX and THORP plants alone might cause consequences within Ireland. We suspect, and I am sorry that I cannot give you a clear response, that there is no Probabilistic Risk Assessment that relates exclusively to the MOX Plant or exclusively to the THORP Plant, and that the Probabilistic Risk Assessments which have been carried out are broader and encompass parts of the plant within which this dispute is concerned. I quite appreciate, and I take the point, that this is a dispute not about Sellafield as a whole, but about the MOX and THORP plants. Our view is that the existence of the MOX and THORP plants enhance the risk and therefore contribute to the package as a whole, and that having given us access by sight to the Probabilistic Risk Assessment we are not altogether clear why we ought not to be able to have copies of it - they are fairly voluminous documents - in order to prepare ourselves

adequately. But I quite accept that this dispute is about MOX and THORP and only MOX and THORP, and again we are not making the argument here - to come back to a point that Professor Crawford made yesterday - that we would have a right to a report dealing with the site as a whole. It may be that the Tribunal can find a means, without identifying even the claim to the existence of such a right, that we might be able to have access to a report which encompasses that part of the Sellafield site which is within this dispute.

Mr President, Members of the Tribunal, I think that concludes our submissions on pollution prevention, I have dealt with it as expeditiously as I think the Tribunal had encouraged us to do. There is one final matter which needs to be addressed in camera, and I wonder then if this is an appropriate moment to go into camera so that I can respond to Sir Arthur Watts' question, unless you have any other questions in relation to Ireland's application.

SIR ARTHUR WATTS: I did ask Professor Lowe two questions yesterday, and he very kindly passed the baby to you. I have not yet heard the answers and I wonder whether I will, either now or in the in camera session.

PROFESSOR SANDS: May I ask you to repeat the question to refresh my memory?

SIR ARTHUR WATTS: The first one was about the numbers of shipments in previous years. I understand your difficulty about future shipments, but knowledge of what you actually were aware of in the past few years.

PROFESSOR SANDS: I am coming to that in the in camera session.

SIR ARTHUR WATTS: Then the other question related to the routes.

PROFESSOR SANDS: I am also coming to that in camera.

SIR ARTHUR WATTS: That is fine. Thank you.

THE PRESIDENT: Do I take it that after the in camera submissions there will be no further submissions?

PROFESSOR SANDS: There will be no further submissions. Is this therefore the moment for me to formally wrap up and invite the Tribunal to prescribe?

THE PRESIDENT: I believe it would be useful, so that it goes into the public record.

PROFESSOR SANDS: I am in your hands as to either reading into the record now the request Ireland makes, or those parts of it which are material, or suspending that until the second round.

THE PRESIDENT: You could do it on both occasions. If you do it now you can still, of course, repeat it.

PROFESSOR SANDS: I am instructed to do it now, so I will do it now. I will only take it from paragraph 9, which is the operative paragraph, the request which Ireland makes.

Ireland therefore requests provisional measures to preserve its rights under UNCLOS and to prevent serious harm to the marine environment as follows.

A. Discharges

(i) The United Kingdom shall ensure that terre are no liquid waste discharges from the MOX Plant at Sellafield into the Irish Sea.

(ii) The United Kingdom shall ensure that annual aerial waste discharges of radionuclides from MOX, and annual aerial and liquid waste discharges of radionuclides from THORP, do not exceed 2002 levels.

B. Co-operation (Note: the following is on a confidential basis)

(i) In the event of any proposal for additional reprocessing at THORP or manufacturing at MOX, (by reference to existing binding contractual commitments), the United Kingdom will notify Ireland, provide Ireland with full information in relation to the proposal and consult with, and consider and respond to issues raised by, Ireland.

(ii) The United Kingdom will inform the Irish Government as soon as possible of the precise date and time at which it is expected that any vessel carrying radioactive substances to or from the MOX or THORP Plant, or to a storage facility with the possibility of subsequent reprocessing or manufacture in THORP or MOX will arrive within Ireland's Pollution Response Zone, SAR Zone or within the Irish Sea, and shall inform Ireland on a daily basis as to the intended route and progress of such vessel.

