DISPUTE CONCERNING ACCESS TO INFORMATION
UNDER ARTICLE 9 OF THE OSPAR CONVENTION

IN THE MATTER OF AN ARBITRATION BEFORE THE
PERMANENT COURT OF ARBITRATION

BETWEEN

IRELAND — Applicant

v

UNITED KINGDOM OF GREAT BRITAIN
AND NORTHERN IRELAND — Respondent

- - - - - - - -

OCTOBER 21ST TO 25TH, 2002

SMALL HALL
THE PEACE PALACE
THE HAGUE
THE NETHERLANDS

- - - - - - - -

BEFORE:

THE TRIBUNAL:

PROF MICHAEL REISMAN (CHAIRMAN)
MR GAVAN GRIFFITH QC
THE RT HON LORD MUSTILL PC

- - - - - - - -

PERMANENT COURT OF ARBITRATION:

Ms Bette Shifman (Registrar)
Ms Anne Joyce (Secretary)
Mr Dane Ratiff (Assistant Legal Counsel)
Mr Omar Mondragon (Legal Intern)

- - - - - - - -

DAY THREE
PROCEEDINGS
(REVISED)

- - - - - - - -

Transcribed by Harry Counsell & Co.
(Incorporating Cliffords Inn Arbitration Centre)
Cliffords Inn, Fetter Lane
London EC4A 1LD
Tel: 44 (0) 207 269 0370
Fax: 44 (o) 297 831 2526

- - - - - - - -

A P P E A R A N C E S

FOR IRELAND

Mr David J O'Hagan (Agent for Ireland)
Mr Rory Brady (Attorney General)
Mr Eoghan Fitzsimons (Senior Counsel)
Prof Philippe Sands (Counsel)
Ms Alison MacDonald (Counsel)

Office of the Attorney General & Office of the Chief State Solicitor

Ms Caitlin Ni Fhlaitheartaigh (Advisory Counsel)
Mr Edmund Carroll (Advisory Counsel)
Ms Anjolie Singh (Advisory Counsel)
Ms Christina Loughlin (Deputy Agent)
Ms Anne O'Connell (Solicitor)
Mr Loughlin Deegan (Special Assistant)

Department of the Environment and Local Government

Minister Martin Cullen
Ms Renee Dempsey
Mr Peter Brazel
Ms Emer Connolly
Mr Frank Maughan
Ms Geraldine Tallon
Mr Conor Falvey
Mr Owen Ryan
Mr Dan Pender

FOR UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

Mr Michael Wood (Agent for United Kingdom)
Mr Douglas Wilson (Deputy Agent)
Dr Richard Plender QC (Counsel)
Mr Daniel Bethlehem (Counsel)
Mr Samuel Wordsworth (Counsel)

Advisors

Mr Jonathan Cook (Department Of Trade and Industry)
Mr Brian Oliver (Department for Environment, Food and Rural Affairs)
Mr Jolyon Thomson (Department for Environment, Food and Rural Affairs)
Ms Olivia Richmond (Foreign and Commonwealth Office)

THE CHAIRMAN: Good morning, ladies and gentlemen. We apologise for the tardy entrance, we were literally locked out.

MR BETHLEHEM: Mr Chairman, members of the Tribunal, I was talking yesterday evening just at the point that the Tribunal rose about the nature of the rights and obligations under Article 9(3) and, in referring to the reference in that article to the right of the contracting parties, I made a number of observations. The first observation was that this was the positive affirmation of a right, the second observation that the reference to a right implied a balancing of rights, the interaction between 9(1) and 9(2) and then 9(3). I took you then to the *Public Citizen v Food and Drug Administration* case. The third point, and this is where I stopped, was that the reference to a right implied a discretion on the part of the State in the exercise of that right; in other words, a margin of appreciation.

