1992 CONVENTION ON THE PROTECTION OF THE MARINE ENVIRONMENT OF THE NORTH-EAST ATLANTIC

IN THE DISPUTE CONCERNING ACCESS TO INFORMATION UNDER ARTICLE 9 OF THE OSPAR CONVENTION AND THE MOX PLANT

IRELAND v UNITED KINGDOM

MEMORIAL OF IRELAND

7 MARCH 2002

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INTRODUCTION

1. This Memorial is submitted pursuant to the Order of the Arbitral Tribunal, dated 8 December 2001, which set 8 March 2002 as the date by which Ireland was required to submit its Memorial in this arbitration. The Memorial addresses all factual and legal matters relating to Ireland's claim as set out in its amended Statement of Claim dated 10 December 2001 **(Annex 0)**.

2. In summary terms, the dispute is a narrow one. It arises from the refusal of the United Kingdom to provide certain information pursuant to requests for information by Ireland under Article 9 of the OSPAR Convention. Ireland has requested full disclosure of two reports commissioned by the United Kingdom Government in the context of the authorisation of a new facility at Sellafield for the production of mixed oxide (MOX) fuel ("the MOX plant"). The material which has been refused relates *inter alia* to sales prices, sales volumes, lifespan of the plant, production capacity of the plant, the number of people who will work there, the number of transports to and from the plant, and whether there are any firm contracts for the supply of MOX. Ireland wishes to have access to the information refused in order to be in a better position to consider the impacts which the commissioning of the MOX plant will or might have on the marine environment. Ireland also wishes to be able to assess the extent of the compliance by the United Kingdom with its obligations under the 1992 Convention on the Protection of the Marine Environment of the North East Atlantic ("1992 OSPAR Convention"), the 1982 United Nations Convention on the Law of the Sea ("1982 UNCLOS) and various provisions of European Community law, including in particular Council Directive 96/29/EURATOM, which lays down basic safety standards for the protection of the health of workers and the general public against the dangers arising from ionising radiation.

3. Ireland's arguments may be summarised as follows:
   - the information which the United Kingdom is refusing to disclose constitutes 'information … on the state of the maritime area, on activities or measures adversely affecting or likely to affect it and on activities or measures introduced in accordance with the Convention' within the meaning of Article 9(2) of the OSPAR Convention;
   - in respect of most of the information the United Kingdom has given no reasons to justify its refusal, and is accordingly required to disclose the information forthwith, failing which it is in continuing violation of its obligations under the OSPAR Convention;
   - in respect of the remaining information the United Kingdom has sought to justify its refusal on the grounds that disclosure would affect "commercial confidentiality" within the meaning of Article 9(3) of the OSPAR Convention;
   - in relying on the "commercial confidentiality" exception the United Kingdom has (a) claimed that BNFL's competitive position would be affected by disclosure, but (b) has provided no explanation as to why such competitive position would be affected, and (c) cannot so demonstrate in the absence of any viable competition to the MOX

plant; accordingly the United Kingdom is not entitled to rely on the exception; and

- further or alternatively, even if the United Kingdom can rely in principle on the 'commercial confidentiality' exception, any such reliance is overridden by the public interest in disclosure.

4. This Memorial is divided into two Parts. Part 1 addresses the factual background and issues. Part 2 addresses the law, including in relation to jurisdiction and the merits. The Memorial concludes with the relief sought by Ireland. There follow several Annexes, including the Report of Gordon MacKerron.

PART 1: FACTUAL BACKGROUND

5. This first Part of the Memorial is divided into three sections. Section A provides an introductory factual background, describing in brief the history of nuclear activities at the Sellafield site and the history of radioactive discharges into the Irish Sea authorised by the United Kingdom. This Section is important because it explains the reasons for Ireland's longstanding – and continuing – concerns about the impacts for the Irish Sea of nuclear activities at Sellafield, and the implications of the MOX plant for a further intensification of such activities. Section B describes the nature and history of the authorisation of the MOX plant, including the principal actors involved in the authorisation, operation and other aspects of the MOX plant, the nature of the MOX fuel market, and the proposed transfer of the MOX plant back to the UK Government (the Liabilities Management Authority) at some point in 2002. Section C describes the history of this dispute, including the communications between Ireland and the United Kingdom relating to the request for the information, and its refusal.

SECTION A: HISTORICAL BACKGROUND

6. Sellafield is a nuclear site presently operated by British Nuclear Fuels plc ("BNFL"). The site is located in Cumbria, in the North West of England, in very close proximity to the Irish Sea **(Annex 6)**. There is no dispute between the parties that Ireland has a legitimate interest in activities authorised by the United Kingdom which may impact upon the Irish Sea, in particular because of the potential impacts of radioactive emissions from the Sellafield facility into the Irish Sea and the consequential impacts for the land and maritime areas of Ireland.

7. The reprocessing of nuclear waste fuel and discharges began at Sellafield (then called Windscale) in the 1950s. Ireland's concern has been acute since 1957, when a major accident occurred at Windscale. In 1993 a fuel fabrication facility – known as the MOX Demonstration Facility (MDF) – began producing small quantities (8 tonnes a year) of Mixed Oxide (MOX)

fuel for Light Water Reactors. In 1994 the Thermal Oxide Reprocessing Plant (THORP) began operating, reprocessing spent nuclear fuel elements from Advanced Gas Cooled Reactors and Light Water Reactors, separating plutonium and uranium from fission products. A second reprocessing facility – the B205 Plant – reprocesses spent fuel from Magnox reactors at Sellafield. The MOX plant which is the subject of this dispute is intended by BNFL to significantly increase MOX fuel production for use in Pressurised Water Reactors and Boiling Water Reactors. The MOX plant will make use of reprocessed nuclear fuel produced at the THORP facility. Ireland is concerned that the MOX plant will not only lead to a new source of discharges, but will also result in an intensification of the use of the THORP plant, with greater radioactive discharges into the marine environment. The MOX plant is intended to have a maximum output of 120 tonnes of heavy metal per year. No nuclear reactors in the United Kingdom currently use MOX and so at present all the MOX fuel produced at this facility will have to be exported. Ireland understands that such dispatches will be by sea, through the Irish Sea. However, the United Kingdom has refused to provide Ireland with any information on such transports, including that (if any) to be found in the PA and ADL Reports.

8. Routine (intended) and accidental discharges of radionuclides into the Irish Sea from Sellafield have occurred since the early 1950s. Ireland has consistently protested against these discharges, and against the use of the Sellafield site for nuclear activities. As a neighbouring coastal State, Ireland is deeply concerned at the nuclear pollution occurring to its territorial waters, and to waters over which it exercises sovereign rights. Ireland's concerns are shared by many of the coastal States in the area. The discharges from Sellafield increased significantly in the 1970s, resulting in severe pollution to the Irish Sea, now one of the most radioactively polluted in the world. The Secretary of State for Trade and Industry has recently stated in the House of Commons that:

> 'In the earlier years of the nuclear programme, the standards of environmental care and regard for long-term safety were not as stringent as those we apply today. Only limited and often superficial records of what the facilities contained were kept. Indeed, the clean-up challenges involved were not recognised as such until well into the 1980s.' (House of Commons Hansard Debates for 28 Nov 2001, col. 990, **Annex 7**)

9. The impact on the marine environment of discharges from Sellafield is felt on the quality of the waters and on marine life. Lobsters and seaweeds, in particular, are known to contain radio-isotopes arising from Sellafield operations. The radioactivity can contaminate beaches, with consequent risks to human health, and has an impact on the tourist trade and fisheries. The levels of radioactive discharges from the Sellafield site have decreased since the 1970s, though they still remain significant, and the discharges of the past decades will last for many thousands of years. Although discharges from the MOX plant alone will, on the limited information given by the United Kingdom, be relatively low, one of Ireland's concerns is that authorisation of the MOX plant will increase activity, and thus discharges, from the

connected THORP plant.[1] Discharges from that plant are much higher, and in Ireland's view constitute harm to the marine environment in their own right.

10. It is important to note that both Ireland and the United Kingdom have recognised the serious nature of nuclear pollution to the marine environment, and are publicly committed to large reductions in that pollution. On 23 July 1998 the Ministers of the OSPAR Contracting Parties and the European Commission adopted the Sintra Ministerial Declaration. That Declaration contained the following commitment:

> 'WE AGREE, in addition, to prevent pollution of the maritime area from ionising radiation through progressive and substantial reductions of discharges, emissions and losses of radioactive substances, with the ultimate aim of concentrations in the environment near background values for naturally occurring radioactive substances and close to zero for artificial radioactive substances…
>
> WE SHALL ENSURE that discharges, emissions and losses of radioactive substances are reduced by the year 2020 to levels where the additional concentrations in the marine environment above historic levels, resulting from such discharges, emissions and losses, are **close to zero**.' (**Annex 8**, emphasis added)

The Sintra Declaration underscores Ireland's concerns about any activities at Sellafield which will increase discharges from that site.

SECTION B: THE MOX PLANT AND THE MOX FUEL MARKET

11. In the early 1990s BNFL sought authorisation for the construction at the Sellafield site of a new MOX plant for the commercial manufacture of fuel from a mixture of uranium and plutonium oxides. Construction of the MOX plant was completed in 1996. On 3 October 2001 the United Kingdom Government took a decision authorising operations **(Annex 5)**. The plant was commissioned on 20 December 2001.

(i) Mox fuel, its market and competition

12. The production of MOX fuel involves three stages.

(I) Transport of Spent Reactor Fuel Elements

13. The uranium and plutonium oxides which are to be manufactured into MOX fuel are intended to come from sources both within and outside the United Kingdom, requiring the transportation of unknown - and potentially very large - quantities of these hazardous radioactive materials in close proximity to the territory of Ireland. Ireland is particularly concerned about the transport of plutonium, by far the more hazardous of the two elements, which forms the basis for MOX fuel production.

[1] The relationship between the MOX and THORP plants is discussed further at para. 16 below.

14. The shipment of spent nuclear fuel from overseas customers to the Sellafield site takes place on dedicated civil freighters. Shipments to the United Kingdom have passed and will continue (if permitted) to pass in close proximity to Ireland, through the Irish Sea. The former shipments of spent nuclear fuel from Japan to Europe under old contracts ended over a year ago, but any new contracts would re-establish shipments over a period of at least four years. Since the 1970s several thousands of tonnes of spent nuclear fuel have been shipped to Sellafield. Further shipments are likely to take place on vessels operated by Pacific Nuclear Transports Limited, the shipping arm of BNFL, which operates two vessels – *Pacific Pintail* and *Teal.* The fuel containers are built to withstand a fire of 800 degrees C for thirty minutes, followed by immersion. In any serious fire both the temperature and the time are likely significantly to exceed these value. The spent reactor fuel elements contained in heavy casks would be at risk of corrosion, with consequent release of radioactive materials into the marine environment.

(II) Manufacture of MOX fuel

15. MOX fuel is made from a mixture of depleted uranium dioxide and plutonium dioxide. It typically contains 3% to 10% plutonium-239, the remainder being depleted uranium-238. The radioactivity in plutonium dioxide makes it a highly toxic material. If a person inhales less than 100 micrograms of plutonium dioxide, it is highly probable that that person will develop lung cancer. If a few milligrams are ingested there is a high probability that the person will develop liver or bone cancer.

16. The plutonium to make MOX comes from reprocessing 'spent' uranium fuel – fuel which has already been used in a nuclear reactor. The MOX process is therefore intimately connected with spent fuel reprocessing: a MOX plant requires a reprocessing plant to supply it with raw materials. In the case of Sellafield, the MOX plant requires the materials produced at the THORP plant, and the functioning of the MOX plant will intensify activity at THORP, with a corresponding increase in the production of radioactive waste. The Report of Gordon MacKerron ('the MacKerron Report') explains in greater detail that MOX production is an expensive alternative to the storage of spent nuclear fuel, rather than being an economically competitive alternative fuel. The Report also explains the link between the MOX plant and the THORP plant, a major source of Ireland's concern. **(Annex 18**, Executive Summary and Section 1.1)

17. In the MOX plant the uranium dioxide and plutonium dioxide are mixed – by grinding, milling and blending – to produce a micronised, granulated powder. During these processes a dry lubricant (zinc stearate) and a conditioner (an agent to control porosity) are added. The granulated powder is then milled, pressed and sintered in an atmosphere of argon-hydrogen. This in turn produces a fused matrix of ceramic dioxide. This sintered MOX is in the form of cylindrical pellets produced to dimensions specified by the customer. Pellets are stored on the Sellafield site until they are required for the production of reactor fuel rods.

18. The production of fuel rods involves placing the MOX pellets in a zirconium alloy sheath that is purged with helium. This forms a sealed fuel rod, which is 2 to 3 meters long. The MOX fuel rods are then assembled: for a Pressurised Water Reactor the fuel assembly typically comprises 17x17 rods, a total of about 72,000 pellets, and for a Boiling Water Reactor the fuel assembly typically comprises 8x8 rods, a total of about 16,000 pellets. These fuel assemblies are transported to the reactor and inserted into the reactor core.

