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
SATURDAY, 21ST 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 EIGHT
(Revised)

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THE PRESIDENT: Mr Wordsworth, please..

MR BRADY: Before Mr Wordsworth commences, could I just say that we received another letter this morning, which I do not know if the Tribunal has yet received? I will deal with that when I come to my closing. Presumably, the application will be made at the end of United Kingdom's submission.

MR WORDSWORTH: I certainly will not be making the application.

Mr President, Members of the Tribunal, I think that you will have received a short skeleton argument that I did overnight. The first half of this is reference materials that I took you to yesterday and the second half is some submissions that I am going to be making today. I am not going to be sticking religiously in any way to that document. Time is too short. I will be skipping through it rather quickly. I am kicking off at page 9 of that document. Today I will be making some very brief submissions about emissions from THORP and emissions from Sellafield and then I will be looking very briefly at the question of risks arising from maritime transports.

The emissions from THORP that Ireland wants to bring into this application are not a consequence of the MOX plant. They are speculative and they provide no basis for the issue of provisional measures in the MOX plant case. That is the legal position. Without prejudice to this legal position, emissions from THORP are, one, lawful; two, well within the international European and domestic limits; and, three, do not lead to any serious risk of harm to the marine environment. I am at para 32 of my skeleton where I have set out what the dose to the critical group from THORP is. You will see that it is 0.002 mSvs from liquid discharges for years 2000 and 2001 and 0.01 mSv from aerial emissions for the same period. These figures, again, are to be compared with the ....

SIR ARTHUR WATTS: I am sorry to interrupt, Mr Wordsworth, but there is just a question of fact. When you say that these are the doses for 2000 and 2001, is that for the two years or for each year?

MR WORDSWORTH: They are for each year.

Those two dose figures are to be compared to the constraint that I took you to yesterday, 0.3 mSv per year from a single new source of radiation. If you compare them to natural background radiation, they are less than one half of 1 per cent of the average dose attributable to natural background radiation in the UK. If you compare them to the figure that I took you to in the ICRP Memorandum of 2003, you will see that they are about the mark below which the ICRP is currently saying that impacts are negligible and require no further regulatory concern. As I said yesterday, this is not the UK's approach. Emissions from THORP are subject to detailed and extensive regulation. But it is indicative of the scale of the emissions. I have a reference in my skeleton to the Article 37 Opinion in respect of THORP. I do not think that there is any need for me to take you to that.

I would like now just to take you to what Professor Jones says about the THORP emissions. If I could ask you to turn to tab 27 of your Judges' folder and turn over the first page of this document you will see 8.1 “Doses to organisms in the Cumbrian coastal area”, so this is the area close to Sellafield. At the bottom you will see “As discharges from the older processes on the Sellafield site are reduced the relative influence of discharge from THORP on radiation doses to marine biota in Cumbrian coastal waters has increased”. This is modelling forward. It is looking forward and as other plants shut down, THORP's relative importance increases. However the bottom line is as follows:

"THORP discharges make a small contribution to the low current and expected future levels of exposure. The contribution to doses experienced by winkles etc is between 0.02 and 0.05 microgray per hour and weighted dose contribution to plankton is rather higher at about 0.2 microgray per hour". But those figures still compare favourably indeed to the 400 microgray per hour benchmark that I took you to yesterday.

Over the page 8.2, "Doses to organisms in the western Irish Sea", the final paragraph of that section: "The contribution of THORP discharges to the radiation dose experienced by organisms in the Western Irish Sea is extremely small, amounting to less than 0.0002 micrograys per hour to winkles etc and .001 microgray per hour to plankton." So again, compared to the 400 microgray per hour benchmark, very small indeed.

If I could ask you to turnover the page to the conclusion of Professor Jones.

PROF CRAWFORD: I have a technical question which maybe you cannot answer. That seems an extremely small figure. Is it a measured figure or is it a calculation from a sort of estimated total dosage divided by area, time or whatever?

MR WORDSWORTH: It is a mixture of both. It is a modelled figure and there is an element of calculation, but the model is made up in part by looking at actual recordings, so you would see if you looked at the full version of this report in the annexes that there is reference to actual data. For example data collected by Dr Woodhead.

PROF CRAWFORD: And it is possible to measure an amount that small?

MR WORDSWORTH: Yes, I believe it is, in terms of becquerels. The point about MOX emissions at the moment is that they are too small and you cannot currently measure them. But for these figures you can measure them.

The conclusion in respect of THORP, the penultimate paragraph; "the contribution of discharges from THORP to the radiation doses received by marine organisms are quite negligible in the western Irish Sea and small in Cumbrian coastal waters. At most they amount to only a small fraction of the range of variation in natural radiation doses and for that reason alone may be expected to have no discernible affects on the populations of the marine organisms". To return to your question, Professor Crawford, I think theoretically you might be able to measure them, but how in fact you do so it may lead to real problems when they are below levels of the range of variation in natural radiation doses. So how you pick up a THORP dose I think is probably impossible, and it is particularly impossible given that the doses from the site as a whole are higher. The point about Professor Jones' report also to be borne is mind is that it has been commissioned on the basis of the DEFRA 2001- 2020 strategy which means it takes into account the possibility that there will be future contracts at THORP. Therefore it is an upper bound case. It is therefore an extremely conservative report.

With these conclusions of Professor Jones in mind, the claim that was made that on the basis of the UK Strategy there is a serious likelihood of Ireland's rights being irreparably prejudiced, and that provisional measures are therefore required, is not sustainable. There is also a factual error that when we were looking at the block chart screen the other day it is wrong to say that all discharges post 2012 would be THORP related. In actual fact if you look at Dr Barnaby's report, who is Ireland's expert, he

says that discharges from THORP are going to be around 10 TBq. That is compared with site discharges of around 50 TBq. Clearly, there is no majority there when you are looking at the period towards 2020.

Just to pick up again on Professor Crawford's question, Professor Jones' evidence is entirely consistent with the evidence of the United Kingdom's other witnesses, including the evidence of Dr Woodhead, who based his conclusions on the monitoring over many years of dose levels actually received by marine biota. I have put some quotes down there in my skeleton at paragraph 36. I am not going to take you to those now, except perhaps paragraph (c), where it is looking at plaice embryos, which are particularly delicate. He says:

"Both of those studies show that the absorbed dose rates to plaice eggs were low, well below the levels at which any adverse effects would be expected, even during the period which environmental contamination levels were at their highest. Therefore it would be reasonable to conclude that no harmful effects would be expected in present day (or expected future) conditions, whether in the northeast Irish Sea or in the western Irish Sea where contamination levels have always been much lower".

That conclusion, of course, is with respect to the whole Sellafield site and not just THORP.

There was a suggestion made by the Attorney-General for Ireland in opening that Dr Woodhead is concentrating on harm to humans. I really do not see how that suggestion can be sustained. One only has to look at Dr Woodhead's report to see that that is not correct.

Ireland has relied heavily on the evidence of Dr Salbu, particularly Mr Fitzsimons in opening, but what he did was to focus on the first report of Dr Salbu. Then you have the substantial report of Dr Woodhead coming in. In the second report of Dr Salbu, you see a markedly different approach by Dr Salbu. The areas of disagreement between Dr Salbu in her second report and Dr Woodhead are now very limited indeed. I think that I mentioned yesterday that her comment on Dr Woodhead's report opened by noting full agreement with most of Dr Woodhead's statements, although she did state that some of his conclusion were questionable.

If I could just refer very briefly to Dr Salbu's conclusions on Dr Woodhead's first report, right at the end she says,

“If the uncertainties are insignificant, then ALARA and BPM should be applied in accordance with the statement given by Dr Woodhead”. Ireland's witness is saying, if there are uncertainties, apply ALARA and BPM. Well, that is a point of agreement, really, between the parties, so one wonders why we are here at all.

I now move on very briefly to the subject of abatement of discharges from THORP. It is said that more can be done with respect to abatement and that Ireland's exceptional intervention is required.

I have put some extracts into your Judges' folder from Dr Barnaby's first report and Dr Barnaby's second report. I do not propose to take you to them now, because I do not think that there is time. The broad point is that, in his first report, a whole series of figures put forward by Dr Barnaby was simply wrong. The data which is replicated at tables 3 and 4 of Ireland's Memorial were all wrong by two orders of magnitude or more. Also he give the wrong total annual liquid discharge from THORP. He said that this was 55 TBq and he corrected that in his second report to 10 TBq, which is quite a significant downward movement. That was the way that he moved into the subject of abatement. He

said that there are these high discharge levels from THORP. Therefore, you need to abate. But his starting point, in fact, has been shown to be wrong. He got the wrong figures for THORP. If I can just ask you at some stage to have a quick look at the revised report of Dr Barnaby in Rejoinder Annex 44, this is a tracked changes version that the United Kingdom requested from Ireland, simply so that you, the Tribunal, could actually identify easily where the changes were. Mr Fitzsimons made a rather strange submission in opening. He suggested that the United Kingdom's witnesses had not taken issue with Dr Barnaby's discharge figures. That is Day 1, page 46, lines 20 to 23. I think that he has it completely the wrong way around.

It follows that Ireland's emphasis on abatement simply started off on a false premise. It basically said that THORP emissions are 100 times X, therefore you must abate. However, the 100 times X figure is wrong, it is X or somewhere around there, and X gives rise to a dose that is a tiny fraction of natural background radiation. Yet what is bizarre about Dr Barnaby's second report is that the conclusions do not really change materially at all. Ireland's position has not changed either.

At paragraph 41 of my skeleton I refer to the table that Professor Sands introduced on Wednesday, which sets out principal radionuclides, the views of Ireland's experts and the response of the United Kingdom's experts. He said that the United Kingdom's response was not that such abatement technologies did not exist - well, certainly it is not - but that additional abatement was not justified due to substantial costs involved. In response to a question from Sir Arthur Watts, he said that no detail had been provided as to costs. I just want to test those submissions by looking very briefly at the Environment Agency's explanatory document, which is in your Judges' folder at tab 22. This is Appendix 6 to which I took you very briefly yesterday. I now just want to canter through one or two of the paragraphs of this. If I could ask you to turn to page 22 of 117 at the bottom, “Ecosystem impact”, and there is a reference to ICRP 60. “ICRP have stated that the controls necessary to protect human from radiation will ensure that other species are not put at risk”. Then you see the Environment Agency's approach, and this is why I say that the UK is at the forefront of radiological protection or development. A6.107:

"However it is becoming increasingly recognised that non-human species and ecosystems should be protected in their own right. This is reflected in the DTR draft statutory guidance to the Agency on the granting of radioactive waste disposal authorisations" etc.

Skipping down the page to A6.109 you will see “in assessing the options for the future regulation of radionuclide discharges to sea the Agency has used a methodology which assesses dosage to marine organisms”, and then below “the Environment Act 1995 also places a duty on the Agency to take into account any affects that its proposal would have on the conservation of flora and fauna”.

Turning back to the issue of abatement if you turn to page 28 you may recall that the first item that Professor Sands drew your attention to on Wednesday was tritium, and there we see at A6.140 the consideration of tritium starts. Turn over the page A6.147, abatement of aerial discharges: “Potential techniques have been identified by BNFL for removing tritium from aerial discharges and they are summarised”. A6.152 you have immobilisation of tritium, and in the next sentence at the top of the next page a reference to that being encapsulated in cement. That is precisely what you find in column 2 of

Professor Sands' table as being the view of Ireland's experts. In Ireland's Memorial at paragraph 9.165 you see these indications by Ireland's expert Dr Barnaby being adopted as if they come from Ireland itself.

A6.158 at the bottom of page 31, you see the Agency assessment begins and then turning to page 34 you see enrichment immobilisation, so this is the "suggestion" of Dr Barnaby, and here you have the Agency's consideration of it. I want to focus on this briefly because it addresses Sir Arthur Watts' question about costs. A6.172; "the cost of tritium abatement options based on potential enrichment immobilisation processes have been estimated at greater than £100 million". That is quite a lot of money. But one can see it might be worth it if there was going to be considerable benefit, because you should know for example that the EARP plant cost considerably more than that to build, and it has been a very successful abatement measure.

A6.174, you have the corresponding benefit to the cost. "The Agency has estimated a maximum critical group dose saving of 0.0007 mSv per year that may result from the implementation of this potential abatement option". That is very small indeed. I have done a little calculation and I think it is right to say that that is two ten-thousandths of natural background radiation in Ireland.

The conclusion at A6.173, which is going back a paragraph, "the Agency considers that the estimated cost of implementing tritium abatement on liquid waste streams is grossly disproportionate to the benefit in terms of potential savings in collective dose to the world population". We submit that these are all very material factors when you come to look at abatement. The United Kingdom Environment Agency has adopted a very sensible approach. Looking at a range of different abatement proposals or initiatives that have come forward from BNFL, it has assessed them in detail, and has come to certain conclusions. None of that is recorded in the report of Dr Barnaby.

I think in my skeleton I have addressed the next item on Professor Sands' table, that is carbon 14 and I am not going to go through that now, but no doubt Ireland will be going through it to check that what I say is correct.

Precisely the same exercise may be carried out for each of the range of technologies that Dr Frank Barnaby "indicated" according to Ireland's memorial at 9.120. Professor Sands asked you to "form a view" on the basis of that table. We submit that that table is manifestly inadequate to form any view of any kind in relation to abatement issues.

If I can come to conclusions on THORP, discharges from THORP are very small, they are far lower than specific or site limits which of course have been set in accordance with domestic and European regulations. The doses from THORP to humans are a fraction of 1 per cent of natural background radiation. The doses to marine biota, specifically, are several orders of magnitude below the 400 microgray per hour benchmark. For example, Mr Fitzsimons in opening said that the United Kingdom had avoided giving an estimate of additional discharges from THORP. That is completely incorrect. The United Kingdom has assumed against itself that THORP discharges might somehow be brought into this application, and we submit that we have shown you that they are very small indeed, and certainly cannot constitute serious harm.

Ireland's submissions on abatement are unreliable and the comments on abatement in

Dr Barnaby's report are also unreliable. We submit that even if the Tribunal had jurisdiction to consider the direct impact of THORP, which it does not, the outcome would be the same. Ireland does not even get close to establishing the scientific and technical facts necessary to show any real risk of serious harm to the marine environment or any situation of urgency or any irreparable prejudice. Just to remind you, THORP has been operating since 1994 in accordance with various Euratom and other authorisations. The suggestion that this Tribunal should now intervene, in particular in circumstances where it is unsure of its own jurisdiction, is misconceived.

I would now like to look very quickly at discharges from the Sellafield site as a whole, and I will be very brief indeed because these do not fall within the scope of this dispute, but Ireland is always trying to bring them in before you. Paragraph 44 of my skeleton, you can see ...

PROF CRAWFORD: One of the things that has been worrying me, Mr Wordsworth - as you say the Sellafield site as a whole is not part of this dispute on any view. At various stages, Ireland has used phrases like the straw that broke the camel's back and so on. In other words a concern seems to be that MOX, both in itself and in terms of its capacity to prolong the life of the project as a whole is, as it were, some kind of capstone or that one can take into account the general background in relation to the existence of the MOX plant. How would you respond to that?

MR WORDSWORTH: I think there are two responses to that. First, in terms of the temporal dimension, it is wrong, because Ireland is not relying on a continued operation of the MOX plant per se. Its case is MOX plant emissions are of no significant magnitude. Its case is the MOX plant leads to additional emissions from THORP some years down the line. That case runs into a barrier when you look at the LMA paper of the UK Government of 2002, which makes it quite clear that any proposals for new reprocessing contracts at THORP will be subject to Ministerial approval. That Ministerial approval will go through a public consultation exercise in which Ireland has been invited to participate and any decision will only be made in accordance with the United Kingdom's obligations. We are several steps removed from the possibility of any prolonged operation of the Sellafield site. That is the point, really, on the scope of the dispute. That is why we say, frankly, that Ireland has no compelling case on THORP whatsoever. Even if it engaged on the issue of causation, which it has never done - it has never gone through the steps of showing that such and such additional contract is somehow connected, that such a future putative THORP contract is somehow caused by the existence of the MOX plant. It has come nowhere meeting any standard of proof in respect of that case.

PROFESSOR CRAWFORD: It is slightly unusual for a State to say to another State, in the context of a shared semi-enclosed sea, as this is, that we are proposing to go through a domestic approval procedure and you are invited to participate in that and that will constitute our interchange with you for international purposes. Professor Lowe, in effect, criticised that approach as the United Kingdom relying on its domestic law as a method of avoiding an international requirement for genuine international consultation. How would you respond to that?

MR WORDSWORTH: I am going to be careful about straying into the area which Dr Plender is going to be addressing.

PROFESSOR CRAWFORD: Fine.

MR WORDSWORTH: The second element, though, to your question is not to forget that, in terms of actual harm, in terms of any evidence of serious harm to the marine environment, the United Kingdom is putting evidence before you which is an upper-bound case. It is looking at what will happen in the future to 2020. That is the whole point of Professor Jones' report. Therefore, you can see, on the basis of this unchallenged evidence, what is going to happen. It does not come anywhere near the threshold of serious harm. Therefore, to say, "Oh, this is the straw that broke the camel's back" does not really mean anything. It is not a straw that comes in any way from any scientific evidence.

I am going to make five points very briefly indeed on Sellafield. In paragraph 44, I have set out a quote from the RPII. This is Ireland's Radiological Protection Institute. You will see at the bottom that "the doses incurred by people living in Ireland today, as a result of the routine operations at Sellafield are now very small and do not constitute a significant health risk". That is Ireland's view. What is striking about this, and why it is worth bringing it to your attention, is that there is no hint of uncertainty in that. That is a clear statement - "no significant risk". It is not "no significant risk, but there are some uncertainties that you should take into account". That conclusion is supported by a wealth of evidence, evidence which includes the latest Marina II study. I have set out a couple of quotes there in the skeleton. Perhaps, I will just read the second one, "During the assessment period (1986-2002) the estimated dose rates to marine biota in the vicinity of Sellafield were found to be even lower than the levels suggested in the literature at which effects on aquatic organisms at a population level would be unlikely". You see there the application of the UNSCEAR and IAEA benchmarks.

Thirdly, I will just spend a moment on the actual radiation doses from Sellafield, which are 0.15 mSv per year to the marine critical group. That compares with the series of limits and benchmarks that I took you to yesterday. The figure is coming down according to the UK strategy to 0.02 mSv per year by 2020.

The fourth point is that the doses to marine biota have been monitored by Professor Jones as well. Again, I have put some quotes in the skeleton at paragraph 47. I will just take you to the first of this.

"Currently, doses to all organisms in the Cumbrian coastal area are well below the reference levels suggested by IAEA and UNSCEAR" - the Cumbrian coastal area, so it is the bit of the Irish Sea closest to Sellafield - "whether doses from alpha radiation are weighted or not, and so effects on the populations of these organisms would not be expected".

The fifth point is that Ireland's case seems to go back to the issue of uncertainty. It seems to be the only evidence that it puts before you as opposed to any evidence of any serious harm at all. The low dose radiation case is very problematic for Ireland because it requires the Tribunal to ignore the fact that the discharge of radiation is an area that international, European and domestic bodies believe can be subject to regulation and it requires you to ignore the standards that have been set.

At paragraph 49 of my skeleton I have set out an extract from the report of Ireland's expert, Dr Liber.

"I do not advocate changing the risk estimates at this time, because I do not think there is a sufficient basis for doing so."

I also refer you to the expert report of the United Kingdom's expert, Dr Preston. That is in your Judges' folder at tab 33. That is highlighting the considerable area of agreement that there is between the parties' experts on low-dose radiation.

The second of Ireland's two experts, Dr Mothersill, disagrees with that, but Ireland's case, on the basis of Dr Mothersill's evidence, is encouraging you to step away from standards that are agreed and applied by all States and which, according to Ireland's first expert, Dr Liber, remain valid.

Our submission is that such uncertainty as there is does not get anywhere near the level of a likelihood or a real risk, or a risk, or a significant risk of serious harm.

If I can deal now very briefly with the question that Professor Hafner raised yesterday about the definition of "the environment". We have had a trawl through and there is not a definition in the Environment Act. We cannot find any other definition in any other piece of principal legislation. We think that it has not been defined, but that it is a broad concept of what is "the environment". It is certainly not specifically directed at human interests alone.

I am going to make some very brief submissions on maritime transports. You will have seen in Ireland's Reply that, effectively, it has dropped its case on maritime transports. There are two very good reasons for that. These are documents that I refer to in the skeleton argument. The first of these is the CRP Project. This is a project that started out with the IAEA, the IMO and UNEP. A five-year Co-ordinated Research Project was carried out by the IAEA addressing specifically the types of hazards that Ireland has raised. I have set out the conclusions of that five-year report carried out by the concerned international organisation. I do not ask you to look at that in detail now, but simply to note that "the risks are very small". You will see that at the bottom of the quote.

The last document I would like you to see is at tab 35 of the United Kingdom's bundle. This is the TranSAS report. I do not think that you have heard very much about the TranSAS report from Ireland. This is a key document. This is a specific appraisal of the United Kingdom's transport practices carried out by the IAEA. If I could ask you to look very briefly at the foreword, you will see reference there at the beginning "Within the family of the United Nations, the IAEA has a specific statutory function of establishing standards of safety for the protection of health against exposure to ionising radiation." There is a reference to the IAEA Transport Regulations just below that. At the beginning of the fourth paragraph, there is a reference to this new service that the IAEA offers, which is a TranSAS appraisal, which is to check on the implementation of IAEA Regulations by Member States. You will see at the bottom of that page the United Kingdom requested a TranSAS appraisal but with a special emphasis on maritime transports.

If you turn over the page in that bundle, you will see where it deals with maritime transport. If I could just draw your particular attention to paragraphs 4.125 and 4.126, "it was determined that there are many good and exemplary features relative to the manner in which the UK implements international maritime regulatory standards". Over the page is the conclusion on maritime transport, "Good Practice. It was determined that the UK has gone well beyond what has been and is currently required in the area of the maritime transport of radioactive material covered in the various Codes, implementing recommendations that have since or later anticipated to become mandatory", etc.

If I could also draw your attention to the final remarks, I do not think that I have time to take you through these now, but if I can ask you just to flip through these at some stage. At 5.2 you will see a reference to the UK has demonstrated a "commendable openness with regard to this vital regulatory activity". You will see at the bottom of 5.3, "In all of these areas and other associated areas the appraisal found much to praise". You will see 5.4, specifically the appraisal "did not find any issues that were safety critical". At the bottom of that, "The good practices identified in the maritime and air transport operational areas are especially noteworthy".

We say that it is difficult to see the basis for a provisional measures application in any of this.

That concludes, Mr President, my canter through the question of serious harm in relation to THORP, Sellafield and marine transports. Our conclusions are as follows: that Ireland has submitted no evidence of a likelihood or a real risk of serious harm; has submitted no evidence of urgency; and has submitted no evidence of irreparable prejudice. None of this shows any material change of circumstances. The only change is the evidence of absence of impact. It is now even more compelling than it was before ITLOS. For these reasons, we will be submitting to you that Ireland's application should be dismissed.

Thank you very much for your attention, Mr President and Members of the Tribunal.

DR PLENDER: Mr President, Members of the Tribunal, you should have received, or are about to receive, a slim bundle, together with a two-page skeleton of my comments.

Gentlemen, Ireland's case at this stage in the proceedings is that the Tribunal should prescribe further provisional measures in more specific terms than those contained in the ITLOS Order on the ground (I quote from Professor Lowe's words) "that this is necessary for Ireland to decide what measures it should take in order to make proper provision to safeguard its rights and interests". In support of that case, Ireland refers to various episodes said to illustrate the United Kingdom's failure to co-ordinate in accordance with the Order made by the International Tribunal for the Law of the Sea. That case, which you have heard developed only a day or so ago, may be contrasted with what Ireland said in its Reply. In its Reply, Ireland acknowledged that it receives much information and cooperation from the United Kingdom, but it complained that this is done other than as a matter of right. I quote from paragraphs 7.2 to 7.4 of the Reply.

"During the 15 months since the proceedings in this case were initiated by Ireland on 25th October 2001, there have been numerous contacts ....

MAITRE FORTIER: Did you say that you had a skeleton argument?

DR PLENDER: I did. I apologise that it has not yet reached you. It contains the references and I shall avoid so much as possible setting out the texts of materials that you have already read.

I quote from Ireland's Reply in paragraph 7.2.

"During the 15 months since the proceedings in this case were imitated by Ireland on 25th October 2001, there have been numerous contacts between the British and Irish authorities in relation to various aspects of the situation brought about by the commissioning of the MOX Plant. Many of those contacts are noted in the Counter Memorial. The Irish Government and other Irish Agencies involved in these contacts are appreciative of the efforts that have been made by the United Kingdom to increase the

level of openness in respect of some of the matters connected with the MOX plant. Recent discussions over the future of the Liabilities Management Agency, for example, have been fruitful and helpful. At best, the level of consultation and cooperation that is now being achieved is precisely the kind of consultation and cooperation that Ireland asks this Tribunal to declare to be Ireland's entitlement".

A similar point, you will remember, was made by Mr Brady in his opening address to this Tribunal. He acknowledged that Ireland does receive information from the United Kingdom, adding "If they have given it to us, they have made it crystal clear that it is given on a confidential basis and we have no right to it. We need to clarify that". Professor Lowe made the point that what Ireland really sought was a determination that it should receive information as a matter of right. He stated, "We ask the Tribunal to give a clear indication of its entitlement in respect of shipments".

It is hardly necessary for me to say that, in the course of an application for provisional measures, a Tribunal will not rule on a claim to receive information as a matter of right, other than such right as is conferred by the Order of Provisional Measures itself, when the claim to receive the information by right is precisely the issue falling to be determined on the merits. Lord Goldsmith reminded the Tribunal yesterday of Ireland's response to Sir Arthur Watts' observation that one of the questions that may be determined by the European Court of Justice is: Who has the rights and who has the obligations that arise under UNCLOS? It is entirely possible that it may be determined that Ireland has no rights under UNCLOS relevant to these proceedings, which are to be protected, whether on a provisional or on an enduring basis, since the relevant rights and obligations are not those applicable between the United Kingdom and Ireland but those which apply between the Community and third States. To that observation, Professor Lowe responded that the identification of the bearer of the duties and rights was a linguistic matter. I quote from his words, "We cannot simply say that the United Kingdom was released from its obligations to secure the marine environment and apparently from all other obligations under UNCLOS". Later he added, "I was, I must say, simply trying to communicate the fact that what we are really asking the United Kingdom to do is not anything that it is not already obliged to do under the Convention." The response fails to contemplate that the Commission and the United Kingdom may be right in saying that Ireland's attribution of obligations is misplaced.

It is, of course, true that, to the extent that the provisions of a mixed agreement fall within the Community's competence, Member States may have related obligations under Community law; but the Member States' obligations under Community law are different in character and content. They do not correspond in all but linguistic respects with the obligations prescribed by UNCLOS. This is but one of the reasons why it would be impossible for Ireland to argue that this Tribunal should prescribe provisional measures to protect the rights that Ireland might have in European Community law. Those rights are not in issue in these proceedings. Nor has Ireland asserted them. On the contrary, the Irish Government indicated in the Dail in 1994 that its prospects of succeeding in an action based upon European Community law were bleak. I invite you to look at tab 1 of my bundle. I shall be reading from the left-hand column, column 1443, beginning at the final paragraph.

In response to a question in the Irish Parliament or Dail, dated 9th February 1994, the Minister stated as follows:

"While the Government always has been and continues to be committed to legal action against Sellafield, if a suitable case for it can be shown to exist, it cannot initiate such action without a firm legal case based on sufficient evidence. The Attorney-General has advised that any legal action would have to be based on scientific evidence as to the injurious effects of the operation of the Sellafield plant on Ireland. A Member State which is considered by the Commission or any other Member State to have failed to meet an obligation under the EU Treaty may be brought before the Court of Justice. There is, however, no evidence to date to suggest that the activities at the Sellafield plant are in breach of EU law. In addition, it should be noted that the Commission had examined the implications of THORP and issued an official Opinion on 30th April 1992 that the implementation of the Plan for the disposal of radioactive waste from THORP is not liable, either in normal operation or in the case of an accident, to result in radioactive contamination significant from the point of view of health, of the water, soil or air space of another Member State".

When considering Ireland's present application for provisional measures, this Tribunal has not only to assume, as is common in applications for provisional measures, that the Respondent's conduct may prejudice the Claimant's right, the existence of which right is undisputed, it has also to assume in Ireland's favour that there are relevant rights in existence.

Having made that point, we do not resist the maintenance of the ITLOS Order. The United Kingdom is content to abide by it despite the doubt that is now cast on the premise of Ireland's case. It was not cast on the premise of Ireland's case at the time when the ITLOS Order was made. But, in considering whether the ITLOS Order should be modified, notwithstanding this new development, wholly in the United Kingdom's favour, the Tribunal should consider what the United Kingdom has, in fact, done following the prescription of provisional measures on 3rd December 2001.

Let me illustrate by a few examples the steps taken by the United Kingdom to cooperate with Ireland since that date. First, the United Kingdom responded to the 55 questions put by Ireland immediately after the Order, save in so far as those questions raised sensitive matter of security, and did so even though many of the questions related to matters falling far outside the scope of the Order or dispute. The questions and answers, for your record, will be found in volume 3, part 1 of the Memorial, pages 221 to 231, 233 to 242 and 269 to 279.