Moving on to my fourth point there, the corollary of the margin of appreciation on the part of a State in the exercise of its right is that the function of an international tribunal charged with reviewing that exercise of rights is to assess whether the State has acted properly within the margin. It is really the same point as I have just made, but approaching it from a different direction. The reference to the *Markt Intern* case that I took you to yesterday demonstrates that.

I should say, just in following the approach that I advanced to the Tribunal yesterday of being candid on the point as to precisely what it is that the United Kingdom is arguing, we are not saying that the standard of review that we urge upon the Tribunal is simply one of deference to the national authority. We are definitely not saying that. It is not simply a question of deference.

What we are saying is that the international tribunal charged with reviewing the exercise of rights is not charged with determining the point de novo itself. I propose to come back to this, with the leave of the Tribunal, in a little more detail in just a moment.

I have a second brief series of observations simply relating to a test of interpretation of Article 9, paragraph 3. The first set of observations related to the reference to a "right".

I move now to the second set which refers to the exercise of that right "in accordance with their national legal systems and applicable national regulations". The point that I have to make here is a small one, but, nevertheless, it is important in our submission. The controlling law is in the first instance national law - the controlling law on the question of commercial confidentiality is the national law of a requested State. It is not the law of the person requesting the information or some other law. I would say, however, that this is an international treaty and the national law operates under the umbrella of international oversight.

There are again a number of brief propositions that flow from this. The first, and this engages with an argument which both Mr Sands and Mr Fitzsimons put to us on Monday, is that the reference to national law implicitly accepts that a different standard of law will operate across contracting parties. I will tease this out in a little more detail as I go through the submissions. But the content of the right to refuse or to provide for a refusal is not laid down in detail. The seven grounds of potential refusal, including commercial confidentiality, are not closely defined. The precise scope of the national law is not indicated and it follows, therefore, that contracting parties may very well address matters differently. Article 9, paragraph 3 accepts that there will be some differences.

The second point that flows therefrom, and this is a corollary of the function that the Tribunal is reviewing the conduct of the State under its own law, is the question of whether the State has complied with its own law in the first instance. In the absence of detailed guidance under the OSPAR Convention, the standard of review is the standard of national law. I will be coming to national law in just a moment.

The third proportion, again flowing from the reference to national law, is that the function of the Tribunal is not itself to undertake a ~~de novo~~ assessment.

The fourth proposition is that the relevant national law is the law of the requested State.

One concluding proposition on this point, by reference to the phrase "applicable international regulations", is that the United Kingdom has accepted in its written observations that the Tribunal can have regard to European Community Directive 90/313. That Directive was implemented in English law by the Environmental Information Regulations. The Directive may, therefore, be looked at for the purposes of interpretation of the Regulations. Mr Wordsworth has already taken you to that Directive, so that is simply a point that we accept.

Members of the Tribunal, I turn now to the role and function of the Tribunal in reviewing compliance with Article 9(3) and to address squarely this question of margin of appreciation or standard of review. Ireland contends that the question for the Tribunal is whether the Tribunal considers that the redacted information is commercially confidential. The Tribunal, Ireland says, and I am quoting here from its reply, "is perfectly entitled to substitute its view for that of the United Kingdom, if it decides that, in fact, the information in question is not entitled to protection as confidential information." In other words, the question, Ireland says, is whether in the Tribunal's view the redacted information is commercially confidential. It is not the United Kingdom's assessment of the matter in 1997, and again in 1991, in the context of the PA report, and then in 2000, in the context of

the ADL report, it is not whether the United Kingdom falls within an acceptable margin of appreciation when it comes to its exercise of its right under Article 9(3). That is Ireland's case and I hope that I am putting that fairly.