19. The MOX production process involves the production of radioactive wastes in solid, liquid and gaseous forms. A significant proportion of these liquid and gaseous wastes will be discharged directly into the Irish Sea or into the atmosphere. Information relating to the intended discharges of radioactive substances from the MOX plant is limited. Until 3 October 2001 what was known was drawn principally from the 1993 Environmental Impact Statement. **(Annex 9)** This confirmed that the plant would produce 'various solid radioactive wastes, principally in the form of plutonium contaminated material' comprising process waste and maintenance waste, in an annual amount of 'about 120' cubic metres (1993 Environmental Statement, para. 4.34-35). The Environmental Statement does not state where this waste will go. It provides merely that:

> '[I]t is intended to route all [plutonium contaminated waste] to the proposed new Water Treatment Complex (WTC) where it will be compacted to originally half its original volume before being prepared for ultimate disposal in a manner consistent with the Company's and the UK's strategy for the disposal of intermediate level waste.'

20. The 1993 Environmental Statement confirms also that the MOX plant will produce liquid radioactive effluents, and that:

> 'effluent arising from floor washings and fuel assembly wash will be about 107 m3/yr; this will be discharged, via THORP, to existing site facilities. The arisings will be conditioned as necessary to make them suitable, after monitoring, for discharge to sea.'

21. This confirms that radioactive wastes will be discharged directly into the Irish Sea. It does not indicate the types or quantities of radioactivity of the radionuclides associated with this waste. The 1993 Statement further confirms that the MOX plant 'will have the potential for different levels of radioactive contamination and airborne activity' (para. 4.39). The Statement confirms that some of the categories of ventilation extracted from the plant will be discharged into the atmosphere, and that they will have a radioactive content (para. 4.41). The United Kingdom's decision of 3 October 2001, authorising the commissioning of the MOX plant, confirms this, stating that 'the aerial and liquid discharges and the solid wastes arising from the operation of this practice at the SMP can be managed within the constraints of the existing Sellafield discharge authorisations.' (para. 60) **(Annex 5)**

22. The operation of the MOX process involves particular risks which distinguish it from other fuels:

- The MOX plant is an automated plant relying extensively on an untried software-based system for control of the process:
- The production process involves the use of an advanced powder technology. Experience in other powder processing industries indicates that processes which are dependent on powder technology are not very reliable, since small changes in conditions can affect the powder and result in poor mixing or powder jams;
- Problems associated with powder technologies are exacerbated when, as in the MOX process, small batches need to be produced to variable formulations;
- Lapses in the quality of inspections carried out by BNFL may have extremely serious safety implications and may have consequences which are time consuming and costly to rectify. In relation to Japan, it is still not clear that the loss of customer confidence caused by the Data Falsification Incident (see para. 49 below) will be possible to rectify at all.
- Although MOX ceramic melts at a temperature of about 1800 degrees Centigrade, surface oxidation occurs at the much lower temperature of about 250 degrees Centigrade if the fuel is exposed to air; at relatively low temperatures MOX pellets give off breathable particles following relatively short exposure periods.

23. For all of these reasons Ireland is concerned to know whether appropriate safety standards are being applied, and properly budgeted for. Ireland assumes that information on these costs is set out in the PA and ADL Reports, but the United Kingdom has declined to make the information available to Ireland.

(III) Transport of MOX fuel

24. No nuclear power stations in the United Kingdom currently use MOX fuel. This means that all MOX fuel assemblies produced at Sellafield will have to be transported abroad by sea. All ships are vulnerable to being involved in an accident. The probability of collision and fire on board the MOX carriers has been assessed for the 'at sea' legs of the voyage, excluding the risk when the carrier ships are in the approaches to ports and berthing in harbours. The effect of an accident on board depends on whether there is a fire and/or explosion involving the MOX fuel, and whether the ship sinks. A fierce fire could cause the plutonium in the MOX fuel to vaporize, resulting in the release of a large number of breathable particles into the atmosphere and the sea. If the ship were to sink, any unrecovered fuel assemblies would eventually corrode and release MOX fuel into the sea. The vessels are, of course, also vulnerable to terrorist attack, which could have the same results. There is also the risk that terrorists could take the MOX fuel from the ship and attempt to separate the plutonium to produce a nuclear weapon. Since the United Kingdom has not shared with it any information as to MOX transports or security arrangements, Ireland is extremely concerned that its territorial waters, and waters over which it exercises sovereign rights, may be at risk of contamination from MOX transports.

(IV) The MOX Market

25. To understand the significance of the MOX plant, and its relationship with THORP, it is important to understand the market in which it operates. This is discussed in greater detail below (paras 147-153). MOX is part of the wider market for the management of spent nuclear fuel, and is inextricably bound up with nuclear reprocessing, both economically and physically. As the MacKerron Report explains in greater detail, the market for MOX is shaped by the need for nuclear power companies to manage the plutonium separated from spent nuclear fuel. MOX is one – particularly expensive relative to buying Uranium-only nuclear fuel – way of returning plutonium from spent nuclear fuel to its owners (**Annex 18**, para. 1.1, esp. 1.1.7)

26. The MOX market, and in particular the absence of competitors within that market, is discussed further below (paras. 147-153).

(ii) British Nuclear Fuels plc and the proposed Liabilities Management Authority

27. The United Kingdom Department of Trade and Industry states that 'British Nuclear Fuels plc (BNFL) is a public limited company managed on a *fully* commercial basis and wholly owned by the Government.'[2] (Emphasis added). This suggests that the MOX plant should be treated as a normal commercial activity. However it is to be noted that BNFL's liabilities exceed its assets (see below at para. 30).

28. BNFL was formed in April 1971 from the Production Group of the United Kingdom Atomic Energy Authority, and was originally called British Nuclear Fuels Limited. It took over the Authority's activities, property, rights, obligations and liabilities. It was incorporated in England under the Companies Acts 1948 to 1967[3] in 1971 and became a public limited company (BNFL plc) in 1984. The United Kingdom government, represented by the Secretary of State for Trade and Industry, is the only shareholder. All profits from BNFL therefore go to the United Kingdom.

29. Since BNFL is a public limited company it has the same corporate structure and is subject to the same rules as any other commercial enterprise. It has the same duties to its shareholders, and the same objective of maximizing profit. However, the unusual feature of BNFL is that it has only one shareholder, the Government. The identity of the shareholder(s) would make no difference in certain contexts, for example a straightforward contractual dispute. However, for the purposes of commercial confidentiality, the identity of the shareholder is highly significant. When balancing BNFL's commercial interests against the competing value of freedom of information on the environment, embodied in the OSPAR Convention and the relevant EU Directives, it is highly relevant that the 'commercial interests' of BNFL

[2] DTI website, Energy, Nuclear Industry, entry on BNFL.
[3] Now repealed and replaced by the Companies Act 1985.

are in reality the commercial interests of the United Kingdom. The United Kingdom, when deciding to omit information from the Reports, is therefore acting on the basis of its own financial interests. Such a situation justifies particularly close scrutiny of claims of commercial confidentiality.

30. On 28 November 2001, the Secretary of State for Trade and Industry (Ms Patricia Hewitt) announced to the House of Commons the creation of a new body, the Liabilities Management Authority (LMA), which is expected to commence activities some time in 2002. (See House of Commons Hansard Debates for 28 Nov 2001, Cols. 990 to 995). The Secretary of State set out the Government's view of nuclear activities in the United Kingdom. These are largely regarded as liabilities which must be managed, rather than as assets. It is apparent that the financial position of BNFL contributed to the decision to remove it from control of, inter alia, the Sellafield site: the Secretary of State told the House that 'BNFL's chairman informed me today that the company's board has concluded that its long-term liabilities are now estimated to exceed its assets' (col. 993). **(Annex 7)**

31. Given the financial position of BNFL, and the huge amount of radioactivity on numerous contaminated nuclear sites requiring remedial work, the LMA has been given the task of 'systematically and progressively reducing the hazard posed by legacy [nuclear] facilities and wastes. It will have a specific remit to develop an overall UK strategy for decommissioning and clean-up.' (col. 991) A detailed explanation of the structure of the LMA was not given. However, it is clear that, rather than being a commercial entity, the LMA will be a governmental body.

> 'I therefore propose to set up a Liabilities Management Authority responsible for the Government's interest in the discharge of public sector nuclear liabilities, both BNFL's and the [United Kingdom Atomic Energy Authority's]…
>
> [T]o enable the LMA to exercise its role across the whole public sector civil nuclear liabilities portfolio, the Government now propose to take on responsibility for most of BNFL's nuclear liabilities and the associated assets. The most significant of those will be the Sellafield and Magnox sites.' (col. 991-2)

32. When considering the extent to which information relating to MOX is commercially confidential, Ireland draws attention to the fact that the MOX plant will shortly be run, not by a commercial entity, but by the United Kingdom Government. This makes it even clearer that the United Kingdom's financial interests are directly at stake, and that any claim to commercial confidentiality – if a government can claim such protection at all – must be scrutinised particularly carefully.

(iii) Regulatory background

33. The construction and operation of the MOX plant is subject to the United Kingdom's obligations under public international law and regulatory obligations under English law, which incorporate requirements of European Community law. Among these obligations are the requirements that (1) the

United Kingdom complies with its obligations to protect the marine environment of the Irish Sea under international law, including the 1992 OSPAR Convention and the 1982 United Nations Convention on the Law of the Sea ("1982 Convention"), (2) the developer (BNFL) must subject the project to an environmental impact assessment procedure and the relevant United Kingdom authorities must take account of an environmental impact statement in deciding whether to authorise, and (3) the relevant United Kingdom authorities satisfy themselves that the project is "justified", that is to say that *inter alia* its economic benefits are greater than its economic costs (see below at paras. 37-41).

(I) Obligations under international law

34. The authorisation of the MOX plant is subject to the obligations of the United Kingdom under international law, including in particular the 1992 OSPAR Convention and the 1982 Convention. Ireland has consistently taken the position that in proceeding to authorise the MOX plant the United Kingdom has failed to take account or proper account of these obligations. The obligations include the requirements of the 1998 Sintra Ministerial Declaration (adopted by the States parties to the 1992 OSPAR Convention, including the United Kingdom and Ireland) to reduce concentrations of artificial radioactive substances in the environment to "close to zero" by the year 2020 (see para. 10 above). Ireland considers that the decision to authorise the MOX plant is inconsistent with the 1998 Sintra Ministerial Declaration, which implies a significant reduction of discharges from Sellafield rather than the increase which will result from the operation of the MOX plant and consequential greater activity of the THORP plant.

35. On 25 October 2001 Ireland initiated proceedings against the United Kingdom under the 1982 Convention, alleging violations of a number of Articles of that Convention (the Statement of Claim in relation to the UNCLOS case is set out at **Annex 14**).

(II) Environmental impact assessment

36. BNFL prepared an Environmental Impact Statement for the MOX plant in 1993 **(Annex 9)**. The construction of the MOX plant was authorised on the basis of that Statement. Ireland has consistently expressed its concern to the United Kingdom about the inadequacy of the Environmental Impact Statement, *inter alia* on the grounds that the Statement had failed to take into account material developments in English, EC and international law (including the OSPAR Convention) since 1993, and that it failed adequately to assess the impact of discharges into the marine environment by reference to these developments. Ireland has initiated proceedings under the 1982 United Nations Convention on the Law of the Sea challenging the

environmental impact assessment procedure (including the Statement) as being incompatible with Article 206 of the 1982 Convention.

(III) The obligation to "justify" the MOX plant

37. Under European Community (EURATOM) law the United Kingdom is required to "justify" the MOX plant before its operation can be authorised. Article 6 of Directive 80/836/EURATOM provides *inter alia*:

> "The limitation of individual and collective doses resulting from controllable exposures shall be based on the following general principles:
>
> a) every activity resulting in an exposure to ionising radiation shall be **justified by the advantages which it produces**" (Emphasis added)

38. Directive 96/29/Euratom replaced Directive 80/836/EURATOM with effect from 13 May 2000. Article 6 of Directive 96/269 also imposes the duty to justify:

> "(1) Member States shall ensure that all new classes or types of practice resulting in exposure to ionising radiation are **justified in advance of being adopted by their economic, social or other benefits** in relation to the health detriment they may cause." (Emphasis added)

39. The requirement to justify is based upon the recommendations of the International Commission on Radiological Protection (ICRP). Paragraph 112 of ICRP Publication 60 provides *inter alia*:

> "No practice involving exposures to radiation should be adopted unless it produces sufficient benefit to the exposed individuals or to society to offset the radiation detriment it causes. (*The justification of a practice*)"

40. The obligation to justify therefore requires an identification of the economic costs and the economic benefits of the proposed project. The economic costs include the costs of measures taken to protect the environment, and any environmental costs incurred by the activity. The obligation of "economic justification" has been recognised by the English courts: see *R v Secretary of State for the Environment, ex parte Greenpeace Ltd and Lancashire County Council* [1994] 4 AER 352.