Second, the Department of Trade and Industry arranged a special security briefing for Irish officials and RPII staff. At the meeting, which took place on 16th July 2002, the United Kingdom provided to Ireland sensitive security information, to the extent that it was able to do so, about the measures taken since 11th September 2001 to reinforce security at civil nuclear sites and about the processes followed by the United Kingdom to assess terrorist threats and to evaluate vulnerabilities and to develop effective countermeasures. You have at tab 2 a description of the meeting. Of course, it does not set out in detail the information, but it records, for example, at paragraph 2, that Mr Buckland-Smith, who is the Director of the Office for Civil Nuclear Security, specified the required security and explained that it was for him to specify the required security measures to counter a threat from terrorism and from proliferation. He described the additional arrangements made for MOX shipments. That is at the top of the second page. Mr Williams went into some details about the work undertaken, following

the events of 11th September, into the effect of aerial attacks on nuclear installations, both in terms of capacity to withstand an attack and in terms of the implications of a successful attack on a vulnerable plant. At paragraph 8, account was given of the fact that the air defence arrangements had been extensively reviewed. At paragraph 9, Mr Buckland-Smith, the Director, took an opportunity to describe some of the additional measures put in place since 11th September to guard against ground-based suicide attacks, such as chicanes and increased security perimeter fences. He mentioned the increase in aircraft and security systems. Mr Robinson, at paragraph 10, reported that the Government had looked exhaustively at the entire system and particularly at our ability to detect aircraft deviating from the flight path. At paragraph 12, Mr Buckland-Smith confirmed that all vehicles were checked and so forth.

A number of the concerns that have been ventilated during the course of this open session have, in fact, been addressed in that meeting, which was arranged following the Tribunal's Order.

Third, the United Kingdom supplied to Ireland the figure, excised from the PA Report, of BNFL's estimate of the number of shipments that would be entailed by the operation of the MOX Plant. The United Kingdom also supplied to Ireland an updated estimate of the number of shipments. This is a matter to which I shall shortly revert, because it is subject to a specific Irish complaint.

Fourth, the United Kingdom has supplied to Ireland other information about shipping. I shall refer to that in camera.

Fifth, in the summer of 2002, there was a public consultation in which Ireland participated on the United Kingdom's White Paper "Managing the Nuclear Legacy". The United Kingdom has invited Ireland to participate as a stakeholder in the arrangements for the Nuclear Decommissioning Agency. A meeting of relevant officials was held on 4th February of this year to discuss Ireland's involvement as a stakeholder. The matter is being followed up energetically and there has been subsequent correspondence on various detailed issues of that matter.

Sixth, the United Kingdom arranged a meeting of the two Coastguard Agencies which was held in Dublin on 16th April 2003, with a view to the exchange of information between them and in the hope of concluding the draft Coastguard Agreement, the text of which you have at tab 3 and which was sent by the United Kingdom to Ireland in 1991.

Seventh, the United Kingdom has offered to bear the greater part of the cost and to provide the port facilities for an emergency towing vehicle - that is a tug - for the Irish Sea. That project can proceed if Ireland accepts the offer. There is a short passage in the TranSAS report dealing with this. You have that at tab 4. At the end of paragraph 4.143, is the IAEA experts - there were 55 experts from a variety of Member States, who reviewed a large number of aspects of the United Kingdom's transport arrangements - say, "The report has been accepted by the UK Government and negotiations have begun with the Irish authorities over the provision of an Irish Sea ETV [emergency towing vehicle]. It is hoped that such an arrangement will work in a similar manner to the joint provision of an ETV by the UK and France in the Dover Straits. A proposal for a joint MCA and Irish Coastguard ETV is being developed and the Irish Government is considering its funding options". As I say, the Irish Government is still considering its funding options, but we consider that we have made a very generous offer in relation to that matter and we have been trying to bring it forward.

Eighth, the text of an agreement between the HSE and the RPII, which was mentioned in the Counter Memorial and Reply, has now been agreed between the parties. It has been agreed and the text of that is at tab 5.

These, as I say, are illustrations of some of the things that have been done following the ITLOS Order of 3rd December.

In submitting that the ITLOS Order has been insufficiently effective and, therefore, needs to be modified, Professor Lowe referred to four events subsequent to that Order and to various events preceding the Order. In judging whether the Order is satisfactory, it seems best to concentrate upon events following the Order and it is with these that I begin.

The first of the events was what Professor Lowe called "the long saga of Ireland's attempt to get information out of the United Kingdom about the number of shipments through the Irish Sea in consequence of the operation of the MOX plant". Professor Sands repeated Ireland's complaint on that matter. The facts are a matter of public record. In paragraph 194 of the Written Response in the ITLOS stage of these proceedings, dated 15th November 2001, the United Kingdom offered to disclose that figure if Ireland would keep it confidential, the confidentiality being precisely an issue submitted to the OSPAR Tribunal. Since Ireland did not respond, the offer was reiterated at the ITLOS hearing. That is in the verbatim record, page 22, lines 16 to 20. As there was still no response, it was repeated in writing on 19th April 2002. That is volume 3, part 1 of the Memorial, page 289. The United Kingdom reiterated its offer to supply the information once more by letter dated 17th May 2002, volume 3, part 1, page 301. On 20th June 2002, that is more than seven months after the offer had been made, Ireland agreed to discuss the matter at a meeting held on 25th June. At that meeting agreement was reached on two details and the figure was subsequently supplied.

On 18th October 2002, the United Kingdom supplied to Ireland an updated figure without being asked for it by Ireland.

In circumstances in which the United Kingdom offered to disclose the figure on a confidential basis, before the ITLOS Order was ever made, and reiterated that offer subsequently and has, in fact, disclosed it and has then brought it up to date, it is simply not tenable to contend that the United Kingdom's conduct amounts to such a failure to comply with the ITLOS Order as to require its modification by this Tribunal.

Pursuing its complaint in respect of that matter, Ireland points out that the number excised from the public domain of the 1997 PA report (that is to say BNFL's then estimate of the number of ships) did not correspond with a range given in the course of a television interview of Captain Miller. The Tribunal will have seen, I suspect, that there is nothing in that. The figure that Captain Miller gave was not a precise figure. It was a range: “up to 8”, something between 0 and 8. By giving that range, he preserved the confidentiality of the figure. The precise figure, the confidentiality of which is in issue in the OSPAR Tribunal, was supplied to Ireland. It was available to Ireland at all material times and the latest estimate has also been supplied to Ireland as it became available.

I turn to the second matter on which Ireland relies, the recommencement of activities at the MOX Demonstration Facility.

Mr Brady complained that Ireland learned of the proposal to use the MOX Demonstration Facility in support of the MOX plant only when an official read of it in the Official Journal. He said "Ireland discovered by the pure fortuity of looking at the Official Journal of the European Community that the UK had in the recent past applied to recommence a level of operations at the MOX Demonstration Facility, it having ceased operations in 1999, and they intended to recommence a level of operation. Ireland was never told about that". Mr Lowe made a similar complaint, describing it as "astounding". It is not at all clear why Ireland should claim to have learned of the intention to recommence operations at the MOX Demonstration Facility only through reading the Official Journal, because this information is contained in the Decision on MOX manufacture dated 3rd October 2001 which is the very central document in these proceedings. It is also contained in other documents supplied by the United Kingdom to Ireland long before the publication in the Official Journal.

The Decision on MOX manufacture will be found at tab 6, volume 3 part 2 of Ireland's Memorial beginning at page 219, and it states at paragraph 25: "BNFL intend to produce MOX fuel only at the SMP, [that is the MOX Plant]. The company have indicated that the MDF, [that is the MOX Demonstration Facility], at its site in Sellafield will not be used again as a commercial production facility, but instead will carry out development work in support of the SMP".

Long before even that Decision Ireland had received from the United Kingdom notice of BNFL's plan to use the Demonstration Facility for this purpose. In August 2001 the United Kingdom supplied Ireland with a copy of BNFL's annual report and accounts for 2001 which states on the first page that the MOX Demonstration Facility will be reopened as a demonstration facility, not a production unit: Tab 8. What is of more importance is that on 1st March 2002 the United Kingdom supplied to Ireland, and not only to one department of the Irish State but to several, copies of the Sellafield Newsletter beginning as follows: "The MOX Demonstration Facility, MDF, has been granted a licence instrument by the NII to recommission the plant as a support facility to the Sellafield MOX plant. This follows BNFL obtaining permission to commission the Sellafield MOX plant, SMP for MOX production in October 2001 ... MDF now have permission to carry out a number of support trials for the SMP which will be important in the current commissioning of the work". The article goes on in some detail to describe the plans for the use of the MOX Demonstration Facility.

It is also the case, of course, that as soon as Ireland asked the United Kingdom for the particular data which were supplied to the Commission, these being data calculated by reference to the period when the MOX Demonstration Facility was being used for MOX production in the period up to 1999, those data were supplied. That was so though, of course, those data are not data of discharges in consequence of the opening of the MOX Plant, which is a separate facility.

The other two episodes on which Ireland relies are episodes which should be addressed in camera. Mr President, I think there are only one or two members of the public present, but if we may go into session in camera now it would be convenient.

THE PRESIDENT: Thank you very much. I think it would be convenient for you to do it in camera straightaway, so I will request those members to please depart at this stage.

(See separate transcript for hearing in camera)

THE PRESIDENT: Dr Plender, shall we have a short break now or do you want to commence a new topic before we do so?

DR PLENDER: I estimate that I have about 15 minutes to go and I leave it entirely in your hands.

THE PRESIDENT: I think that it would be better for you to complete your submissions and then we will have a break.

DR PLENDER: The other events on which Ireland relied, as indicating the need for the revision of the ITLOS Order, occurred before the Order was made. Notwithstanding the fact that they precede the Order, I shall respond as briefly as I can to the allegations that were made, since the purpose of making them appears to be to suggest that by reason of its past conduct, the United Kingdom cannot be expected to fulfil in good faith the measures prescribed by the ITLOS Order.

As in the proceedings before ITLOS, Ireland complains in this Tribunal of what Professor Lowe terms "The United Kingdom's uncooperative attitude in the MOX consultation". The burden of the complaint is that, after Ireland had elected to participate in the various MOX consultations, Ireland did not receive detailed responses to the letters that it sent to the Ministers responsible for those consultations. Rather it received holding letters and, as I shall show, the points raised in Ireland's letters were then addressed in the ensuing Decision.

It is at this point helpful to respond to the question put by Professor Crawford to Mr Wordsworth. It is not the United Kingdom's position now, nor was it the United Kingdom's position in relation to the past consultations, that Ireland is required, as Professor Lowe put it, "to queue up" with private citizens. Of course, Ireland can make its voice heard through ordinary diplomatic exchanges, through any of the fora which have been described in the Counter Memorial, through the other fora which exist. There is no question now, nor was there ever a question, of constraining or compelling Ireland to participate in a public consultation unless it chose to do so. It is simply at liberty to do so. The relevance of the announcement that no further contracts for THORP will be concluded without a public consultation is that this. Together with all the national and international regulations in force, makes it inconceivable that there could be such a contract without Ireland having an opportunity to make its voice heard, either through the consultation, if it so wishes, or by diplomatic exchanges, if it so wishes. But, if Ireland chooses to participate in a public consultation, it follows that it participates as a participant.

PROFESSOR HAFNER: Since you are mentioning the public consultation, Dr Plender, could you please tell me what would be the legal status of Ireland if it takes part in such public consultations? Will it have the status as a private individual or will it have the status of a state, enjoying immunity?

DR PLENDER: The question may raise broader issues than Professor Hafner intended. No distinction is drawn between a state and a private individual for the purposes relevant to response to Ireland's question. That is to say that, where a private citizen or a public entity or a state elects to participate in a public consultation, it is entitled to have its views heard, to have them taken into account and to have them reflected in the decision ultimately taken, but fairness and equality as between participants requires that a sovereign state which has participated should not have an answer to the point that it has raised before others, who are participating, have had the chance to make their views known.

I hope that that sufficiently answers Professor Hafner's question, although I do appreciate that it might go further than, I think, he intended.

It is particularly on the letter of 23rd December 1999 that Ireland relies. Ireland has identified three issues which were raised in that letter and to which it says that it did not receive a response. If the Tribunal will in its own time review the points of the decision which are identified in my skeleton, the Tribunal will find that each of Ireland's points were addressed. Ireland's first request was that there should be no decision until the position on Japanese shipments becomes clear. That was addressed in the ADL Report, to which reference is made in the Decision; and in the Decision itself. The second was that there should be a separate environmental impact assessment. Environmental questions were addressed but Ministers were advised that an environmental impact assessment was not appropriate. The third was that the United Kingdom should set out the basis on which it considers that the international standards were applied. That was also addressed in the ensuing Decision. It is not the case to say that Ireland's concerns were not addressed. They were addressed, but they were addressed in the Decision.

Complaint is made here, as was made before ITLOS, about a letter from Mr Beckett. Ireland complains that it learned, as Professor Lowe put it, "not from the British Government" that it was planned to authorise the MOX plant on 23rd November, whereas Mrs Beckett's letter said that the authorisation was not complete. Mrs Beckett's letter was correct and it was apt. As for the date of 23rd November of which Ireland learned "not from the British Government", the fact is that counsel for Friends of the Earth informed counsel for BNFL in domestic proceedings that BNFL hoped to obtain authorisation on 23rd November. That was the date by which BNFL hoped to get authorisation and that is the date that is quoted by Ireland. It was not from the United Kingdom. In fact, BNFL was too optimistic and the authorisation came later and what Mrs Beckett said was correct.

Professor Lowe devoted a substantial part of his argument to a criticism of the paragraph of our Rejoinder dealing with the existing mechanisms. That paragraph simply says that Ireland does not take issue with our account of the facts about the mechanisms. That is what we understand to be the case. But Ireland misses the point. The point about the existing mechanisms is that they are in existence. They have been working. Meetings have been taking place. There are ample fora through which the supply of information and consultation takes place. If it were the case that Ireland needed the assurances and information that it now seeks, it could have asked for this in any of several fora in the last 18 months. Much of the information, the disclosure of which Ireland seeks in these proceedings, is readily available in the public domain. For example, by paragraph B(iii)(a) of its Request for Provisional Measures, it asks to be provided with monthly information about the discharges from MOX and THORP. We are not aware that this has been asked for before, but there are statutory returns. They are published by the Environment Agency. They are readily available. They are on the website. Ireland could look them up. If it would prefer to have them on paper, they have only to ask and a suitable place to ask would be at any of the twice-yearly contact group meetings. Likewise at paragraph B(iii)(b) Ireland asks for information about the volume of waste in the HASTs. Again, we are not aware that Ireland has ever asked for this before, but the obvious forum for the supply of this information, which is regularly available, although not precisely in the form specified in Ireland's request, would be the

meetings between the HSE and the RPII. The same is true of Ireland's request to be supplied details of reportable incidents. Indeed, it is advised regularly of any reportable incidents. BNFL publish them in a weekly newspaper. This is supplied to Ireland. The Health and Safety Executive supply them on a quarterly basis. This is supplied to Ireland. On top of that, officials at DEFRA provide officials of the Irish Government with material that may be of interest to that. We do not know what aspect of the present arrangements are thought to be unsatisfactory. It is of some importance to bear in mind that the United Kingdom has offered to review the existing arrangements to see how they can be improved. Ireland has yet to accept our offer, but it is there and we are perfectly happy to review the present arrangements to ensure that such information as can be supplied will be supplied to Ireland in the means most appropriate to them.

Mr President, Members of the Tribunal, in considering Ireland's Request for Provisional Measures, it is appropriate to bear in mind that independently of these proceedings, Ireland's concern for advanced notification is already addressed as a matter of routine in various fora and Ireland has an offer, which has been made genuinely and not for some hope of an advantage, to review the present arrangements so as to improve the supply of information so far as can be done. The offer has been made and repeated. And, beyond that, Ireland is protected by the detailed regulatory regimes, national and international, which have been described by Mr Wordsworth. Ireland itself participates in these regimes. For example, there are two Irish experts on the panel which considers Opinions under Article 37 of the Euratom Treaty. Beyond that, Ireland has the protection afforded by the ITLOS Order with which the United Kingdom is careful to comply. Beyond that, Ireland has the assurances given in the United Kingdom's letter of 13th June this year. In my submission, there simply is no need for yet further provisional measures.

Mr President, Members of the Tribunal, those are my submissions.

THE PRESIDENT: Thank you very much, Dr Plender. I suggest that we break at this point and resume at a quarter to eleven.

(Short Adjournment)

LORD GOLDSMITH: Mr President, members of the Tribunal, I would like to turn now and finally to the detail of the orders which Ireland seeks. I would like first of all to identify the propositions of law we developed yesterday because now is where they really come in. It is relevant to Ireland's request in two ways, because it indicates provisional measures are exceptional, but also because it helps to respond to the detail of Ireland's case. We have set those propositions out in a separate document, which I hope will be of some help. It obviously is important. You have heard me on them but I would like to identify the steps in the case that Ireland has failed to show a change of circumstance sufficient to warrant the modification of the provisional measures ordered by ITLOS. Given the expressed uncertainty by the Tribunal in respect of the EC law point it is appropriate to proceed with caution as regards prescription of any further provisional measure.

Ireland's request at least as regards A1 is effectively designed to obtain an interim judgment in favour of an important part of Ireland's substantive claim on the merits.

Ireland has not shown proof of damage as opposed to a speculative possibility of damage of an

indeterminate kind at some indeterminate point in the future.

And Ireland's requests do not take account of the rights and interests of the United Kingdom.

No serious risk of irreparable prejudice has been shown or the likelihood of serious harm, and the likelihood of serious harm only in fact appears to have been engaged in a sense at all by Ireland's first two requests, A1 and A2. The rest of them do not address that at all. They are concerned with so-called claims of rights.

As regards those two, as I shall say in a moment, A2 falls outside the scope of this dispute because it is largely directed to THORP and not just to THORP new contracts.

We have given, and I am grateful to Mr Wordsworth, what is in fact uncontroverted evidence of the United Kingdom showing overwhelmingly that there is no significant risk of any harm to the marine environment, let alone of a likelihood of risk of any serious harm.

So far as heads B and C are concerned, so far as those requests are justiciable in these proceedings at all, as regards the request for information as we say in this note there are only two grounds on which provisional measures can be ordered, preventing serious harm or preserving the rights of a party. Ireland's claim to information cannot trigger the first ground because the provision of information of itself would not have any effect on the state of the marine environment. The prevention of serious harm ground cannot therefore be relied upon in relation to any of head B.

So they can only be looked at as directed towards the preservation of the rights of the parties. Ireland we say has not shown a prima facie right to entitlement to information. The breach of the right to information is quintessentially capable of reparation in damages and is therefore inappropriate for the prescription of provisional measures.

So far as C is concerned, to which I will have to come back, that too seems to engage a claim of preservation of rights but is also prima facie capable of reparation in damages.

The prevention of serious harm ground cannot be relied upon in relation to that head either because it is at most only indirectly engaged by the request. But if the ground could be engaged indirectly it would seriously and significantly enlarge the provisional measures procedure. We also make the point, and I developed it yesterday, that Ireland has not shown urgency, any immediate risk of irreparable damage or serious harm. As the International Court of Justice said this week "at the present time" no sufficient risk. There is no suggestion that even assuming a risk of irreparable damage or serious harm this will result in the near or medium term in the absence of provisional measures. Ireland accepts, as I said yesterday, the emissions from the MOX plant are insufficient to cause serious harm to the marine environment. Even assuming for the sake of argument that emissions from THORP were of a scale to cause such harm there is no suggestion that THORP emissions coming within the purview of this case will occur in the near or medium future, in other words it is a question of whether there will be new contracts. So there is no urgent need for provisional measures.

Those propositions in general cover the entirety of the order that is sought, but as Mr Wordsworth has also clearly demonstrated, and I do not apologise for repeating the point because it is important, this operation has not only been authorised in accordance with rigorous international regional and national standards, but the future operation of the plants will also be strictly controlled and

regulated. There is no need therefore for some further regime of regulation to be laid down in order to provide protection to the Irish Sea or the Irish people.

I also yesterday drew attention to the circumstances in which this application came to be made and the Tribunal should be wary of an application made under such circumstances with no hint over the preceding 18 months since the grant of the ITLOS order of the need for any further measures. I have submitted that there are clear inferences to be drawn as to why that should be. But the way the application has come about gives rise to other issues and I will touch on those when I come to deal with the detail.

If I take first of all head A of the request for provisional measures. It divides into two parts. The first part relates to liquid waste discharges from the MOX plant, and the second part deals with aerial discharges from MOX and all discharges from THORP. In our submission neither part of this application is justified. We deal first of all with the first part. It will be no surprise to you to know that my very first submission in relation to A1 is that the threshold requirement for an interim measures application does not begin to be met. There is no likelihood of serious harm from discharges of the level of those from the MOX plant and indeed there is no likelihood of any harm. We have been through the key materials, radiation doses being negligible, not likely to result in radioactive contamination, significant from the point of health, of water, soil or airspace as the European Commission said. Negligible radiological significance, assessed dose of less than one millionth of that due to natural background radiation, proposed decision of the Environment Agency, contributions of discharges from SMP to radiation doses received by marine organisms vanishingly small. No possible conceivable significance, that is Professor Jones, and Ireland does not assert (paragraph 2.77 of the Reply) that there are proved and serious detrimental affects on the biota of the Irish Sea and you will recall what my friend Mr Brady said in opening.

That is the first and absolutely fatal objection to this application. Secondly, the consequences of this proposed action would be very serious to BNFL and the United Kingdom. There is a very real risk that complying with this order, were you to make it, would lead to the plant having to stop operating, at least for a period of months. Ireland, I know, says it is not asking for closure of the plant, although the Irish press, and you may have seen in the judges folder an extract from that, seem to have got the idea from somewhere that that is exactly what Ireland are seeking this week. One wonders where they got that agenda from.

I must deal with Ireland's suggestion that somehow some system might be introduced at relatively low cost under which the plant wash water could be captured and somehow routed to some storage tanks. This idea has never been suggested before. Ireland has not in the many consultations, in the meetings, in the correspondence, ever made this suggestion. It is not as straightforward as it sounds and you will not be surprised to hear that. It would take time to design and implement. Whilst the radioactive content of the liquid is extremely low any engineering modifications on the site would need to meet nuclear plant standards, and a method of doing this would have to be found. It certainly would not be the Irish suggestion of storing the discharge in the HAST tanks. It would be grossly irresponsible to take this very low level waste and contaminate it by storing it in other tanks which had previously

held more radioactive material. That is contrary to all principles of management of radioactive waste. It cannot be placed in empty tanks because those have to be kept in case of need pursuant to the safety case.

BNFL estimate that it would be likely to take up to six to twelve months to implement a properly engineered system and it would necessitate shutting down the plant for at least several months, and the cost of that would be significant. A key part for the reason of that is that it would require regulatory approvals.

MR FORTIER: Mr Attorney, is that in the record, BNFL's estimate of six to 12 months?

LORD GOLDSMITH: I have just put it in the record, and the reason it is not in the record is because the suggestion was never made before and I have had to find out during the course of this week what they say. If this had been pleaded out with a request there would have been a response in writing and it would have been discussed in meetings and ideas could have been taken forward. I am doing the best I can to tell you this is what they believe the consequence would be, and I will do my best to tell you why because of the problem of regulatory approvals. I obviously have this direct from them. The Health and Safety Executive and the Environment Agency who, of course are entirely satisfied with the present arrangements for discharging this extremely low-level waste into the sea, they would have to be satisfied about the proposals. If BNFL were required to implement some other procedure for managing the liquid they would have to get necessary regulatory approvals; plans for re-engineering the MOX plant would also have to be approved by the Health and Safety Executive. This is not a case of sticking a plastic tube somewhere into a tank and parking it by the side of the road. Ireland would be one of the first to complain if we started to do that, even though it is extremely low-level waste it obviously has to be handled in accordance with regulatory approvals. BNFL would have to submit a safety case and to explain why the modification was necessary, address all the safety and health issues associated with implementing the modification.

During that period how is the plant to operate? If it is to stop operation then the disruption, the cost, the commercial damage would be very significant and all this apparently for something which is of such minuscule levels of radioactivity.

But it is worse than that because there is no guarantee that the regulators would approve any such plans. Nuclear operators are required by the Health and Safety Executive to keep the amount of radioactive waste held on a nuclear site to the lowest amount practicable, and the Health and Safety Executive would no doubt take this matter into account in considering any proposal from BNFL to store the liquid from the MOX plant rather than disposing of it in the manner in which they have approved as has the Environment Agency. No doubt they would have to have regard to the fact that there would not at that stage be any clearly defined route for the eventual disposal of this material.

I turn from that to the second of the proposed measures which is Aii.

MR FORTIER: I am looking at Ireland's submission to the ITLOS Tribunal because you did say that there had never even been any suggestion by Ireland that this measure be ordered. I am looking at No. 2, that the UK immediately suspend the authorisation of the MOX plant dated 3 October 2001; alternatively take such other measures as are necessary to prevent with immediate effect the operation of the MOX plant.

LORD GOLDSMITH: They certainly did but they were saying do not start MOX at all, do not start MOX either - because by that stage MOX had not started - by refusing your authorisation, which could have stopped it, or by giving some direction to say "Please don't start it". They have never before suggested that, it having started, some measures should be taken to contain this very low-level liquid waste.

Of course, I do rely upon the fact that they did ask ITLOS to stop the plant starting. I say that that is the classic case where, that having been rejected by UNCLOS, it would be appropriate to do something which has the same effect. There really is no justification for revisiting that issue.

I go on to the second, which is ensuring that annual aerial waste discharges of radionuclides from MOX and then all discharges from THORP do not exceed 2002 levels. Again, there is no justification for the imposition of that condition. As far as MOX is concerned, the aerial discharge again are terribly, terribly low. You know what the detail in relation to that is. Therefore, there is no justification for saying that the continuation of those tiny aerial discharges will cause harm, let alone serious harm.

For THORP the level of discharges is also very small. You have heard Mr Wordsworth on this. They are far lower than specific or site limits. The doses from THORP to humans are a fraction of 1 per cent of natural background radiation, well within domestic and European limits. You have this in mind from what Mr Wordsworth has said. Also several orders of magnitude below this 400 microgray per hour standard for marine biota. Professor Jones - you saw this this morning - said that they are quite negligible in the western Irish Sea and have no discernible effect on the populations and marine organisms. Of course, that is the entirety of THORP to which he is referring.

The discharges from existing contracts for reprocessing at THORP are not within the scope of this dispute, so, irrespective of the merits of Ireland's argument that future THORP contracts would flow as a result of the commissioning of the MOX plant, it cannot be contended that this is the case in respect of contracts which are currently being fulfilled. These are contracts which are there and it cannot be open to Ireland to ask, in the context of this dispute, this Tribunal to make an order imposing a constraint upon the operation of the THORP plant in fulfilling those existing contracts.

Of course, that does not mean that this is an issue that is without regulation. BNFL is required by the Environment Agency to keep discharges to the lowest practical level. At all times BNFL have to ensure that they remain within authorised limits. What the Tribunal is really being asked is to come in instead of the regulatory agency and impose some new maximum limit for discharges from both the MOX plant and the THORP plant. That is not justified by way of a request for provisional measures.

The second point that I want to make is that there is no justification for limiting discharges to the 2002 levels. As far as MOX is concerned, MOX in 2002 was only at the beginning of its five-year commissioning period over which time the plant will progressively ramp up to full operation. The figures that you have, of course, unless there has been a misunderstanding, as to estimated discharges are on the basis of that full operation. The figures that we are giving will hold good. In fact, in 2002 the plant was operating at nothing remotely approaching the maximum throughput capacity that the Environment Agency had considered in estimating the environmental impact of the plant. Given that the MOX plant will now begin to ramp up gradually towards full operation, it is obvious that discharges in

2003 certainly cannot be guaranteed to be the same as those for 2002, although what can be guaranteed is that, even at the highest throughput, they will be inconsequential.

A requirement to ensure that discharges of the plant did not exceed the levels occurring in 2002 amounts to an order to shut the MOX plant. Again, unacceptable.

As far as THORP is concerned, we also say that there is no justification, no special significance indeed, to the actual discharges from THORP for 2002. The result of imposing such a restraint would be to limit the amount of spent fuel that could be reprocessed at THORP in any given year, meaning that BNFL might have to end up having to take longer simply to process the amount of THORP contracts that are there already. That does not achieve any good. It is an extension of the period of time that would impose, I am told, very extensive costs on BNFL and the total amount of radioactive discharges would be unaffected. It would simply be to spread them over a longer period of time. This does not preserve the rights of the United Kingdom; there is no justification for it and it should be rejected.

I want to turn then, if I may, to head B, which is the request for information. It is a mixture of discovery and disclosure and bits of cooperation. We say that they should all be dismissed. I will say something separately in a few moments about the question of the THORP contracts. I have not forgotten at all the question that was put to me about responding to the criticisms of our letter that were made. But none of these requests, as I have said, are justified on the grounds that they are necessary to prevent serious harm to the environment. It is important to keep that clearly in mind.

They have to be justified on the grounds of some necessity to preserve rights, but there will be no irreparable prejudice to Ireland's rights, in our submission.

I want to make a number of fundamental objections to these requests. Some of them may slightly overlap with what Dr Plender said and I apologise for that, but the points are important.

The first point that I want to make is the way that the requests have been made. Ireland has not shown a prima facie right to this particular information and there are a number of different objections to different parts. One theme that would run through what we would say is that the United Kingdom had no prior notice that these requests were going to be made. That is surprising. As you know, we have had for the last 18 months the ITLOS Order, within the framework of which we would have expected there to be raised specific difficulties so that they could be discussed and workable solutions found. There are no less than 11 separate mechanisms of cooperation and discussion available. Standing arrangements. They are set out at paragraphs 6.54 to 6.83 of the Counter-Memorial. They include standing arraignments for bilateral consultation, Embassy contacts and, this is very important, the regular UK/Ireland Contact Group, which is specifically set up to provide arrangements for exchanges of information on matters of radioactivity. It meets six-monthly. A range of Governmental officials from both sides meet. There is the British-Irish Council. This is important. There are arrangements for the exchange of information between the Health and Safety Executive and the Radiological Protection Institute of Ireland. In that the head of the RPII and the Chief Inspector of Nuclear Installations Inspectorate meet annually to talk through issues and exchange information. There is close contact between the Irish Board, the RPII and the NRPB, which is the British Board.