The United Kingdom disputes this analysis. As a preliminary observation, in contesting the proposition, the standard of review/margin of appreciation, Ireland seeks to undermine it by suggesting that it is, in its written pleadings and also in the speaking notes put forward by Mr Sands on Monday, misconceived and unsupported by law and perhaps even that it emerges from some extreme notion of deference. Let me say in our submission it is none of these things. This is a relatively common question that is put to international Tribunals and addressed by International Tribunals. It is not misconceived. It is quite clearly countenanced by international law. It is supported by a number of authorities, and I will take you to those in a moment; and indeed as I hope I have just demonstrated, it flows from the express language of Article 9(3) of the OSPAR Convention.

I would further emphasise, and it is a point I put to the Tribunal before the break last night, that the United Kingdom is not proposing that the Tribunal in this case should simply defer to the decision of the national authority. We accept that Article 9(3) contemplates some form of review or oversight, and indeed this is precisely what we are engaged in at the moment. So it is not a question of deference, but neither is it a question of ~~de novo~~ review. As I will suggest to the Tribunal there is another standard in between these two extremes which really emerges from the jurisprudence of for example WTO Panels and the Appellate Body, the European Court of Human Rights, and if necessary from other Tribunals suggesting that a review is somewhere between ~~de novo~~ and complete deference.

The standard of review/margin of appreciation question as we have indicated in our rejoinder very briefly, arises both in international human rights law and in international trade law, and as you will see from the extracts of the Yutaka Arai-Takahashi document which is in the bundle, but I do not propose to take you to, as you will see from that commentary, this is an issue that has arisen not only before the European Court of Human Rights and before WTO Panels, it has arisen in NAFTA proceedings, it is certainly in the NAFTA Treaty. It has arisen in the Inter-American Court of Human Rights and it has been addressed by the European Court of Justice.

In a trade context, if I may start at that point, the issue was addressed recently by the WTO Appellate body in the New Zealand Lamb Case, and that is in tab 20 of the yellow bundles that were distributed yesterday. I will take you to that text in just a moment. I should say in deference both to

my eye sight and perhaps to others who are looking at it that the print there is very small, so I have extracted in the speaking notes the relevant paragraphs.

The New Zealand Lamb case is the most recent of a long line of cases that address standard of review/margin of appreciation in the WTO context both at Panel and Appellate Body level, and at the top of page 11 of my speaking note I indicate a number of the recent decisions and the relevant extracts.

The New Zealand Lamb case concerned the question of whether a safeguard measure taken by the United States International Trade Commission restricting imports of lamb from New Zealand and Australia was consistent with the GATT Safeguard Agreement. The safeguard question obviously addresses the issue of whether a measure of protection afforded to the domestic industry in the face of imports is permissible and consistent with the agreement. The Panel found that the United States action was in breach of the Safeguard Agreement on some points but not on others. All the parties appealed, the United States on the one hand, Australia and New Zealand on the other hand. One of the questions on appeal was whether the Panel had adopted the appropriate standard of review in assessing the actions of the United States International Trade Commission; whether the Panel had adopted the appropriate standard of review in assessing the actions of the national authority. It is comparable in some respects to the question faced by this Tribunal. The Appellate Body addressed the question at some length, and one of the points material for present purposes is that the safeguards agreement of the WTO does not contain a standard of review clause. There are other WTO agreements, for example the Anti-dumping Agreement, which do contain an explicit standard of review clause, but the safeguards agreement does not. Therefore the Appellate Body was addressing this out of the ether, as part of its inherent judicial competence to determine the law. It stated as follows, and I take you to paragraph 101 which is in the middle of page 31 of the bundle. As I say, the relevant parts are extracted in my speaking note.