41. In its decision of 3 October 2001 **(Annex 5)**, the United Kingdom decided that the MOX plant was 'justified'. The effect of that decision is to allow the MOX plant to operate, and new radioactive discharges to enter the Irish Sea. The decision on justification was based largely on the PA and then the ADL Reports. The environmental consequences of the decision are self-evident.

SECTION C: THE DISPUTE BETWEEN IRELAND AND THE UNITED KINGDOM CONCERNING ARTICLE 9 OF THE 1992 OSPAR CONVENTION

42. The dispute between Ireland and the United Kingdom concerns information removed from the public domain versions of the PA Report and the ADL Report. These two Reports were commissioned by the United Kingdom Government to assist it in reaching a view as to whether the MOX plant was "justified" in accordance with EURATOM law, and in particular to serve as the basis for public consultations (see below, paras. 43-54). This Section describes:
    - the circumstances in which the PA and ADL Reports were commissioned and their use in five public consultations in the UK (1);
    - the information removed from the PA Report (2);
    - the information removed from the ADL Report (3);
    - the steps taken by Ireland to obtain the information removed from the PA and ADL Reports and the response of the United Kingdom.

(1) The commissioning and use of the PA and ADL Reports

43. For the purposes of complying with the obligation to justify the MOX plant, in January 1997 BNFL provided the UK Environment Agency (the relevant body) with information relating to the proposed MOX plant. The United Kingdom decided to hold a public consultation to address the issues associated with the justification of the MOX plant.

44. From February to April 1997 the UK Environment Agency held a **first public consultation** on issues associated with the commissioning and operation of the proposed MOX plant. During the course of the consultations concerns were raised *inter alia* about the lack of information made available to the public on the case for the proposed MOX plant, taking into account the requirements of Directive 80/836/EURATOM. The United Kingdom decided to obtain an independent opinion as to BNFL's economic case for the proposed MOX plant. The Environment Agency appointed a private company - the PA Consulting Group ("PA") - to carry out an independent assessment on the "economic justification" of the MOX plant and to prepare a report on the basis of which the public consultation could be carried out. Ireland took part in the first round of public consultation.

45. PA produced a Final Report dated 12 December 1997 ("the PA Report"). The PA Report was not made available to the public. Instead, the Government of the United Kingdom published a "public domain" version of the PA Report ("1997 Public Domain PA Report") which excluded certain material on the grounds of commercial confidentiality: PA Consulting Group, *Final Report - Assessment of the BNFL's Economic Case for the Sellafield MOX Plant*, 12 December 1997, Version Released December

1997; **Annex 2A**. The 1997 Public Domain PA Report formed the basis of a **second public consultation** held from January to March 1998. Around 100 responses were received to the second consultation, including from the Irish Government, which again requested a full copy of the PA Report.

46. In October 1998, following the second public consultation, the UK Environment Agency concluded that plutonium commissioning, full operation and decommissioning of the proposed MOX plant was "justified" and proposed draft decisions on *inter alia* the justification of the proposed MOX plant. The draft Agency decision was forwarded to the UK Secretary of State for the Environment, Transport and the Regions and the UK Minister of Agriculture, Fisheries and Food ("the UK Ministers").

47. In June 1999, the UK Ministers reached a preliminary decision that the evidence indicated that the proposed MOX plant was economically justified. However, the UK Ministers considered that the amount of information which had been excluded from the 1997 Public Domain PA Report (on grounds of commercial confidentiality) was more than strictly necessary. The Ministers therefore decided that a fuller (but not complete) version of the PA Report should be published and circulated for further consultation, and that it should exclude only that material (such as contract prices) whose publication would cause unreasonable damage to BNFL's commercial operations or to the economic case for the SMP plant itself. This revised version of the PA Report would then form the basis for a further public consultation.

48. The **third public consultation** was held from July - August 1999. For the purposes of this consultation a revised but still heavily censored version of the PA Report was published ("1999 Public Domain PA Report"): see **Annex 2B**. The 1999 Public Domain PA Report version of the PA Report was essentially the same as the earlier version, save that the latter included in place of the data removed on grounds of "commercial confidentiality" a description of its nature and an explanation as to why it had been removed: see further below at para. 55 to 57. Ireland made a further submission on 30 July 1999, once again asking for a full copy of the PA Report.

49. In September 1999 allegations were made about the MOX Demonstration Facility (see para. 7 above). In particular, it was alleged that certain data relating to MOX fuel destined for a Japanese customer had been falsified. The United Kingdom Nuclear Installations Inspectorate (NII) of the Health and Safety Executive carried out an investigation, and concluded that:

> 'It is clear that various individuals were engaged in falsification of important records but a systematic failure allowed it to happen. It has not been possible to establish the motive for this falsification, but the poor ergonomic design of this part of the plant and the tedium of the job [measuring MOX pellets] seem to have been contributory factors. The lack of adequate supervision has provided the opportunity.' (Health and Safety Executive, Nuclear Installations Inspectorate, 'An investigation into the falsification of pellet diameter data in the MOX demonstration facility at the BNFL Sellafield site and the effect of this

on the safety of MOX fuel in use, Report released 18 February 2000', page iii.)

This resulted in a further delay in the authorisation of the MOX plant.

50. In March 2001, following the data falsification scandal and concerns relating to the size of the international market in MOX fuel, the United Kingdom initiated a **fourth public consultation** on the justification of the MOX plant. The consultation was based on the 1999 Public Domain PA Report and two new documents prepared by BNFL. Once again Ireland requested a complete and uncensored copy of the PA Report to enable it to make a meaningful contribution to the consultation (letter of 22 May 2001, **Annex 4**). No such copy having been provided, these proceedings were initiated by Ireland on 15 June 2001.

51. By this time the United Kingdom had decided not to proceed to consider authorisation on the basis of the PA Report. The United Kingdom decided instead to commission a new report on the "justification" of the MOX plant - from Arthur D. Little, another private company – and to carry out a further public consultation. The Report from Arthur D. Little ("the 2001 ADL Report") was submitted to the UK authorities on 15 June 2001.

52. On 27 July 2001 the UK Department for the Environment, Food and Rural Affairs and the UK Department of Health initiated a **fifth public consultation** on justification. On that date it released a public domain version of the new report prepared by Arthur D. Little Ltd ("2001 Public Domain ADL Report"): see **Annex 3A**.

53. In its submission to the fifth public consultation Ireland also once again sought to obtain an unedited copy of the 2001 ADL Report, in order to be able to make a meaningful contribution to the consultation.

54. On 3 October 2001 the United Kingdom adopted its decision on the justification of the MOX plant: see **Annex 5**. That decision relied on the findings of the ADL Report rather than the PA Report. The United Kingdom decided that the MOX plant was economically justified, the benefits from the plant outweighing the detriments to health and otherwise. The decision briefly considers the environmental impact of the MOX plant, concluding that:

> 'Therefore, the Secretaries of State consider that the radiological detriments which would arise in association with the manufacture of MOX fuel from plutonium separated in THORP and belonging to foreign customers would be very small and that any effects on wildlife would be negligible. They also consider that the aerial and liquid discharges and the solid wastes arising from the operation of this practice at the SMP can be managed within the constraints of the existing Sellafield discharge authorisations.
>
> The Secretaries of State are satisfied that the manufacture of MOX fuel can be carried out within discharge limits which will effectively protect human health, the safety of the food chain and the environment generally. They are satisfied that regulatory measures can be taken to

ensure that the SMP operates safely and within such discharge limits.' (paras. 60 and 61)

(2) Information removed from the PA Report

55. The PA Report (1997 and 1999 Public Domain Versions) served as consultation documents in four rounds of public consultations on justification. For the purposes of these proceedings reference need only be made to the 1999 Public Domain PA Report. The 1999 Report concludes:

> "PA's examination of the BNFL economic case indicates that the operation of the [MOX plant] will produce a strongly positive [Net Present Value ("NPV")], which is very unlikely to be less than £100m, exceeds £300m in many options, and on average amounts to £230m. In all ranges PA considers plausible for the key variables, the NPV remains strongly positive" (Executive Summary).

56. In reaching this conclusion, however, the PA Report takes no account of sunk capital costs.[4] Further, the 1999 Public Domain Version of the PA Report omits *inter alia* all numerical information relating to assumptions as to production capacity and costs, sales volumes and prices, contractual commitments, price and decommissioning costs, start-up date, plant maintenance down time, fixed costs, level of manning, operational costs, and the quantity of fuel already on site. Of additional concern to Ireland is the removal of information relating to the number of transports that are likely to occur, and how the costs of these transports (including costs of protective measures to be taken by the Irish Government, if any) are to be assessed and integrated into the overall economic analysis. A full list of the information which has been omitted is set out at **Annex 3**. The resultant gaps in the information make it impossible for a reader of the 1999 Public Domain PA Report to assess whether the PA Report's conclusions are objectively justifiable and reasonable, and whether the MOX plant should be authorised to operate, and whether discharges into the Irish Sea and further international transports of radioactive materials in and around the Irish Sea should be permitted. The excised information also makes it impossible for Ireland to assess whether, inter alia, the costs of security measures and insurance against the consequences of accidents have been fully taken into account.

57. The justification for the removal of the information is set out at Section 1.3 of the 1999 Public Domain PA Report, and relates to concerns as to "commercial confidentiality". This states, inter alia, that:

- BNFL asserted that elements of the economic case for the MOX plant are "commercially sensitive" and therefore that certain information in the PA report should be withheld from the public domain;

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[4] The PA Report states that:

> 'As the costs of building the plant are already sunk, [the Reference and Base] cases examine only the further costs and revenue streams that would arise from commissioning and operating the SMP or withdrawing from the MOX fuel fabrication business.' (**Annex 2B**, para 1.1)

The capital costs of construction are understood to exceed £300 million (£470 million according to the ADL Report, **Annex 3A**).

- PA "was asked to provide the Agency with an independent view on the validity of BNFL's assertion" as to commercial sensitivity;
- PA relied on regulation 4(2) of the Environmental Information Regulations 1992 (which incorporate in England the provisions of Directive 90/313/EEC on freedom of access to environmental information);
- In seeking to rely on regulation 4(2) (which creates exceptions to the right to information in the case of the information which is capable of being treated as confidential) PA "identified a series of specific criteria to determine the information the placing of which in the public domain could prejudice the commercial interests of BNFL", specifically that information should not be placed in the public domain if it would *inter alia*:
  1. Allow or assist competitors to build market share or to benchmark their own operations;
  2. Allow or assist competitors to attack the BNFL customer base and erode business profitability;
  3. Allow or assist new competitors to enter the market;
  4. Allow customers or competitors to understand the specific economics and processes of the BNFL MOX fuel fabrication business;
  5. Breach contractual confidentiality requirements with customers or vendors.

(3) The omissions from the ADL Report

58. The ADL Report was commissioned following the MOX fuel falsification incident in August 1999 at BNFL's MOX Demonstration Facility, and a new business case put forward in 2001 by BNFL. As with the PA Report, the ADL Report deals with the justification of the MOX facility. It too ignores all capital and related costs of constructing the proposed plant, which it estimates to be in the region of £470 million (**Annex 3A**, p.5). Nevertheless it concludes that the proposed plant will produce a 'net economic benefit' over its life of between £199 million and £216 million (Executive Summary, p1/2). It is to be noted that (1) the 'net economic benefit' (profit) of the proposed MOX plant is significantly less than its cost of construction which will never be recovered, and (2) there is a significant lowering of the 'profit' as compared with that estimated by the PA Report.

59. Like the PA Report, the basis upon which the ADL Report reaches its conclusion cannot be assessed objectively, because the public domain version of the ADL Report omits, among other things, total projected MOX production capacity; prices; total MOX volumes; all information as to the identity of customers, the status of contracts with them, and the volume contracted for; operating costs; transport revenues and costs; transport information; and the projected life span of the MOX facility. A full list of the omissions is set out at **Annex 3B**. The extent and type of omissions are similar to the PA Report. As with the PA Report, the resulting gaps make it

impossible for the reader to assess whether ADL's conclusions are objectively justifiable and reasonable, whether the costs of environmental protection are adequate and have been accounted for, and whether the proposed MOX facility is economically justified. The ADL Report contains no discussion of commercial confidentiality, and identifies no criteria for omitting information, other than one paragraph at the foot of the Table of Contents **(Annex 3A)**:

> "Footnotes in italics refer to changes made after the report was submitted to DEFRA. In the majority of cases, the changes have been prompted by the need to exclude from this published version any specific comments or figures whose publication would cause unreasonable damage to BNFL's commercial operations or to the economic case for the Sellafield MOX plant itself."