Those contacts, we suggest, are very relevant for three reasons. First of all, when considering

the argument by Ireland of lack of cooperation, it is really important to see the wide range of consultations and discussions which go on. Dr Plender has dealt with the particular allegations of lack of cooperation. I am not going to repeat that. The fact is that relations are close, much discussion and exchange of information takes place. One has always to recall that consultation and exchange of information does not necessarily mean agreeing with the other party. I understand that it may be frustrating from time to time when you are consulted and your point of view is not accepted, but you have been consulted all the same and bona fide and genuinely and in every respect sincerely.

The second reason that this is important is that one would have expected the request to agree to specific further measures to have been raised through one or more of those contacts. I know, of course, and you know, that there are specific issues about provision of information which the United Kingdom says or BNFL says is commercially confidential. That is an issue on which we are eagerly awaiting the decision of OSPAR any moment now. We also know that there is a disputed request for information which we say is security sensitive. To the extent of those pieces of information, no doubt it is right to say that in one way or another Ireland has made known their wish to have certain further information, but there is a dispute between us as to whether or not it is right that that should be provided. But, so far as the other requests are concerned, so far as one can tell, the same cannot be said. These are not requests that have been made and rejected. For example, item B(iii)(a) monthly information as to the quantity of specific radionuclide discharges. As far as we are aware, Ireland has never made a request for this information. Why is it now being made? One of the consequences - and this is an important point, I do not shrink from making it - is to give the impression (or it may give the impression) to you and the outside world that the United Kingdom has been dragging its heels and keeping its information secret. That would be a very false impression. On this specific item, for example, BNFL makes statutory returns to the Environment Agency providing the full details of radioactive discharges. It can be found on the Agency's public register. Ireland can obtain it without difficulty. Indeed, it would be surprising if they have not. If they have some difficulty with that statutory information, well, they could have discussed with us, and consideration could have been given, how to deal with it, but it is really inappropriate to make an order when no prior discussion and request has been made.

I want to make two other points in the context of the same request. First, I would resist very strongly any suggestion - and it may be that Ireland will make it in its reply - that where we say that we are prepared to provide information that an order should be made that we should give it. That would be giving the impression that we are being forced to do something by this Tribunal which otherwise we would not have done. We have offered, for example, to review the arrangements. I would object, frankly, to an order from the Tribunal that we should be ordered to review the arrangements. Why do they not come to us and say, "Yes, we want to do it"? It is a little bit like the argument that is sometimes uses to say that, if you have got no intention of shoplifting from Marks & Spencer, then you should have no objection to an injunction being granted against you prohibiting you from shoplifting from Marks & Spencer. I think that we would all object if such an injunction were granted, because it sends a very clear message that you are the sort of person who would otherwise, unless restrained by the court, doing it. We are not the sort of people who otherwise, unless ordered by the Tribunal, not respond in

accordance with the Order already made by ITLOS. We do not, being blunt, see why some victory over the recalcitrant Brits should be claimed on the basis of something that really we have not had an opportunity of discussing.

Secondly, and this is very important, the prior discussion would actually have thrown up particular issues and allowed them to be discussed and practical solutions found where possible. Let me give an example of what I mean by that. Take Ireland's formulation of B(i). I am going to come back to this in more detail. That is in relation to the additional contracts. Ireland says that it wants "full information". I can already see the possibility of disputes if an order in those terms were made. Would it be taken to mean, for example, including information alleged to be commercially confidential? I think that there is every risk that Ireland would say that it does. By making what might otherwise seem an apparently innocuous order, we would be sailing into inevitably choppy seas with disputes and arguments and accusations and references back to the Tribunal about whether they have or have not complied. If, on the other hand, we had had , as we should have had, a prior and sensible discussion, those difficulties could have been identified and worked out.

B(iii)(c), which relates to research studies, is another example. That is a request that has never been made before, but it could be construed very widely indeed. It talks about all research studies carried out or funded in whole or in part by or on behalf of the United Kingdom or any of its agencies or BNFL. Does it cover, for instance, internal draft working papers and reports? Are studies funded in part by the United Kingdom within the meaning of such an order, if they are produced by an institution, a university or a person who is supported financially by the United Kingdom? How would we define that so that we would not inadvertently find ourselves in breach? It is very difficult on a Saturday - the last Saturday of the hearing - to start to try to negotiate in committee, as it were, detailed drafting points of that kind, which have never been the subject of debate and discussion before. If they had been, it would have identified just what the issues are and just what we need to do. It is very difficult to do it now. My submission is that you should not allow yourselves, if I may respectfully say so, to be drawn into that sort of drafting exercise.

But, thirdly, a prior discussion would have identified to Ireland, if they do not already know it, that there is information publicly available. Let me take B(iii)(b). Monthly information as to the volume of waste in the HAST tanks and the volume vitrified during the previous month. I need to say a word about this. It is an important area. The storage of highly-active liquid in the HASTs is, of course, a matter that is of safety significance and is, accordingly, the subject of close regulatory scrutiny and control by the United Kingdom's nuclear safety regulator, the Health and Safety Executive's Nuclear Installations Inspectorate. That Executive has published a series of reports on the safety of storage of this waste and on progress with converting it into solid form through vitrification. The first report, I understand, was published in 1995. There was an update in February 2000. There was a further update in 2001. Ireland, of course, has copies of these reports. But the Health and Safety Executive also published information about this issue in their Annual Reports and in their Quarterly Nuclear Safety Newsletters. The Nuclear Installations Inspectorate and BNFL have in place an agreed strategy to reduce the stocks of liquid held in the tanks to buffer volumes by the year 2015. That includes an agreed

maximum upper limit on the amount of liquid that may be held at any one time. That agreed limit is set out in the Health and Safety Executive's published reports, so it is public knowledge that stocks must remain below that agreed maximum limit and that that is a legally enforceable requirement. The Health and Safety Executive has made clear that, should it appear that the agreed limits might be exceeded or that progress towards meeting the agreed timetable for reducing stocks of liquid to upper volumes was not adequate, they would require BNFL to slow down or stop operations at THORP. So Ireland, like everyone else, knows the upper limit of the amount of liquid held in the tanks even before it has received any more detailed information about the matter from any other source.

But the request throws up a further objection. Ireland does already receive information that it is now sought to seek by way of order. The subject of the HASTs and progress with vitrification is a subject which has long been of interest to the Radiological Protection Institute of Ireland. It is a matter covered routinely, I am told, in the regular contacts between the RPII and the HSE. It is covered routinely at meetings of the Radioactivity Contact Group that I referred to before. There appears to be northing preventing Ireland from obtaining any more detailed information than may be publicly available through such routine contacts. It is clear, therefore, that this is not a matter that requires a provisional measures order from this Tribunal in order for Ireland to obtain information, but, goodness me, what an impact it might have if it appeared that this Tribunal had to make an order to require us to provide information in relation to this.

A further example of that is item B(iii)(d). That relates to reportable incidents. I touched on this when I opened by saying that Ireland were asking for information that they were already getting three times. I am not sure that it is not four now that I have looked at the detail. First of all, details of reportable incidents at civil nuclear sites, such as Sellafield, are published routinely. BNFL publishes details of such events in their weekly Sellafield site newsletter. That newsletter is sent every week to the Radiological Protection Institute of Ireland. Secondly, the Health and Safety Executive publishes a quarterly statement of incidents at nuclear sites. That, too, is routinely sent to the Radiological Protection Institute of Ireland. Thirdly, the Health and Safety Executive provides relevant information about safety-related events at Sellafield to the Radiological Protection Institute of Ireland as and when these may appear to be of relevance. That information exchange arrangement is the subject of the draft agreement between the Health and Safety Executive and the RPII, the draft text of which has now been agreed between the parties. Fourthly, it is also the practice of officials at our Department for Environment, Food and Rural Affairs to provide the officials of the Irish Government with details of any events that it considers might be of general interest to Ireland, whether or not they are actually of any safety significance.

I have to respectfully suggest that all of this appears fully to satisfy the desire expressed by Professor Sands to be kept informed if only for the purpose of being able to address undue public anxiety that might arise due to the misconception of such an event, as he said. I am not quite sure why these arrangements that I have referred to do not seem to be known to Professor Sands or those advising him, because we have referred to them at various points in the context of this case, in the context of the ITLOS provisional measures in order to cooperate, and in our submissions to this Tribunal.

It may be that this is one of those cases where Ireland says, "Well, we may be getting the information but we think that we should have it as of right". I do not know, but, with respect, if that is the answer, that is nonsense in the context of an application for interim measures. It cannot be right to determine now a legal entitlement if that is an issue between the parties, as opposed to saying, is there something that is necessary to prevent irreparable prejudice to the party at this stage?

It is very hard to see how Ireland can support the suggestion that it has to rely on the television news or other media to find out what happens at Sellafield. It is clear, if I may say so, that there is no need whatsoever for the Tribunal to make an of the sort of orders of B(iii) (b) and (d) that I have been referring to.

Just going back to the HASTs, I should have said that there are also published by BNFL regular reports on progress with vitrification. That is in the Sellafield site newsletter. It is in reports of the Sellafield Site Local Liaison Committee as well as in the annual reports. That information is available on the web through the website of the Committee. By way of example, the latest quarterly report of the Sellafield Local Liaison Committee, which goes up to March 2003, states,

"The vitrification process continued to operate with a greater throughput in this quarter. Whilst also requiring downtimes for planned and breakdown maintenance, this financial year's production of containers, that is vitrified waste across all three lines, was in excess of 300 containers for the current year, the best total for four years". There is the information publicly available.

This request also, if I can stay on the HAST, throws up yet another objection to the requests made by Ireland, that they go way beyond this particular dispute. As you know, operation of the MOX plant has no impact on the HASTs. It does not impact on the amount of material in them. New contracts for THORP in the future could, but that will be subject to approval and consultation. There is no justification for this request which actually relates not to the MOX plant but to other aspects of Sellafield.

Item B(v) -I am sorry to be dodging about a little bit, but it helps to try to understand, I hope, the principles we are concerned with - is in relation to a request for cooperation with Ireland in arranging trilateral liaison between the Irish Coastguard and the United Kingdom's Maritime and Coastguard Agency and BNFL on the shipping part. That throws up also an area which is already being dealt with. Cooperation between the respective coastguards of Ireland and the United Kingdom is an established fact. A draft cooperation agreement has been under consideration between the parties for many years, although has yet to be finalised. You will find details of this in the Counter-Memorial. I will not trouble you at the moment. I think that it is chapter 6. It is the same chapter that deals with the 11 layers of contact. But there is also routine cooperation between relevant Government officials. It is entirely available to Ireland to request meetings and to ask that BNFL or PNTL, the shipping people, attend such meetings. We have sought to engage Ireland as fully as we can about the respective duties of the two coastguard agencies. There was a meeting in Dublin on 16th April of this year when officials of Ireland's Maritime Safety Directorate and Coastguard discussed a range of related matters with officials from the United Kingdom's Maritime and Coastguard Agency and the Department of Transport. At this meeting the United Kingdom side did, in fact, propose to help arrange a meeting between the Irish Coastguard

and BNFL. It is difficult to see why Ireland should consider this a matter about which they require this Tribunal to make an order. Ireland, of course, goes much further than requesting such cooperation. Ireland wants to the Tribunal to order that trilateral liaison should take place in respect of all shipments of radioactive materials to or from the MOX and/or THORP plants. Presumably, they mean in advance of each shipment. It is not clear what purpose would be served by that. The United Kingdom coastguard does not itself require any such meetings with BNFL in advance of individual shipments. It does not require detailed information about the timing and route of such shipments and it would not welcome, I am told, being ordered to conduct what it would regard as purposeless meetings of the kind requested by Ireland.

I am going to go to some of these requests which now touch on security issues. The clearest example of that is item B(iii)(f). Because this is a matter which in part concerns material which is dealt within confidential annexes I do not want to read material out. I am going respectfully to invite you to note some references I will give and perhaps in your own time you would look at them.

The issue is dealt with in our Counter-Memorial at 6.117 to 6.129 and in annexes which are referred to there, and at paragraph 7.41 to 7.54 of the Rejoinder and annexes which include annex 49, which is an open letter, a long letter from the Secretary of State for Trade and Industry to the Irish Minister for the Environment and Local Government, and at annex 51 there is a letter which is confidential. These set out the United Kingdom's policy as clearly as possible. I can just quote one sentence at least from Mrs Hewitt's letter which is the one at annex 49, where she explained in some detail why it is and how it is that the United Kingdom does not disclose outside the United Kingdom government details of the threat assessments we have made, details about the physical robustness of installations against terrorist attacks, about the measures in place to address such threats, about potential damage that might be caused by an attack or about counter measures. Access to such information is limited strictly to those who need it for the performance of their duties. The reason for this is that such information could be of use to someone seeking to carry out a malicious attack and we understand that the Irish authorities have declined to give details of security arrangements for example at Irish airports for precisely the same reason. Those who have any familiarity with security issues will understand why such strong measures are taken and why the provision of information is limited to those who need it for the performance of their duties. No disrespect is intended to anybody by making this clear. I recognise that there is a dispute between us as to whether that is right or not. There is of course also article 302 of UNCLOS, which specifically deals with the rights of the state to keep security information to itself. But at some stage in the merits on this you or some other tribunal will have to grapple with this issue. But it is wholly inappropriate in my submission to decide such an important issue as part of provisional measures; and if Ireland come back and say what is the harm, we can be trusted, the UK cannot be put in a position in a matter so serious as national security to be ordered to make disclosures which are contrary to our existing policy, which many other countries, and we think Ireland itself although I cannot be sure about that of course, would follow.

Item B(iii)(e) also concerns security issues amongst other things. That relates to the right and facility to make a copy of Continued Operation Safety Reports. The relevant legislation as amended

establishes a system of nuclear safety regulation based on a nuclear site licensing regime and provides that the responsibility for ensuring the safety of nuclear facilities rests with the operator subject to regulation by the nuclear safety regulator, the Inspectorate; and through the licensing regime the Inspectorate has wide powers to ensure that operators manage safety effectively, including the power to require an operator to take whatever actions it considers necessary in the interests of safety. The statutory powers to regulate nuclear safety are vested solely in the Health and Safety Executive's Nuclear Installations Inspectorate. There is no other organisation which has either the technical competence or the legal powers to regulate nuclear safety in the United Kingdom. And neither, with respect, the Irish Government nor any of its agencies could have any role. No purpose would be served by providing Ireland access to the safety case for facilities at Sellafield.

Those safety cases are made up of a suite of ever-developing documents amended as necessary in the light of operational developments and regulatory requirements. They are the tools though which the operator is required to demonstrate to the Inspectorate the case for safely operating the relevant facility. Obviously it is crucial that the operators are able to include in the safety case full details of all aspects of the plant so as to ensure that the regulator has all relevant information on which to base his assessment of the safety case. It is obvious that much of that information is going to be sensitive for a number of reasons, including particularly security, in view of the potential for detailed information about the engineering of nuclear facilities to be used to identify ways successfully to sabotage or attack such a facility.

We have explained to Ireland, and in our written submission to the Tribunal, that that sort of information is strictly controlled in accordance with internationally recognised principles and guidelines concerning the physical protection of nuclear facilities. In the United Kingdom, section 79 of our Anti-Terrorism, Crime and Security Act 2001 establishes a legal framework that requires such information to be protected. And the provisional measures sought by Ireland would in fact be in direct conflict with our national legal obligation through an Act passed by Parliament. In fact before that Act in 1999 the United Kingdom did agree to allow the RPII to have access to detailed safety case information concerning the HAST and that was in view of the fact that the facility housing those tanks was clearly identified with them as one in which there existed a potential for an accident to lead to an offsite release of radioactivity. Information about this is provided in the Institute's annual reports for 1999 and 2000. They are annexes 25 and 26 to the Counter-Memorial and they are referred to at para 6.125 of our Counter-Memorial. At para 7.41 of the Rejoinder also. That was however a unique occurrence. It took place under specific requirements, for example to ensure that no copies of documents were taken, and that the safety case information provided was not publicly disclosed.

Having asked us to allow this exceptional access to detailed information Ireland now appears to be using the fact that we agreed to do so in 1999 as evidence to support their assertion that we did not then consider the information to be security sensitive. That is not the case. We did consider it to be security sensitive but were willing at that time to relax our policy in respect of that one facility in order to accommodate strenuous requests from Ireland that we do so.

As a result, I have to say, of the access which members of the RPII were given they concluded

that the present risks of severe accidents associated with the HASTS were low. However, Ireland then says that there is a need to have information available because an accident at the Sellafield site could result in harm to Ireland. Their own Department of Public Enterprise has produced an information booklet in March last year called National Planning for Nuclear Emergencies. It is available on the RPII website and the document notes that two early notification systems are used for early warning of the occurrence of a nuclear accident abroad and the document sets out briefly what those schemes are. And it says this: "These early warning systems are designed to provider essential information as quickly as possible. They are tested regularly at both national and international level and are continuously improved in line with experience gained and available technology". In terms of emergency planning copies of the Sellafield offsite emergency plan are available to members of the public in public libraries throughout Cumbria. So there is information available in order to demonstrate that people are ready to act.

Item B(iv) to which I turn contains a fairly open-ended demand for a particular form of cooperation. I am still really under the same heading of emergency planning. We in the United Kingdom have in place a clearly established and comprehensive system for planning for an emergency at a civil nuclear site. The requirements to do this are laid down in statute. The system we have establish also implements the commitments entered into by the United Kingdom in respect of notification and cooperation with other states in the event of a nuclear accident. We are a party to the 1986 Convention on Early Notification of a Nuclear Accident and the Convention on Assistance in the case of a Nuclear Accident or Radiological Emergency. The United Kingdom is also a party to the arrangements in place within the European Community relevant to this area. There are Community arrangements for the early exchange of information in the event of a radiological emergency agreed under EC Council Decision 87/600.

So the obligations falling on the United Kingdom in respect of cooperation with other states in this particular area are already clearly established in existing international instruments. There is no gap that this Tribunal is required to fill in this regard. Through the relevant legislation the United Kingdom implements the relevant provisions of the Basic Safety Standards Directive 96/29 of Euratom, as these relate to emergency preparedness and public information sets out requirements for preparation of emergency exercise and dissemination of information to members of the public who might be affected by an accident. So yet again we have international regulation national regulation, regional regulation which deals with our responsibilities towards Ireland in these circumstances. Ireland are asking you to cut across that, without even considering what the alleged deficiencies with those regimes are. You may think it is particularly one of those areas where the uncertainty in relation to jurisdiction would in any event suggest that you should tread very carefully given the existence of such regulation elsewhere.

So far as information is concerned, information about the United Kingdom emergency planning system is available publicly. There are regulations in 2001 which require that Hazard Identification and Risk Evaluation Reports are made and provided to the relevant local authorities as the basis for the local authority emergency plan. It is not a legal requirement for local authorities to do so but some local authorities choose to publish those Hazard Identification and Risk Evaluation Reports, and Cumbria

County Council has chosen to do so in respect of the plan concerning Sellafield site. It is freely available to Ireland. Indeed, I am told that an official in the Health and Safety Executive sent a copy to a Mr Chris Hone of the RPII in Ireland just last year.

In addition to that the Department of Trade and Industry chairs the nuclear emergency planning liaison group and that group has issued consolidated guidance on emergency response arrangements for emergency planners, and that detailed guidance can be found on the website of the Department of Trade and Industry. There is an awful lot of detail I am giving you and I apologise for that, but it is the consequence of this never having been raised before in this context and we could have actually identified what the issue between us is. No absence of publicly available information, no basis for Ireland to claim that it has been deprived of access to relevant information about the United Kingdom's plans for responding to a nuclear accident at Sellafield. It has a copy of the detailed plan.

Let me turn to the area concerning shipping information. Ireland requests the Tribunal to require the UK to provide to Ireland detailed information about the timing and route of all sea shipments of radioactive material to and from Sellafield. I emphasise all shipments, item B(ii) - both MOX which may be exported and shipments of spent fuel for reprocessing at THORP. Again it extends beyond the proper bounds of this dispute.

As you have heard BNFL or PNTL as the operator have to comply with all relevant regulatory requirements. details of those requirements, the fact that they are founded in internationally agreed standards and recommendations are set out in the Counter-Memorial. Again, if I may just give the references: paras 2.79 to 2.97 of the Counter Memorial and the witness statements of Mr Rawl, Mr Young and Captain Miller. Compliance with those requirements necessarily involves providing certain operational information to relevant authorities and regulators but there is no requirement or need for BNFL to provide the United Kingdom government or the United Kingdom coastguard with the information that Ireland now asks you to order they should be given.

As I suggested, the position of the United Kingdom coastguard is that being given such information would serve no practical purpose. They consider that the purpose of emergency preparedness is to be prepared at all times to deal with an emergency should one occur. If it becomes necessary for a vessel to contact the coastguard for any reason it will do so. The coastguard can then put in place an appropriate response by reference to the actual circumstances of the problem, and it would not help them at all in terms of being prepared to respond to such an eventuality if it was given precise details about the planned route and timing of passage of a particular ship. It certainly would not help it to be deluged with daily reports about the progress of particular vessels.

What Ireland says is that we have very few vessels and would only be in a position to come to the aid of a vessel in distress if they were given precise advance warning of when that vessel was likely to be in Ireland's Search and Rescue zone, and detailed information about its position. I suppose the logic of that is to say that a vessel would only be allowed into that zone if Ireland were in a position to ensure that one of its eight naval vessels were available to respond. But the fact is that the Irish Sea is an extremely busy waterway. On a daily basis it is traversed by ships of all kinds carrying all manner of goods, including hazardous goods. Ships carrying those will be traversing. One cannot assume that

Ireland has arranged with every government in the world to be given precise details of every ship that might enter its Search and Rescue zone or even every ship carrying any form of hazardous material so it might be in a position to place a vessel close by.

There obviously is a further implication of such an order if it were granted. There are other states who are entirely entitled to take a view which is one of opposition to nuclear energy and therefore to the international transport of nuclear material. Many of them would like and have claimed the right to be notified and consulted in advance of all shipments of radioactive material. That is really what Ireland is doing here, turning this request into a claim that there is a right of prior notification. Should it be granted, the implications would not be lost on others. The United Kingdom's view is that there exists no right of prior notification, consultation or prior informed consent in respect of shipments involving hazardous cargoes, including radioactive material. The United Kingdom's view is that such claims impact significantly on the fundamental principles of freedom of navigation on the high seas and innocent passage through territorial waters. Those are enshrined in UNCLOS, too.

But there may be debate about that. The point is that this is not the occasion to determine, on an application for interim measures, a matter of that sort.

We have, notwithstanding that position, made it our policy, in common with the Governments in France and Japan, to provide certain information to States that request it, about certain shipments of radioactive material. Professor Lowe and Professor Sands made clear that that is done on a voluntary basis and in confidence. We have only been in the practice of doing this with respect to shipments that appear likely to generate public interest and attention from non-governmental organisations.

In the past, that has meant provision of information about shipments of MOX fuel from France and the UK to Japan and shipments of high-level waste from France to Japan. We have not been in the practice of providing information about the much more frequent shipments that have taken place over many years of delivering spent fuel to the UK from Europe and Japan for reprocessing.

The aim was to ensure that those Governments were not caught by surprise over such shipments, should others, such as non-governmental organisations, generate controversy about them - also to ensure that they had factual information about the material being transported and the robust safety arrangements in place.

The three States involved intend to continue this informal practice on the basis that the relevant Governments find it helpful.

The precise time of a departure of a vessel is not provided. We do not provide details of where a vessel may be at any one time during a voyage. Such detailed information is again necessarily protected for security reasons in line with Guidelines of the International Atomic Energy Agency relating to the physical protection of nuclear material. Such detailed information is only to be disclosed to those that need to receive it for the performance of their duties.

The truth is that providing any information at all to foreign Governments about the timing and route of shipments of nuclear materials is, strictly speaking, a breach of best practice in terms of security, but to supply the level of detail which Ireland is asking the Tribunal to order would be a wholly unacceptable step further.

The Tribunal will appreciate that it is altogether more problematic for the UK to respond positively to a request from Ireland to provide it with daily updates giving detailed information about the progress and position of vessels. There is no operational reason for Ireland to have such detailed information. Dr Plender has dealt compelling, if I may respectfully say so, with that. It is not involved with the shipments in any way. For reasons of security, detailed information about such things is not disclosed unnecessarily. The arguments put forward by Ireland really are so weak as to not merit further consideration.

Ireland, I think, says that there is no point in protecting that information because there are organisations, like Greenpeace, that put the information about shipments on their websites. It seems to me, with respect, to be a double-edged sword as far as Ireland are concerned. But whether or not they do take such steps as part of their anti-nuclear protest activities, it does not remove the obligation that falls on us, as the United Kingdom, to properly protect security sensitive information in accordance with internationally-agreed principles concerning the physical protection of nuclear material. The Tribunal is being asked by Ireland to impose a reporting requirement on the UK that would require it substantively to breach those clearly established and internationally-accepted principles of security. That, we respectfully say, is unacceptable.

I want then to turn, if I may, to B(i), the position about new THORP contracts. It has been stated, I would respectfully say, with abundant clarity that there are no proposals of any kind for such new contracts. There are no memoranda of understanding, no letters of intent, no heads of agreement. If at some point in the future a proposal for a new contract were to be brought forward, we have set out in a White Paper in very straightforward language exactly what we would do. The Government would have to give its approval before any contract could be concluded. The Government would review the proposal against a range of clearly-stated criteria. We have made it clear that we would consult before taking any decision and that Ireland would be invited to participate in such consultation. I hope that those statements are clear enough as I have now made them.

As far as MOX contracts are concerned, the position is different. BNFL is free to enter into MOX contracts with a supply of MOX to be manufactured using plutonium belonging to customers in Switzerland, Japan and Sweden from existing THORP reprocessing contracts. Following the October 2001 decision on justification of MOX manufacture and the subsequent authorisation to commence plutonium commissioning at the MOX plant, the regulatory steps necessary to allow BNFL to proceed with such MOX supply business were cleared. But it is an entirely different point. The only reason that we get into the new THORP contracts is because of the argument that, if they come about as a result of MOX, the THORP reprocessing may add - although we still say well within acceptable limits of discharge - to what is otherwise so little in terms of MOX. That is not the issue if one is looking at possible future MOX contracts which will be coming from existing THORP reprocessing contracts.

Can I come to item C? I have almost finished, I am glad to say, given the time. That is the order that you are asked to make, that the United Kingdom should 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.

This is a completely new request made by Ireland. There have been in the course of the hearing numerous different interpretations placed on what is requested by different members of the Irish counsel team. It is not at all clear to us, as a result, what this request means. Ireland sought to clarify it by saying that it wishes to prevent any engineering activity that might preclude the future implementation of some unidentified abatement technique. It is also said to mean preventing the conclusion of new THORP reprocessing contracts that might prejudice a potential future decision of the Tribunal.

Let me just examine that. Taken at face value, the provisional measure sought would prevent BNFL from making any changes to plant or process in case this were to preclude some future abatement requirement arising from some future environmental impact assessment that might be ordered by the Tribunal. In his submissions, Professor Sands gave an example. He said that BNFL should not fit - if I understood this correctly, I apologise if I did not - abatement technology in case such a future assessment identified a better abatement option. Well, that really would be inconsistent with the existing United Kingdom requirement on BNFL to use best practicable means at all times. As and when new assessments indicate a need and/or new technology provides a means, improved methods of abatement will be implemented, as they have been in the past. To require BNFL not to do so would actually be contrary to the requirements of the Environment Agency and, indeed, to article 194(1) of UNCLOS.

As for the prospect of new THORP contracts being concluded, Ireland's other point, that, I hope, we have addressed. There are no proposals for any such contracts and there may never be any such proposals. You may recall, because it is referred to in our Memorial, the evidence that was given by Ireland's expert in the OSPAR proceedings that they thought there never would be any such contracts. But, if there were to be, the United Kingdom, as I have said, would review those proposals, carry out a consultation in which Ireland would be invited to participate before reaching a decision whether or not to approve them. It is abundantly clear that, if Ireland felt at that stage that its rights in respect of this case were being infringed in some way, it would have plenty of time - I say again I do not wish to encourage them, but it is a fact - to seek an order for provisional measures before any decision could be taken by the Government and, much more importantly, before any contract could actually be implemented. The lead times for implementation of those contracts are very long. The fuel has to be delivered, stored and, finally, reprocessed at THORP. It is inconceivable that all this could happen somehow without Ireland noticing. We respectfully suggest that this, frankly, fanciful idea appears to have been put forward by Ireland simply to try to justify its request. The Tribunal is being asked to leap forward in time to assume that all these hypothetical events have somehow already occurred, that new spent fuel reprocessing contracts are about to be implemented at THORP and award a provisional measure that protects rights that Ireland claims it may have in this regard. We respectfully agree with the observation made by Professor Crawford in the course of argument that the scope of this requested provisional measure is very uncertain. I indicated before that, if I was advising a private client, I would say, "Goodness sake, make sure an order like this is not made, because you could never be sure that you would not end up breaking it because of the extent of the uncertainty". But it is a wholly inappropriate order to be asked to make and there is no justification whatsoever for it to be made.

That completes what I wanted to say about the detail of the orders. I hope that I have covered

the questions that you had which arose from what had been said about Ireland. There is one point that I wanted to come back to from yesterday. I was asked about the Nuclear Tests case. May I just deal with it briefly; if further detail is required I might invite you to direct further questions to Mr Bethlehem or invite him to respond to them in any event. But, as is well-known, the case concerned parallel cases brought by Australia and New Zealand against France concerning France's atmospheric nuclear testing in the South Pacific, the allegations being that testing was illegal. There were two separate provisional measures ordered. What I think is important, in our submission, is the actual evidence that was provided about actual harm. Australia contended that the testing had caused widespread fallout in Australian territory and they said that it gave rise to measurable concentrations of radionuclides in foodstuffs and in man, but the effects on the environment could never be undone and would be irremediable. That is paragraph 27 of the Order. New Zealand contended that the testing had added the radioactive fallout on New Zealand territory. That is paragraph 28. Accompanying their request for provisional measures, they submitted considerable evidence to the Court; the detail is not apparent from the Orders, but it included, I am told, six UNSCEAR reports, a report of the Advisory Committee of the United States National Academy of Sciences on the Biological Effects of Ionising Radiation, the results of the detailed fallout monitoring programme undertaken by Australia during the testing and a report on the effect of the testing on the atmosphere and waters proximate to Australia. In its provisional measures, the Court ordered the parties not to do anything that might aggravate the situation and France to avoid nuclear tests causing the deposit of radioactive fallout on Australian and New Zealand territory. What we would submit is the crucial distinction between the cases there and MOX is that in the former the applicants did submit strong evidence pointing to actual harm. There was nothing speculative about their allegations of harm. Here the position is entirely different. But we do know that the court did not actually order France directly to cease atmospheric testing, but rather to ensure that any fallout would not deposit on the applicants' territory. It may be that the consequence of it was the same.