As regards the standard of review contained in Article 11 of the Disputes Settlement Understanding, Article 11 of the Disputes Settlement Understanding simply requires that the panel assisting the Dispute Settlement Body must undertake an objective assessment. "We recall that in ~~European Communities - Hormones~~, we stated that the applicable standard is neither do novo review as such nor total deference, but rather the objective assessment of the facts. In our report", it goes on in paragraph 102, "in our report in *Argentina-Footwear Safeguard*, we gave certain indications as to the application of the standard of review in Article 11 of the Disputes Settlement Understanding, in

disputes where claims are made under Article 4 of the Agreement on Safeguards". I quote from the *Argentina-Footwear Safeguard*:

"With respect to its application of a standard of review, we do not believe that the panel conducted a de novo review of the evidence or that it substituted its analysis and judgment for that of the Argentine authorities. Rather the panel examined whether, as required by Article 4 of the Agreement on Safeguards, the Argentine authorities had considered all the relevant facts and had adequately explained how the facts supported the determinations that were made. Indeed, far from departing from its responsibility, in our view the Panel was simply fulfilling its responsibility under Article 11 of the DSU in taking the approach it did. To determine whether the safeguard investigation and the resulting safeguard measures applied by Argentina were consistent with Article 4 of the Agreement on Safeguards, the panel was obliged by the very terms of Article 4 to assess whether the Argentine authorities had examined all the relevant facts and had provided a reasoned explanation of how the facts supported their determination." The emphasis that I have given in my speaking note is the emphasis in the original of the report, although not in the online version that you have before you.

"Thus", goes on the Appellate Body at 103, "an 'objective assessment' of a claim under Article 4, paragraph 2(a) of the Agreement on Safeguards has in principle two elements. First, the panel must review whether competent authorities have evaluated all relevant factors and, second, a panel must review whether the authorities have provided a reasoned and adequate explanation of how the facts support their determination. Thus the panels's objective assessment involves a formal aspect and a substantive aspect. The formal aspect is whether the competent parties have evaluated all relevant factors. The substantive aspect is whether the competent authorities have given a reasoned and adequate explanation for their determination".

Then, if I may, simply jump to paragraph 106, the Appellate Body there says,

"We wish to emphasise that, although panels are not entitled to conduct a de novo review of the evidence, nor to substitute their own conclusions for those of the competent authorities, this does not mean that panels must simply accept the conclusion of the competent authorities. To the contrary, in our view, in examining a claim under Article 4(2)(a) a panel can assess whether the competent authority's explanation for its determinations is reasoned and adequate only if the panel examines that explanation in depth in the light of the facts before the panel."

Mr Chairman, members of the Tribunal, some of the nuances of this analysis hinges on the particular obligations in the Safeguard Agreement and, therefore, is not directly germane to the case.

The statement of principle on the question of de novo review versus an objective assessment of the reason and adequacy of the determination of the national authority is, however, in our submission useful by way of analogy in the present case.

I would like now simply to take you to a second WTO case in which this issue arose, in fact, it preceded the *New Zealand Lamb* case, but it is particularly cogent for present purposes because it involved, amongst other questions, the question of confidential information. It is a case which you will already be aware of from the correspondence preceding the oral phase. It is the *Wheat Gluten* case, which you will find at tab 21. Fortunately, the references there are rather more visible than in the other text.

The issue here was once again whether the United States had acted consistently with its obligations under the Safeguards Agreement in respect of a quantitative restriction imposed against imports of wheat gluten. Once again, the basis of the safeguard action was the report of the national authority, the US National Trade Commission - a public domain version of which had been published excluding confidential, so there was a redacted report in issue. The Tribunal - the panel in this case - had to address the propriety of the redacted report and in that context it addressed two questions. First, the standard of review question and, secondly, it addressed the issue of substance.

On the standard of review point, if I may take you to page 45 of tab 21, at paragraph 8.4. Again the relevant passages are extracted in my speaking note. This is the evaluation of the panel on the question of standard of review and the panel says as follows:

"Article 11 of the Disputes Settlement Understanding articulates the appropriate standard of review for panels examining the consistency of a safeguard measure with the provisions of the Agreement on Safeguards. Pursuant to that article 'a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements'. Thus" in paragraph 8.5 it goes on, "we agree with the parties that a de novo review would be inappropriate. However, we also consider relevant the view of previous panels that for us to adopt the policy of total deference to the findings of the national authorities could not ensure an objective assessment as foreseen by Article 11 of the DSU".