60. The footnotes referred to do not explain or justify the omissions. They simply state, in extremely brief terms, what is missing: for example, 'cost information' or 'volume information'. The Report does not define what it considers to be 'unreasonable damage', and makes no reference to the United Kingdom Environmental Information Regulations 1992 or to the United Kingdom's international obligations. No criteria are identified to explain or justify the suppression of information.

(4) Ireland's efforts to obtain the information removed from the PA and ADL Reports and the response of the United Kingdom

61. Since 1997 Ireland has sought to obtain unexpurgated copies of the PA Report and, since July 2001, the ADL Report. Ireland has sought the information because it is concerned about the impact of MOX on the environment, particularly from the intensification of activities at THORP, and because it wishes to ensure that the justification process is taken in a transparent manner, allowing proper public scrutiny of the economic justification, or otherwise, of the MOX plant, given the potential effect on the marine environment of the Irish Sea. Ireland is also concerned to ensure that all relevant costs (including in particular environmental costs) have been taken into account.

62. In March 1998, in the context of the second public consultation, Ireland's submission protested at the omission of data from the PA Report:

> 'The report does not release information on cost and price data and on plant process and performance. As a consequence, many of the assertions made in the report are unverifiable and BNFL's economic case is not open to public review.' (para. 3. See **Annex 4**)

No response was received from the United Kingdom.

63. On 30 July 1999, in the context of the third public consultation, Ireland requested that the United Kingdom provide it with "an unedited and full

copy of the [1999 Public Domain] PA Report": **Annex 4**[5] It received no response to that request, and no explanation as to the failure to respond or to provide the information.

64. By letter dated 25 May 2000 Ireland's Department of Public Enterprise wrote to the United Kingdom Department of the Environment, Transport and the Regions (**Annex 4**). In that letter Ireland explained that it had been advised by external counsel that there was no justification in law for the refusal of the United Kingdom to provide Ireland with the information it had requested, namely "the information deleted from the PA Report". The letter went on to state that the refusal "is inconsistent with the United Kingdom's obligations *inter alia* under Directive 90/313/EC (on freedom of access to information on the environment) and the 1992 OSPAR Convention, which entered into force for Ireland and the United Kingdom on 25 March 1998." The letter went on:

> "Initially and for present purposes relating to the United Kingdom's obligations under Article 9 of the OSPAR Convention, Ireland reiterates its request that it be provided with the following information (relating inter alia to production and sales volumes, start dates and transports) which has been omitted from the PA Report:
>
> - Details as to sales volumes; time estimates for increasing market share; probability of achieving higher sales volumes; % of plutonium already on site, either separated or awaiting separation from the spent fuel; probability of being able to win contracts for recycling fuel in 'significant quantitites'; information in sales volume tables (PA Report, para. 2.4 – Sales Volumes (p2-11));
>
> - Annual production capacity required in light of estimated sales demand and estimated eventual annual production capacity, relating to the five phases of the MOX plant production process (PA Report, para. 2.6 – Production Capacity (p2-17));
>
> - Figures for sales volumes and sales prices assumed for MOX fuel together with other matters omitted (PA Report, para. 2.10 – Conclusions (p2-24/5));
>
> - Plant Capacity and commissioning; potential start dates for plutonium commissioning; the anticipated period of

[5] The 1999 consultation invited views to be submitted to the UK Ministers. On 30 July 1999 Ireland submitted its views, *inter alia* that:

1. the information upon which the British Government was basing its decision did not provide a proper basis for determining whether the proposed MOX plant was justifiable,
2. the information which had been provided did not indicate that the proposed MOX plant was in fact economically viable, and

3. the proposed MOX plant (and international transports of plutonium related thereto) raised other issues of European and international law **(Annex 4)**.

time before maximum capacity is attained, and maximum throughput figures (PA Report, para. 3.5 – Date Input (p3-28));

- MOX transport: number of voyages per year (PA Report, Appendix B-37, 40)).”

65. No immediate written response was received to that request. The dispute was discussed bilaterally and at the meeting of the OSPAR Commission in June 2000. The dispute was not resolved.

66. By letter dated 27 October 2000 (i.e. more than six months after Ireland’s request in its letter of 25 May 2000) the United Kingdom responded with a refusal to make available to Ireland the information requested pursuant to Article 9 of the OSPAR Convention (see **Annex 4**). The United Kingdom letter stated:

> “[T]he UK Government does not wish to prejudice the commercial interests of an enterprise by disclosing commercially confidential information. We note the views set out in your 25 May letter, but nevertheless believe that disclosure of the information which you have sought would cause such harm.”

67. On 9 February 2001 (see **Annex 4**) the Irish Minister of State wrote to the UK Minister of the Environment reiterating the request for information. His letter stated:

> “In conclusion, it now appears that a dispute exists between Ireland and the United Kingdom as to the interpretation and application of Article 9 of the OSPAR Convention. Once again I invite your Government to disclose the information requested in the letter of 25 May, or alternatively to propose appropriate means for resolving our differences. In the absence of information or an early resolution of our differences my Government reserves its right to invoke the procedures envisaged by Article 32 of the Convention.”

68. On 15 May 2001 officials from Ireland’s Nuclear Safety Division of the Department of Public Enterprise met in London with officials of the UK Department of the Environment, Transport and the Regions. The meeting had been requested to inform the United Kingdom that Ireland was preparing an application under Article 32 of the OSPAR Convention, that the matter was being put formally to Government, and that a continuing refusal by the United Kingdom would result in the initiation of Article 32 proceedings.

69. On 17 May 2001 the United Kingdom Minister of State responded to the letter from the Irish Minister of State dated 9 February 2001, apologizing for the delay. No information was provided, but the Minister expressed the hope that he would be able to provide a substantive reply “shortly”. No substantive reply was received until 5 September 2001 (**Annex 4**), nearly six months after the request. That reply provided no reasons beyond a general assertion of confidentiality (see para. 73 below).

70. Also in May 2001, in the context of the fourth public consultation, Ireland requested once again an unexpurgated copy of the 1999 Public Domain PA Report. In his letter of 22 May 2001 **(Annex 4)** the Irish Minster of State, Mr. Joe Jacob, stated that:

> "It is the view of the Irish Government that the information contained in the Consultation Papers and the absence of critical information relating to primary economic factors including critical data relating to other cost factors such as transportation and security, makes it impossible for the reader to assess the justification of the [MOX plant] as is required under the [Directive 96/29/Euratom]. […]
>
> The Irish Government in its submissions in regard to the previous Consultation Rounds sought the unedited and full copy of the then PS Consulting Report. In the absence of this information from the Consultation Papers, which is critical to assessing the justification of the SMP, the Irish Government is reserving its right to pursue legal measures for the release of the information."

No response was received until 5 September 2001.

71. On 7 August 2001, in the context of the fifth public consultation, Ireland requested an unedited copy of the ADL Report:

> "Due to the omission of economic data from the public domain versions of both the PA and ADL reports it is not possible for us to make an independent analysis of the economic justification of the proposed plant. It is our opinion that the omissions cannot be justified on the grounds of commercial confidentiality.
>
> In this context I would be very grateful if your Department could pass on to my Department a copy of the full version of the ADL report. In the event that a copy of the full report is not provided Ireland reserves the right to amend and extend its application in the OSPAR arbitration filed on 15 June last to include the information omitted from the ADL report." (**Annex 4**)

72. In its letter of 7 August 2001, Ireland also requested the United Kingdom not to authorize the proposed MOX plant pending the outcome of the OSPAR arbitration proceedings. The United Kingdom declined to given an undertaking not to authorize the plant (Letter of 13 September 2001, **Annex 4**).

73. By letter dated 5 September 2001, Mr. Richard Wood of DEFRA explained the basis for the refusal to accede to Ireland's request for information. This constituted the most "substantive" response to Ireland's request. His letter said *inter alia*:

> "[M]y authorities do not accept that the information excised from the public version of the ADL Report is information falling within the scope of Article 9(2) of the OSPAR Convention. […]
>
> [E]xcisions have been made on the grounds that publication of that information would cause unreasonable damage to the commercial operations of [BNFL] or to the economic case for the Sellafield MOX plant itself." (**Annex 4**)

74. By letter dated 13 September 2001, Mr. Michael Wood, Legal Adviser at the Foreign and Commonwealth Office set out the United Kingdom's position in greater detail: see paragraph 114 below. Mr Wood also stated that the United Kingdom does not accept that the information omitted from the PA and ADL Reports falls within the scope of Article 9(2) of the OSPAR Convention.

(5) Summary of the dispute

75. The omissions from the Reports are listed in full in **Annex 3** (PA Report) and **Annex 3B** (ADL Report). In terms of subject matter the information which has been refused relates to the following areas:

(A) Estimated annual production capacity of the MOX facility;
(B) Time taken to reach this capacity;
(C) Sales volumes;
(D) Probability of achieving higher sales volumes;
(E) Probability of being able to win contracts for recycling fuel in 'significant quantitites';
(F) Estimated sales demand;
(G) Percentage of plutonium already on site;
(H) Maximum throughput figures;
(I) Life span of the MOX facility;
(J) Number of employees;
(K) Price of MOX fuel;
(L) Whether, and to what extent, there are firm contracts to purchase MOX from Sellafield;
(M) Arrangements for transport of plutonium to, and MOX from, Sellafield;
(N) Likely number of such transports.

76. The United Kingdom has not claimed that items (B), (D), (E), (F), (G), (H), (I), (J), (L), and (M) may be withheld on grounds of "commercial confidentiality": see letter of Michael Wood of 13 September 2001, (**Annex 4**).

77. The dispute therefore appears to have crystallized around two points (see letter of Michael Wood of 13 September 2001, **Annex 4**):

- In relation to all the information requested by Ireland, is it within the scope of Article 9(2) of the OSPAR Convention?
- In relation to items the information requested by Ireland for which the United Kingdom claims commercial confidentiality (items (A), (C), (K) and (N) above), is the United Kingdom entitled to rely on the "commercial confidentiality" exception contained in Article 9(3)(d) of the Convention?

PART 2: THE LAW

78. It is against this factual background that the dispute between Ireland and the United Kingdom concerning the interpretation and application of Article 9(3)(d) of the 1992 OSPAR Convention falls to be assessed. This Part of the Memorial is divided into three sections. Section A describes the OSPAR Convention and provides the legal background against which Article 9 falls to be interpreted. Section B addresses the jurisdiction of the Arbitral Tribunal. Section C addresses the legal merits of Ireland's claim, namely that upon a proper construction and application Article 9(3)(d) of the OSPAR Convention does not permit the United Kingdom to withhold the information from the PA and ADL Reports which Ireland has requested. Section D sets out Ireland's arguments as to why the United Kingdom is not entitled to rely on the 'commercial confidentiality' exception to refuse disclosure, and Section E argues that, even if the United Kingdom is entitled in principle to rely on that exception, the public interest still requires disclosure.

SECTION A: THE 1992 OSPAR CONVENTION

79. The OSPAR Convention **(Annex 1)** was adopted by 14 States and the European Community on 22 September 1992, and entered into force on 25 March 1998. Ireland and the United Kingdom became parties on that date. It replaced two earlier conventions: the 1972 Oslo Convention for the Prevention of Marine Pollution by Dumping from Ships[6] and the 1974 Paris Convention for the Prevention of Pollution form Land-Based Sources.[7] The OSPAR Convention applies to a maritime area which includes the whole of the Irish Sea.[8]

80. The Convention's Preamble indicates the underlying rationale for the adoption of the Convention. The Preamble recognizes that "the marine environment and the fauna and flora which it supports are of vital importance" as well as the "inherent worth of the marine environment of the North-East Atlantic and the necessity for providing coordinated protection for it". It calls for concerted action at national and regional levels to prevent and eliminate marine pollution. The Preamble considers the results of the 1992 UN Conference on Environment and Development[9] and expressly recalls "the relevant provisions of customary international law reflected in Part XII of the United Nations Law of the Sea Convention and, **in particular, Article 197 on global and regional cooperation for the protection and preservation of the marine environment**" (emphasis added). The Preamble also considers that "the common interests of States

[6] 932 UNTS 3, in force 7 April 1974.
[7] 13 ILM 546 (1974), in force 6 May 1978.
[8] Art. 1(a).
[9] Which includes the Rio Declaration on Environment and Development **(Annex 11)** and Agenda 21.

concerned with the same marine area should induce them to cooperate at regional or sub-regional levels".

81. The Convention establishes a Commission and a permanent Secretariat, which is based in London. The Commission's task is to oversee implementation of the Convention and, to that end, to adopt decisions and recommendations (Article 10). The Commission does not have an enforcement function. The Convention establishes substantive obligations for the Parties. These obligations are pertinent to the present proceedings. Ireland's request for information (under Article 9 of the Convention), which has been refused by the United Kingdom, is intended in part to enable Ireland to assess the extent to which the United Kingdom has complied with its substantive obligations under the Convention.