PROFESSOR CRAWFORD: It felt that way.

LORD GOLDSMITH: But there we say is the critical distinction. I do not think that it is necessary for me to go, although one can obviously see, to questions of the particular nature of what, in any event, was at issue.

I am asked just to make this small correction. Mr Wordsworth was asked whether or not the word "environment" was defined in the 1995 Act. It was Professor Hafner who asked the question. He said that it was not defined in the 1995 Act. There is a reference to it in the 1995 Act. It goes back to the 1990 Act. Regrettably, we do not have that Act with us, but we are checking it and will, of course, inform the Tribunal as soon as we have an answer as to what the definition is. I hope that it will assist.

Those then, Mr President and Members of the Tribunal, are our submissions. We invite you, as Dr Plender has said, to reject this application. I do, if I may, just finally - and I hope that the Tribunal will forgive me for saying so - say this. Given the circumstances in which this application has been made, given the fact that notwithstanding that that we believe that we have been complying with the UNCLOS Order and will continue to do so and will meet our obligations, there is no scope, I say to Ireland, for any consolation prize here of some sort of order which will enable them to say, "Well, we got something out of this hearing". If genuinely there are not the requirements for an order, that there is

not that proper discussion which ought to have taken place beforehand demonstrating a failure by the United Kingdom to meet our obligations, there is no scope, I regret to say to my good friends from Ireland, for them having any order from you on this occasion. We invite you to dismiss the application.

Mr President, thank you.

THE PRESIDENT: Thank you very much. We have one consolation in the fact that we will be able to keep to the timetable that we had agreed last night.

MR WOOD: Thank you, Mr President, I will not delay you for more than a moment. We made an application for directions which is set out in a letter of today's date. I would be happy to read it out, but I would be happy just to leave it to speak for itself. I am in your hands.

THE PRESIDENT: It would be useful for you to read it out, please.

MR WOOD: Mr President, the United Kingdom recalls that in paragraph 12 of your Statement of 13 June the Tribunal expressed the hope that, by 1 December 2003, it would have a clearer picture of the EC legal position. In that regard urged the parties to take the necessary steps to expedite the measures for the resolution of outstanding questions. Given that expedition is in part in Ireland's hands, we would request the Tribunal to make a direction, addressed to Ireland, (1) requesting Ireland to take all steps within its power to expedite the resolution of the matter and (2) requesting Ireland to keep the Tribunal and the United Kingdom informed of developments.

Thank you, Mr President.

THE PRESIDENT: Thank you very much indeed. We have taken note of that. I am quite sure that Ireland will be referring to this when it comes to make its submissions, unless, of course, Ireland has anything to say at this point.

MR BRADY: No, we will address it in the context of our overall submissions.

THE PRESIDENT: Thank you very much. Then we adjourn, as agreed, until two o'clock.

(**Luncheon Adjournment)**

THE PRESIDENT: Mr Brady, please.

MR BRADY: Thank you, Mr President. I will be making a speech and, to some extent, I am under racing orders, in that we have a limited time of two hours, which we have agreed, and I do not object to that, I will be dealing with more general principles. Overnight, I have tried to put together as best I can a kind of statement of what I see as being the overarching legal principles and the criteria to be applied to an application of this nature. I think that it is fair to say, and this is not a criticism of the United Kingdom, if anything it is maybe an oblique criticism of the way in which we have presented the application, that there is a need to focus on the principles and the correct criteria to be applied to an application for provisional measures. I hope, and at the risk of sounding that I have probably taken on more than I will live up to, to be able to crystallise for you, sirs, the issues that you are going to have to address and the principles that you will have to apply to each of the individual reliefs that we are seeking. Because of the time constraints under which we are operating, I am not going to deal with each of those reliefs. What I have arranged with my colleagues, Mr Fitzsimons, Professor Sands and Professor Lowe, is that each of them will take the relief that we are seeking. We will deal with the points that have been made yesterday and this morning by the United Kingdom in respect of each of those separate provisional measures and put forward our bases for asserting that the apparently robust position adopted by the United Kingdom by way of defence does not stand up to analysis.

There is one area where I have to accept that, on reflection, the observation by, I think, Lord Goldsmith, but to some extent prior to that by Professor Crawford, was that the wording of the measure - and this is to do with assessment - may be somewhat uncertain. Professor Sands will deal with introducing a greater level of certainty into that measure. I do accept the criticism to some extent that an order that has to be made is an order that should be certain and clear. In fact, to some extent, that was an essential part of this provisional measures application. We were criticising the fact that there was uncertainty. So, to the extent that there is perceived to be uncertainty in one of the reliefs, I think that I have to accept that and we will readdress that issue.

What I have done is I have prepared a written submission, which I am told is presently on its way to be delivered here. I will take you through that, hopefully, not at break-neck speed, but reasonably rapidly from the point of view of the constraints under which we are operating.

If I can deal with another matter in reverse order before I start my actual submission, which is this. The letter that was referred to this morning by Mr Wood needs to be addressed and, while I will come to this at the end of the submission, I will deal with it now while we are getting a copy of my submission. The Tribunal has been asked to make a direction, the effect of which is to require Ireland to seek to bring about expedition in the disposal of the competence issue before the European Commission and, presumably, by extension, if it goes to litigation, before the European Court of Justice. The instinctive reaction from Ireland to that is that we want this dealt with quickly, we want to dispose of it rapidly, and, in principle, of course I do not object to that direction. But it seems to me that some degree of parity is required and I think it arises in this way. Rather than be saying to you I want to resist an order because shock horror if any order was ever made against Ireland in relation to this matter that could be portrayed as a victory. I think I can say right at the outset Ireland wants to take whatever steps

it can take with the European Commission and thereafter the European Court of Justice to ask them to expedite the matter. However we say that the United Kingdom likewise participate in that process, and the order that should be made by this Court should not be the asymmetrical order that is proposed by the United Kingdom directed solely as against Ireland. The position here, just to support that analysis is that it was the United Kingdom who raised that argument and they were perfectly entitled to raise that argument. it was the United Kingdom who did not seek its trial as a preliminary issue. It is the United Kingdom's burden in many respects based on the proposition that he who asserts must prove. In my respectful submission the exigencies of a situation are best met by an order from this Tribunal which requires both parties to communicate with the Commission ad in turn with the ECJ if it goes down that way to bring finality and clarity as to where we are, and hopefully we will know the position by the time we come back here at the end of November.

Having said that I do not wish to be raising false hopes that the matter will be disposed of or resolved expeditiously, and I do not wish to get into a situation where I am accused of being censorious about the European Commission, that is not the nature of this exercise. But I simply refer to this fact; that the last occasion we engaged with the European Commission on this issue of competence and our proceedings was October 2002. There had been some exchanges prior to that. The next occasion we heard from them was the letters of the 15th May, which we received on the 6th June. So to some extent the pace at which they deal with events is beyond our control, but we will respond to it.

I will start off my submission and, of course, in making some comments I have to respond to some general remarks that were made by my good friend, Lord Goldsmith. I think that we are both equally robust characters that we can withstand the criticism that arises in the course of forensic jousting. If I have some remarks of a slightly obliquely critical nature to make about the United Kingdom or the way in which it has approached this phase, I am sure that it will be taken in the context of litigation between the two States. We have, and will continue to have, very good friendly relations on a multiplicity of levels.

I want to start off dealing with the issues that I intend to address as quickly as I can. The issues that require attention from me essentially come to a tripartite division. I will outline those to you initially and then I will address them seriatim.

The three issues that I intend to address are as follows: (a) the current circumstances; (b) the legal criteria; and (c) THORP contracts. I will come back and revisit the issue of EU competence and the role of this Tribunal in the context of EU competence. Before I do that, there is one matter with which I think that I must deal, and it is this. There was, I think, not to put too fine a tooth on it, a challenge made yesterday, and repeatedly made this morning by my good friend, Lord Goldsmith, in relation to the motivation of this application. As I understand the proposition that was advanced, it was this. That this provisional measures application was being advanced and was being made by Ireland as a last-ditch attempt to get something out of this case for the public. It was described this morning, perhaps somewhat less graphically, as Ireland looking for a consolation price and a win over the recalcitrant Brits. That, in my respectful submission, needs to be dealt with, and I will deal with it fairly quickly, because it seeks to challenge the motivation and, to some extent, the current bona fide of this application.

I just want to dwell on that for a moment.

I start off by saying that Ireland has a genuine interest in pursuing this provisional measures application. When I opened this case for provisional measures, I made clear the importance that Ireland attaches to this application. I also made it clear that we presented an application that was considered carefully and, when we sought relief, we did so in measured and appropriate terms. We did not seek an order saying that we want to shut down MOX or we want to shut down Sellafield in relation to new contracts. It represented, in our view, the minimum protection that Ireland could reasonably expect from UNCLOS. I also made it plain that a proportion of the relief in respect of cooperation was being sought so as to assist both States and avoid misunderstandings and misinterpretations. Ireland now finds that its application in whole is being treated as lacking bona fides. In short, the accusations is that this application is inspired by motives other than the proper prosecution of this litigation - the protection of Ireland's rights and the preservation of the marine environment. Ireland's application is not vexatious. It is not about consolation prizes. The allegation by the United Kingdom does not stand up to analysis. I will seek to demonstrate why that is so in a moment. It is not correct and, to put it as diplomatically as I can, it is an ungenerous view of Ireland's position. Indeed, the very making of this accusation, repeated again this morning, demonstrates to some extent the problem that has actually arisen in the relationship between the two States. That is an unfortunate situation to be in, particularly where on a multi-variety of levels we have such good relations. But something has gone wrong here. I do not want to get into the business today of allocating blame. I do not think that it is proper or appropriate for this Tribunal, certainly not on an application of this nature.

I just want to look at the facts that are the substratum to the contention advanced by my good friend, Lord Goldsmith. We came to The Hague last week with the intention of having a full hearing on the merits. I spent, I think, nearly four hours dealing with the case in detail and dealing with the issue of merits. We had anticipated, not unreasonably, in my submission, that the trial would proceed towards a final award of this Tribunal which would then, finally, decide the issues of fact and law that existed between the United Kingdom and Ireland. That was what we were looking for. We were reinforced in our belief that we would have a trial on the merits by reference to the fact that the United Kingdom have not pleaded the jurisdiction issue. They are entitled to have taken this position. They did not look for the trial of a preliminary issue. The United Kingdom also sought a determination of the merits. If Ireland never sought an adjournment of this case, the United Kingdom never sought an adjournment of this case, you, sirs, for perfectly understandable reasons, have reached a decision to do with comity of courts in the context of international tribunals to adjourn this case to await further clarification. That was the fact that precipitated this application. It was not some approach to seeking a consolation prize opportunistically.

Let me just deal with facts that evolved during the course of the hearing, because the issue of timing is important, timing in terms of when we decided we wanted to make this application. It is instructive to look at the history of the expression of an intention to make potentially a provisional measures application. This was actually first ventilated in the course of exchanges between, I believe, Professor Crawford and Mr Paul Sreenan, when an issue arose about an adjournment. I am happy to say

that the script has now arrived. It is page 2, paragraph 2.03. I am not going to read this line by line. I will try to take you through it as best I can.

The issue first arose during the course of exchanges between Professor Crawford and my friend, Mr Sreenan, when, at that stage, I think, with respect, we did not know what order the Tribunal was going to make. But we floated the idea that, in the event of an adjournment, a provisional measures application may be necessary. In fact, at that point in time, sirs, you will recall, that one of the few areas where there was agreement between Ireland and the United Kingdom was on issues that were not, as we saw it, affected by the competence issue; the security issue, for instance, where I think there was a reasonable apprehension on the part of both parties that, maybe, that aspect of the case would proceed. I think that, when you actually look back and you look at the history of how this issue arose, you can see, with the greatest of respect to my friend, Lord Goldsmith, that his contention does not stand up to factual analysis.

Moreover, it was, in fact, Ireland who postulated the view that a six-month postponement of the issue of your award after a full hearing on the merits was one option that you could consider that would then enable either the UK or the European Commission to bring injunction proceedings to restrain us from taking up the award.

They are the background facts against which in my respectful submission you have to assess the contention that Ireland is somewhat opportunistically now bringing this application so that we will get something out of the case, a consolation prize, and we will bring it back home to the poor unfortunate citizens of Dublin who will be delighted with the result. With respect that does not fairly or accurately describe our position. Let me make this clear. I am looking for provisional measures. I make no apology for that. I am not looking for a consolation prize. I am looking for our rights and our entitlement to be protected by virtue of provisional measures. I make no apology for that. We came here looking for final relief. We came here not looking for provisional measures. We ended up making such an application in the circumstances that I have adumbrated.

It is also instructive to note that the provisional measures that we are looking for at this stage are much more restricted and limited than the overall relief that we are seeking. The overall relief is to shut down MOX. That is not the relief we are seeking here. If this was intended to be an exercise attended by hyperbole and political opportunism that is the type of relief that would have been sought, We tailored our relief in my respectful submission to reflect what was in our view a requirement to protect our rights at a minimum level pending an adjournment subject to a contingency for an unknown period of time.

Lord Goldsmith seeks to buttress his argument about the motivation for this application by reference to the fact that we had not previously sought provisional measures. This argument is posited on the period of time that has elapsed since the ITLOS order and today and the omission to seek provisional measures. He is right, we did not seek provisional measures. But it is not that we suddenly woke up one day and decided last week we will go for provisional measures. We in fact had threatened provisional measures before. This is not something that came out of the blue. You will see in paragraph 2.05 that having referred to the omission to seek provisional measures as being somehow probative of

Ireland's ulterior motive we in fact refer to two matters of significant interest and import. Firstly Ireland did in the past consider provisional measures. Ireland did in the past threaten to make an application for further provisional measures, and there are two letter which I will refer you to. There is a letter of the 22nd March 2002 and the 9th May 2002 where we were seeking information in relation to transports in respect of the MOX shipment, and we threatened and reserved our right to bring a provisional measures application. We did not pursue the provisional measures application for the very reason that was articulated by Maitre Fortier in an exchange with Lord Goldsmith. We took a view, we made a judgment call that we were as well to get on with the case, achieve finality, concentrate on finalising our evidence and our case and getting on with it. So the suggestion that provisional measures somehow appeared out of the ether and is part of some form of a stunt is with respect not correct, and some of the factual assertions about Ireland not having raised previous provisional measures applications do not stand up to analysis.

Moving on to 2.06, it is necessary to probe the logic of the assertion that the omission to seek provisional measures somehow is demonstrative of a lack of bone fides or probative of an improper motive. Let us just think this through. If we had applied for provisional measures and we got them how cold we be criticised for that? if we had applied for provisional measures and failed I have no doubt we would be told in the course of the submissions you failed in ITLOS and you failed here again, and therefore because you failed this again is demonstrative of the lack of bone fides in your part. In my respectful submission having explained the circumstances relating to provisional measures application the omission to make them which I have explained in paragraph 205 does not with the greatest of respect prove anything. It is nihil ad rem. We made a judgment call, it was the right call. We were facing a trial and we had hoped to get a trial. For reasons I think it is fair to say beyond everyone's control we are not now getting a trial on the merits within the time span that everyone had anticipated an fixed quite some time ago.

There is one other issue I want to touch upon and it is this. As part of the proposition that this is some type of a stunt, reference has been made to an article in a newspaper. I am very slow in a Tribunal of this nature to be referring to newspaper coverage. WE could be here all week looking at newspaper coverage and it will not get us very far. But the letter that is in divider 7 of the first bundle put in by the United Kingdom was interesting, because it contains a number of statements - and was relied upon by my friend, Lord Goldsmith, this morning with greater clarity than his reliance upon it yesterday - that somehow suggest that we have raised the expectation that they are going to shut down the MOX plant, that, because of political embarrassment, the Irish Government were, therefore, making this application and that we have briefed or informed a journalist in Dublin in relation to this. This is untrue. That journalist did not receive any information from the Irish legal team or the Irish Government. I do not want to go into the history of sources for that journalist in relation to articles on the Sellafield case, but let me be clear. The article is wrong in a number of factual respects. It contains a description of our application that I have never made. It says that it is to shut down MOX. I have never made that application. When I opened this case, however briefly, the only order that I explained in detail was in relation to the issue of storage of the wastes from the MOX plant in tanks. That was not an

application to shut down MOX. Yet it has been ascribed to Ireland as being the basis of our case. It is not the basis of our case. With respect, the article in *The Irish Times* is based on a misapprehension of our case and it is based on an understanding of our case which is articulated by the United Kingdom and not by Ireland.

I think that it is unfortunate, at a minimum, to say that there have been misunderstandings and misinterpretations as to the duty of cooperation. That is why we are here looking for the clarity and specificity of the order that is, sadly, missing from the ITLOS Order.

I believe that both cases will benefit by this Tribunal prescribing rights and duties. It will clarify the legal position. The very fact that Ireland's application for provisional measures is viewed as a stunt re-emphasises the point that I made earlier on - something has gone wrong with the dealings between the two States that needs to be dealt with for everyone's benefit, because protection of the marine environment is not just protection for Ireland's benefit, it is for the protection of everyone's benefit, including the peoples of the United Kingdom. An opportunity has now been provided to the Tribunal to prescribe measures that bridge the gap between both States and remove this as an issue of contention in our relations. Hence, the necessity for clear and precise orders as to the cooperation and coordination required. The Tribunal can make it clear in its order. This is not a victory for one side or the other. It is a victory for common sense and it is a victory for ensuring orderly relations between the two Governments pending the hearing of the merits, which we will accept.

I now want to move on to a separate topic which is to address the issue of current circumstances. Here, maybe, I am moving on to less controversial territory. What I propose to do is briefly to outline what we say are the current circumstances. I do not want to become entangled in this nomenclature issue as to whether or not they are new circumstances. What you have to decide is what are the current circumstances before you, by reference to the evidence and the events of last week, make your adjudication. I referred at the moment - and Professor Lowe will deal with this in greater detail in the course of his submission - to the fact that the ITLOS Tribunal's jurisdiction is a different jurisdiction. It is constrained by a temporal limitation. It is constrained by the fact that its Order can only be made pending the constitution of the Annex VII Tribunal. That was a key factors when you read the judgments, as I am sure you all have, of Judge Mensah. That was a key factor in his reasoning in relation to the order that was made. I respect that reasoning. I understand that reasoning. This Tribunal is in a different situation. This Tribunal has, if I may describe it, a full original jurisdiction not subject to that tight restraining temporal limitation of the ITLOS Tribunal.

I go now to outline the current circumstances that we say should inform the exercise of your jurisdiction and your discretion. They are as follows: (a) (paragraph 3.02) the period of time that will elapse which is currently unclear from today's date to the date upon which the Tribunal commences a hearing of the merits. If I could just draw a parallel with litigating in both Ireland and the United Kingdom, I suppose that the closest analysis is that of the interlocutory injunction. The injunction is usually ordered to cover the period from the date of the application to the date of the trial. There is always an inherent jurisdiction for a court to vary, set aside or discharge any interlocutory injunction that it makes, and it does so by reference to, perhaps, change in circumstances.

(b) The very considerable additional body of evidence and information that is before this Tribunal in contrast to that which was before ITLOS. I was not actually in the ITLOS hearing, but I am told by those who were, and you can look at the documents, that there was considerably more evidence before this Tribunal than there was before the ITLOS Tribunal.

(c) The fact that this Tribunal has accepted prima facie a jurisdiction and the relief which it can grant is not limited to the short period that constrained ITLOS' ability to grant provisional measures.

(d) The lapse of time since the original order was made by ITLOS.

(e) The difficulties and problems that have arisen between the two States in the implementation of that Order.

I have tried to be as polite and as diplomatic as I can by putting it down to, maybe, misinterpretations and misunderstandings. It is not going to help anyone to get into the business of making comments that are intensely critical or barbed. That is only going to aggravate the situation. I think that it is in that context that I wish you to approach the issue of provisional measures, taking account of the circumstances, the current circumstances, by reference to your jurisdiction.

I now want to move on to another issue that arises, which is the legal criteria. Here I have to accept that there has, perhaps, been a lack of clarity of exposition of what is the criterion that you apply on an application of this nature. I will take some little time just to deal with those because I think that it helps to focus in on the nature of the case we have to establish and the nature of the relief that we seek. To some extent, it has the added advantage that it relieves you, sirs, of a significant burden of having to sort out who is right and who is wrong, which expert opinion has an opinion that is sound and well based and which opinion may be a little bit wacky. That is not something that you are going to have to decide today. Whether you will have to decide it another day only time will tell. But maybe if I just outline what I say, in my respectful submission, are the criteria to inform the exercise of your jurisdiction and, hopefully, be of some assistance in this.

They are set out at section 4. (a) Ireland must establish its case on the merits to a prima facie standard only. I will come back to what that actually means, because it is one of these phrases that can be a little bit elastic, depending on what case you want to make.

(b) It is axiomatic, therefore, that Ireland does not have to prove on a provisional measures application that it will succeed on the merits of the final hearing.

(c) It follows, therefore, that the Tribunal does not, in fact, engage in deciding the merits. It does not, for instance, decide, therefore, which of two conflicting opinions is to be preferred. It cannot decide issues of credibility of witnesses. The Tribunal has not had the benefit of examination and cross examination of witnesses. Its adjudicatory role at this juncture is of necessity limited.

(d) Because the Tribunal does not adjudicate on the merits at this stage, it follows, as of necessity, that the presentation of each side's case is more limited than if this was a full hearing. Indeed, and I was not here, but I read the transcript, I noted that you, sir, Mr President, I think on Day 6, before Professor Sands commenced, gave a warning, if I can put it this way, that really we did not have to get into the merits to any great detail. Of course, getting into the merits was a trap door and I am sorry to say that it is a trap door, even though we got a very clear warning from you, that both legal teams have

fallen through repeatedly in the course of this case. You do not decide the issue of the merits of this case.

I just want to refer briefly to the eloquent submission of my friend, Mr Wordsworth, yesterday, who took us on quite a detailed analysis of the case. It was very interesting. Part of it consisted of a bit of a trip down Memory Lane in relation to regulations that were passed in 1990 by the ICRP; part of it was based on looking at Professor Jones' report in extensive detail. That is a very interesting exercise and I do not criticise him for it, because I understand why he wants to put forward that case. He wants to turn around and say, "Ireland does not even jump the first hurdle of the prima facie case". But I think that, when you look at what is really meant by a prima facie case, you will see that, interesting as that exercise was, it was ultimately somewhat redundant, because, in my respectful submission, you will see that by reference to the prima facie burden that Ireland has, indeed, jumped that hurdle and cleared it well.

My members of the team will deal briefly, because I do not want to get into this detail, with some of the aspects of the case that demonstrate that we have jumped the prima facie hurdle.

I now want to look at what are the issues, applying the prima facie test, with which you are now confronted on the provisional measures applications. They are outlined at paragraph 4.03. It seems to me that they reduce themselves down to four questions that you will have to answer at this stage in the context of a provisional measures application. The first hurdle has four elements in it.

(a) Has Ireland established a prima facie case for the existence of a right to cooperation of the nature contended for?

(b) Has Ireland established a prima facie case for the existence of a right to coordination of the nature contended for?

(c) Has Ireland established prima facie the existence of a duty to assess under Article 206 of the nature contended for?

(d) Has Ireland established prima facie that the liquid and aerial discharges of radionuclides is pollution to which UNCLOS applies?

SIR ARTHUR WATTS: I am sorry to interrupt. I understand what you have been saying in this paragraph as to the matters that this Tribunal is concerned with, but I look at paragraph 90 of UNCLOS and the requirements that are there set out for a decision on provisional measures. Maybe that is something that you will be coming to later or somebody else will, but I would be grateful for your comments on how what you have just read out relates to the requirements in Article 290.

MR BRADY: I will deal with it, but it will also be dealt with at a later stage. I think that the way in which to approach it is this. This is almost a two-stage process. First of all, do you jump the hurdle of a prima facie case? If you do not, you do not have to get into the second issue of rights being preserved and serious harm. If you do not jump that hurdle, you do not have to concern yourselves. It is not that they do not have a case; it is a case that is unfounded. Therefore, you do not have to get into the issue of serious harm or preservation of the rights. They do not have a case to start off with. It is a separate and distinct issue.

SIR ARTHUR WATTS: Thank you.

MR BRADY: I now deal with, the best I can, what I understand to be the context of a prima facie case. Hopefully, I will give a concrete and practical illustration of what are the elements of the requirements of a prima facie case. To some extent, it may be worth repeating the broad proposition that you do not decide the case on the merits.

I am at paragraph 4.04. Ireland is not obliged to establish that it is bound to succeed. That is probably stating the obvious and a bit of tautology. It is, in my respectful submission, prima facie established, where an argument on the law and on the facts has been made by Ireland, that the United Kingdom is required to meet that case. It must not be unfounded. There has to be some factual substratum that represents the predicate for the case. In short, it is an argument that at the conclusion of Ireland's case, the Tribunal cannot then state on the basis of Ireland's arguments and evidence that the case is to be dismissed. it is clear from the pleadings, the statements of evidence and the documents exhibited that there are many conflicts of fact and law, but the tribunal does not now decide those conflicts. Furthermore it does not now decide if the United Kingdom's answer to Ireland's pleaded case is right, or that Ireland's case is wrong. It merely decides at this juncture whether the United Kingdom has a case to answer and not whether it has in fact answered the case. That is for the trial.

The United Kingdom can in my respectful submission only succeed at this juncture if Ireland's case is unfounded or is an abuse of legal process.

I now want to deal with one aspect of the analysis of the case which was put forward and if I may a t the risk of being somewhat colourful describe this as the Badoit or Brazilian nut defence case, and I must say I was surprised to hear about Brazilian nuts, I am rather partial to them. But be that as it may I just want to deal briefly with this because so much time was spent on this radiation dose point I do not want not be seem as if we are somehow running away from it if I do not engage in it. But of course I recognise instantly that by engaging in it I am walking straight into the trap door which I have cautioned all of my colleagues to avoid. So at the risk of advocated some degree of caution to avoid the trap door perhaps you will permit me momentarily to fall through it so as to give you an overall perspective of our case.

PROF CRAWFORD: Mr Brady, the very last thing I would want you have do is fall through a trap door. One of the criteria for provisional measures under article 290 is serious harm to the marine environment. You do not have to establish that ultimately but if you establish the threat of serious harm you would be very firmly on the floor.

MR BRADY: Yes. I am actually at the end going to deal with that issue as well, hopefully having fallen through the trap door and got back out again safely. If I can deal with the Badoit defend and with some trepidation, and I am sorry that I have to detain you dealing with these issues because they are scientific issues, I say you do not have to get into them but I will deal with them very briefly. In substance what the United Kingdom contends is that because the radioactive discharges from MOX and from Thorp and indeed the whole Sellafield site is less than one mSv the discharges do not constitute pollution. Accordingly we are led inevitably and relentlessly to the conclusion that the discharges from Sellafield do not constitute pollution and it follows unavoidably that it is beyond the ambit of UNCLOS. That is the conclusion of that submission. We say instinctively that cannot be right. The case indeed that is

made is because the discharge are within a regulatory level set by either a national regulator or the ICRP, that that somehow is dispositive of the issue as to what constitutes pollution for the purposes of the Convention.

I do not want to go into too much detail in this but I dealt at length when I was opening the merits with this issue and why in our respectful submission that is an error, and I say that with the greatest of respect, that is an error in terms of the approach to what constitutes pollution and what is within the definition of pollution in UNCLOS.

We also make the point that I elaborate upon here that of course the limits prescribed by the ICRP and other regulatory bodies are directed at protecting human health. You do not have to decide at this stage whether or not the difficulty I have postulated for the United Kingdom's case is one that they or do nt surmount. That is exactly what you do not have to decide in this case. They have a point, and maybe a good point, and it maybe a bad point, and you ultimately will have to decide that. But as the point has been made in support of the case that I suppose Ireland's action is unfounded and that it is really without any basis whatsoever, I just want to refer to a number of passages of evidence to show that in fact there is harm, there is some harm. The extent of the harm is in dispute but even on the United Kingdom's evidence there is harm. I am taking the somewhat unusual step of referring to what their witnesses have said in terms of harm to the marine environment. I would ask you to refer to the end of page 8 a number of extracts from witness statements delivered in these proceedings. You will see the source of the extracts. The fist extract is from John Clarke and I give the reference there. The agent considered all these issues and this included the radiological impact in the review of the Sellafield discharge authorisation concluded and the proposed decision that there was no evidence at the present time of a significant impact on non human species.

Dr Dennis Woodhead, who was mentioned on numerous occasions yesterday in the literature and by Mr Wordsworth also has some very interesting observations to make, and I quote from them. None of the material in the memorial of Ireland provides a reasoned basis for claiming that the radionuclides released into the north east Irish Sea from Sellafield site have caused or may in the future cause significant damage to living marine resources. Let me pause there. I have underlined the word significant, just to make it clear, it is not that it is underlined in the statements. They are very careful about what they say. There is no significant damage. They are not saying there is not any damage, they are saying there is no significant damage.