(iii) The United Kingdom shall ensure that Ireland is promptly provided with:

a. Monthly information as to the quantity (in becquerels) of specific radionuclide discharges in the form of liquid and aerial waste discharges arising from the MOX Plant and separately from the THORP Plant, and the flow sheets relating to environmental discharges liquid and aerial referred to at paragraphs 118 and 124 of Mr Clarke's first statement;

b. Monthly information as to the volume of waste in the HAST tanks and the volume vitrified during the previous month;

c. All research studies carried out or funded in whole or in part by or on behalf of the United Kingdom Government or any of its agencies or BNFL into the effect of liquid or aerial discharges, from the MOX or THORP Plant, upon the Irish Sea, its environment or biota;

d. Full details of any reportable accidents or incidents at the MOX or THORP Plant or associated facilities, that will be the subject of a report to the United Kingdom's Health and Safety Executive (or any other public body with responsibility for health and safety at the Sellafield site);

e. Access to, and the right and facility to make a copy of Continued Operation Safety Reports (including the Probabilistic Risk Assessments) and associated documents relating to the Sellafield site,;

f. The results of reappraisals since 11 September 2001 of the risks to the MOX Plant and THORP and associated facilities such as the HAST tanks, and of the measures taken to counter any change since 11 September 2001 in the level of the perceived threat.

(iv) The United Kingdom shall co-operate and co-ordinate with Ireland in respect of emergency planning and preparedness in respect of risks arising out of reprocessing, MOX fuel manufacture and storage of radioactive materials including providing Ireland with such information as is necessary to take appropriate response measures.

(v) The United Kingdom shall co-operate with Ireland in arranging trilateral liaison between the Irish Coastguard, BNFL/PNTL and the United Kingdom's Maritime and Coastguard Agency in respect of all shipments of radioactive materials to or from the MOX and/or THORP Plants.

C. Assessment

The United Kingdom shall ensure that no steps or decisions are taken or implemented which might preclude full effect being given to the results of any environmental assessment which the Tribunal may

order to be carried out in accordance with Article 206 of UNCLOS in respect of the MOX Plant and/or THORP.

D. Other Relief

(i) Further and other relief.

(ii) Liberty to apply.

That is the end of Ireland's request for provisional measures.

THE PRESIDENT: Thank you very much. On that basis then we will now go into camera, unless there is anything from the United Kingdom. If not, I would request those present, who do not come within the category that we have agreed, to withdraw, and I think we will leave it to each party to determine which members of the team shall remain.

MR FITZSIMONS: I wonder, Mr President, just before we proceed to the next phase, could I raise a scheduling matter? Mr Wood informed us that the United Kingdom would not be able to commence its submissions in reply until 3.00 pm on Friday, but would finish by lunchtime on Saturday, in other words within a day. Obviously, we have no objection to that. At the break Mr Wood also raised the possibility, and of course it is only a possibility and it is entirely subject to the Tribunal's views and convenience, that the parties might seek to conclude the arbitration on Saturday afternoon by making their respective reply and rejoinder submissions. I was not able to come back to Mr Wood, but I have since taken instructions from the Attorney-General and he is agreeable to that. I do not know what the Tribunal would think of that, but it is entirely a matter for the Tribunal, obviously. If in principle the Tribunal could accede to it then it would be simply a question of arranging times for closing submissions during Saturday afternoon and breaks in between. It would of course mean a punishing day for the Tribunal, but we are in the Tribunal's hands in that regard. If it is not convenient then the existing arrangements can stay as they are. It is entirely a matter for the Tribunal.

MR WOOD: Thank you, Mr President. Indeed, we would hope and expect to be able to conclude our submissions by lunchtime on Saturday, and if the Tribunal were able to have a rather long day on Saturday we would be happy to go along with that. I think we would need an equal period of preparation and it would of course be subject to any major surprises in the Irish reply which needed more time, but I would not anticipate that. So in principle we would be happy to go ahead on the basis suggested by the Irish side.

THE PRESIDENT: As my colleague said, the last thing the Tribunal would want is to detain the parties against their will, but as far as the Tribunal is concerned I think any detention of the Tribunal would not be against its will. Therefore, in the light of the views of both parties we would be quite willing to give the opportunity for both replies to be made on Saturday afternoon. We will want to maybe consult with you as to the mechanics and the logistics, but I am sure that what you want can perfectly be accommodated on Saturday afternoon and part of the evening, if necessary.

(Adjourned until 3,00 pm on Friday, 20 June 2003)