82. In relation to substantive obligations, Article 2 of the OSPAR Convention is entitled 'General Obligations'. Article 2(1) provides:

    a. The Contracting Parties shall, in accordance with the provisions of the Convention, take all possible steps to prevent and eliminate pollution and shall take the necessary measures to protect the maritime area against the adverse effects of human activities so as to safeguard human health and to conserve marine ecosystems and, when practicable, restore marine areas which have been adversely affected.
    b. To this end Contracting Parties shall, individually and jointly, adopt programmes and measures and shall harmonise their policies and strategies.

    To achieve these objectives, Article 2(2) provides that the Parties "shall apply" the precautionary principle[10] and the polluter-pays principle. Article 2(3) commits the Parties to define and then apply "best available techniques and best environmental practice … including, where appropriate, clean technology" (Ireland considers that access to the full versions of the PA and ADL Reports will assist, *inter alia*, in determining whether the commitment in Article 2(3) has been complied with, by reference to cost implications).

83. The OSPAR Convention prohibits any dumping at sea (by vessels) of all radioactive substances and radioactive wastes: see Article 4 and Article 3(3) of Annex 2.

84. The Convention also imposes strict requirements to prevent pollution of the Irish Sea from land-based sources such as the MOX and THORP plants. Article 3 of the Convention requires the United Kingdom to take "all possible steps to prevent and eliminate pollution from land-based sources in accordance with the provisions of the Convention, in particular as provided for in Annex 1". Annex 1 of the OSPAR Convention sets forth a number of

[10] By virtue of which "preventive measures are to be taken when there are reasonable grounds for concern that substances or energy introduced, directly or indirectly, into the marine environment may bring about hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea, even when there is no conclusive evidence of a causal relationship between the inputs and the effects".

mandatory requirements which require the United Kingdom (in relation to the MOX plant) *inter alia*:

- to require the use of "best available techniques" and "best environmental practice";
- to "take preventive measures to minimise the risk of pollution caused by accidents";
- where adopting measures in relation to radioactive substances, including waste, to take account of the recommendations of other appropriate international organisations and agencies and the monitoring procedures recommended by these international organisations and agencies;
- to provide that discharges to the maritime area, and releases into water or air which reach and may affect the maritime area are strictly subject to authorisation or regulation by its competent authorities, which authorisation or regulation must "implement relevant decisions of the Commission which bind the United Kingdom".
- To provide for a system of regular monitoring and inspection by its competent authorities to assess compliance with authorisations and regulations of releases into water or air.

85. In 1998 Ministers of the OSPAR parties adopted the Sintra Ministerial Statement **(Annex 8)**. In relation to radioactive substances the Ministers agreed

> "to prevent pollution of the maritime area from ionising radiation through progressive and substantial reductions of discharges, emissions and losses of radioactive substances, with the ultimate aim of concentrations in the environment near background values for naturally occurring radioactive substances and close to zero for artificial radioactive substances."

The Ministers further undertook to ensure

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

The Ministers also noted

> "the concerns expressed by a number of Contracting Parties about the recent increases in technetium discharges from Sellafield and their view that these discharges should cease [and] that the UK Ministers have indicated that such concerns will be addressed in their forthcoming decisions concerning the discharge authorisations for Sellafield."

The Ministers welcomed

> "the announcement of the UK Government that no new commercial contracts will be accepted for reprocessing spent fuel at Dounreay, with the result of future reductions in radioactive discharges to the maritime area."

86. Following the Sintra Ministerial Declaration the OSPAR Commission adopted a *Strategy with regard to Radioactive Substances*, to give effect to the Ministers' undertakings: **Annex 16**.

87. The commitment of the OSPAR Parties to eliminate nuclear reprocessing which may cause discharges to the marine environment is further reflected in two OSPAR Commission Decisions – Decision 2000/1 and Decision 2001/1 – which call upon Parties to review their current authorisation for discharges or releases of radioactive substances from nuclear reprocessing facilities, with a view to implementing the non-reprocessing option for spent nuclear fuel management (dry storage) and taking preventive measures to minimise the risk of pollution: **Annex 17**. The Decisions were adopted by qualified voting majority, with the United Kingdom abstaining on the vote on both Decisions.

SECTION B: THE TRIBUNAL HAS JURISDICTION OVER THE DISPUTE

88. Article 32 of the OSPAR Convention ('Settlement of Disputes') provides for the settlement of disputes concerning the interpretation or application of the OSPAR Convention.

89. Article 32 of the OSPAR Convention provides that Contracting Parties which cannot otherwise settle a dispute shall, at the request of any one of those Contracting Parties, submit to arbitration under the conditions laid down in Article 32 of the Convention. No prior procedures need to be exhausted before arbitration proceedings may be initiated under Article 32. Nevertheless, as set out above, Ireland had over a period of more than a year, raised its concerns in relation to the dispute by correspondence and in bilateral meetings and within the OSPAR Commission. In its letter of 25 May 2000 **(Annex 4)** Ireland drew attention to Article 32 of the OSPAR Convention on settlement of disputes, inviting the United Kingdom to engage in an exchange of views and to discuss the matter with the OSPAR Commission. The letter then stated:

> "In the event that the dispute is not resolved during the meeting of the Commission, Ireland would reserve its right to invoke the arbitration procedure envisaged by Article 32 of the OSPAR Convention."

90. Ireland's efforts to resolve the dispute have been unsuccessful and it remains unresolved.

91. Article 32(3)(b) of the OSPAR Convention requires Ireland to inform the Commission that it has requested the setting up of an arbitral tribunal. Ireland did so on 15 June 2001.

92. All the requirements of Article 32 have been satisfied. The Arbitral Tribunal has jurisdiction over this dispute.

SECTION C: THE INFORMATION REQUESTED BY IRELAND IS WITHIN THE SCOPE OF ARTICLE 9(2) OF THE OSPAR CONVENTION

93. Article 9(1) of the Convention provides that

> "The Contracting Parties shall ensure that their competent authorities are required to make available the information described in paragraph 2 of this Article to any natural or legal person, in response to any reasonable request, without that person's having to prove an interest, without unreasonable charges, as soon as possible and at the latest within two months."

94. Article 9(2) of the OSPAR Convention provides that "environmental information" is

> "any available information in written, visual, aural or data-base form on the state of the maritime area, on activities or measures adversely affecting or likely to affect it and on activities or measures introduced in accordance with the Convention."

95. Beyond the general and unparticularised assertion made in the letter of 13 September 2001 (see para. 74 above), the United Kingdom has given no reasons for considering that the information contained in the PA and ADL Reports does not fall within the class of information, disclosure of which is required under Article 9.

96. Throughout the period when Ireland was making its requests the United Kingdom never claimed, or even suggested, that the PA or ADL Reports were not "environmental information". Those Reports themselves make no such claim. Ireland submits that it is self-evident that the information in both Reports constitutes information "on activities … adversely affecting or likely to affect [the maritime area]" within the meaning of Article 9(2) of the Convention. As explained at paragraphs 19-20 above, MOX production is an activity which will inevitably and certainly affect the maritime area, including Ireland's waters. It will do so principally in three ways: (1) routine (intentional) discharges from MOX; (2) routine (intentional) discharges from THORP, due to the intensification of activity aimed at producing materials for the MOX plant; (3) discharges from possible accidents or terrorist attacks, either from the MOX plant itself or from transports of radioactive waste to, or MOX from, the plant. On the United Kingdom's own

information, radioactive waste from the MOX plant will be discharged into the Irish Sea.

97. Clearly, the admitted discharge of radioactive waste adversely affects the maritime area. Such waste, with a lifespan of many thousands of years, harms marine life and damages human health and economic activity. Moreover, the United Kingdom, in adopting the Sintra Ministerial Statement of 1998, has *itself* recognised the long-term damage done to the marine environment by radioactive discharges, and has undertaken to reduce background radiation to "close to zero" by 2020. In light of this commitment, it would be surprising in the extreme if the United Kingdom were to argue that the discharge of radioactive waste into the Irish Sea does *not* adversely affect the maritime area, or does not even have the potential to do so.

98. The information omitted from the PA and ADL reports covers a variety of subjects, and it may be that the United Kingdom seeks to argue that individual items of omitted information do not relate *directly* to activities which adversely affect the maritime area. However, Ireland submits that this is the wrong approach. The correct approach is to look at the information *as a whole*. The purpose of the PA and ADL Reports is to examine the justification of the MOX plant. That plant makes possible an activity – MOX production – which will undoubtedly have an adverse impact on the maritime area covered by the OSPAR Convention. The omitted information relates closely to various important aspects of that activity, and contributed to the determination whether that activity should be permitted. It would be unduly restrictive to read Article 9(2) as referring only to *environmental* information about such an activity. That qualification does not appear in Article 9, and it is clear that the spirit of openness and access to information embodied in the Convention requires a wider interpretation: information must be disclosed (subject to the exceptions in Article 9(3), if applicable) if it relates to an activity having, or potentially having, an adverse effect on the maritime area. In this regard, the Convention is committed to the precautionary principle (see para. 82 above).

99. Ireland submits that it is clear that *every* aspect of the omitted information is covered by Article 9(2). The *entirety* of each Report is directed exclusively to assessing, using a wide range of information, the prospects of the MOX plant. All the omitted information relates to the functioning of the MOX plant: in fact, it has been omitted *precisely because* the United Kingdom considers that disclosure would harm the economic functioning of the plant. The United Kingdom cannot argue simultaneously that the information is so integral to the MOX process that it cannot be disclosed because of the adverse economic effects, and that the information has so little to do with the MOX process that it is not within the scope of Article 9(2).

100. Ireland's interpretation of Article 9(2) is fully consistent with international and domestic law and practice. The 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('the Aarhus Convention') **(Annex 10)** confirms that the requirements of openness and transparency apply to a wide range of

information. The United Kingdom and Ireland have both signed the Convention, which came into force in October 2001, and are in the process of ratifying it. The definition of 'environmental information' contained in Article 2(3) of that Convention includes "cost-benefit and other economic analyses and assumptions used in environmental decision-making", making express that which is implicit in the 1992 Convention.

101. The United Kingdom cannot plausibly claim that the PA report and the ADL report – produced and relied upon in environmental decision-making – does not constitute 'environmental information'. To confine such information to data directly addressing the impact of the project on the environment would be too narrow. Ireland's interpretation of the OSPAR Convention is consistent with the clear trend in international law and practice towards extensive disclosure of environmental information in all its forms. Indeed, Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties directs the interpreter to 'take into account … any relevant rules of international law applicable in the relations between the parties.' A narrow interpretation of Article 9(2) would be inconsistent with the United Kingdom's – and Ireland's – commitment to these principles.

102. The European Court of Justice has also given a wide definition to the concept of 'environmental information' contained in Directive 90/313/EC, as unamended. In Case C-321/96 *Mecklenburg v Kreis Pinneberg der Landrat* [1999] All ER (EC) **(Annex 15)**, the Court held that the concept of 'information relating to the environment' contained in Article 2 of the Directive was intentionally broad, so that to constitute such information it was sufficient for a statement of views put forward by an authority to be an act capable of adversely affecting or protecting the state of one of the sectors of the environment governed by the Directive. Therefore, the Directive covered a statement of views given by a countryside protection authority in consent proceedings, if capable of influencing the outcome of those proceedings. In Ireland's view, this is very similar to the present case: it is clear that the PA and ADL Reports were a significant part of the consultation process, and that ADL's statement of views was relied on heavily in the decision of 3 October 2001 to authorise the MOX plant and allow new discharges of radioactive substances into the Irish Sea.

103. Ireland submits that, given the extensive definition given to 'environmental information' in international and domestic law and practice, and given the clear words of Article 9(2) of the OSPAR Convention, it is unsustainable for the United Kingdom to assert that the information in the PA and ADL Reports, taken as a whole, is not within the scope of Article 9(2).

SECTION D: THE UNITED KINGDOM IS NOT ENTITLED TO RELY ON THE "COMMERCIAL CONFIDENTIALITY" EXCEPTION TO REFUSE DISCLOSURE

104. Article 9(3)(d) of the OSPAR Convention provides, in relevant part, that:

'(3) The provisions of this Article shall not affect the right of Contracting Parties, in accordance with their national legal systems and applicable international regulations, to provide for a request for such information to be refused where it affects: […]

(d) commercial and industrial confidentiality, including intellectual property; […]

(4) The reasons for a refusal to provide the information requested must be given.'