Then we move on to some other observations that are made by Mr Dennis Woodhead, and remember this is the United Kingdom's case, this is their evidence. We have much stronger evidence which will be touched on briefly by Mr Fitzsimons. I just give a number of illustrations of what is said. (1) The induction of hereditary mutations in aquatic organisms is likely to be low, but it is there. (2) Minor affects on physiology and metabolism have been seen in individuals of the most sensitive aquatic organisms at dose rates in the order of 400 micrograys per hour from beta and gama radiation, though it has been concluded that there is unlikely to be any significant impact on populations at lower dose rates. (3) There have been no studies on the affects of chronic low level radiation on winkles, and if you get the opportunity to read Dr Woodhead's analysis, and indeed our evidence, these become a central part of

the case about the effect of radiation on these and indeed the pathway that they represent of radiation to the public. (4) Dr Woodhead makes it clear that admitted uncertainty requires additional and continuing research.

Consistent with my contention that we are not engaged with an assessment of the merits I just do want to deal with one issue, and it is this. Lord Goldsmith referred to one of our witnesses yesterday in a way which I think invited the Tribunal to be somewhat dismissive of her opinions, and it was a reference to Dr Mothersill who I am sure you will have in my opening is one of our witnesses who deals with this issue of generic instability and I am not going to revisit that issue. But it was quite curious that in the course of dealing with this matter Lord Goldsmith described Dr Mothersill as a laboratory scientist. It does not represent her true qualifications and it is a comment on the quality of her evidence. That is not a matter for this point in time that is a matter that can be dealt with when she is being cross-examined and at the conclusion. But I just want to put this in context. Again I do not ask you to make any finding on this. Dr Mothersill has recently been appointed to a senior academic position in McMaster University in Canada. I do not suspect that the Canadians come to Dublin too often looking for laboratory scientists. With respect, it demonstrates that she is a person of some substance. I do not asking you to decide that at this stage, but a comment was made, for example, by Lord Goldsmith, which I think it would be unfair on my witness in a public forum such as this not to respond to, and I do so. I now move on to another issue.

Once the Tribunal is satisfied - and this is the next threshold element - of the existence of elements of our case, the four elements that I have outlined, on a prima facie basis, what does it then do? It then considers whether it is appropriate to grant the provisional measures relief. I accept that that introduces a judgment or discretionary element for the Tribunal. I think that I have to accept that you are not bound to grant these measures; in your discretion, taking into account of a variety of factors, you can grant them.

Among the factors to which this Tribunal is entitled to have regard in this context is whether at the full hearing it can make an order that will put the then successful applicant in the same position that it would be in if provisional measures were granted. Is, therefore, the loss of rights that were established at the trial, one, that can be compensated for by the nature of the final relief ordered by the Tribunal? In Ireland's submission, in event of success of the trial, the final relief does not solve Ireland's current problems during the period of the adjournment. That is that it asserts the existence of rights under UNCLOS, which it will not now have determined by this Tribunal, potentially for many years, and the exercise of which it will not enjoy for that period. It has been deprived of the fruits of success in this litigation at an early date. This arises because of the circumstances that I have already outlined.

It is also necessary to look at the loss of the rights that would be occasioned to Ireland if provisional measures are refused. These include the imparting of information to enable Ireland to protect its citizens and, for instance, to discharge its duties under the SAR Convention. We cannot see how damages or monetary compensation, if it was ever an appropriate remedy, could possibly amount to an adequate remedy for the permanent loss of these rights. We seek provisional measure in order to preserve Ireland's rights pending the final hearing of the case. This is not a reopening of the ITLOS

Order. That Order was based on different circumstances. Ireland seeks these rights to be preserved while at the same time it does not impose a real burden on the United Kingdom. This is particularly so where we exert rights to information, cooperation and coordination. If it does not have these rights preserved by these provisional measures, it will have been deprived of these rights for potentially a significant duration of years; its loss in that period will be permanent; we cannot undo history.

The serous pollution we contend arises from (a) the irreversibility of the deposit of radionuclides into the Irish Sea and (b) the longevity of these radionuclides for many thousands of years in the Irish Sea. It is submitted that serious pollution should not be equated with serious and current harm. The case that Ireland makes is that pollution is occurring in circumstances of the discharge of radioactive material in whatever quantity into the Irish Sea. This is part of our case.

The THORP contract I want to deal with very quickly, because I am running out of allocated time. Lord Goldsmith repeatedly made the point that there may be no new contracts for a number of years, what is wrong with Ireland? What is the concern about? Have they not got reassurances? He is missing one fundamental point. It is this. Of course, there may not be any new contracts for THORP for many years, but he has forgotten about the German contract. You will recall when I opened the case about the German utilities and agreements in 2000 with the German Government, an atomic law in Germany in 2002, and the fact that some contracts had been cancelled, others by definition had not been cancelled, and made the case that it was the very fact of the existence of MOX that was linked or connected with the choice available to the German utilities to proceed or not to proceed. So it is not, in our respectful submission, an accurate assessment of the situation to say that there will not be further THORP reprocessing for many years. There will in relation to German contracts.

Now the question is, "Tell us, Mr Brady, which are the contracts will be reprocessed by the Germany utilities"? I have to put my hands up and say "I don't know". Why? Because they will not tell us. They refuse to tell us this information. They refuse to tell us about these contracts and we are left in a situation where we have to deal with this problem in an absence of knowledge - and they have that knowledge. I want to have recourse to a principle of evidential law rather than to the common law system, certainly in Ireland and I believe in the United Kingdom. It is this. If there is fact peculiarly within the knowledge of a party to litigation and they do not disclose it, the burden of proof reverses, and adverse inferences can be drawn from their failure to make full disclosure.

I want to move on to the second to last part of my submission. If you will bear with me, I will move to it very quickly, because I can see my colleagues are very anxious to address you on, perhaps, more substantial issues. Radioactive discharges. Our concerns about the consequences of chronic low-dose radiation are not fanciful concerns. The fact that the ICRP and respectable scientific opinion says that we have got to look at this assumption that, because you protect man, you have protected the environment. Millions have been spent on this. This is not some fanciful notion that we have dreamed up in Dublin to make a case. The science is available. Back in 1994, when the Minister made a statement in the Dail, he said, "If we had the scientific evidence to bring the case", that, to me, shows a responsible attitude of the Irish Gov. We did not rush into litigating with no evidence. We rushed in when we got the evidence together.

I am sure, sirs, you will read this in more detail, so if you do not mind me, perhaps, moving on.

Finally, I say that the fault line in the United Kingdom's case is its obsession with the Badoit or Brazilian nut defence case. This obsession with radiation dose. As I have said, and I do not want to repeat myself, that may be a very good defence to a case we never made. We never asserted that they were pumping out radioactive material at a level in excess of authorised limited or international prescribed limits, but it does not solve the problem in relation to the issue of pollution. I am sure, sirs, you will see my reasoning in relation to this.

There is one final matter. That is the current criticism of Ireland in relation to medical waste going into the Irish Sea. Both States do, indeed, discharge medical wastes into the Irish Sea. The view was put forward that the radiation dose emanating from this is higher than the radiation dose from, I think, the totality of the Sellafield discharges. That is correct to some extent. The life of the radionuclides, the radiation waste, is predominantly a matter of hours or days, not tens of thousands of years. There is one exception to that, which I need not explore, but there is a very simple answer to this. It is not a defence to what has been done at Sellafield in relation to the MOX plant to say, "Hey, look at what the Irish people are doing. What is sauce for the goose is sauce for the gander". It should not be the sauce for either party, if the truth be told. This very issue, sirs, you will see at paragraph 6.2, has been brought up by the United Kingdom at OSPAR and will be dealt with at OSPAR and will be the subject, no doubt, of detailed consideration at OSPAR. I have dealt with European Union issues, sirs, at paragraph 7. I am not going to repeat it. I am sorry that I have raced through this, but, with your permission, I will hand over to my colleague, Mr Fitzsimons.

THE PRESIDENT: Thank you very much.

MR FITZSIMONS: I will be fairly brief. I propose to deal with some of the matters raised by the UK counsel in their addresses and also I propose to address relief claimed at A in the provisional measures.

Firstly, and very briefly, the topic of the Brazil nuts that the two Attorney-Generals appear to be so interested in. I would just make an interesting point arising from the very interesting article upon which it was based. That is at divider, tab 3 of yesterday's book. It appears that a small fraction of the dose from other natural causes of radiation can be supplied by these nuts. No doubt, the United Kingdom would seek to use the nice phrase used by both Professor Jones in the final page of his report, and also by Dr Preston on the fifth of his statement of evidence - great minds think alike - "vanishingly small". That would probably be appropriate to apply to the position with Brazil nuts, but the alarming fact is that eating these nuts increases the risk of cancer. I refer you to the final conclusion paragraph of that most interesting article. But happily there is a preventative element in the nuts, apparently, that reacts against the cancer-causing agent. The reason that I raise this topic is to refer briefly to the natural causes of radiation, because we have heard a lot about these during this arbitration. Comments have been made about natural causes as if they are totally harmless. Well, in fact, they are not totally harmless, as I think everyone knows. They, too, are cancer inducing and problems do arise from time to time with natural causes, such as radon gas that has to be catered with by local authorities and so forth.

To move on to Mr Wordsworth's comments, he dealt with the regulatory procedure. Just at the outset I might mention that he was critical of a comment that I made and, on reflection, I agree with his

comment and I withdraw the remark that I made there. It was a justifiable criticism, I think. My particular remark was over the top in the circumstances.

Mr Wordsworth stated that I had not referred to the regulators, but, in fact, if you review my earlier talk, I did refer to the procedures and, indeed, some of the more recent reports, and, in fact, I relied a great deal on the statements of evidence and the contents of the reports of the United Kingdom witnesses.

The second feature I would submit of Mr Wordsworth's presentation was that it was concerned more or less entirely with human health, as indeed has been the UK case. Their entire focus where damage or harm is concerned relates primarily, I would submit, to human health. Of course, Ireland has not made that case. This is not a case about Ireland or the Irish people, as some of the United Kingdom evidence, and, in particular, the evidence of some of its experts, would indicate. This is a case about what is in the Irish Sea, the marine environment of the Irish Sea, and this Tribunal is, of course, formed to protect that environment in accordance with the goals of UNCLOS.

We have a plethora of experts' reports, all of which make most interesting reading. I relied very particularly on the report of Professor Salbu in my initial presentation and I still rely on that report. Mr Wordsworth in his remarks referred you to the report of Mr Woodhead. Again, a most interesting report. But you will have noted that, when Professor Salbu came back with her second report, replying and dealing one by one with the English experts, that the United Kingdom felt it necessary to seek assistance, and the assistance was in the form of Professor Stephen Jones of the West Lakes Institute. I think that that is a great tribute to Professor Salbu and it indicates the strength of her comments, because, as she points out in her second statement, which I will recommend to you, none of the English experts seek to deal with the unpleasant topic of hot particles that come out of this Sellafield pipeline that can cause nasty surprises for anyone who comes across them. She, together with the other two gentlemen, Professor Jones and Mr Woodhead - Mr Woodhead is from an agency of the Department of the Environment, Professor Jones is from West Lakes Institute, which appears to be not a subsidiary of BNFL, but it is an institute, we understand, formed or certainly funded in a major way by BNFL and, from Mr Clarke's second statement at paragraphs 42, 44 and 46, a huge amount of the work at the West Lakes Institute comes from BNFL. I just make this point for what it is worth. Professor Jones is not here to be cross-examined and I am not disputing his expertise in any way. Indeed, I rely upon it, as I rely upon that of Dr Woodhead, because all of them, with Professor Salbu, establish in their evidence, if you read it, that there is damage and harm to biota in the Irish Sea from the Sellafield discharges. Our case is, of course, that the additional MOX discharges will cause additional harm and, indeed, on the basis of their evidence, I would submit that it is self-evident that this must happen.

SIR ARTHUR WATTS: If I may just ask one little question, whether there is not a difference between "some harm" and "serious harm", which is what Article 290 requires. Perhaps that is something to which you will come later.

MR FITZSIMONS: I will deal with it straightaway, if that is in order, to make this point. What we rely upon in that context, in particular, is the fact that we are dealing with one of the most dangerous toxins known to man and we rely very much on the fact that, as I think was put earlier, there is effective permanent

damage to the marine environment, when there is a discharge into the sea. That arises by virtue of the long half life. 24,435 years for plutonium with additional half lives, as the earlier half lives are used up. So we are talking of hundreds of thousands of years of a life span for these materials once they enter the Irish Sea. We submit that that is serious harm from any perspective. We base very much our case on that.

In that context, if I could make a point, you have not heard from the United Kingdom as to what they say is the threshold of harm. They have come in and made this case, saying that there is no harm, the discharges are vanishingly small, etc, etc, but at no point in time have they said, in practical, understandable terms, what would be the threshold, how much has to go into the sea, how many fish, lobsters, should it affect, where should it be, etc, etc, etc. It has carefully avoided consideration of any such topics and the Tribunal might consider questioning the United Kingdom on that topic when they return to you.

That, of course, brings me to an associated point, the discharges themselves. What is the amount of the discharges? This case has gone on for eight days. We do not know the quantum of the discharges in 2002 or each month of 2003. The United Kingdom have apparently taken the view not to tell us - or maybe they have forgotten. We did get a hint this morning from Lord Goldsmith, when he said that there is a five-year ramp-up period and there is only, I take it, a small amount at the moment, but we do not know what the amounts of the discharges are.

Lord Goldsmith was critical of Ireland in that regard. He said, for example, that Ireland did not dispute the ITLOS figures. Well, all that Ireland had then was 1997 estimates. They were in no position to query them. We are beyond ITLOS now. There should be exact concrete figures. Again, I ask this Tribunal to ask the United Kingdom what the precise figures are. If they cannot give precise figures, I ask the Tribunal to draw an adverse inference in the circumstances.

The low-dose radiation issue I think the Attorney-General has dealt with the evidence of Ms Mothersill. I invite you to read Ireland's Memorial 168 and 169, where she comment on the topic there. In my submission, her evidence is compelling and in that regard it is supported totally by the United Kingdom National Radiation Protection Board, whose view is set out at page 17 of Ireland's reply. If you read it, you will find that it is on all fours with the view of Dr Mothersill, where the potential effects of low-dose radiation is concerned. However, having said that, low-dose radiation is more relevant to humans than to the marine environment.

Just to finish up on this, the Attorney-General, Lord Goldsmith, has said that there is no evidence of harm in Ireland's case. We do not accept that. There is harm galore in Ireland's case and the fact that there is irreparable damage from the discharges I think goes far beyond the level of harm that is required at any stage. But we do not need to rely on just the evidence before you. We have the United Kingdom's own view. The United Kingdom Environment Agency in 2001 - that is document T23 of Mr Wordsworth's volume - is proposing reductions. Why is it proposing reductions? What is the problem? We have the UK Sintra strategy promising to go down to close to zero, albeit by 2020. But why, if it is harmless? What is the problem? Why go to this trouble? There is only one inference, in my submission. These discharges are harmful. The United Kingdom and the regulators know that. I invite

the Tribunal to say that Ireland has discharged the onus of proof in this regard.

To move on, and I will deal with this very briefly, because I am holding up my colleagues, who have extensive submissions to make, to our primary relief, A in the measures, discharges. We are told in January 1997 - Counter Memorial, volume 6, Annex 32, letter from BNFL to the Environment Agency of 27th January 1997 - that the estimate for MOX liquids was 107 cubic metres of liquid discharges. As I say, it is clear from what Lord Goldsmith has said that, if there is a five-year ramp-up - and when we get the exact figure - that the figure at the moment must be a great deal smaller than that, because the 107 cubic metres was full capacity. Maybe it is 20 cubic metres. Our advice is that the 107 cubic metres would fit in three or four petrol tankers. If one is talking about the next six months or year, one is talking about a small container only being necessary.

We are told that the HAST tanks cannot be used. We understand that they have a capacity of 85 to 145 cubic metres each. There are seven of them vacant.

We also find out from the Environment Agency document T23 paragraph A7.80 to 83 that low level solid waste as distinct from liquid waste is disposed of in landfills on the Sellafield site. There cannot be a problem with the regulator if low level solid waste can be disposed of in the ground. Dig a hole and stick it in. Because on the United Kingdom case the liquid waste is harmless. There could be five glasses of water in front of you with it and, if sterilised, on the basis of Mr Wordsworth's submission you could all drink it and remain healthy. I am sure you would not dare but that is the United Kingdom case. It actually goes as far as that. If it is so harmless there can be no problem whatsoever of disposing of it in this way.

There is also a reference in the same document to moving solid waste to a different plant. So that is another way of getting rid of the liquid waste if space cannot be found for it in Sellafield.

There is a fourth possibility which is not in that document. The liquid waste can be boiled to leave a sludge. It then becomes solid waste and can be put in the ground. It could not be simpler. These are all options that will cost nothing to BNFL, and very simple to do, particularly if the current volumes are low.

Lord Goldsmith has said that the MOX plant would have to close. In our submission we would not accept that. On any of the options I have mentioned it would be quite a simple task to continue operations with the alternative arrangements. If this liquid waste is harmless the regulators will surely not have the slightest problem with it.

Finally, just to make one minor point. The problem about this case and I think you can probably perceive it, that no one ever questioned the pipe. The pipe has always been used in Sellafield. The liquid waste has always been put into the sea and it has not occurred to anyone that it should ever be questioned. There is an unwillingness as a result to change it. It is literally as simple as that. As I have indicated with the MOX plant it is not a cost matter. Secondly of course what has clearly never been considered, the marine environment or UNCLOS.

Gentlemen, thank you.

PROF LOWE: Thank you, Mr President, members of the Tribunal, I have three matters that I shall deal with fairly shortly. The first is to say a few words about the legal context of the application and in particular

article 290 of UNCLOS; the second, to respond to our friends comments on Ireland's case on cooperation; third, to summarise the specific interests which Ireland has which lie behind the provisional measures which relate to cooperation.

As far as the first point is concerned, and article 290, I should simply say that Ireland's application is based upon article 290 paragraph 1 of UNCLOS which empowers this Tribunal and any Part XV Tribunal to prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment. That is a power which, as was pointed out yesterday, exists in parallel with the power under article 290 para 5, which is a quite different provision which allows the modification of urgent ITLOS ordered measures. As you rightly pointed out, sirs, it contains no reference to urgency at all.

Ireland therefore submits that it is not making a reapplication for provisional measures under article 290 para 5. This is its first application under article 290 para 1, and so there is no need to establish a change of circumstances. But as the Attorney said earlier, there has in fact been a change and he referred today and last week to the delay which Ireland now faces in having the merits of its claim determined, to the new scientific evidence that has become available and is before this Tribunal, and also to the fact that ITLOS order has not worked in practice. You will recall that Ireland has drawn attention to the non-notification of the article 37 opinion on MDF, problems over the numbers of shipments and problems over the date and time of the autumn 2002 shipment. If the Tribunal has any residual doubts about the extent to which the UNCLOS order has worked since it was issued in 3rd December 2001 we would invite you to read the correspondence between the two parties which is set out in Ireland's memorial volume 3 part 1, from page 209 on to 328. You will get some flavour of the nature of cooperation from those documents.

I turn to the question of what it is that the Tribunal can prescribe, and under paragraph 1 of article 290 it has the power to prescribe measures to protect the respective rights of the parties and to prevent serious harm to the environment. Ireland has raised both of those arms in its case and it has said in relation to serious harm that the seriousness of the pollution rises from the extraordinary half life of plutonium, which puts it into a completely different category to oil pollution which over the scope of a human generation or two will be dissipated in the sea. That is simply not true of plutonium, and that which is continually added to the stockpile in the Irish Sea is in effect an irreversible deposit and that puts it in a different category of pollution from pollution which is reversible.

As far as the preservation of rights is concerned, the Attorney has already made the point that Ireland is submitting that it has various rights of a procedural and a substantive nature in relation to the prevention of marine pollution and it is the preservation of those rights which Ireland is seeking.

At this point there is one of those nice junctures which one sometimes has in a case where it does become crystal clear what the differences on the interpretation of the law between the two sides. The British Attorney said that in Britain's view provisional measures can only be given in respect of procedural rights if there is a breach which causes some harm, and that is their interpretation of UNCLOS. Ireland's response is to say to that two things. The first is that there is harm caused by a

violation of procedural obligations; and the harm which we suffer is our inability - for the period where there is a failure to hand over information and to cooperate, to make the kind of emergency planning measures which we consider that we are bound to make. But that in any event - and this is the true difference on the interpretation of UNCLOS, Ireland takes the view that if procedural obligations are breached then that is something which by itself calls for provisional measures. The reason is the very straightforward one that in Ireland's view states have no right to buy their way out of procedural obligations. They cannot simply say, in this particular case we do not think it is necessary to consult or to pass on information, and if we should be wrong we accept that we will be responsible for any pollution that results and we will pay for the cost of cleaning it up, and so on. Ireland does not regard that as a proper answer. States are not entitled to circumvent their procedural obligations by assuming that risk. No state has a monopoly of wisdom, and if other states are seeking active cooperation with a state which is under an obligation to cooperate then the cooperation must be joint. Similarly Ireland says that states cannot decide unilaterally that the scale of pollution is too small to warrant the duties of cooperation and coordination being engaged. As I said earlier, Ireland considers that the half life of plutonium puts it in a different category and makes it serious pollution necessarily, regardless of amounts. But in any event although the preventive and abatement duties may vary according to the scale of the pollution, the duties of coordination and cooperation do not - and even if the hazard is thought to be vanishingly small that does mean that a state is justified in making vanishingly small efforts to cooperate and coordinate with other states.

We also make the point that we understood the desire of this Tribunal to organise good relations with other tribunals which may have some competence in this area. Although the British Attorney has said that it would be wrong to base an application on tension between tribunals Ireland would submit that the tribunal here can certainly take that into account. Our case is not based on that tension. Ireland's case is based upon the prejudice to our rights and harm to the environment. But it is a factor that can be taken into account.

In our submission this tribunal here has chosen to defer to the European Court of Justice in the possible event of the matter being referred to the European Court and with the possibility of the European Court giving a different answer to that which this tribunal might give. Having deferred to the European Court in that sense it is seems reasonable, within the community of Tribunals for the European Court to accept that this is the tribunal which is currently seized of the UNCLOS debate and to be at least tolerant of the fact that it is this tribunal which has to take the decision on provisional measures in this case.

Lord Goldsmith also suggested that in some way European Community law may constrain the tribunal's power here under article 290 in terms of the actual provisional relief which it might give. I am not altogether clear what the argument was there but I make three points on it. One is that the nature of the Community's competence is itself unclear and a matter that still remains to be decided. The second that article 290 is proleptic in its reference to respective rights of the parties; and the third is the point that there is a real world concern here about the duties of an UNCLOS tribunal in relation to the preservation of the marine environment; and the people who have to carry the responsibilities in practice

for implementing the obligations, whether they flow from UNCLOS or from the European Community or whatever, those parties are before you now on this provisional measures application.

My final point on article 290 is the balance of convenience point, and there I say simply that Ireland did in fact draft the provisional measures application very carefully, and it was conscious of the need to put before you a reasonable application which took account of Britain's interests. That is why for example the provisions on liquid and aerial discharges are different, and my colleague Mr Sands will refer to that a little later.

Let me turn now to the question of cooperation. Mr Wordsworth said yesterday that the Tribunal was in effect being invited to trespass into an exceptionally heavily regulated area, and that really encapsulated Ireland's problem. There is a sense in which Ireland feels that every time it raises one of these points it is trespassing in an area where it has a right of way, that it is not a matter where the United Kingdom can simply say we have all of this under control, just forget about it and get on with your own affairs. Ireland has an actual interest in these matters. I am afraid that attitude is one that has persisted all the way through. We are all under constraints of time here and I can quite understand why Mr Plender truncated his reading out of paragraph 7.5 of the reply. He read out the words "at its best the level of consultation and cooperation that is now being achieved is precisely the kind of consultation and cooperation that Ireland ask the Tribunal to declare to be Ireland's legal entitlement", and he read that to you by of an illustration of the fact that even in Ireland's view we accept that cooperation was working well. The words he left out from that paragraph were these: "Ireland has often sought such consultation and cooperation unsuccessfully in the past. But consultation and cooperation do not always operate at the optimum level", and Ireland then spends the next 150 paragraphs of chapter 7 of its reply explaining why cooperation was not working properly.

There are four basic problems that Ireland has, which all came out in the presentation this morning, and the first is the response which was given to Ireland's complaint about its December 1999 letter. It was said there that Ireland had submitted this letter and that if Ireland looked carefully at the decision that was taken it would find that all its concerns had been addressed. This is a simple difference of interpretation as to what cooperation is. In Ireland's view it is not simply the lodging of a letter and then waiting for the publication of a document to see how that letter has been dealt with. It requires some sort of engagement between the United Kingdom and Ireland, and it was that which was so sadly lacking in that saga that I took you through of the unanswered letters from Ireland to the United Kingdom. There is a clear issue of interpretation there as to what cooperation and consultation involve.

The second point which no doubt you will have noticed is the narrowness of the interpretation of the ITLOS order. On a number of occasions Mr Plender referred to matters being raised before the ITLOS order or falling outside the scope of the order. I hope you will forgive me saying that what I did not detect there was any spirit of generosity in the interpretation of the Order of the kind one might expect when the matter at issue is that of cooperation between states.

The third point is the erratic and incomplete information which Ireland gets. Mr Plender referred to the long list of matters which were dealt with at the special security briefing that was arranged. I am advised that the Irish side view was that no security information as given at that meeting

but simply a description of the principles governing the United Kingdom's approach to security matters and that the meeting was regarded as unsatisfactory. But the real point, that is uncontrovertible, is that on the one hand there is a willingness to have special security briefings, whatever their value, and yet something as simple as the time of arrival of one of the ships in the Irish waters appears to be a problem which cannot be overcome because of its security implications.

The British Attorney referred to the IAEA documents on safety and so on, and you will see that Ireland had dealt with those matters in paragraphs 8.222 to 8.230 of its Memorial. But in Ireland's view there is absolutely nothing in the IAEA documents and guidelines which suggests that it is desirable to withhold information from the coastal state is these circumstances. Quite the opposite.

The fourth point is simply that the statements that are made about the public availability of the information - even if telling the other side they should go away and get the information off the web - is not perhaps the optimum way of conducting cooperation We take the point; but the real issue that Ireland has there is that all the information is not publicly available and we will be giving you specific instances of that later.

Let me very briefly deal with two specific matters. The first is the number of shipments. You may have had the impression from this morning that there was a seven month delay between the United Kingdom suggesting that the number of shipments might be handed over and the eventual handing over of them, during which nothing happened. If you will in your own time look at annex 7 of the Memorial, volume 3 part 1 at page 325, you will see a catalogue of the letters which were going backwards and forwards between the parties trying to get this straightened out; and you will see that in that stage in July the most recent British offer was rejected by Ireland and with the words "Having carefully considered the matter Ireland is unable to agree to the suggestion that it should give prior sight of its pleadings or a portion of its pleadings to the United Kingdom". That was one of the conditions which it was suggested the United Kingdom might attach to the disclosure of the instruments. So there were lots of matters going on and it was not the case that we were silent there.

The second matter I should deal with in passing is Mr Plender's eloquent defence of the Beckett letter where it was said that Ireland had suggested that Mrs Beckett had tried to mislead Ireland on that. In fact that was not something I said here, it was raised in ITLOS a couple of years ago: but I did not make the point last week.

As far as the relief which Britain seeks is concerned, Professor Sands will deal with some of those and I will go very briefly through starting with B2 of the relief sought. That is a request for information about date and times at which vessels will go through the Irish waters. I must say we find it very difficult to see what the problem is with this particular matter. The information does not seem to be particularly difficult to obtain or particularly sensitive. We take the point from the United Kingdom that Ireland does not conclude agreements of this kind with every state whose ships go through the Irish Sea. The reason for that is the very obvious one that in this case the ships present a very particular hazard, and it is not simply because of their cargo. It is because BNFL ships attract protest flotillas in a way that other ships do not attract protest flotillas. As a coastguard responsibility it is a quite different kind of incident that we are dealing with.

We also take the point about hospital waste. But as Professor Sands will mention later the ships carrying hospital waste across the Irish Sea are carrying waste of a very different kind of radioactive quality and they are not carrying plutonium.

On the floodgates argument, that if Britain is obliged to give Ireland this kind of notification then every other state might want it as well, even without suggesting that it might be a good idea for other states to have it as well, I make the simple point that Ireland's case is framed plainly in the context of article 123 of the Convention, and that is a situation in which Britain and Ireland are in an absolutely unique position, there is no other state with which Britain is in that relationship. I should also add that there were many pages of pleadings in both the Memorial and the Reply on the article 123 case. It was very far from being a new argument raised here.

On B3, if I can go through those briefly, Professor Sands will deal with paragraph A and the information sought there. And on the HAST tanks: the HAST tanks are one of the most dangerous risks that there is on the Sellafield site, and it is necessary for Ireland to have that information in order to make its estimates of the consequences of any escape of radioactivity, potentially catastrophically from that plant, and in order not draw up its own contingency plans, as I think we have tried to make clear in the past. It needs information on that in order to keep those matters updated.

There was a point made this morning, which we take, on the question of the research studies and the vagueness of that provision there; and I should make plain that Ireland is only concerned under paragraph C with research studies that are commissioned by the BNFL or Government in relation to discharges from MOX or Thorp. Our sole aim in asking for this relies is that in Ireland's view the duty of cooperation does not extent merely to giving notification of risks that arise in the form of giving data and information: it also extends to a duty of cooperation over the analysis of existing data; and if BNFL and the United Kingdom becomes aware of a new risk by going over old data in a newly commissioned study that is something that Ireland thinks falls within the scope of cooperation and about which it would wish to know.

Paragraph D on accidents. It has been said that this is provided three or four times over. With respect that is not entirely right. The answer to question 55 of the famous 55 questions that Ireland sent which you will find set out in volume 3 part 1 of Ireland's memorial, page 67; and question 55 appears at page 85. Ireland asked for information about sabotage incidents at Sellafield and what was said in reply was "For obvious security reasons the government does not disclose details of security matters or the measures in place to ensure the security of nuclear installations and nuclear and nuclear materials." We have given in the judges folder in tab 9 a BBC report of a couple of incidents of sabotage which were not reported under these normal procedures. Nor, for example, has Ireland been told of the leak in the roof of the Technetium 99 storage tank which was reported in the Guardian a few weeks ago. So there is information which comes across; but our complaint under this provision is that it is incomplete, it is filtered on its route from BNFL to the Health and Safety Executive and then through and across to Ireland. What Ireland seeks is prompt notification of matters of this kind, in an unfiltered form, a full form. On paragraph E it is very straightforward. As has been said Ireland has been given access in the past to the probalistic risk assessment and it simply wishes to have that access regularly. If that

assessment is changed then the same reasons which justify sight of it in the first place justify sight of the change and access to the document for that purpose.

On paragraph F, the reappraisals, again we accept the security point: but I reaffirm the point which I made last week which is that test under UNCLOS of security is not whether the information that is sought is security sensitive. The question is whether the disclosure by the United Kingdom to the Government of Ireland under conditions of confidentiality would itself prejudice British security, which is a much higher threshold. So we renew the application on that basis.

Finally, the last two paragraphs, paragraphs 4 and 5. On 4, on the coordination in respect of emergency planning, reference has been made to IAEA and European Euratom instruments. But those instruments are all concerned with post-event, post-incident, post-disaster, cooperation. What Ireland is trying to achieve is planning before the event, before there is a need to call upon them. Rather than having the kind of fragmented approach which we have at the moment to the bits of information that we can get at, Ireland is seeking to have a clear direction that it is entitled to full cooperation in the formation of a comprehensive plan.

The final point is on trilateral cooperation between BNFL, the British and Irish Coastguards. That is a matter that Ireland has become aware of when it was emphasised in the TranSAS report, which we had last year. All Ireland is seeking there is the assistance of the British Government in pulling the parties together so there can be discussions between those who actually have responsibility for discussions and for the handling of the threat to maritime transport. The fact that the British Coastguard does not need to speak to BNFL is neither here nor there. That is simply a question of how the United Kingdom chooses to allocate responsibilities for looking after the PNTL ships amongst its own organisations, but there is a plain need for the Irish Coastguard to liaise with the British Coastguard, and also a plain need for the Irish Coastguard to liaise with whoever is responsible for the PNTL ships. To put our friends' minds at rest, we are certainly not envisaging a meeting every time there is a new transport planned. We are simply asking for liaison over the matter.

I should make two points very briefly in closing. The first is to say this. What all this comes down to is the fact that this kind of information and this kind of planning is within the hands of the authority which is responsible for the health of communities which live 112 miles north of Sellafield and 112 miles southeast of Sellafield. What Ireland is asking for is that the same facility be offered to the authorities which are responsible for communities 112 miles southwest of Sellafield, in Ireland. Britain, quite rightly, regards this kind of information as necessary for its planning; and Ireland regards it as necessary for its planning too.

My very final point, Mr President, is with contrition, to repair an omission at the beginning, when I did not say that it was an honour to appear before you. So I shall say that it is an honour to have appeared before you and, indeed, to have presented this part of Ireland's case.

PROFESSOR CRAWFORD: Professor Lowe, listening to the two parts of the argument this week on provisional measures in relation to cooperation has been a slightly odd experience, because one side is saying that we are not being told or we are not being told enough, and the other side is saying that, yes, of course, we have already told you three times and you did not read such and such a bulletin. It is almost an

existential problem that one side appears to say that it is cooperating and the other side appears to think that there is not cooperation; yet both sides cannot be right. You cannot have cooperation only from one side. Do you have any observation to make about that? It would help us to understand what appears to be an existential problem that a party is being dragged here for a provisional measures order that it does not want. The Attorney says that we will implicitly condemn the UK, but the other party saying, you are not cooperating.

PROFESSOR LOWE: It is something of which I have been acutely conscious; and the analogy that pressed itself on my mind this morning, in fact, is that it was very much like a situation where a couple appear before a marriage guidance counsellor, one insisting that the relationship has broken down and the other firmly denying it. I think that this is absolutely right, and the core of the problem is a simple one. I think that the two sides have a different understanding of what cooperation means. The United Kingdom's view, if I may characterise it like this, is that cooperation requires it to receive Ireland's submissions and to take them into account through its own processes. Ireland's view of cooperation is that it requires more than that. It requires an active engagement on a Government-to-Government basis in addressing the specifics of the problems over the MOX and THORP plants.

PROFESSOR SANDS: Mr President, Members of the Tribunal, I think by our calculation I have somewhere between 20 and 25 minutes. I shall more than adequately finish within that time. What I am going to do is to focus on the remaining parts of the relief that Ireland seeks in relation to discharges, in relation to cooperation or information on discharges and in relation to assessment and to do so by reference to three topic areas: the United Kingdom's regulatory regime, the issue of pollution and the issue of assessment. Perhaps if I can follow on immediately from the conversation between Professor Lowe and Professor Crawford and the difference of understanding in relation to cooperation. It is plain also that there is a big gulf between the parties as to what is actually required under international law in relation to the prevention of pollution. I think that in the simplest terms it is fair to say that the United Kingdom approach essentially focuses on the question of doses to humans. That is something that we heard a great deal about from Mr Wordsworth. What we say is that they have applied the wrong test. They have asked themselves time after time, will the release of this amount of radioactivity from the MOX plant cause harm to humans? They have proceeded on the basis that, if humans are adequately protected, then the environment, too, will be fine. As you have seen from the materials, that reflects a mind set and an approach which may have been appropriate in the period of the 1950s to the late 1980s and the early 1990s, but which we say has now changed. The change is crystallised in a transformation of a legal order, which took place and which crystallised effectively in the period 1996, 1997 and 1998, when various new instruments came into force, in particular the UN Convention on the Law of the Sea as between the two parties in 1997 and 1998. What we say is that the coming into force of that Convention transformed the question that had to be asked. the question which really now ought to be asked is not will it give rise to excessive collective doses to humans, but will this give rise to pollution? Will it reach beyond the jurisdiction of the United Kingdom or the territory of another State, as the Law of the Sea Convention puts it? Have we, the United Kingdom, minimised releases to the fullest possible extent? Are there technologies available ...

SIR ARTHUR WATTS: I am sorry to interrupt on a point that I have raised before, but it does occur to me that the comments that you have just made are perhaps more related to merits, which we are not discussing, than to the question of serious harm to the marine environment, which is all that is relevant in this context for the immediate purpose of provisional measures. Maybe I have misunderstood both the thrust of your argument and the provisions of the Convention, but maybe you could also enlighten me, if that is so.

PROFESSOR SANDS: I hope that I can, Sir Arthur. It may well be that you have not misunderstood, but we are focusing in this part of the presentation not on serious harm to the environment, but on the preservation of Ireland's rights. The point that I am seeking to make is that, under the UN Convention on the Law of the Sea, Ireland has the right to expect the United Kingdom, in preventing pollution, to consider whether pollution arising from MOX and THORP will or will not reach areas beyond the jurisdiction of the United Kingdom, whether they have used techniques or technologies which will minimise to the fullest possible extent. This part of the submission focuses not on demonstrating, as Mr Fitzsimons and the Attorney did, serious harm to the environment, but what are Ireland's rights? Of course, one of the things that we did not hear a great deal about from the other side over the course of the last day was the arguments in relation to what Ireland's rights are. That is what I want to address now, if I may.

PROFESSOR CRAWFORD: I am sorry, I think that it is for the President to judge whether the questions are impinging so much on your time that you need a bit more time, but it is a key question for present purposes. Clearly, Ireland has said that it has rights that this material not be deposited in the Irish Sea irrespective of the question of whether the material will cause serious harm to the marine environment. You say that it constitutes pollution and that there is an obligation to reduce pollution, irrespective of serious harm. You also say, and we have heard Ireland say, that this is serious harm because of the specific characteristics of the radionuclides involved, their long duration and the impossibility of getting them out once they are there. So there are two different arguments. Focusing for a moment on your argument, you are saying that Ireland has a right, for the present purposes a claimed right, for this material not to be there. I think that the point that Sir Arthur is making is that, under Article 290, provisional measures could only be given in accordance with normal principles either if the conduct was causing serious harm to the marine environment, which is not your case, it is your colleague's case, or, alternatively, it is necessary to preserve your rights for the future. We have to look then at the timescale involved and the amount of material. Given that, hypothetically, you are going to get a declaration from this or another tribunal within some period of time saying that this must stop, irrespective of serious harm, why do you need provisional measures to protect in the period before you get that declaration?

PROFESSOR SANDS: Because our position is that, on our argument as to what our rights are under the Convention, nothing should be going into the marine environment from the MOX plant at all. If the United Kingdom had directed its mind to the standards set forth in Article 194, paragraph 2, will pollution reach Ireland - not serious harm, will pollution reach Ireland - will any radionuclides discharged from MOX facilities reach Ireland? They have not asked themselves that question. Until they have asked themselves that question, they cannot exclude the possibility that it will not happen. On that basis, we say, as we said earlier in the week, we have the right to expect not a single radionuclide to

enter the Irish Sea from the MOX plant and that, if a single radionuclide enters the Irish Sea from the MOX plant, our rights are irreversibly prejudiced. WE do not have to get to the point of demonstrating, although we argue that that is the case, that those radionuclides will actually cause serious harm. That is not our case on that part of the analysis. That is why we say and why our application for provisional measures is, as it is reasonably put, that liquid discharges from MOX should be stopped altogether until this Tribunal has decided how to proceed. That is the basis of the case.

What I will do very quickly, and I am conscious of both of the questions, is to try to explain very briefly, in response to the submissions made very admirably yesterday by Mr Wordsworth, on how it is that the United Kingdom has misdirected itself. IN simple terms, it has misdirected itself because its own regulatory system has required it to ask the wrong questions. I can illustrate that in the simplest of terms. Professor Hafner asked the question about anthropocentric approaches to environmental protection and did the United Kingdom have a definition of "pollution". Indeed, there is a definition of "pollution" and you have it in the bundle that we have just submitted to you now at page 4. It may be worth just turning to that. You have the Environmental Protection Act 1990 and over the page, at page 5, you have the definitions of "the environment". "All or any of the following media, namely, the air, water and land and the medium of air includes the air within buildings and the air within other natural or manmade structures above or below ground". I think that that is a very reasonable and broadly acceptable definition. Below that, just out of interest, although I do not make a point about it, "Pollution of the environment means pollution of the environment due to the release into any environmental medium from any process of substances which are capable of causing harm to man or any other living organisms supported by the environment". It is essentially a broader definition than UNCLOS. We do not make a point in relation to that. The simple point is, as a matter of English law, that it is unarguable that every radionuclide that goes from MOX is a pollutant within the meaning of that definition. It absolutely has to be. If you then go a little bit further to section 7 of the Act, which you will find at page 12, section 6 deals with the grant of authorisations, and this deals with authorisation in relation to what are called "prescribed processes". Nuclear is completely excluded from prescribed processes. It is not governed by this Act or by the 1995 Act, but rather is governed by the 1993 Radioactive Substances Act. At the bottom you will see at section 7 that there should be included in an authorisation - and then it goes on to various conditions to meet the objectives set forth over the page at subsection 2 below. You then see, at subsection 2, those objectives are ensuring that, in carrying on a prescribed process, the best available techniques not entailing excessive cost will be used. In the next paragraph, compliance with any directions by the Secretary of State for the implementation of obligations of the United Kingdom under international law relating to environmental protection. That is a sensible approach which the United Kingdom applies across the board to a whole range of activities, not to the nuclear sector. In the context of nuclear and radioactive discharges, they have not turned their mind to the application of that standard, which, we say, would achieve minimisation to the fullest possible extent, would amount to best available techniques and which would meet the objectives that Ireland is seeking to promote here and would meet Ireland's rights. That is the key point that we are making.

I have also drawn your attention, lest it be said, as it has been said by Mr Wordsworth, although

he did not talk about "best available techniques" at all, that the United Kingdom by applying "best practical means" or "best environmental options" is, in effect, applying the same thing. I have drawn your attention at page 2 of the materials to a Department of Trade and Industry Guidance Note in relation to offshore combustion installations. There you see a number of points. They apply best available techniques, but, most importantly, they say at paragraph 5.2, "best available techniques is a fundamental concept". It is different from the other approaches. They have not applied that standard. They have applied the wrong standard. That is why we say we are entitled to the relief that we seek in relation to discharges, because, if they had applied that standard, which we say they are required to do as a matter of UNCLOS, they would have reached the conclusion that alternative techniques and technologies are available. In particular, the alternative technologies that are available apply and pertain in the United States. Under the US MOX plant, the position is absolutely clear. We have set it out at page 15 of these documents. I do not propose to take you to them now, but you will see there a clear statement that there are no liquid discharges from the manufacture of MOX.

The paragraphs that Mr Wordsworth took you to yesterday relate to the plutonium-polishing process. That is the THORP equivalent. That is the manner in which you obtain the plutonium dioxide. It is distinct from the manufacture of the MOX pellets. That, through a laboratory, creates what is called "a rinsing" and that goes off to a separate part, but that, too, we understand is not discharged into the environment. There are technologies that are available which would allow the United Kingdom to achieve the objective that Mr Fitzsimons has described to you in relation to zero discharges to the Irish Sea. That is why we maintain absolutely our request for A(1) of our application and why we also maintain what we think is a reasonable request in relation to A(2), namely on aerial discharges we appreciate and we recognise that there are no technologies that we are aware of in relation to aerial emissions and we, therefore, think a sensible approach is to focus on what the discharges have been. We hear what the Attorney said in terms of five-year ramp-up period and it may well be that the Tribunal may want to take account of that aspect of the stage of development that the MOX plant is at. To be very clear, it is not the object of this application to shut down the MOX plant. It is the object of this application to stop the discharge of liquid radioactive effluents until such time as the Tribunal has determined who is right and who is wrong in terms of rights or discharges.

PROFESSOR CRAWFORD: I do not want to go through the Attorney's trap door, especially as he has been through it before me, but in Article 194, paragraph 2 and paragraph 3(a), there is some discrepancy - this is the 1982 Convention. I had actually asked a question about this in the first round, to which, given the pressures of time, understandably, people did not return. The obligation in relation to toxic, harmful and noxious substances, especially those which are persistent in 3(a) is to minimise to the fullest possible extent. The obligation in 2 is to ensure that pollution does not spread. It seems an absolute obligation. To my mind there is some tension between those two. Obviously, you cannot argue this in full, but, since you are relying on rights, could you just in 30 seconds respond to that?

PROFESSOR SANDS: I think that I would have to say that it may be that there is a tension between those two provision. We argue, of course, that each radionuclide is a pollutant and no radionuclide ought to be released into the Irish Sea where it might reach an area beyond the jurisdiction of the United Kingdom.

But I can quite see that the argument may be made, and we would accept that argument, that the obligation to minimise to the fullest possible extent is something other than obligation to minimise totally. There may be well be a conflict between the two. WE are not sure that you would have to deal with that at this stage. If we are relying simply on 194(2), that is sufficient for our purposes. The possibility cannot be excluded that radionuclides will travel from Sellafield across beyond areas over which the United Kingdom exercises jurisdiction.

PROFESSOR CRAWFORD: In any event, you also say that the United Kingdom has not taken measures to minimise to the fullest possible extent the result referred to in paragraph 2. Even if one were to infer consistency between the two provisions by a qualification of the apparent absolute language of paragraph 2, the result would be the same?

PROFESSOR SANDS: In effect, yes, it would. Without drawing the connections between 194(2) and 194(3)(a), in separate argumentation, both of those points, which I think is not inconsistent. We will obviously have to reflect in due course about how to come back on that possible (I would not put it higher than that) tension.

The second point to which I turn very briefly is in relation to pollution. Of course, you have heard a lot argument and discussion on what is and what is not pollution. I do not propose to come back to that. I simply want to refer to the request for relief at cooperation B(3). That is the monthly information as to the quantity in becquerels of specific radionuclide discharges in the form of liquid and aerial waste and so on and so forth. That is not information that Ireland has ever received. Indeed, we are not aware that the United Kingdom is even able to provide it. You will find in the materials at page 29 the responses to our 55 questions. AT the bottom of page 29, there are three questions that are asked together. Questions 17, 18 and 22. We asked specifically these questions. It is not accurate, as was suggested this morning, that this is new news, that we have never asked for this, this comes out of the blue. I appreciate that not everyone has been here throughout the hearings, but we asked for this nearly two years ago. What is the predicted level of discharges into the Irish Sea of alpha emitters* and beta emitters, one, from the MOX plant and, two, from the Sellafield site as a whole? Then the same or a related question at question 18. You will see there the answer, "A projected profile of liquid discharges from the nuclear reprocessing sector, ie Sellafield, from 2001 to 2020, as annualised five-year averages, is given in another consultation document". Here the United Kingdom says you cannot have MOX, you cannot have THORP, you can have Sellafield as a whole and you can have it annualised over five years. WE do not think that that is sufficient to protect our rights in relation to aerial discharges for the purposes of the period coming forward from any order that you might give. We think that the Tribunal need it. We think that we need to know precisely what is coming out through the chimney, what is going into the marine environment from THORP and it needs to be particularised to individual radionuclides as happens in other parts of the world, for example, the United States and Canada. Under the International Joint Commission established under the 1909 Treaty, both States provide individualised discharges on a regular basis.

Then you will find over the page, question 22. It is worth taking you through this, because it gives you a flavour of what it is we are up against and why you may be picking up a degree of

frustration at what we are hearing from the other side. Question 22, "Per unit of MOX fuel produced, what is the radioactivity and radionuclide composition of solid liquid and gaseous waste generated from the associated plutonium separation process carried out at THORP?" Answer: "Reprocessing irradiated nuclear fuel and the manufacture of MOX are entirely separate activities. The radiological composition of waste that arises from reprocessing is not related to the manufacture of MOX". That has been the constant position in relation to requests that Ireland has made. Nothing new, we would say, there. We make the request again through you at this stage. We say that that is information that we are entitled to receive.

We have the argument already on de minimis levels. Contrary to what Mr Wordsworth said yesterday, this is not de minimis. Even under the London Dumping Convention, it is clear that there are five possible categories of de minimis. Natural radionuclides, that is not covered. Radionuclides which are in materials derived from activities involving some modification of a natural radionuclide component, that is not covered.

Shall I pause for a moment?

THE PRESIDENT: I think, Professor Sands, you have about five minutes.

PROFESSOR SANDS: That should be fine. I refer you then to Ireland's reply, paragraphs 2.53 to 2.55.

On that issue, I turn then, finally, to the questions of assessment. I have dealt with A(1), A(2) and B(3). Let me turn briefly then to B(1) and C. B(1) is the request in relation to cooperation in respect of additional reprocessing contracts at THORP. I come back to the point made by the British Attorney, which sought to address a question put by Sir Arthur, what was the reaction to Ireland's argument, why the assurances given by the United Kingdom were insufficient? As I understood the Attorney, he only addressed part of the issue, and we heard, and we will look at the transcript very carefully, the formulation that was provided by the United Kingdom, but we noted again that there was no movement at all in relation to consultation. Ireland will once again take its place in a long list. There was no information in relation to notification. The point was made that somehow Ireland might come across this information. We need information on a timely basis, in advance of decisions being made, in order to determine whether our rights under this Convention have been met. What we heard this morning did not meet that level of assurance that we required.

Finally, in relation to what we seek on assessment, we have heard and we have listened very carefully, and we have sought to be flexible, to points made by the Tribunal in relation to the relief requested as we had proposed it. We have gone away, we have had a think about how we might address this issue and we have drafted another approach to this. I am not sure how much more clarity it will bring, although I hope that it will bring a greater degree of familiarity, since we have essentially modelled ourselves on the Provisional Measures Order of the International Court of Justice in the Nuclear Test case. For the record, what we read into it is that the request that we seek is that the Governments of the United Kingdom and Ireland should each of them ensure that no action of any kind is taken which might prejudice the rights of the other party in respect of the carrying out of whatever decision the Tribunal may render in the case, including in relation to Article 206 of UNCLOS. I stress those final words. WE attach great importance to those final words. You will have heard again today

that the United Kingdom is simply not willing to give any assurances at all in relation to assessment of future THORP contracts. It is another area on which the United Kingdom has been completely silent, so we have a particular attachment to that formulation.

That, sirs, concludes my submissions. I have one final thing to share with the Tribunal. That is to bring finality, we hope, to one aspect that has travelled around these proceedings, both ITLOS, OSPAR and now here. That is the issue of the dog that did not bark. We are extremely grateful to a visiting researcher at Cambridge, Mr J M Gillroy, for sending a copy of "Silver Blaze" and a history of the episode which has given rise to such comment and discussion. There is some academic suggestion that, in fact, this finds its roots in Homer's Odyssey, Book 16. But what is of most interest in relation to the question that was put by Mr Watson, "Is there any other point which you would wish to draw my attention?" the answer did not, in fact, relate to any barking at all. Sherlock Holmes' answer was "To the curious incident of the dog in the night time". "The dog did nothing in the night time", says Watson. "That was the curious incident". We find ourselves in a situation where we would say since 1997-1998 the United Kingdom has in relation to UNCLOS been the state that has done nothing to give affect to those obligations and we hope that that might be brought to a conclusion i a timely way.

Thank you very much for your attention.

MR BRADY: Sir, before you resume this has nothing to do with the case or submissions, but if I could have the last bark if I can put it that way. I unfortunately have to head home this evening because of a commitment in the morning, and so again I think perhaps for the third time in the last few days I am sure you will not read into my absence any discourtesy to the Tribunal. I would like to thank you for your various courtesies throughout the hearing. Thank you.

THE PRESIDENT: Thank you very much, and I wish you bon voyage. In the light of what you have said I would advise you to be careful about Brazil nuts and water, since you are flying! Mr wood.

MR WOOD: Mr President, just to say that I think we could be ready to recommence at quarter to six, if that would be acceptable to the Tribunal.

THE PRESIDENT: That is helpful. We will resume at quarter to six.

(Short adjournment)

THE PRESIDENT: Lord Goldsmith.

LORD GOLDSMITH: Thank you, Mr President. I will limit what I say. There are a few points that we do want to come back to. I will, of course, try very hard not to repeat what we said before. That, of course, stands. Equally, if we do not deal with a particular matter at this stage, for that reason, that does not, of course, mean that we agree with what has been said.

I will go first. Mr Wordsworth will say something shortly about some factual issues. Mr Bethlehem will deal with legal issues. Dr Plender will finish on cooperation, on the directions order and any literary allusions that he feels it necessary to make.

By that stage, with your permission, I am likely to have departed. I had not anticipated that I would be here, that the Tribunal would be sitting until this time, and I am afraid that I have flight arrangements, like Mr Brady did, and I hope that you will, again, understand that there is no discourtesy intended if I have to, as I think I will, leave before the submissions are completed.

I want to address the points that I am dealing with by reference, really, to the terms of the orders sought, but I, obviously, want to make just one or two general observations. Fundamentally, we will say that the response of Ireland to what we have said has failed to demonstrate that what they are asking for is necessary or even desirable in order to prevent serious harm. We will say that they have not demonstrated the urgency or the necessity for the orders that they are seeking and they have certainly not demonstrated any need for measures of cooperation in order to achieve anything. I want to make these particular observations. I do to want to trespass on what Mr Bethlehem will say. He will make a submission on law as to why it is necessary to show that there is a risk of serious harm and what level of risk. You certainly do not get to the point, if I may respectfully say so, of talking about serious harm by quoting people who say, "There is no significant risk". That does not get you anywhere close to saying that there is serious harm. That is what Mr Brady was doing in pages 8 to 9 of his submission. Nor, in our respectful submission, can you conceivably suggest that the single radionuclide theory, Professor Sands, amounts to serious harm.

The second point that I wanted to make is to recall that the issue as to whether we could start or BNFL could start operating the MOX plant at all was an issue that was fairly and squarely before ITLOS. ITLOS did not say that the MOX plant should be stopped from starting. Ireland did not attempt to renew that issue before this Tribunal when constituted. That is a fact. And it is very important, when considering the relief that is sought, that the fact is that an application having been made to attempt to stop the plant from starting, it has started and one has to judge the situation in that context and, therefore, have regard particularly to the other side of the balance and the respective rights of the parties.

The third preliminary point that I want to make is this. Mr Brady, in his submissions, said, "Well, at this stage we do not have to prove our case, we only have to show a prima facie case". We certainly submit that they have to go further than that, because they have got to put this at least within the category of serious harm. Mr Bethlehem will deal with that. I do not want to go over that point. I do want to remind you, respectfully, of this. As we said at ITLOS and as I at least hinted yesterday, one of the consequences of the interim measures jurisprudence is that it does enable a Claimant sometimes to say, "Well, I may be wrong. You do not have to determine this now, because I need to be protected in

case I am right". I am not talking about the degree of likelihood of "in case I am right". The point that I want to make is this. It is the very fact that it is possible for somebody to say, "Look, you can give me this relief even though it may turn out that at the end of the day I am not entitled to it" that puts a particular responsibility on that party, (a) to demonstrate by credible evidence what their case is, but (b) to demonstrate that necessity for giving them the relief, because one otherwise may be giving them something which, at the end of the day, they are not entitled to. One has to focus on that, particularly the necessity, urgency or however one describes it.

One of the principal submissions that I made, moving on, was that Ireland by failing to give notice of this application, by failing to discuss in advance this application, had really deprived all of us of the opportunity of properly identifying (a) the truth of the necessity and (b) areas of concern and difficulty in relation to the particular orders that they were putting forward. I would recall that we have been faced with an unusual application, remarkable application, in fact, for this reason. Normally, whether it is in a municipal court or in an international court, a party facing an application for interim measures would be likely to have some degree of notice of that application, some written document which supports it, a written application, for example, like there was in ITLOS or there would be in the International Court of Justice, in the domestic situation, perhaps, an affidavit or something of that sort. And we had nothing. Until Monday afternoon we had nothing. Despite our requests to have some indication, we did not know what it was that they were seeking. And we did not know why they were seeking it until - I was going to say until they stood up to speak, but actually until they were speaking. So, until early this week. We have done the best we can in those circumstances to deal with the applications. I am going to suggest that we put forward yesterday, and particularly this morning, a substantial detailed account of what the difficulties were with the orders that they were seeking, propositions, such as the amount of information that they were receiving already, receiving it three or four times, available publicly, that they had not asked for it before, and very, very largely they have not disputed what we said about that. They have not come back and demonstrated that that was wrong.

Let me take one example of that. One of the points that I made this morning was that they had consistently not asked for orders or not asked for information that they were now seeking. I think - I may be wrong and, if so, I will be corrected - that the only example that was given by our learned colleagues this afternoon, where they said that was not the case, was in relation to item 3(a). That is the request for monthly information as to the quantity of becquerels of specific radionuclide discharges in the form of liquid and aerial waste and flow sheets. It was said in response to that, "no, that information was requested in questions 17 and 18 of the 55 questions". I can take you back to what the questions actually were that were asked. They are at the end of this little clip, but they are also in volume III, part 1 of the annexes to the Memorial. Right at the end are Questions 17 and 18. Bearing in mind that what you are now being asked to order is that we provide them monthly information as to actual discharges broken down in a particular way, Questions 17 and 18 were not asking for that. They were asking for predicted level of discharges, predicted level of alpha emitters and beta emitters from MOX and Sellafield each year up to the projected operational life or end of the projected life of the MOX plant on two different assumptions. One the assumption (1) that the MOX plant does not enter into operation, or

(2) alternatively that it does.

Question 18 was also looking into the future and not to the past. What is the predicted level of discharges into the atmosphere of alpha emitters and beta emitters from MOX and Sellafield as a whole in each year up to the end of the projected operational life of the MOX plant on the assumption that it does not enter into operation or, alternatively, that the MOX plant is commissioned on the 20th December 2001 and enters into operation as soon as practical thereafter? So they were asking for predictions over the life which is not the same as asking for monthly figures after the event. They were asking for them to be divided between MOX and Sellafield as a whole. The question now is the MOX and THORP plant. They did not ask for flow sheets and that is now in the order that they asking for. If, with respect, that is the best they can do demonstrate that they have asked for all this information before, it simply proves our case up to the hilt, that they have not been asking for this information and we have therefore not had the opportunity of seeing what the problem is about what they have been having.

In that context I also noted that I think it was Professor Lowe who was dealing with this point, and he said that the United Kingdom may be unable to provide this information. It is quite remarkable, and for all I know that may be right in terms of the breakdown that they are asking for, but to come and say we need this information broken down in the way they themselves think we are unable to provide is a pretty serious undermining of the order that they are asking for. We have to look much harder at that in order to see why that would be appropriate.

I move on to some of the other orders, all of them in my submission demonstrate the main points that I am making. They have not demonstrated the need for the order and we ought to have been looking at these in detail before. That is the "no liquid waste discharges from the MOX plant". Mr Fitzsimons gave us the benefit of his further views this afternoon on how one could actually achieve this end. None of these, of course, has been raised before and we now have new suggestions made this afternoon as to how you could deal with this. I am bound to say that, if I were a regulator, I think that I would want to know some answers in relation to the propositions that Mr Fitzsimons put forward. I think that I would start, for example, by saying to Mr Fitzsimons, "You are coming proposing that instead of discharging this into the sea, what we should do is boil it. Can you please tell me, Mr Fitzsimons, why that is not simply going to result in all the radioactivity simply going up in steam into the atmosphere and coming out as an aerial discharge?" It is not at all obvious to me or to anyone else around me why that is not absolutely the answer to that. This is radioactivity which is coming because of tiny little bits of contamination which settle from the atmosphere on the floors or when people wash their hands in the plant. The idea that you can simply bury the sludge, and Mr Fitzsimons tells us with great confidence that, no doubt, the regulators would be perfectly happy with that, when no one has ever raised it with them before, is, with respect, not a safe way to proceed in relation to this sort of issue.