105. The OSPAR Convention therefore provides for an *exceptional* right to refuse disclosure. In this Section Ireland sets forth the conditions under which the right to refuse information may be relied upon. The conditions are:

(i) the burden is on the United Kingdom to justify its entitlement to invoke the exception;

(ii) the United Kingdom must give reasons for refusing to provide the information requested;

(iii) the United Kingdom must satisfy the Tribunal that the refusal is "in accordance with its national legal system and applicable international regulations"; and

(iv) the United Kingdom must satisfy the Tribunal that disclosure of the information will "affect … commercial and industrial confidentiality"

(i) The United Kingdom has the burden of justifying its entitlement to invoke the exception

106. The structure of the OSPAR Convention is clear: information falling within the scope of Article 9(2) is to be disclosed unless it falls within one of the exceptions contained in Article 9(3). These are narrowly defined. There is a clear presumption in favour of disclosure. This presumption is backed up by the obligation to give reasons for a refusal to provide the information requested. Given the context – freedom of information in relation to potentially serious threats to the marine environment – and the presumption in favour of disclosure, 'reasons' must be taken to mean full, clear reasons which show that the authority has good grounds for deciding that the information falls into one of the restricted categories, and that the authority has given proper consideration to its duties of disclosure, taking all relevant factors into account. An objective process of compliance with regulatory requirements must be carried out in a transparent manner, consistent with ordinary principles of decision-making in a democratic society. Concerned persons, whether natural or legal, are entitled to know why they are not allowed to see information about potentially serious threats to the environment, and to know what sort of information is being kept from them. Interferences with this entitlement must be kept to a minimum. This is all the more so where the request comes from a friendly, neighbouring State with a legitimate interest in the matter.

107. As set out above, Ireland submits that it is clear that the information which has been removed from the PA and ADL Reports constitutes 'information' within the meaning of Article 9(2). Therefore the presumption under OSPAR is in favour of its full disclosure.

108. For non-disclosure to be lawful, the burden is on the United Kingdom to show that the omitted information 'affects commercial confidentiality', giving full reasons for this decision. The burden is not on Ireland to show why it should have the information. Giving full reasons would require the United Kingdom, *inter alia*, to identify accurately each type of information, the specific commercial interests which would be threatened by the disclosure of the information, how this threat arises from the disclosure of the particular pieces of information, and the reasons why partial disclosure is impossible.[11] The United Kingdom has a duty to justify each and every omission. In keeping with the aim of making non-disclosure as limited as possible, the United Kingdom must show why the drastic step of omission was necessary. In order to allow public scrutiny of the justification process, and in order to allow the reader to understand the report, and its implications for the marine environment of the Irish Sea, the omitted information must be summarized, and its nature given, as fully as possible.

109. The United Kingdom has clearly failed to discharge this burden of proof. The PA and ADL Reports do not identify clearly (or in some cases, at all) the nature of the information omitted. Where criteria for withholding information are given, these are rudimentary. These problems, internal to the Reports, are discussed below. However, for the purposes of OSPAR, the obligation in international law is on the United Kingdom itself to advance clear and convincing reasons for withholding the information. It has not done so. The omission of almost all significant information from both Reports has never been justified by detailed reasons. Justification has been expressed by the United Kingdom in the most cursory terms. The mere assertion of confidentiality is not enough.

110. In Ireland's view, therefore, the United Kingdom has not come close to discharging the burden of proof. It has barely attempted to do so. Not only has the legal burden not been met, but in practical terms, until the United Kingdom gives full and particularized reasons for withholding the information, Ireland is not in a position to put its case fully. Ireland wishes the issues as to confidentiality to be fully aired in this Arbitration, but until the United Kingdom gives detailed reasons for non-disclosure, it is difficult for Ireland to present full argument on the substance of the dispute, namely whether or not the omitted information 'affects' commercial confidentiality within the meaning of Article 9. These submissions, and the MacKerron Report, are directed to the unparticularised claims given to date by the United Kingdom. In many cases, especially in the ADL Report, information is not only omitted, but no explanation is given as to its nature, source or

[11] By 'partial disclosure' is meant disclosure of the information in disguised or aggregated form. For example, if a table lists the amount of MOX ordered by various customers, instead of deleting the whole table, an aggregate figure could be given. Alternatively, instead of a specific figure, for example a price, a range of figures could be given. This possibility is discussed further below at 160-161.

import. Conclusions are stated with no way of questioning the reasoning which led to them. Ireland reserves the right to supplement the arguments contained in this Memorial in a Reply, should this appear necessary. Ireland is, however, also mindful of the desirability of a speedy resolution to this dispute.

(ii) The United Kingdom must give reasons for refusing to provide the information requested

111. The 'reasons' provided by the United Kingdom to justify withholding the information are to be found in the PA Report and in correspondence between Ireland and the United Kingdom. The ADL Report contains no discussion of confidentiality, except for the brief paragraph quoted above (para. 59). Since it is impossible to see what criteria have been applied in editing the report, Ireland submits that the omissions from the ADL Report must, at the very least, be reconsidered in the light of clearly stated confidentiality criteria.

112. At page 1-6, the PA Report states, *inter alia*, that: 'Information should not be placed in the public domain if it would:

1. Allow or assist competitors to build market share or to benchmark their own operations;
2. Allow or assist competitors to attack the BNFL customer base and erode business profitability;
3. Allow or assist new competitors to enter the market;
4. Allow customers or competitors to understand the specific economics and processes of the BNFL MOX fuel fabrication business;
5. Breach contractual confidentiality requirements with customers or vendors.'

113. The Report goes on to state that '[i]n addition, information should not be placed in the public domain that would breach security and safeguards requirements with respect to plutonium quantities, locations and movements.'

114. More detailed reasons for non-disclosure have been given on one occasion by the United Kingdom in correspondence with Ireland. In his letter of 13 September 2001 **(Annex 4)**, Michael Wood, Legal Adviser to the Foreign and Commonwealth Office, stated that:

> "… I should like to make it clear that the United Kingdom does not accept that the information which is the subject of Ireland's statement of claim is information of the kind contemplated by Article 9, paragraph 2, of the Convention. It is therefore not information to the disclosure of which Ireland is entitled.
>
> Moreover, the information requested by Ireland cannot be disclosed for the reasons given in article 9, paragraph 3(d), of the Convention. In particular:

i) details of **secured and forecast sales volumes** must be kept confidential since their disclosure would enable competitors to gain undue advantage, by attracting from BNFL sales forecast but not yet secured;

ii) details of the required **annual production capacity** must be kept confidential since their disclosure would enable both customers and competitors to gain undue advantage: the former could use this information to drive down the price that they would otherwise pay for BNFL's product (on the premise that a manufacturer may sell at a low price, or even at a loss, in order to maintain required production capacity); the latter could use it to validate or modify their own economic models;

iii) figures for **sales volumes and sales prices** assumed for MOX fuel must be kept confidential since their disclosure would enable both customers and competitors to gain undue advantage: the former could use this information to drive down the price that they would otherwise pay for BNFL's product (on the premise that a manufacturer may sell at the price assumed in his economic model, although the negotiated price would otherwise be higher); the latter could use it to misrepresent in the market place BNFL's economic strength or practices;

iv) details of **Plant capacity and commissioning start dates** for plutonium commissioning must be kept confidential since their disclosure would enable both customers and competitors to gain undue advantage: the former could use this information to drive down the price that they would otherwise pay for BNFL's product (on the premise that a manufacturer which is already meeting its costs by existing sales, may contract to sell additional production at a relatively low price in order to make full use of Plant capacity); the latter could use the information to secure sales considered by customers to be beyond BNFL's capacity or in advance of BNFL's start date for plutonium commissioning;

v) information relating to the **number of voyages annually** must be kept confidential because it may assist competitors to gain information on BNFL's pattern of supply." (**Annex 4**, emphasis added.)

115. In relation to the five types of information identified, Ireland submits that the 'reasons' given by the United Kingdom are manifestly inadequate, and cannot be said to amount to 'reasons' within the meaning of Article 9(4) of the OSPAR Convention. The limited attempts to justify non-disclosure refer to shifting, ill-defined criteria and leave central issues unresolved. It is entirely unclear whether commercial confidentiality is being claimed for all or just some of the omitted information; whether the commercial threat comes from customers, competitors or both; which companies the United

Kingdom considers to be credible competitors; what the United Kingdom considers to be the relevant market; and how each item of omitted information would cause serious harm to BNFL if disclosed.

116. Ireland notes that no reasons have been given for the non-disclosure of all other information. In respect of this information the requirements of Article 9(4) of the OSPAR Convention have not been met and the Tribunal should, Ireland respectfully submits, order disclosure.

(iii) The United Kingdom must satisfy the Tribunal that the refusal is "in accordance with its national legal system and applicable international regulations"

117. The requirements of Article 9(3) establish a further condition which the United Kingdom must satisfy: the refusal to disclose the information must be in accordance with the United Kingdom's national legal system and applicable international relations. Therefore, while this dispute falls to be resolved entirely on the basis of the OSPAR Convention, that Convention directs the Tribunal to consider domestic and international law and practice.

118. The position in English and international law in relation to the withholding of information on the basis of commercial confidentiality is considered in detail below (paras. 123-145). As that discussion will show, domestic and international law imposes strict criteria for the withholding of information. Those criteria could, in summary, be described as procedural and substantive. On the procedural level, the body seeking to withhold information must show that it has struck a fair balance between the rights of the public to know and the right of the commercial entity. It must consider less restrictive alternatives to non-disclosure, and, most importantly, must give detailed reasons for its decision. On the substantive level, the information in question must be *genuinely* commercially confidential, and that confidentiality must be significantly and adversely affected by disclosure. The meaning of these terms is considered below. Ireland submits that, on examination of domestic and international law, the United Kingdom's blanket refusal to disclose the information is not consistent with the standards of its own law and practice. Nor is it consistent with emerging international standards, in particular those which the United Kingdom has signed up to under the 1998 Aarhus Convention. Moreover, Ireland emphasises that the burden is on the United Kingdom to satisfy the Tribunal otherwise.

(iv) The United Kingdom must satisfy the Tribunal that disclosure of the information will "affect … commercial and industrial confidentiality"

119. The burden is on the United Kingdom to satisfy the Tribunal that disclosure of the information requested by Ireland will "affect … commercial

confidentiality". This part of the Memorial begins by defining the meaning of the words "affect" and "commercial confidentiality", before setting out the conditions that must be satisfied for the United Kingdom to be able to rely on Article 9(3)(d). The United Kingdom has justified its reliance on Article 9(3)(d) on the basis that (1) disclosure of information would result in competitive disadvantages for BNFL or (2) violate contractual provisions against disclosure. However, Ireland will show that (1) there is no competition in the market for the production of MOX fuel, that (2) even if there was, disclosure of the information requested would not affect competition, that (3) the United Kingdom has not provided any evidence supporting its claim that there exist contractual provisions between BNFL and its competitors requiring non-disclosure, and that (4) even if there were such provisions, the information has been provided to the United Kingdom Government which, as a public authority, is not entitled or required to rely on such contractual provisions.

(a) "Affects" means "adversely affects"

120. It is to be noted that the Convention uses the words 'where it affects' rather than, for example, 'where it relates to'. This indicates a high threshold to justify withholding information: higher than, for example, the original version of the United Kingdom Environmental Information Regulations 1992, which authorizes the non-disclosure of information 'relating to matters to which any commercial or industrial confidentiality attaches.'[12]

121. It is clear from the natural meaning of the words used in Article 9, and from the context and purposes of the Convention, that it is not enough to show that the information *relates* to matters which could be considered confidential. Vague generalizations are not enough. Commercial interests must be *affected*. The word 'affect' necessarily has a negative connotation. Given the spirit of openness and freedom of information with which the requirements of the OSPAR Convention should be interpreted, Ireland takes the view that Article 9 requires the party claiming confidentiality to point to a specific and pressing threat to a clearly defined and legitimate business interest. This presupposes, also, that the entity claiming confidentiality is a genuinely commercial one.

(b) "Adversely affects"

122. In Ireland's submission, it is clear that 'adversely affects' means that the effects of disclosure must be *significantly detrimental*. Given the importance of the right to which Article 9(3) creates exceptions – the right of access to environmental information, the importance of which has been recognized, inter alia, in the Aarhus Convention, to which the United Kingdom is a party[13] – it is submitted that Article 9(3) should be read as subject to a *de*

[12] These Regulations have now been altered by the Environmental Information (Amendment) Regulations 1998, substituting 'affects' for 'relates to': see footnote 14 below.

[13] The Preamble to the Aarhus Convention states that 'adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself', that 'to be able to assert this right and observe this duty, citizens must have access to

minimis exception. To come within Article 9(3), the United Kingdom must demonstrate that *significant* harm would flow from the disclosure of the information.

(c) "Commercial confidentiality"

123. This section considers the approach taken to commercial confidentiality in English and international law and practice. The Tribunal must, of course, decide this dispute by interpreting and applying Article 9 of the Oscar Convention. However, as discussed above (at para. 117), Article 9(3) itself requires that any refusal of information be, inter alia, consistent with the law of the refusing state. This requires an examination of English law, and of the United Kingdom's international commitments. In addition, the Vienna Convention directs the Tribunal to consider international practice as an aid to interpretation (see para. 101 above).