I would also say to him, if I were the regulator, "Why do you say that there is less water at the moment? You say that there is less water, Mr Fitzsimons, on the grounds that the MOX plant is not producing fully, but is not the water coming from washing the floors and people washing their hands? Is not the floor size absolutely the same whether or not you are producing 100 per cent or whether you are simply producing at a lower level?" This is the sort of proposition which gets asserted without any

justification when this sort of serious question about how you would re-engineer a nuclear site is put forward, with respect to him, by lawyers simply by way of argument.

We come back to saying, as BNFL has told me, that it in order to re-engineer it would be necessary to go through a process of regulation. Whether at the end of the day that approval would be granted, we do not know, but it would take a period of time and the likelihood is that that would result in the plant having to stop operating for a period of time while it is done.

Another example of how, when we start to focus on these detailed requests, it becomes apparent that they fall apart is A(ii). This having been put forward seriously as a request for a distinguished international tribunal by one State to order another State to do, all I had to say this morning in response to this for the first time is, "Hold on a moment. You cannot limit us to the 2002 discharge levels, because the MOX plant has not been operating at that level". I also said at "full level". I also said that for the THORP contracts the level is not necessarily the same in each year either. To which the response comes back from Professor Sands, "Well, Members of the Tribunal, maybe you would [and these are the words I took down] like to take that into account". With respect to him, taking into account the fact that the 2002 level is not an appropriate level to set means that this application can simply be struck through because all that they are asking for is to limit us arbitrarily to a 2002 cap which by my saying one simple thing they recognised is inappropriate.

I move on. Item B(i) relates to the THORP contracts. I need to deal with one point that Mr Brady dealt with. I do not need to deal at any length with what Professor Sands said, because I did not understand him to be saying, in anything that he said, that they found any lack of clarity in the statement that I had made before about what was meant in the letter about contracts. Nor is there any lack of clarity in what the White Paper has said and what was have said about involving Ireland in the consultation. They might want more; they are not entitled, in our submission, to more, but it is very clear what we are offering. I hope that we have put to rest "this is not clear enough in what you are saying".

The point that I want to deal with is a point made by Mr Brady; I think rather accepting our point that this does adequately deal with the new contracts - perhaps he does or perhaps he does not, it does not matter. Mr Brady says that it is not enough to deal with the new contracts because there are some old contracts which might have been cancelled but have not been.

I want to make several points. I showed you this morning the way in which the Amended Statement of Claim was described and how it was described in terms of not being limited to MOX but also those things which are associated with it, including, in particular, intensification of the THORP plant as a result of MOX. There is no doubt at all, if one reads the Memorial, that the focus of their case had been "You will get new contracts or may get new contracts for THORP and that will have an impact". I am not taking a pleading point, but it is illustrative of the way that the case has changed that now the focus is on, "Well, there might be some contracts" - might be some contracts - "which would have been cancelled but for MOX". But there is not any evidence that there are any such contracts. The contracts are binding contracts, underpinned by inter-governmental exchanges, there is evidence from Mr Rycroft, who has two statements, one attached to our Counter-Memorial, one attached to the Rejoinder, which deal in detail with the circumstances in relation to contracts. No doubt we will have to

go further into it at a merits hearing. These points are important. He says that the contracts are binding and will be fulfilled. Mr MacKerron in another document described the contracts as watertight. They are not contracts out of which people can wriggle. They would have to cancel and pay. Mr Rycroft says that, in fact, the two or three contracts which were cancelled rather earlier were not cancelled because of an absence of MOX, but for a complex series of reasons. I submit that there is no evidence that any other contractors have remained with THORP because of MOX. But, even if there was something in this point, the only contracts that Mr MacKerron and Mr Brady were talking about are certain German contracts. They represent, as Mr Rycroft shows, five - maximum ten - per cent of the total of THORP contracts load. It is at best only a small part of the THORP contracts. Our overriding point in relation to THORP in any event is, as you well know from Mr Wordsworth's submissions, that even the totality of the THORP contracts, and we could at the most be talking about five or ten per cent of the THORP contracts, do not create a risk of serious harm because of the level of discharges from them. It is true that they are greater than from MOX, absolutely, but they are still not such as to create a risk of serious harm, so it would not matter. The most one is talking about is ten per cent. There is no evidence to support it and, with respect to Mr Brady, it is not acceptable to say that, where there are commercial justifications for not disclosing commercial information, that somehow you should infer something about these contracts.

In relation to item B(ii) you know what our submission is. Dr Plender made it and I will not repeat that.

With regard to B(iii) I have dealt with (a). On B(iii)(b), there was no response in my submission to the point I made about the availability of this information already. I will come back to (c) and (d), but I just want to pick up on B(iv) which relates to coordination in respect of emergency planning and preparedness. Again no rebuttal of the detailed points that I had made in relation to this this morning, including the fact that they have had the Hazard Evaluation and Risk Evaluation. That was the one that went to Mr Chris Hone of RPII last year. No denial of that. They have that, and they have not rebutted the proposition that that is what they need and all they need in order to be able to do the planning they do need.

Going back to (d), which is the reportable incidents, this is another illustration, and that is why I am picking up on these points of what happens if you make an application of this sort without it having been properly thought through, properly debated and properly discussed. They do not dispute, as I understand it, that they have been given the information three or four times. The position that is put forward in response consisted of one single point. By reference to Question 55 of the questions asked, to be found in an annex in volume III part 1, and I will read it and invite you to look at it afterwards. The question was this: "have there been any cases of deliberate sabotage at Sellafield?" Then it goes on: "If so please provide details. What is the risk of sabotage, what measures have BNFL taken to prevent sabotage." The focus of the question is risks of sabotage. The answer that is given is that for obvious security reasons the Government does not disclose details of security matters or the measures in place to ensure the security of nuclear installations and nuclear materials. You understand why such an answer is given. The focus of the question is on what is the risk of sabotage and what are you doing to stop it.

The focus of the answer is these are security matters and we do not go into them.

From that answer, as I understood it, Professor Lowe built a case for saying this shows somehow that the reporting is incomplete. We, with respect, do not see why that should follow. I am not in a position to be able to advise you because it is the first I hear of this point this afternoon, whether in the event of there being some particular security related incident the nature of the incident although it is otherwise reportable is somehow adjusted or expressed in a way for public consumption. I do not know the answer to that question, but one certainly cannot draw from what has been said the proposition that there is some information which legitimately ought to be provided to Ireland which is not being provided to Ireland. If an incident is of a nature that it needs to be reported to the statutory authority it is not obvious to me why at least in some form that does not have to be reported.

Item (v), another illustration of to be blunt the cobbled together way this application has been made. What was said in relation to item (v) about coastguard cooperation are two things. First of all, it was said what we are asking for is that someone should arrange that such meetings take place. No comment at all on the point I made this morning that at a meeting in April 2003 - that is to say this year - "the United Kingdom did in fact propose to help a meeting between the Irish coastguard and BNFL." There is no comment on that at all. I asked this morning why is an order being sought to do the thing we have already offered to do, and which we offered in April to try and arrange, and there has been no answer to that. It is entirely unacceptable to seek an order on that basis.

The second point that was made was again to have to redraft the order that was being sought. it was accepted by asking for liaison in respect of all shipments of radioactive material they did not mean that, they did not mean they wanted a meeting before all shipments. That is the sort of thing that a discussion about what they wanted would have sorted out in advance.

The strongest example of their having, as a result of just this discussion, to redraft and to adjust their application is in relation to head C. They did it also in relation to (iii)(c) about research studies recognising that that went too far. They have withdrawn the whole of what has been sought under (c) recognising that it was inappropriate and at 4 o'clock this afternoon, on the Saturday of the hearing, I am presented with a wholly new application. That is not the way to seek to impose on a state an important serious obligation in relation to the operation of a commercial facility.

Or course one recognises the sort of formulation that is being used, and it may well be appropriate in a case such as the LaGrand case, where the question is whether or not someone is going to be executed before rights have been exercised, that that should not happen. That, with respect, makes a great deal of sense. We are in a very different situation here, because we simply do not know what form the eventual decision that this Tribunal or any other Tribunal might take. We have, in effect, been permitted to start the MOX operation and we said in the ITLOS hearing that starting the MOX operation would not be irreversible, but it would be very difficult and expensive to stop it at a later date. If that is what the Tribunal decides, that is what the Tribunal decides. But to have an open-ended all-embracing order that nothing should be done, which might somehow prejudice rights, goes far, far too far. It goes even further, indeed, than the order that was being sought before. I very strongly, but politely, submit

that that cannot be, in the context of this case, an appropriate order to make and when so little argument has been put forward in order to justify why that would be appropriate.

I am going to conclude my part of it. Professor Crawford put to, I think again, Professor Lowe the question, "What has gone wrong?" Part of what has gone wrong is simply that Ireland has come at this very, very late stage without pre-warning and pre-notification and said, "All these things we want". But they have never demonstrated that there has been a process of mature discussion, as one would have expected, in which, whether they were happening or not, would have become apparent. You would have seen correspondence, you would have seen what our answer was, you would have been able to judge whether it was viable or not. That is not what happened at all. Dr Plender will deal with the background in relation to cooperation, but things which have happened in the past do not really justify arguing that what is happening now under an Order which has been made is inadequate or inappropriate. Of course, there will be issues to be determined at the main hearing whenever that takes place. Is the "single radionuclide" theory right? Are they, in fact, entitled to know details that we regard as security sensitive? Now is not the moment for these. What we say overall is what, I am afraid, has gone wrong here, there is not some difference of approach to consultation or cooperation at the moment, which would require the Tribunal to intervene and try to take the blinkers off people's eyes. There is nothing there to justify any conclusion that the United Kingdom is not properly complying with the ITLOS Order, as it has been made, and no reason to say that, if that Order stays in place, as we have throughout said that it should stay in place, that that will not adequately protect and preserve anything that needs to be protected and preserved. That is our fundamental submission. After all, there are interim measures in place and no case has been made, no justification has been shown for that being adjusted at this stage. Our respectful submission to you, which will be followed by my friend, is that that is what you should say in answer to this application.

Can I, as I leave the podium and probably the room, too, thank you also for your enormous courtesy and, if I may say so, for your enormous flexibility in sitting the hours that you have, including today. We are extremely grateful to you for what you have been doing. Thank you, Mr President.

THE PRESIDENT: Thank you very much indeed, Lord Goldsmith.

MR WORDSWORTH: Mr President, Members of the Tribunal, I am going to make eight very brief points or, rather, pick up on eight points made by Ireland.

First, the Attorney-General for Ireland said at paragraph 4.05 of his speaking note that the United Kingdom's argument is that, because discharges are less than the ICRP 60 1 mSv limit, they are not pollution. That, of course, is not our case. Our case on pollution is made by specific reference to the provisions of article 1.1(4) of UNCLOS. Of course, the very small scale of discharges in the case of the MOX plant, the infinitesimally small scale of the discharges by reference to the applicable international standards and guidelines, is very important when it comes to the question of assessing whether emissions result or are likely to result in deleterious effects.

Point two. The Attorney-General at paragraph 6.05 of his speaking note referred briefly to the case on hospital discharges, a rather esoteric subject. I am not sure whether you still have your Judges' folders on this. If you do have them, if you could turn to tab 15 and table 2. This is volume 1. Table 2

is "Radionuclides discharged from Irish hospitals to the OSPAR Maritime Area 2001". You will see there about half way down "TC 99M", which is by far the largest radionuclide discharged. The Attorney-General is right, of course, to say that TC 99M - that is metastable technetium-99 - has a very short half life and it breaks out into technetium-99 in a matter of hours. That is true, but all it breaks down into is technetium-99 which, of course, has low radiological significance and it also has a half life of 213,000 years. If I could ask you to flick on to table 6, which is another three pages along, page 16 of the document, and if I could ask you to look down to item 9. These are the intermediate goals for implementing the strategy. You will see Ireland's approach in relation to hospital discharges. Take a decision on the back fitting of holding tanks to existing facilities, end 2005. It is not the matter of the greatest urgency to Ireland and yet, just to give you the scale of the comparison, the discharge is something like 500,000 times the emissions of the MOX plant.

Point 3. There has been a last-minute attempt to call into question the credibility of Professor Jones. This cannot be taken very seriously. Of course, if Ireland had wanted to question the credibility of Professor Jones, it would have called him for cross-examination at the merits stages. It did not do that. I will just read out paragraph 1 of Professor Jones' report, which just establishes his credentials in the scientific community. "I have over 25 years experience in the field of radiation protection, primarily involving environmental radiation protection, and encompassing specifically environmental modelling, environmental radioactivity monitoring, radio-ecology, radiation dose symmetry and radiation dose assessment, both for humans and non-human biota. Although my career has not primarily involved academic research, I have published 50 peer-reviewed papers in the scientific literature on these topics. I am a Fellow of the Society for Radiological Protection and gained the Society's Founder's Award for contribution of distinction to radiological protection in 1991". I think that that is pretty much all one needs to say about that.

Point 4. Ireland is now putting its case emphatically by reference to the longevity of radionuclides. I want to make it quite clear that there is no trickery here at all. The dose calculations that the United Kingdom has put before you take the characteristics of particular radionuclides into account. You can test that submission by looking at the tables to Professor Jones' report, tables 4 to 10 at Annex 39 of the Rejoinder, and you will see there he looks at the individual radionuclides. Again, the dose figures that we have taken you to take into account the issue of hot particles raised at the last moment by Mr Fitzsimons.

Point 5. It is said by Mr Fitzsimons and Professor Sands that I was focusing on doses to humans in my presentation not doses to marine biota. I think saying something enough times does not necessarily make it true. The record on that will speak for itself.

Point 6. Professor Sands started to plead out Ireland's new case on the failure of the United Kingdom to implement UNCLOS. This is all very interesting, but it is all new to us and it is not relevant, we submit, to issues raised by Article 290, paragraph 1, of UNCLOS.

Point 7. Our arguments on de minimis are set out at paragraphs 8.25 to 8.27 of the Rejoinder. I am not going to go to those now.

Point 8 is on the Savannah MOX facility, which keeps coming back. If I could ask you

possibly to turn to volume 4 of Ireland's Memorial - I apologise for this, but it is a short point - page 3-33, figure 3.6. Professor Sands' point, as I understood it, was that the United Kingdom, in fact, was not comparing like with like. We were referring to rinse water, which was equivalent to the liquid waste from the Sellafield MOX plant, but, in fact, the rinse water that we took you to earlier was, in fact, from reprocessing at the Savannah facility and not from the Savannah MOX facility. If I could ask you to look in the right-hand corner there, I do not think that it could be more clear. We see MFF Laboratory and then you see laboratory rinsing, sanitary washing, rooms, HPAC, going out rinsing water. That is what is equivalent to the liquid waste of the MOX plant.

SIR ARTHUR WATTS: I am sorry to detain you at the podium for a minute or so longer. There is a question that Mr Fitzsimons raised. I am not sure whether it is for you to answer or for one of the others, but it sounds to me if it may be in your field, so let me put it to you. If it is not for you, you will no doubt say so. He did ask whether there was a threshold for what might be regarded as serious harm. I wonder whether that is, indeed, so and whether one can allocate any threshold for what may be classified as serious harm and, if so, what it is.

MR WORDSWORTH: I think that that is a question that Mr Bethlehem is going to come back to in spades right away.

SIR ARTHUR WATTS: Thank you.

MR WORDSWORTH: Mr President, Members of the Tribunal, thank you very much.

MR BETHLEHEM: Mr President, Members of the Tribunal, just to pick up on Mr Wordsworth's concluding remarks, I am not sure that "in spades" is quite the right way to describe the level of detail that I will go into on this, but I will certainly return to the question. I should say that we heard in Professor Sands' concluding remarks a reference back to Conan Doyle and I have to say that, as these proceedings have over the last few days unfolded, I was beginning to feel that perhaps in respect of our front row I was the dog that was not barking or silent in the night, perhaps. The day has lifted a little bit and we will wait to see whether this is the dog that does not bite.

It seems to me that I have the usual misfortune, perhaps, of following colleagues both on our side of the room and on the other side of the room, who have given rather briefer presentations and I am going to try to tease out one or two of the threads. There are three elements that I will address. The first one is simply responsive to various points that were raised by Mr Brady, Professor Lowe and Professor Sands. Each of these go to wider questions of provisional measures under Article 290. Second, I propose simply to spend a little bit of time setting out the framework of law relevant to provisional measures. Much of that will be evident from what I have said already. But Mr Brady in the earlier part of his remarks, under "Legal Criteria", paragraph 4, introduced his discussion by suggesting that there was lack of clarity in the criteria or at least in the presentations of the parties to this point. I respectfully agree with that and what I am going to try to do is actually just set the law in framework. Then third, and I will do this rather briefly, is just to touch upon a number of salient points about applying the law to the facts. We are almost at the end of quite a long series of submissions on this. There has been a great deal that has been said on the facts. The law circumscribes the Tribunal's appreciation of the facts in these circumstances, so that is the object of my presentation.

I should say, it being rather late in the day, and as you will see I am working off some scribbled handwritten notes, that I am going to beg the indulgence of the Tribunal and rely on the principle of jura novit curia because I am going to be taking you to, or at least referring to, a number of cases. I do not have a bundle to take you to and I am sure that none of the cases that I will be referring to will surprise my friends on the other side of the room. Many of these were touched upon in our proceedings in ITLOS. Certainly, if it is of assistance to the Tribunal or to the other side we will provide a bundle in due course, but my purpose of actually drawing attention to these is simply to read them into the record so if Members of the Tribunal want to pursue issues they will have something there.

The starting point for my submissions really ought to be a general proposition as to what the relevant law is, or the relevant principles are, in respect of provisional measures, and there are four. I am going to set them up by way of proposition because I will be coming back and teasing them out in a little more detail in just a moment. In our submission Ireland has to show four things as the applicant in this case.

First, in our submission, it has to show that there is a change of circumstances or are new facts to warrant provisional measures.

Second, we submit that it has to show that there is a serious risk of irreparable prejudice or damage to its rights.

Third, in the alternative, it must show that there is a likelihood, and by that I mean more than 50 per cent, of serious harm to the marine environment.

Fourth, it must show that it needs those provisional measures now, as a matter of urgency, in the immediate future, not something that is looking towards two years time or three years time but now. I will come back to all of these points, but they really frame my responses to the submissions of the Irish side and also to the sketch of the law that I will come to.

First of all turning to the submissions by counsel for Ireland which are relevant to the legal framework. The first one I come to is the submission by Mr Brady where he says that he did not want to get entangled in the question of whether there were new circumstances, and he urged the Tribunal simply to look at the current circumstances. And then Professor Lowe in his submission really picked up that baton and said that this was not an application under article 290 para 5 but rather a new application under article 290, para 1, and therefore that there was no need to show urgency and there was no need to show change of circumstances.

Our response, with respect, is that Ireland is wrong on this. Article 290 para 5 indicates the criterion or the threshold to apply in circumstances in which provisional measures have already been prescribed in the case. Of course there is a renvoi to paras 1 to 4 of article 290 and therefore we get back to paragraph 1 of article 290, so Professor Lowe's application within the framework of para 1 of article 290 is of course correct. But our submission is that it comes through paragraph 5. The importance of it is really, for the purposes of Ireland's case, is that it is not only that this is a submission in respect of paragraph 1 but they must also take into account paragraph 2 which addresses the need for changed circumstances. Provisional measures may be modified or revoked as soon as the circumstances justifying them have changed or ceased to exist. So, in our submission, para 2 is relevant, changed

circumstances are relevant. And as regards the point of urgency, and I will come back to that in just a moment, in our view urgency in respect of this application is derived from the general law and it is absolutely pertinent and on point.

Turning to the next submission by Mr Brady, he said this Tribunal has a fuller jurisdiction than ITLOS. Our response on that is yes, of course that is correct, in a sense. It is correct in two senses in fact. It is correct because this Tribunal is seized with the disputes on the merits whereas ITLOS was not. And it is also correct because this Tribunal is operating under a different temporal framework. The Law of the Sea Tribunal was operating under a temporal framework which was looking to the establishment of this Tribunal, whereas your seisin is longer. But there is an added requirement in respect of your competence or jurisdiction, and that is the requirement to consider change of circumstances, the requirement to go through the terms of paragraph 2 of article 290. Although, as the Attorney General for the United Kingdom said yesterday, there was not much comment on this aspect in the Virginia Commentary, there is a little bit of comment on article 290 and it is evident that these additional hoops if I could put it in those terms have been inserted into article 290 to prevent abuse, to prevent a series of provisional measures requests. I will come back to that in the framework section in just a moment.

We then had a submission from Professor Lowe where he said the Tribunal can make an order if it considers such an order to be "appropriate". I may be doing him an injustice, and if so I apologise, but my recollection is that he really stopped at that point, leaving the impression that the Tribunal had an unlimited jurisdiction to order whatever it wanted in whatever circumstances it perceived to be appropriate.

If one has a look at article 290 para 1, the language is that the court or tribunal may prescribe any provisional measures "which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision".

Our submission therefore is "yes" you can indeed make an order that you consider appropriate, but appropriate in circumstances in which you consider it necessary for the preservation of the respective rights of the parties or to prevent some serious harm to the marine environment.

Then, turning to the next submission, Mr Brady at para 4.03 of his outline suggested that all that the Tribunal is concerned with in these proceedings is whether Ireland has established a prima facie case on the merits And he went on to say that the question is whether the United Kingdom has a case to answer, not whether it has answered it. Now, Sir Arthur Watts put a question to him at that stage, if I recall correctly, asking about the relationship of this prima facie test to the test in article 290 and his response was, well, the prima facie test is if you like the threshold, the portal through which you have to go and you then get to article 290. We did not, however, hear a great deal about article 290 subsequently. Let me respond to this prima facie point that Ireland seems to rely upon. In our view this is the wrong test; it is absolutely the wrong test. The test that the Attorney General for Ireland seems to be proposing seems to me a test which is akin to a hearing for leave to make an application on the merits, almost by way of domestic judicial review proceedings. You go in front of a court, you make an application for leave where you have to show that you have an arguable case and

you then come on to the merits at a later stage. That is not the case here. The relevant test is drawn from article 290 of UNCLOS and from the general law and what Ireland is in fact asking for when one looks at very many of the requests for provisional relief, if I can put it in those terms, what it is in fact asking for, is an interim judgment on something that is the subject of its merits application, and I should say this is the first punctuation point of jurisprudence. This was a matter which the Permanent Court of International Justice addressed in, if Professor Crawford will forgive my pronunciation, the Chorzow Factory Case. This was precisely what was at issue there. There was an application for an interim award of damages pending the final award of damages and the Permanent Court turned that down, saying this was really seeking an interim judgment on a point that was the subject of a merits application. And, with respect, we do not think that this is appropriate for these proceedings either.

Turning to the fifth point which is the Nuclear Tests case, Professor Sands very helpfully, as is his style, indicated that there was a new reformulation of Ireland's assessment provisional measures application. The Attorney General has just dealt with that point. But let me touch upon the Nuclear Test point and underline and expand a little bit on what the Attorney General for the United Kingdom said a little earlier today. Apart from the fact that both the Nuclear Test Cases and this case touch upon the affects of nuclear radiation there is no similarity between the cases at all. In terms of the subject matter, the Nuclear Test cases concerned atmospheric nuclear testing. There was considerable doubt expressed as to whether that practice was legal. This case concerns civil nuclear processing, a practice that is unquestionably legal, is heavily regulated and is subject to international standards and guidelines regarding radiation protection. In terms of the evidence, in the Nuclear Test cases Australia and New Zealand presented the court with detailed evidence showing actual harm. In fact, Australia had conducted a radiation fall out assessment in respect of food to Australians as a result of the nuclear tests and other aspects of fallout. There was detailed evidence of actual harm. In this case Ireland has presented no evidence showing actual harm. It has not even presented evidence showing any real risk of serious harm. It has presented hypothesis and conjecture and scientific opinion which suggests that there is uncertainty. But they have not made the leap from uncertainty to harm. They have not even made the leap from uncertainty to unregulated risk, and on our side of the room the case on low dose radiation is not that there is no uncertainty, we accept that there is uncertainty, there is a great deal of scientific work that is going on. On our side of the room what we say is that that uncertainty is addressed in the work that is being undertaken by the International Commission on Radiological Protection, by the NCRP, which is the Untied States body; by a whole series of other bodes which are undertaking similar research and that is where the risk assessment element comes in.

On the question of evidence there is no joinder between the Nuclear Test cases and this case.

On the question of scale, in the Nuclear Test cases there was, as I suggested, significant radioactive fall out on the territory of the applicants. In this case the radioactive emissions from the MOX Plant are below the level of detection and from THORP are so small as to be insignificant.

In our submission there is no similarity between these two cases and to the extent that, in the light of Professor Sands' rather helpful presentation of his application to you, you might be tempted to look to the formulation of the Nuclear Test order when you come to consider this case, we submit to you

that that is not appropriate. There is no similarity between the two cases.

I should say just, in terms of the formulation of Professor Sands' assessment request, that we consider that Ireland has not shown any basis for this request whatsoever, and so I simply follow the Attorney General's submission in asking the Tribunal to reject it.

On the sixth point made by Mr Brady, obviously mindful of this submission from our side of the room, that Ireland has not really adduced evidence to show harm, he emphasised the point that there is a "very considerable body of additional evidence". Our response, with respect, is that there is indeed a very considerable body of additional evidence, we have binders and binders full of experts' reports and pleadings. The question is what does that evidence show, and it does not, in our submission, show harm or even a real risk of harm, it simply shows uncertainty. I am going to come back to one or two points in Dr Mothersill's report in just a moment.

The question of how uncertainty is relevant to an assessment of risks and whether there has been such an assessment is in fact a merits point which we will deal with in due course.

The next point of response is to Professor Lowe, where he indicated, as he did the other day, that really what was in issue here in respect of much of Ireland's request was a focus on procedural rights and if procedural rights are breached there will be harm. As the Attorney General suggested, there is an element of deja vu to this because this is a rerun of the argument before ITLOS. Our response to this is a relatively straightforward one. If this was the correct approach to provisional measures then a provisional measures order in respect of procedural rights would always anticipate a merits decision, and that is not the object of a provisional measures award. In fact this comes within the Chorzow Factory principle, that you cannot get an interim judgment on a point which is really in issue in respect of the merits.

Let me make one further point here because it may be a rather useful punctuation point in respect of this element, and that is simply to refer you to in passing the Aegean Sea Continental Shelf provisional measures order. These were proceedings between Greece and Turkey in part over the delimitation of the continental shelf although it also included access to information relating to seismic tests and exploration. The court rejected Greece's application for provisional measures. On the question of the Greek application for information, it said quite explicitly that access to information was not appropriate at a provisional measures stage because there was no irreparable damage and that this was something that was quintessentially remediable by way of some other form of reparation at the end of the case if the claim was upheld on the merits.

The next point of rebuttal, and there are only two more to go, really addresses a point that Professor Sands made, not so much in his reply but rather in his main presentation in a response to a question raised by Professor Crawford, touching upon the Great Belt case. Professor Sands, in response to that question, which I will come to in just a moment, moved away from the test of serious harm. The question put to him by Professor Crawford was whether, in the event that the Tribunal were to decide in Ireland's favour in due course, whether an appropriate remedy would not simply be for the United Kingdom to comply with the decision of the Tribunal and, in so doing, to assume the commercial consequences of any actions that it had to undertake to unwind its arrangement. Professor Sands

suggested, with alacrity on the point, that there was one material difference between the Great Belt case and the present case. If I may, I am just going to read the extract from Professor Sands' submission. He said, "The contracts could be put into effect and could result in discharge of radioactive substances into the marine environment which would be an irreversible act. In the Great Belt 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".

I would make two points rather briefly on this. The first one is simply a point of correction, where Professor Sands says that he United Kingdom does not accept that the discharges from THORP are significant. As you will have heard from Mr Wordsworth, on the contrary, the evidence that we have submitted is that the discharges from THORP are not significant. I am not sure whose pleadings Professor Sands was reading, but certainly not ours. I would simply direct you to our Counter Memorial at paragraphs 3.27 to 3.37. There are ten paragraphs on that there. Then in the Rejoinder, paragraphs 2.39 to 2.40.

But the second observation really goes right to the heart of what we are addressing at the moment. That is that Professor Sands' statement goes to the test in respect of provisional measures. From the extract that I have just quoted, he rejected the analogy with the Great Belt case on the grounds that "we are dealing here with discharges which are irreversible in terms of their potential and likely effects on the environment". The point here is that the provisional measures test has undergone a subtle but rather critical transformation. A test that by reference to the established jurisprudence is focused on irreparable prejudice and serious harm has been recast by counsel for Ireland as a test which is focused on potential and likely effects. With respect, it is not an effects test. We had the analogy, and much disparaged, of pouring a bottle of natural mineral water into the Irish Sea. Now, that has an effect. It does not cause harm. The test is not an effects test. It is a test of irreparable damage or serious harm.

The final point of rebuttal is again in respect of Professor Sands, where, once again he was responding to a question from Professor Crawford, on the suggestion that Article 194, paragraph 2 of UNCLOS, in fact, imposed an absolute requirement rather than some kind of flexible or variable requirement as in Article 194, paragraph 3(a). Professor Sands went on to say that it was sufficient that Ireland come within the requirements of Article 194(2) and that Ireland has - I hope I get his words correctly - a right to require zero pollution, and he came back to the argument of "not a single radionuclide".

In response, let me just make a number of very brief points. The first one is that the meaning of Article 194(2) is a question for the merits. I am not sure that we would accept the interpretation that has been put on it. The question now, though, is not simply whether there will be harm, but whether there is

a likelihood of irreparable damage or serious harm. It is not enough, with respect, simply to say that radionuclides have a long half life. For Ireland to get over the threshold, it must show serious harm or irreparable damage.

That is by way of response to Ireland's case. What I propose to do now, and I will do so very briefly, because I think that I can do this almost in telegraphic form, just setting up a number of bullet points, is just to try for the record, when you come back to have a look at this, to set out what we see as the key points in respect of the legal framework of provisional measures. The first one is to come back to a point made by Lord Goldsmith, the Attorney-General. That is to underline the fact that this is an exceptional procedure. Let me simply pick up a statement or two by one or two Judges of the International Court in previous decisions which underline the point. Judge Nagendra Singh, in the Nuclear Test cases that we have been touching on: "The sole justification is if the judgment would be rendered meaningless". "The sole justification!". Judge Shahabuddeen in the Great Belt case, which we have also touched upon, formulated it in these terms, "the question is whether it is open to the court to restrain a State from doing what it claims it has a right to do without having heard it in defence of that right". The significance of this proposition, that this is an exceptional procedure, is that there is to some extent an overturning of the normal burden of proof, because the United Kingdom has not been heard in defence of its rights. Although we have lifted the veil on some aspects of our merits case, because we have had to do so, we have not been heard in defence of our rights, and it would really be, in our submission, quite inappropriate for the Tribunal to proceed as if this were simply, to take Mr Brady's language, "a question of making a prima facie assessment as to whether Ireland had an arguable case". This is an exceptional procedure. So exceptional that there has been only one such case before.

PROFESSOR CRAWFORD: I am sorry, Mr Bethlehem, I did not understand, you said that there had only been one such case before. What do you mean?

MR BETHLEHEM: Only one case in which there has been a second request; I am coming back to the Genocide Case.

The second point - perhaps anticipating Professor Crawford's reluctance to move me off my stride I should say that there has only been one other case before ICJ, PCIJ, ITLOS, where there has been a decision on a second request. There has, of course, been one other case where there was a second request, but that was simply held in abeyance and that was in the Nicaragua case, where the matter was actually put to the court, but the Court took the view that this ought to be addressed after a decision on jurisdiction and Nicaragua, the applicant, did not go back to that. Also before the Permanent Court of International Justice, there were two requests by Belgium in the Electricity Company of Sophia case, but in that case Belgium withdraw the first application and then went on to make a later application. If I am just being absolutely accurate, that is the position, but there has only been one second order of provisional measures.

The next point within this framework, after the exceptional procedure, is the threshold requirement for a fresh request. In our submission, as I have already suggested, the threshold requirement is that there must be a change of circumstances or new facts. This is not simply something that is found in UNCLOS Article 290(2), but it is found in the Rules of Procedure of ITLOS, it is found

in the ICJ Rules, it is found in the European Court of Justice rules. I would further say that, in respect of a second request, that the burden of showing a necessity is on the applicant. The Genocide Case establishes that proposition and the point is also addressed by Shabtai Rosenne in his Commentary. We would say that the burden of showing that there are a changed circumstances to warrant a second request is on Ireland.

SIR ARTHUR WATTS: Before you leave the question of change of circumstances, Mr Bethlehem, in your earlier discussion of this point you said that the Tribunal got back to paragraph 1 of Article 290 through the provision in the last sentence of paragraph 5 of Article 290. But the question is, in my mind, that that reference back from the final sentence of paragraph 5 only arises if there is a request to modify, revoke or affirm those provisional measures. According to the text, it does not appear to apply if provisional measures are to be prescribed de nova. The same sort of thought seems to be implicit in the difference in language in paragraphs 2 and 3. Paragraph 1 talks about the power to prescribe. Paragraph 2 says that provisional measures may be modified or revoked in the case of change of circumstances but not prescribing. But paragraph 3 takes you to all three circumstances, prescription, modification and revocation. There must be some reason why prescription is not included in paragraph 2. I wonder whether you can enlighten the Tribunal on what the reason for that is.

MR BETHLEHEM: I would make two points by way of response. The first is that, as I read it and I will certainly reflect on it subconsciously as I proceed, but, as I read it, paragraph 3 of Article 290 really addresses the generality of the provisional measures procedure. Provisional measures may be prescribed, modified or revoked under this Article only at the request of a party to the dispute after the parties have been given an opportunity to be heard. It deals with the Article as a whole. So it addresses the generality of the right of the parties to be heard, whereas paragraph 2, indeed, deals specifically with the modification or revocation in circumstances where there is already a provisional measures order on the books, if I can put it in those terms.

The second point I think really goes more to the heart of your question. That is that, in our submission, the reading that you postulate by way of your question really would not be an appropriate reading of the provision because it would leave it totally within the control of an applicant to determine whether it had to satisfy the change of circumstances or not, because an applicant would then, if it did not feel that it did not need to or could not satisfy the change of circumstances test, it would simply characterise the request as a new request, whereas, if it felt that it wanted to modify the old request because for some reason it was not working, it would cast it in terms of a modification. If we were to adopt that reading, it would leave the procedure in the hands of the applicant and we do not think that that would be appropriate.

SIR ARTHUR WATTS: Thank you very much.

PROFESSOR CRAWFORD: Mr President, if I could follow up on that, is it the United Kingdom's view that, in substance, what Ireland seeks is a modification of the Provisional Measures Order of ITLOS, because, of course, the form which these proceedings have largely taken is whether there should be some additional provisional measure. The United Kingdom has certainly expressed the view that it is content with the existing ITLOS Order and my understanding is that Ireland has not asked for any textual amendment to

that Order. Of course, you are right, it seems to me, with respect, in saying that it cannot be a matter of characterisation by the Claimant or the requesting party in respect of a particular provisional measure. It is a question of substance. What is your position?

MR BETHLEHEM: I think our position quite clearly is that this is a request for a modification or an enlargement or a further development of the existing provisional measures. That reading comes from three points. The first one is the way in which Ireland characterises it. I do not stand on this too heavily, but it characterises it as a further request.

MAITRE FORTIER: Request for further provisional measures.

MR BETHLEHEM: Yes, for further provisional measures.

The second point is that we have heard in Ireland's submissions throughout Tuesday and Wednesday quite a number of points of criticism and clarification of the old request, so, as we take it, it is really a request to modify.

The third point really follows from what Lord Goldsmith has said and that is that, at least in respect of a number of elements, the effect of this request goes right to the heart of what was in issue before ITLOS, because, certainly, in respect of request A(i), the effect would be to cause the MOX Plant to shut down.

THE PRESIDENT: Can I ask for a clarification? Assuming that the International Tribunal for the Law of the Sea had rejected Ireland's request for provisional measures and had not prescribed any provisional measures, are you saying that, in those circumstances, Ireland would have been precluded from coming to this Tribunal with a request for provisional measures?

MR BETHLEHEM: No, not at all. We do not take a formal point saying that Ireland is precluded. All we say is that Ireland has to establish that there is a change of circumstance. If the Law of the Sea Tribunal had rejected completely without ordering any provisional measures, Ireland would have been entitled to come back, as it will be entitled to come back in the future, depending on how you decide to deal with this. It will have been entitled to come back to say that there are new facts, there is a change of circumstance, we would like you to look at this afresh.

One of the contentions on our side of the room - and I will come back to this when I deal with urgency in just a moment - is that the provisional measures procedure is there. It is alive, it is well, it is able to be invoked by Ireland whenever the circumstances change or there are new facts which warrant it. But now is not that time.

Just to put the scheme in focus again, the first point in my scheme is the exceptional nature of the procedure. The second point is the threshold requirement for a fresh request, which is a change of circumstance or new facts. The third elements is the jurisdiction on substantive requirements. There we have to go to Article 290(1). There we are entirely with Professor Lowe, that that is the provision that we have to start off with . There are three elements there. The first one I will say very little about. The first one is the question of prima facie jurisdiction of which you heard something from Lord Goldsmith yesterday. The second element, and these are in addition or in the alternative, is the requirement to show the need to preserve the respective right of the parties.

Let me just try to tease out a point or two on this which I think, Sir Arthur, goes to the question

that you put to Mr Wordsworth. The preservation of the respective rights of the parties has really been the subject of quite a lot of comment in jurisprudence over the course of the last 80 years, notably from the Court just at the bottom of the steps. Invariably, it has been interpreted to mean irreparable prejudice or damage. I emphasise those words. It is irreparable prejudice or damage. It is not just damage. It is not just prejudice. It is not just harm. It is something irreparable. That irreparable prejudice or damage has, in fact, been interpreted to mean a "serious risk of irreparable damage". The case that I would simply refer you to there, which I know a number of the Members of the Tribunal will be very familiar with, is the Cameroon v. Nigeria case, because that was the language that was used, "a serious risk of irreparable damage".

The Attorney-General, Lord Goldsmith, in passing, referred to the Arrest Warrant case in support of the proposition that irreparable prejudice really means irreparable harm. That really turned on the facts of the Arrest Warrant case, because, in the middle of those proceedings, the individual who was the subject of the arrest warrant, Mr Yerodia Ndombasi, was moved from being Foreign Minister to being Minister of Education while the arrest warrant remained in place. And the Court, on the basis of those new circumstances, took the view that there was no irreparable prejudice. The fact is that the arrest warrant remained in place, so the instrument in contention remained in place. What had changed was the irreparability of harm. We take the view that the test there is a serious risk of irreparable damage – or harm.

There is one further gloss to put on this and it is a gloss that I think the Attorney-General touched upon, but it may be useful if I just tease out for a moment or two. That is that a good deal of what we are hearing from the other side of the room is really focused on allegations of pollution. That really does take the Tribunal (and take us all) back into the definition of "pollution". The definition of "pollution" talk about the introduction of substances into the marine environment that result or are likely to result in harm. In our view, that reference to likelihood, which is the looking to the future, is rather important, because likelihood, in our submission, is 50.1 per cent or more. It is not 40 per cent or 20 per cent or 15 per cent. It is not some kind of characterisation of risk. They must show, on the basis of evidence, that there is a likelihood of irreparable damage.

I turn then to the next limb in Article 290(1) which is the prevention of serious harm to the marine environment. I would simply make the same point here, because, once again, for the purposes of this case, we are focusing on pollution. To the extent that we focus on pollution, we go back to article 1, paragraph 1.4 and we come back to "likelihood".

In our submission Ireland, under this limb as well, must show that there is a likelihood of serious harm to the marine environment. I will not go much further and try and define what is meant by "serious" harm but it is obviously something more than just harm. So in other words if we go back to Mr Brady's contention in respect of a prima face case where he suggests that all Ireland needs to do is establish that it has an arguable case, Ireland's arguable case on the merits is focused on harm. It cannot simply piggy back its merits case into the provisional measures forum and say "we have got over the threshold of harm in merits, therefore you can award provisional measures". Serious harm must mean something more than harm and the likelihood of serious harm we contend sets the bar quite high, entirely

in keeping with the exceptional nature of the procedure.

I come now very briefly, because I do not want to detain you longer than is necessary, simply to identify a number of other principles which we contend run through the jurisprudence on provisional measures, wherever you look and whichever international forum you look to, and that they are principles that you ought to be cognisant of. The first of the principles that I draw attention to is that of urgency. We heard from Professor Lowe that, as this was a new request and there was no requirement to show urgency in article 290 paragraph 1, that Ireland did not need to show urgency, and we take the view that this is wrong.

There are two elements to our contention here. The first one is that we say that urgency, as an integral part of the provisional measures procedure, is evident from the exceptional and expedited nature of the procedure and we see that in the ITLOS Rules, we see that in the ICJ Rules and frankly we see that in the procedure in which we are engaged at the moment. As the Attorney General Lord Goldsmith indicated just before he departed, this really is quite an extraordinary provisional measures procedure because we moved from a preliminary objections argument with very brief notice indeed into a full scale provisional measures hearing. So, exceptional and expedited, and we say that that implies urgency. But the second point is perhaps a little more telling, and that is that we say there is a general requirement of urgency which is separate from the tenure of the measures that may be ordered. There has been some discussion about what precisely is the tenure of the measures that the Tribunal might order. Are we talking about six months, are we talking about two years, three years, six years or whatever. Our proposition is that there is a general requirement of urgency which is separate from the tenure of the measures and that this is apparent from the jurisprudence. I simply punctuate three cases, or highlight three cases.

The first one is Cameroon -v- Nigeria, where the court said at para 35 that the measures are only justified if there is urgency and in the way in which that paragraph was formulated this seemed to be really a distinct self standing requirement rather than one that was linked to a final decision. The second point emerges from the Aegean Sea Continental Shelf case, where, rather interestingly in the dispositif of the Court's Order, the Court said "the circumstances as they now present themselves do not warrant provisional measures". They did not say "the circumstances as they may present themselves in six months time or six years or through the tenure of the case", but rather the circumstances "as they now present themselves" do not warrant provisional measures.

Then the third case is the case decided by the International Court last week, the case of Congo -v- France where, at para 35, the Court said that there is "at the present time" no risk of irreparable prejudice. And, of course, given the circumstances of a criminal investigation of the President of the Congo by a French examining magistrate there may very well come a time in the future where there is a risk of irreparable prejudice. But the Court emphasised that there was not "at the present time" any risk of irreparable prejudice. So, in our view, Ireland has to show urgency and urgency means it has to show a need for provisional measures now or in the immediate future. We are prepared to accept for these purposes that the immediate future will run for the tenure of the adjournment. We do not consider that Ireland has even approached this standard.

The next point is simply that provisional measures must not prejudge the outcome of the merits and I have referred you to the Chorzow Factory case, and of course this is particularly important when one talks about access to information or procedural rights.

The third point is that prejudicial effects which would be capable of reparation by appropriate means following a determination on the merits do not warrant provisional measures and again the case is one I have touched upon already, that is the Aegean Sea Continental Shelf case and the request for access to information which the Court rejected.

The penultimate point is that provisional measures must take account of the respective rights of the parties and that comes not only from ITLOS Rules and UNCLOS but it also comes from the Cameroon -v- Nigeria case where the Court made that point.

The final point in respect of the general principles relevant to provisional measures again brings us squarely back to Mr Brady's prima face case and that is that there is an indication in the jurisprudence of the International Court that an applicant must show proof of damage: and the case here really is one which was the subject of the exchange between Professor Crawford and Professor Sands, the Great Belt case, because there the International Court rejected the application for provisional measures and in one material respect it did so because it took the view that Finland had not presented proof of damages. That was in respect of consequences for the Finnish shipbuilding works and shipyards as a result of the building of the bridge. So there is a requirement to show proof of damage and once again we take the view that that standard has not been met.

That is the framework of law. What I propose to do now in five minutes is simply to give you five points which we consider takes the facts into the law and which will be relevant to your deliberations.

The first point on the facts relates to radiation protection dose limits, and there are three bullet points. The radiation protection dose limits are set by international bodies and regional bodies. The ICRP, the International Atomic Energy Agency and Euratom. They set limits for humans 1 mSv and they set a threshold for marine biota, and Mr Wordsworth took you to that, ref 400 micrograys per hour.

The second factual point relevant to this legal matrix is that the International Commission for Radiological Protection report of 2003 does not signal any particular concern over limits to non-human biota. As the Attorney General indicated when he took you to extracts both from the ICRP memorandum and from the report, the current initiative of the ICRP is focused on developing a conceptual framework. They say quite explicitly that their work is not motivated by any particular concerns as regards environmental protection.

The third factual points which fits into the legal matrix is that the actual emissions from the MOX Plant are infinitesimally small, as Mr Wordsworth has shown, and from THORP as well as from Sellafield more generally are very small and very well within international limits.

The fourth point is that the evidence supporting this, as well as showing a long record of work in this field as regards the environment, going back at least 30 years to 1976 if not before, the evidence supporting this is given in experts' reports annexed to the United Kingdom's pleadings. You have been taken to these, Professor Jones, Dr Woodhead and Dr Hunt.

The final point, and I will spend two brief minutes on this, is that the material adduced by Ireland to suggest harm from low dose radiation does not assist Ireland in this case. The first point to make is one that I have already alluded to, and that is that the issue of low dose effects has been considered by a number of authoritative bodies and other leading experts from the perspective of risk assessment, and I stress this, from the perspective of risk assessment. And in so far as we can establish all of these expert bodies and individuals have without question concluded that, despite the existence of uncertainty, the current approach towards radiation risk assessment and protection remain appropriate; and there are substantial reports that go to this. So there is a chasm between uncertainty, as Ireland contends, and the approach as regards radiation assessment, where low dose effects have been addressed in considerable detail and the view has been taken that the current approach towards risk assessment is appropriate.

This is addressed in particular in the evidence of Dr Preston, and I should say that this conclusion on this point on the adequacy of the protection standards is supported by his colleague from the United States who is an expert witness for Ireland, Dr Liber. They are at one on this point.

We then come to the evidence that Ireland submits on this point, and that is the evidence of Dr Mothersill. Let me make the point quite clearly that we do not intend to impugn Dr Mothersill's scientific credentials but we do say that she is focusing on this from a laboratory perspective. The evidence of Dr Mothersill does not confirm harm. At its highest she only alleges uncertainty. And I am going to read three statements into the record so you have a sense of this, all from her report attached to the Reply. Page 156 of her Second Report: "The bottom line is that there is uncertainty and controversy about whether low dose rate or chronic doses are more damaging than high dose rate acute doses upon which our risk assessments are mostly based". She says: "The bottom line is that there is "uncertainty", not the bottom line is that there is risk or that marine biota are going to suffer some kind of irreparable harm.

The second extract comes from pages 157-157 and this underlines the way that she as an expert for Ireland, perceives her role in the proceedings. She says: "Regulators above all need to regulate. My role is to present the new data and explain why people might be concerned about low doses of radiation. How the information is transformed into regulatory policy is not really the crux of the argument at all, accepting that it exists is". With respect to Dr Mothersill, and we will deal with this when it comes to the merits, the crux of the argument <u>is</u> how this uncertainty is transformed into regulatory policy. She simply skates over the point.

The third extract from page 162 of her Second Report, where she says: "No one is saying that the radiation released from the Sellafield site", in other words she is looking at the Sellafield site generally, she is not even focusing on the MOX emissions, "No one is saying that the radiation released from the Sellafield site will definitely cause massive increases in cancers in Ireland or cause untold harm to the marine ecosystem, but we are saying that we do not know how many cancers or other affects might be due to historical current releases." Once again she has focused on uncertainty.

I will simply end with this point. The current approach to radiological protection, whether it is in respect of humans or marine biota, adopts what is called a linear non-threshold approach, and that is

to say that somewhere along the line there is likely to be an effect. The lower you go in terms of dose the lower the effect is likely to be. At some point you get so low that the effects are likely to be, in the scientific jargon, stochastic, probabilistic, and that they just become infinitesimally small. This is where the relevance of the material that Mr Wordsworth put before you comes. We are talking here about emissions of radionuclides which are so small that in very many respects they can only be calculated. They can only be modelled. There is no risk of serious harm. There is no likelihood of serious harm or of irreparable prejudice.

The Attorney-General in his submissions on this left you with a three-page note which simply highlighted our response. That would be the next part of my submission, but I think that I can end there. Thank you.

THE PRESIDENT: Thank you very much. Dr Plender.

DR PLENDER: Mr President, Members of the Tribunal, I can, I think, begin with a point of encouragement. I really will be short!

May I remind the Tribunal of the point that we have now reached on the question whether the Order made by the International Tribunal for the Law of the Sea requires to be modified.

Mr Bethlehem is correct in the articulation of the United Kingdom's understanding of what you are presently concerned with. It is a question of a modification of an order made by the Tribunal. On this point, the distance between the parties appears to have narrowed. We began with the proposition that there had been pervasive and grave failures on the part of the United Kingdom in relation to cooperation (see, for example, paragraph 8.104 of the Memorial: "The United Kingdom has not responded to any of Ireland's enquiries, they cannot have considered to take into account Ireland's interests"). The distance between the parties narrowed perceptibly during their replies, particularly during the passage that I read this morning. It is entirely fair of Professor Lowe to say that there were, indeed, remaining differences. There were points about which Ireland complains and, in so far as they are relevant to the question of provisional measures, I hope to have addressed them this morning.

May I remind the Tribunal that there were at that stage, when I spoke this morning, four episodes on which Ireland relied subsequent to the Tribunal's Order. The first upon which Ireland relied most heavily, the one that was highlighted by the Attorney-General for Ireland in his opening speech, and to which Professor Lowe applied his most colourful adjective, was the case of the alleged failure to notify Ireland of the proposed resumption of activities at the MOX Demonstration Facility. I showed the Tribunal that Ireland had been notified of that not once, not twice, but at least three times, to say nothing of any exchanges of which we have been unable to obtain details in the limited time available. What has been Ireland's response? Silence. A deadly silence. It appears that Ireland has conceded, as it must, that the point that it made about the MOX Demonstration Facility was entirely erroneous.

Then there was a second point on which Ireland relied, that which Professor Lowe called "the saga of the shipments". As I showed the Tribunal this morning, the United Kingdom had made the offer even before the ITLOS hearing to disclose the figure on conditions of confidentiality. That has been reiterated. There has been no contest with that. All that we have heard from Professor Lowe has been a reference to one of Ireland's own letters concerned not with the question whether Ireland was entitled to

or would be shown the figure, for Ireland had the figure available to accept at any time. It was concerned with the manner in which Ireland would refer to it in these proceedings. The point of difference was the search for a common form of words between X and Y. Ireland wanted a different method. But the point that is common and is established is that the offer was made that Ireland could have the figure at any time.

The other two points really are points of appraisal. There is Ireland's request for access to very sensitive materials on the part of Mr Killick, to take copies of them and digital photographs to have facilities which would not be extended even to members of the United Kingdom Security Services. Then there was the question whether the cooperation in respect of the Kansai shipment had been appropriate. You have seen, this is common ground, that Ireland was notified well in advance in relation to that matter and there was a further notification. It is a question of appraisal for the Tribunal whether this represents such a departure from the Tribunal's Order as to warrant a modification. To describe the United Kingdom's conduct in relation to that matter as ungenerous, as Professor Lowe did, is a source of some disappointment on this side of the room. And that is it. There is nothing else in relation to observance of the ITLOS Order, save references back to complaints that Ireland makes about antecedent matters. Nothing but rhetoric - and the rhetoric itself is often at variance with the evidence. There is, for example, no basis that we can discern for the assertion that the United Kingdom does not seem to acknowledge a duty to cooperate in relation to the small doses of radiation. After five years of public consultations, years of exchanges (written and oral) between officials and Ministers in relation to what is by any standards low, if not ultra-low, doses of radiation, it is impossible to see the basis upon which such an assertion could be made.

I did note that Professor Lowe denied making to this Tribunal the point about Mrs Beckett's letter to which I responded. He said that he made that point only in ITLOS. Not only my notes and my recollection, but the verbatim record shows otherwise. Day 5, page 42, lines 13 to 29. The particular passage from which I was quoting and to which I was responding is at line 22. The response that I made to Professor Lowe this morning has produced not an explanation, not a rejoinder, but amnesia! I am very sorry to have provoked this condition in my good friend. Mrs Beckett's letter was correct. The criticism made of it was unfounded and now that Professor Lowe has forgotten that he has made the point, a very wise course of action, may I comment that Members of the Tribunal follow his excellent example.

At the end of his speech, Professor Crawford asked him to explain why, in his view, we have two parties, one complaining that it has received insufficient information and the other insisting that it has supplied it.

PROFESSOR CRAWFORD: If I could just interrupt, I was not expressing a view, I was asking a question.

DR PLENDER: I hope that I have just said, but may have misspoken, that Professor Crawford asked him to explain why, in his view - that is Professor Lowe's view - we have these two parties. This is, perhaps, the most difficult question that has been asked in the course of the proceedings, because it is not a question of law, nor a question of evidence, but only a question of conjecture. But I shall do my best to essay an answer. The first is that, perhaps, Ireland's appetite for information exceeds its capacity to

digest it. For example, the complaint that no advance information was given of the use of the MOX Demonstration Facility for purposes related to the MOX plant shows a plain error. It is clear that the information was given and it is equally clear that the Attorney-General was aware that it was given when he made the submission that he did. There is no suggestion on this side that he did so other than in the utmost good faith. The problem is that there is a very substantial volume of information about the Sellafield site: national, European, international and regional. It is available for dissemination. Great volumes of information are supplied to Ireland as a matter of routine and it may be that a meeting of experts from the two sides could find a way of ensuring that the information that Ireland requires is supplied in a manageable way and the information that it does not require is identified.

There is a second possibility. That is that the intervention of contentious legal proceedings may not be the best way of promoting cooperation between experts. It was with this in mind that the United Kingdom wrote to Ireland on 7th December 2001 suggesting a meeting of relevant policy and technical experts to discuss modalities of further exchanges. The point was reiterated in Dublin on 11th December and, again, on 19th February 2003. As I remarked this morning, this offer was not made for tactical advantage. It was a genuine offer and it was an offer which, even now, we should be happy to see accepted.

I deal now with the proposed direction on expedition. The Tribunal, if it chooses to make any such direction, will, of course, word it as it chooses and it may prefer to address it to both parties as Mr Brady suggests. There is, however, a certain cause for concern since Mr Brady speaks of a proposed direction as one whereby both parties would be directed to urge expedition on the part of the Commission.

Two issues arise. In the first, the United Kingdom is not a party to correspondence between Ireland and the Commission. Indeed, as I have remarked, we have not seen all of it, although indeed we have asked for it. There is a certain irony about that in the context of what has been said against the United Kingdom in these proceedings. But not being a party, we have no standing to urge expedition on the Commission's part.

In the second place, our concern on the point of expedition arises from the statement in camera by Mr Brady and in this Tribunal I think, possibly in camera, by Mr Sreenan, that there would be a reaction to certain events only at a late stage at the beginning of the Commission's vacation and that would hold matters up until the autumn. The direction that we have in mind is one which would call for expedition on matters which are within the power of the parties concerned to speed within the maximum capacity and convenience, without prejudice to themselves, of doing whatever they need to do and not what the Commission need to do. We hope that the Tribunal will consider what can be done to secure expedition between now and the next scheduled meeting of this Tribunal in November. Naturally, we trust Members of the Tribunal to find a form of words appropriate to the circumstances of the case.

Gentlemen, before I sit down, I would wish personally to thank you for the attention and courtesy with which you have greeted my submissions - and the silence with which you have treated the present one, which has enabled me to get through them more rapidly. I now call upon Mr Wood to present the United Kingdom's formal submission.

THE PRESIDENT: Thank you very much.

MR WOOD: Mr President, just as a formality, I should recall a statement in our letter today that the United Kingdom requests the Tribunal, one, to reject Ireland's request for further provisional measures and, two, to order Ireland to bear the United Kingdom's costs in these proceedings. Thank you, Mr President.

THE PRESIDENT: Thank you, Mr Wood.

MR O'HAGAN: Mr President, just before you bring the proceedings to a close might on behalf of the Irish legal team express our thanks and appreciation to you, Mr President, and to the members of the tribunal for the courtesy and respect and pleasantness with which you have conducted this arbitration, a difficult one giving rise to very difficult and unusual issues. It has been a pleasure and a great honour for us all to appear before you.

Might I also express my thanks and appreciation to the Secretariat Anne Joyce and Dane Ratcliff for again the great courtesy and respect and good humour with which they have treated us. They have helped us in every possible way from the beginning of these proceedings, and we are very grateful for all of that assistance.

Thank you, Mr President.

THE PRESIDENT: Thank you very much indeed. There is just one matter that I would like to raise before we bring these proceedings to a close at this stage. I would like to refer to Article 1 paragraph 2 of our rules which says "to the extent that nay question of procedure is not expressly governed by these rules or by annex 7 to the Convention or other provisions of the Convention, and the parties have not otherwise agreed, the question shall be decided by the arbitral tribunal after consultations with the parties".

In this respect the Tribunal considers that, in taking decisions in respect of the request for provisional measures, it would be appropriate to apply or be guided by the generally prevailing practice of international tribunals, especially having regard to the rules adopted in this regard by the International Tribunal for the Law of the Sea and also by the International Court of Justice. It was with great pleasure that I listened to both sides referring to these practices.

I am dealing in particular with the question of the procedure adopted by the International Tribunal for the Law of the Sea with respect to provisional measures which it prescribes. In its rules, Article 89 paragraph 5 says that it is open to the Tribunal to prescribe measures different in whole or in part from those requested by the applicant. This is also reflected in rule 75 paragraph 2 of the International Court of Justice. They further go on to provide for the court or the tribunal to request parties to provide information with regard to compliance with any measures that it may prescribe. The Tribunal believes that it is appropriate for it to follow this practice which is well known, but since under our rules we have to consult the parties we felt this is the best opportunity for us to inform the parties that this is what we intend to do. We hope very much that, in the light of what has been said, that this is not going to be controversial, but, for form's sake, we thought that it was necessary for us to inform you.

Unless there are any objections, we take it that we can proceed on that basis. We are very grateful to you.

I would like, at this point, on behalf of the Tribunal, to thank the Agents and all who have appeared on behalf of the parties, particularly, I am sure that you all understand, the two Attorneys-

General, for the assistance that you have given to the Tribunal, not only in this substance of your submissions, but also - and I think that this is very important – for the very courteous and general relaxed atmosphere in which the presentations and the exchanges have been made. We have been greatly assisted by the submissions. There has been a great deal of light, but, thankfully, not too much heat, and for that we are very grateful.

We are particularly grateful, too, for your understanding of the course of action that we have decided to adopt for further proceedings in the case. We fully appreciate that suspension of the hearings will cause considerable inconvenience to the members of your teams and your Governments, but I hope that I need not stress that this is a decision that was not taken lightly by the Tribunal. I express the hope that developments will fulfil the hopes and expectations on which that decision was based.

The Tribunal will now deliberate on the various submissions and, as previously indicated, the decision of the Tribunal regarding further proceedings and on Ireland's Request for Provisional Measures will be embodied in a formal order which we hope to issue some time next week. The terms of the Order will be communicated to the parties by the Registrar and, subsequently, published.

The dates on which the Tribunal has tentatively agreed to meet again have already been notified to the parties. They will be informed in due course if any changes become necessary. I wish again to thank you all for the assistance that you have given to the Tribunal and, until we meet again, I want now to adjourn the hearing and thank you once again. Thank you very much indeed.

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