124. The law regarding access to environmental information in the United Kingdom, is set out in the Environmental Information Regulations of 1992 ("EIR"), which give effect to Directive 90/313/EEC. Regulation 3 creates an obligation to make environmental information available, and states:

> "(1) Subject to the following provisions of these Regulations, a relevant person who holds any information to which these Regulations apply shall make that information available to every person who requests it.
>
> (2) It shall be the duty of every relevant person who holds information to which these Regulations apply to make such arrangements for giving effect to paragraph (1) above as secure—
>
> (a) that every request made for the purposes of that paragraph is responded to as soon as possible;
>
> (b) that no such request is responded to more than two months after it is made; and
>
> (c) that, where the response to such a request contains a refusal to make information available, the refusal is in writing and **specifies the reasons for the refusal**." (Emphasis added)

125. The obligation in Regulation 3 is subject to Regulation 4, which sets out the grounds upon which the 'relevant person' can refuse to supply the requested information. This provision states that :

> "4(1) Nothing in these Regulations shall -
>
> (a) require the disclosure of any information which is capable of being treated as confidential; or
>
> (b) authorise or require the disclosure of any information which must be so treated.

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information, be entitled to participate in decision-making and have access to justice in environmental matters', and that 'in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns, and enable public authorities to take due account of those concerns…' **(Annex 10)**

4(2) For the purposes of these Regulations, information is to be capable of being treated as confidential if, and only if, it is information the disclosure of which – […]

(e) would affect the confidentiality of matters to which any commercial or industrial confidentiality attaches, including intellectual property."[14]

126. In 1992 the United Kingdom joined in the adoption the Rio Declaration on Environment and Development, Principle 10 of which provides that:

"Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available…"[15]

127. In 1998 the UK signed the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('Aarhus Convention') **(Annex 10)**. In 2000 the United Kingdom published a proposal for revising the environmental information regime in the light of its commitments under the Aarhus Convention, and in view of the European Commission's proposal to amend the 1990 Directive in June 2000. This proposal is now in its second reading in the European Parliament.[16] The UK's proposal states *inter alia* that public bodies are required to release environmental information to the public on request, as soon as possible, or at the latest within two months, unless one of the exemptions set out in the regime applies, and that environmental

[14] The original provision stated that environmental information could be refused even if it merely related to matters to which any commercial or industrial confidentiality attached. This was recognised as being wider than, and at variance with the United Kingdom's international obligations with regard to access to environmental information. In 1998 Regulation 4 (2) was amended by the Environmental Information (Amendment) Regulations 1998 thus making it more consistent with the United Kingdom's international obligations which required the requested information to affect matters to which any commercial or industrial confidentiality attached.

[15] Adopted at the United Nations Conference on Environment and Development, held in Rio de Janeiro, Brazil, 3 to 14 June 1992 **(Annex 11)** Also adopted at that conference was Agenda 21, Chapter 40 of which, entitled Information for Decision-Making, puts forward proposals for increased public access to information.

[16] That proposal is set out in Commission Document 'COM (2000) 402 Final' at http://europa.eu.int/eur-lex/en/com/pdf/2000/en_500PC0402.pdf. The problem areas identified include the need to draft the exceptions more narrowly, clarify the duty to respond and give reasons for a refusal. While under the current Directive public authorities are entitled to refuse access to environmental information if disclosure simply 'affects' one of the legitimate interests listed in the Directive, the proposed amendments only allow the information to be withheld if disclosure would 'adversely affect' the listed legitimate interests. The amended proposal also requires that 'in each case, the public interest served by the disclosure shall be weighed against the interest served by the refusal. Access to information will be granted if the public interest outweighs the latter interest.'

information should be released unless there are *'compelling and substantive reasons to withhold it'.* [17] (Emphasis added)

128. The EIRs were accompanied by Departmental Guidance on their implementation. The Guidance, at para 40, states that the "the presumption is that environmental information should be released unless there are compelling and substantive reasons to withhold it."[18] It is also worth noting that section 22 of the United Kingdom's Environmental Protection Act 1990 provides that "Information is, for the purpose of any determination under this section, commercially confidential, in relation to any individual or person, if its being contained in the [public] register *would prejudice to an unreasonable degree* the commercial interests of that individual or person." (Emphasis added).

129. It is apparent that the United Kingdom Government has taken the view that the commercial confidentiality exception may be invoked only in these exceptional circumstances.

130. The English courts have had the opportunity to consider the EIRs on at least two occasions. In *R v British Coal Corporation, ex Parte Ibstock Building Products Ltd*[19] **(Annex 15)**, Harrison J adopted a purposive interpretation, stating that:

> "…[T]he purpose of the legislation, it seems to me, is to provide for freedom of access to information on the environment. It would be strange if the legislature had intended that only the bare information itself should be disclosed, without it being possible to ascertain whether it was right, wrong or indifferent."[20]

131. Subsequently the EIRs were considered in *Secretary of State for the Environment, Transport and the Regions and another, ex parte Alliance Against the Birmingham Northern Relief Road and others*[21] **(Annex 15)** where the details of a concession agreement were sought to be kept confidential by the Secretary of State on the grounds, *inter alia*, that it fell within the exception in reg. 4(2)(e). Sullivan J ruled that the language of the regulations was clear: whether information related to the environment was capable of being treated as confidential, and if so, whether it fell within any of the categories in regulation 4(3), were are all factual questions to be determined in an objective manner.

132. On the question of whether there was a duty on the relevant authority to specify the reasons for a refusal, Sullivan J stated that:

> "The purpose of art 3.4 of the Directive, as reflected in regulation 3(2)(c) of the Regulations, is to enable an individual who is refused information to ascertain whether the refusal is well founded in fact and

[17] "Proposal for a revised Public Access to Environmental Information Regime", Consultation Paper, 18 October 2000, available at www.defra.gov.uk/environment/consult/pubaccess/index.htm.
[18] Paras 55-60 deal with commercial confidentiality.
[19] [1995] JPL 836
[20] This was in the context of an application for costs.
[21] [1998] All ER (D) 386

law, or whether it is susceptible to challenge. **That purpose is not fulfilled by the bare assertion that the Agreement is confidential under a particular regulation**. It should be possible to provide some, albeit brief explanation as to why the information sought is confidential, without breaching that confidentiality.' (Emphasis added)

133. Quoting the Department's Guidance, Sullivan J stated that 'disclosure may be withheld only where it would prejudice the commercial interests of an individual or business'. He stated that:

> "There must be **cogent evidence of the need for protection on the ground of confidentiality, and the period of time over which protection is sought must be justified**. The test in respect of other registers of environmental information was whether disclosure 'would prejudice to an unreasonable degree the commercial interests of that individual or person'. [22] (Emphasis added)

134. In this case the Applicants argued that 'commercial or industrial confidentiality' meant specific information which a business needed to keep confidential in order to protect its competitive position, technological know how, or production methods. The respondents contended that the Agreement as a whole fell within the exception by virtue of its very nature as a commercial document which contained a bundle of rights and obligations, which would have financial implications for the parties, and which the parties had agreed should be treated as confidential. They argued that it was unnecessary for there to be evidence of specific harm.

135. Sullivan J recognised that the Directive provided for refusals to requests for information on 'specific and clearly defined cases.' He stated that:

> "In such a context reference to commercial and industrial confidentiality must mean **specific information which an enterprise needs to keep confidential in order to protect its competitive position**, not general knowledge of business organisation or methods (see *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 per Lord Atkinson at pp. 703-705); or 'know how', as described by Brightman J (as he then was) in *Amway Corporation v Eurway International Ltd* [1974] RPC 82, [1973] FSR 213 at pp. 85-87… (Emphasis added)

136. Further,

> "…any derogation contained in the Directive must be construed strictly and proportionately, in a manner which is consistent with achieving the underlying objective of the Directive."

137. This, said Sullivan J, was reinforced by the obligation to separate out non-confidential information. He did not accept the respondent's submission that the agreement, being a commercial document as a whole, fell within regulation 4(2)(e):

> "…To treat the entire Agreement as commercially confidential because it is a commercial document would be contrary to the advice in the

[22] Butterworths Direct, QBD, 29 July 1998.

Department's Guidance. Whilst the Guidance is not authoritative as to the law, it does, in my view, set out a sensible approach to a practical problem."

138. He considered that a balancing act would need to be carried out between whether the public interest that confidence should be protected outweighed the public interest in the disclosure of environmental information under the 1992 Regulations.

139. More recently, the United Kingdom Government has clearly stated that the 'commercial confidentiality' exception must be strictly applied. In proceedings concerning access to information on GMOs, the Ministry of Agriculture, Fisheries and Food (MAFF as it then was), in response to requests for information under the EIR, stated on 4 April 2001 that:

> "We shall treat as being "commercially confidential" **specific information** that an enterprise needs to keep confidential in order to protect its competitive position, rather than general knowledge of business organisation or methods … However, and in any event, as a matter of good administration and due process, we must first ask the suppliers of the requested items of information whether they consider that any of it is commercially confidential on the basis of the **strict test** under the EIR, and if so their reasons." (**Annex 13**, emphasis added)

140. A further statement of the United Kingdom Government's view of the narrowness of the 'commercial confidentiality' exception is contained in a letter from the Pesticide Safety Directorate to a company seeking exemption from disclosure. The Directorate stated that the company could not rely on a "blanket" exemption. The Directorate stated that under the EIR they "must take an objective approach in determining whether some or all of particular documents can truly be regarded as attracting commercial confidentiality.' They also stated that the 'test' they would use to assess this would be "specific information that an enterprise needs to keep confidential to protect its competitive position." According to the Directorate types of data that could be treated as "commercially confidential" were those containing information on formulations, methods of manufacture etc. This was information, which if released would enable a competitor to reproduce or replicate the product developed and compete in the market without incurring the same developmental costs. The Directorate informed the company that in "the absence of any cogent evidence for the need for protection … on grounds of commercial confidentiality" they would not consider the information commercial confidential for the purposes of the EIR **(Annex 13)**. These examples show that the United Kingdom has taken, and continues to take, a narrow view of the scope of commercial confidentiality when acting in its domestic regulatory capacity. In the case of the PA and ADL Reports, the United Kingdom Government has adopted an entirely different standard.

141. Important guidance as to the English law approach to commercial confidentiality, particularly in the context of advisory reports, has been given by the Court of Appeal in the recent case of *London Regional Transport and*

London Underground Limited v The Mayor of London and Transport for London [2001] EWCA Civ 1491. In that case the claimants sought to restrain the Mayor of London and Transport for London, a body of which the Mayor is the Chairman, from publishing an independent report by Deloitte and Touche into the economic viability of certain aspects of the privatisation of London Underground. They claimed that the report contained commercially confidential information which had been provided by companies bidding to run various parts of the Underground, and which would cause commercial damage if made public. Their case appeared to have been strengthened by the fact that Transport for London had signed contractual confidentiality agreements with the providers of the information (see below, paras. 154 and following). However, the Court of Appeal refused to give an injunction, approving the reasoning of Sullivan J at first instance. Sullivan J had set out the relevant principles at paragraphs 40 to 43 of his judgment, which are worth quoting at length, as an up to date statement of English law on the subject of confidentiality:

> "1. … Whether the Government's [Public Private Partnership] meets the [Value for Money] test is a matter of vital concern to Londoners. There can be no doubt whatsoever that it is a matter of **very considerable public interest** …
>
> 2. There is a wealth of authority to the effect that **the democratic process, if it is to be effective, must be informed by freedom of information. It is vital that the Government and LUL are not seen to control the flow of information about the PPP Process.**
>
> 3. I take into account the nature of the document that is proposed to be produced. This is not some item of distasteful trivia. It is not the equivalent of paparazzi photographs. It is **a serious report about a matter of very considerable public interest**, prepared by a highly reputable organisation, Deloittes …
>
> 5. Those seeking to release the information are, firstly, the democratically elected Mayor of London and secondly, a public servant… It is plain that they are not seeking to release this information for private gain. **They are seeking to have the information released because they conceive it to be their public duty…**" (Emphasis added)

142. The Court of Appeal upheld the reasoning of Sullivan J and elaborated on the applicable principles. Robert Walker LJ stressed that the contractual confidentiality agreement made no difference to the balancing exercise to be carried out in deciding whether disclosure would be in the public interest (paras. 45-6: see below at para. 155). Sedley LJ concisely summarised the values at stake:

> "Article 10 of the European Convention on Human Rights is not just about freedom of expression. It is also about the right to receive and impart information, a right which (to borrow Lord Steyn's metaphor in *R v Home Secretary, ex parte Simms* [2000] AC 115, 126) is a

lifeblood of a democracy. The Deloittes report is on one view a set of contested opinions about the bidding process; but on another it is an expert and adverse evaluation of it, the very fact of which is of public importance. Whether or not undertakings of confidentiality had been signed, both domestic law and Art. 10(2) would recognise the propriety of suppressing wanton or self-interested disclosure of confidential information; but both correspondingly recognise **the legitimacy of disclosure, undertakings notwithstanding, if the public interest in the free flow of information and ideas will be served by it**." (para. 55, emphasis added)

143. This makes it clear that English law requires a balancing exercise, with the emphasis firmly on the public interest in the free flow of information and ideas. While the report at issue in the *London Underground* case had been redacted to remove certain figures, it is clear that those redactions were narrow and had been reached by a co-operative process in which it had been considered whether those redactions were really necessary. Ireland submits that the present case is very similar to *London Underground*: applying the criteria set out by Sullivan J, it is clear that:
    - The MOX plant is a matter of very considerable public interest, both in the United Kingdom and especially in Ireland;
    - Whether the MOX plant should go ahead is essentially a political issue which should be resolved democratically, for which informed public debate is vital;
    - The PA and ADL Reports are – while possibly flawed – serious analyses of the prospects of the MOX plant;
    - Ireland is not seeking access to BNFL's documents, but to the full versions of the PA and ADL analyses;
    - Those seeking disclosure of the information are democratically elected representatives of the people of Ireland, and are acting out of their public duty.

144. Ireland therefore submits that the blanket refusal to disclose the information contained in the PA and ADL Reports is inconsistent with the United Kingdom's domestic and international legal commitments.

145. In summary, Ireland submits that:
    - International and English law and practice recognise the importance of access to information on the environment;
    - Article 9(3) of the Ospar Convention directs the Tribunal to consider these developments in English and international practice;
    - It is manifest that in English and international law, exceptions to the right of access to information must be narrowly interpreted;
    - Commercial confidentiality, to justify non-disclosure, requires a pressing, serious threat to well-defined commercial interests from identified competitors on a specified market;
    - Full reasons must be given for non-disclosure;
    - The United Kingdom has not fulfilled these criteria.

146. The following sections of the Memorial examine in greater depth the meaning of each of the criteria for withholding information on the ground of commercial confidentiality, the matters which would have to be proven by the United Kingdom in order to invoke the exception, and the ways in which the United Kingdom has failed to fulfil these criteria.

(d) Commercial confidentiality cannot be "affected" where there is no competition

147. In Ireland's submission, it is obvious that commercial confidentiality can only be 'affected' where there is credible competition on a particular market. The assumption made, in withholding information on this ground, must be that the information would harm one commercial entity *by benefiting another*. For competitors to benefit from particular information, those competitors must be established on the market, or must have a realistic prospect of establishing themselves on that market.

(e) There is no competition in the market for the production of MOX fuel so "commercial confidentiality" cannot be affected

148. The United Kingdom's reasons for refusing disclosure presuppose that the MOX market is a freely competitive one. This is an assumption which, as explained in the previous paragraph, must be made in order to justify withholding information alleged to be commercially confidential. However, as the MacKerron Report explains in detail, this assumption is not justified in the case of the MOX plant: see in particular section 1.3 **(Annex 18)**. There is only one MOX plant in the world, other than at Sellafield, which makes MOX on a commercial scale. That is not a 'competitor', because of the nature of the MOX market:

> '[T]here is no competition at all in the market for managing separated plutonium. Reprocessing contracts bind customers to have their fuel reprocessed and are watertight … This means that the customers' plutonium is essentially captive to the reprocessor – physically once reprocessing has taken place, and financially before it takes place. **In other words, BNFL has a complete monopoly in the 'market' for managing separated plutonium among its existing reprocessing customers.** There is therefore no possibility that the disclosure of information about MOX could harm its competitive position in this 'market'.' (para. 1.3.19, emphasis in original)

149. The Report goes on to conclude that:

> 'The relevant current 'market' for MOX is confined to customers who have already signed reprocessing contracts, and is for the management of separated plutonium. For customers who already have such contracts, there is no possibility of competition between BNFL and its only existing potential competitor (Cogema).' (1.3.22)

150. The United Kingdom has failed to point to any potential competitors, the existence of which might justify the withholding of information on commercial grounds. Ireland submits that there are no such competitors.

(f) Even if there was competition in the market for the production of MOX fuel disclosure of the information requested would not affect competition

151. The Report of Gordon MacKerron, at Appendix A, addresses the reasons given by the United Kingdom in the letters of 5 September 2001 **(Annex 4)** and 13 September 2001 **(Annex 4)**. As this Statement shows, for much of the information sought by Ireland, disclosure would simply not be capable of affecting competition, even if that competition existed. **(Annex 18**, Appendix A)

152. In this regard, Ireland notes that, during the authorisation process for the THORP plant, detailed information was made public by BNFL (see 'The Economic and Commercial Justification for THORP: A document prepared by British Nuclear Fuels Plc', **Annex 12**). This information included:
    - Value of confirmed orders at the time of the report (page 1, para. 1.4, and page 14, para. 4.2.1);
    - Projected start-up date (page 2, para. 1.4);
    - Weekly erosion of BNFL profits due to start-up delays (page 2, para. 1.4);
    - Plant lifespan (page 2, para. 1.4);
    - Number of employees (page 2, para. 1.4, and pages 22-25, para. 7);
    - Projected future sales values (page 2, para. 1.4);
    - Sales demand and number, nationality and value of orders (pages 8-10, paras. 3.3.1-3.3.9);
    - Identity of many of the customers (Appendix 2);
    - Volume of assumed fuel processing (page 14, para. 4.1.1);
    - Value of down payments, loans and capital payments from customers to BNFL for THORP (page 14, para. 4.2.1);
    - Volume and type of fuel in the THORP order book (page 15, para. 4.2.1);
    - Amount of fuel awaiting reprocessing at Sellafield (page 17, para. 4.4.3);
    - Capital costs, decommissioning costs, and other costs (page 18, para. 5.3).

153. Ireland can see no reason why this information (which the United Kingdom has refused to provide to Ireland in relation to the MOX plant) was considered not to affect competition in relation to the THORP plant, but is considered to affect competition in relation to the MOX plant.

(g) The United Kingdom has not provided any evidence supporting its claim that there exist contractual provisions between BNFL and its competitors requiring non-disclosure

154. The fifth ground given in the PA Report for withholding the information is that disclosure could breach contractual confidentiality agreements with customers or competitors. The United Kingdom has not provided any evidence as to the existence or content of any such agreements.

155. Further, Ireland submits that these provisions, if they exist, do not affect the nature of the test to be applied when considering disclosure of such information. The existence of contractual confidentiality provisions is not dispositive of the issue. The English Court of Appeal has recently held that such contracts are irrelevant to the process of considering whether disclosure is justified. In the case of *London Regional Transport and London Underground Limited v The Mayor of London and Transport for London* [2001] EWCA Civ 1491, the Court considered the effect of such contractual provisions in a situation where the recipient of the information, a party to the contract, wished to disclose that information in the public interest. The Court considered that the existence of contractual confidentiality provisions did not affect the test in law, which requires the court to balance the risk of harm from the disclosure of *genuinely* commercially sensitive material against the clear public interest in full access to information on matters of genuine public concern (in that case, economic reports on the financial viability of PPP – public-private partnership – as a means of running the London Underground.) The Court gave particular weight to Article 10(1) of the European Convention on Human Rights, incorporated into domestic law by the Human Rights Act 1998, which requires inter alia that any interference on the right to impart or receive information be strictly proportionate to the achievement of one of the narrowly defined aims contained in Article 10(2). Robert Walker LJ, writing for the Court, said:

> "The third and fourth grounds of appeal criticise the judge for his approach to the express, specific provisions as to confidentiality which bound [Transport for London] under the confidentiality agreements. It is contended that in the face of provisions of that sort the judge erred in his approach in embarking on a balancing exercise, and in his reliance on Article 10(1) of the Convention … Sir George Jessel MR's observations about the sacredness of freedom of contract in *Printing and Numerical Registering Co v Sampson* (1875) 19 Eq 462, 465 are an echo of the high Victorian age in which freedom of contract was regarded with a special awe. **No authority has been cited to the court establishing that an apparent breach of a contractual duty of confidence is more serious, and is to be approached differently (as regards injunctive relief) than other apparent breaches**. Indeed in many cases … the defendants include ex-employees who had been in contractual relations with the claimant, and representatives of the press who were not bound by contract, but the court adopts the same approach to both." (paras. 45-46, emphasis added)

156. This conclusion is particularly striking given the wording of the confidentiality agreement in that case. It provided that:

> '(1) All information related to the review of bids … being undertaken by Robert Kiley and named individuals of his team **must be held in the strictest confidence** and not used for any purpose other than for the purpose of enabling [Transport for London] and the Mayor to discharge their duties pursuant to Section 298(3) of the Greater London Authority Act 1999.' (Para. 23, emphasis added)

157. Even this strong wording was held not to affect the approach to be taken by the Court. Ireland submits that the Court's approach is principled and correct, and should is pertinent to the construction and application of Article 9(3) of the OSPAR Convention. Either information is commercially confidential, and subject to protection, or it is not. This is determined by its nature and by an assessment of the public interest, and not by any contractual terms which the parties may have concluded.

SECTION D: EVEN IF THE COMMERCIAL CONFIDENTIALITY EXCEPTION COULD BE RELIED UPON IT IS OVERRIDDEN BY THE PUBLIC INTEREST

158. Ireland submits that, even if the information sought falls within Article 9(3)(d) of the OSPAR Convention, in that disclosure would affect commercial confidentiality, public interest considerations nevertheless compel disclosure. It is clear from an analysis of domestic and international law and practice that 'commercial confidentiality' is not a trump card: it does not entitle the holder, without more, to withhold the information. Rather, commercial confidentiality is one factor in a *balancing exercise* which must be carried out in relation to each item of information. That balancing exercise was set out particularly clearly by the English Court of Appeal in the *London Underground* case (see paras. 141-153 above), in which the free flow of information and ideas was described as 'the lifeblood of a democracy'.

159. Ireland submits that disclosure would be in the public interest. The people of Ireland, and indeed of the United Kingdom and other interested states, are entitled to know the details of a nuclear project which may affect health and safety, which has serious environmental implications for the Irish Sea, and which may not, on close analysis, be economically justified. The authorisation of the MOX plant is not a technical or legal issue: it is primarily an issue to be resolved through the democratic process, which requires full public participation. This participation requires full information. The value of this participation far outweighs any harm – the potential for which is denied – to BNFL or the LMA.

COMMERCIAL CONFIDENTIALITY: THE CORRECT TEST

160. In summary, Ireland submits that, in order to justify the withholding of information which falls within the scope of Article 9(2) of the OSPAR Convention, on the basis of Article 9(3)(d), the United Kingdom must:

(i) Give full and detailed reasons, in respect of every class and item of information requested, why disclosure cannot be given, by:

(ii) Identifying the relevant commercial competitors and the relevant market;

(iii) Demonstrating that disclosure of each item of omitted information would cause serious and unreasonable detriment to the competitive position of the company in question;

(iv) Showing that the public interest does not outweigh any competitive detriment which may be caused.

The United Kingdom has manifestly failed to satisfy any of these requirements.

RELIEF SOUGHT

161. For these reasons, Ireland requests the Arbitral Tribunal to order and declare:

(1) That the United Kingdom has breached its obligations under Article 9 of the OSPAR Convention by refusing to make available information deleted from the PA Report and the ADL Report as requested by Ireland.

(2) That, as a consequence of the aforesaid breach of the OSPAR Convention, the United Kingdom shall provide Ireland with a complete copy of both the PA Report and the ADL Report, alternatively a copy of the PA Report and the ADL Report which includes all such information the release of which the arbitral tribunal decides will not affect commercial confidentiality within the meaning of Article 9(3)(d) of the OSPAR Convention.

(3) That the United Kingdom pay Ireland's costs of the proceedings.

TABLE OF ANNEXES

R v Secretary of State for the Environment, ex parte Greenpeace Ltd and Lancashire County Council [1994] 4 All ER 352

Case C-321/98 *Mecklenburg v Kreis Pinneberg der Landrat* [1999] 2 CMLR 418

R v British Coal Corporation, ex parte Ibstock Building Products Ltd [1995] Env LR 277

Secretary of State for the Environment, Transport and the Regions, ex parte Alliance Against the Birmingham Northern Relief Road [1999] Env LR 447

London Regional Transport and London Underground Ltd v The Mayor of London and Transport for London [2001] EWCA Civ 1491

Annex 16: OSPAR Strategy with regard to Radioactive Substances (1998-17)

Annex 17: OSPAR Decision 2000/1 on Substantial Reductions and elimination of Discharges, Emissions and Losses of Radioactive Substances, with Special Emphasis on Nuclear Reprocessing;

OSPAR Decision 2001/1 on the Review of Authorisations for Discharges or Releases of Radioactive Substances from Nuclear Reprocessing Facilities

Annex 18: Report by Gordon Mackerron, NERA, 7 March 2002.