If I may jump to paragraph 8.6 over the page, the intervening discussion is not germane on the point, the panel continues at paragraph 8.6, "we do not see our review as a substitute for the investigation conducted by the US International Trade Commission. Our role is limited to a review of the consistency of the United States measure with the Agreement on Safeguards in Articles I and XIX

of the GATT. Within the framework established by the Agreement on Safeguards it is for the United States International Trade Commission to determine how to collect and evaluate data and how to assess and weigh the relevant factors in making determinations on serious injury and causation. It is not our role to collect new data nor to consider evidence which could have been presented to the United States International Trade Commission by interested parties in the investigation but was not".

I should say, again for the sake of completeness and to be completely transparent on the point, that this case was a panel decision. It went on appeal to the Appellate Body. The issue of standard of review was not in question on the appeal and that is the reason why I am only taking you to the panel report. Nor was the issue of confidential information to which I will come now.

The panel went on to consider the assertion by the European Communities that in producing only a public domain version of the report, the International Trade Commission was in breach of the publication and transparency obligations of the Safeguard Agreement. Of particular note is the panel's analysis at paragraphs 8.13 to 8.26, which begin on page 49. The relevant extracts that I would refer you to are paragraphs 8.20 and following. Mr Chairman, members of the Tribunal, I do not propose to read through those extracts in detail, but just to highlight three points as they are indicated in my speaking note. The text is detailed and I think that the points can be simply made.

The first point that emerges from these extracts is that in the absence of a detailed elaboration of a definition of the types of information that must be treated as confidential - I quote from the panel - "we consider that the investigating authorities enjoy a certain amount of discretion in determining whether or not information is to be treated as confidential." That emerges from paragraph 8.20 in the first part of the paragraph.

A second point that I would make on the basis of this report is that the issue of the treatment of aggregate data was addressed and the European Communities, in paragraph 8.22, contended that aggregate data cannot be considered confidential in that it could be presented in percentages or index form or in some other amorphous or generic form so as to protect its confidentiality. That is the EC submission paragraph 8.22.

The panel rejected this assertion, it did so at paragraph 8.24, noting amongst other points that the small number of firms in the sector in question - and I highlight that because that is one of the issues that we are faced with here. We know from the experts' reports on both sides that we are dealing with a limited number of firms. The panel here stressed that the small number of firms in the sector in question, together with a number of other factors which were particular to the International

Trade Commission investigation, indicated that the discretion implied in the treaty as regards the right of a State permitted the redaction of confidential information including aggregate data. That is at paragraph 8.24 right at the end.

The final point that I would make simply by reference to this text at paragraph 8.25 is that the panel proceeded on an assumption of good faith in this case. It could see no basis for concluding that the US International Trade Commission had systematically extended confidential treatment to information that did not merit such treatment. That may also be an appropriate point of guidance for the Tribunal in this case.

The panel in that case then went on to conclude at paragraph 8.26 that the United States was not in breach of the agreement when it produced a redacted version of the report.

Mr Chairman, members of the Tribunal, this approach in a WTO context is also evident in the margin of appreciation jurisprudence of the European Court of Human Rights. Mr Sands in his speaking note, although not spoken, in the written version of the speaking note, sets out a whole host of cases from the European Court of Human Rights. I have already taken you to the *Markt Intern* case and I will just make one or two brief submissions on the European Court of Human Rights jurisprudence. I will again refer you to the recent analysis extracted in the bundles by Yutaka Arai-Takahashi which is precisely on this question.

In a human rights context, one area in which margin of appreciation operates is in respect of the freedom of expression in Article 10 of the Convention, subject to such conditions as are prescribed by law and necessary in a democratic society for preventing *inter alia* the disclosure of information received in confidence. I took you to the language of Article 10 yesterday in the context of the *Markt Intern* case.

The circumstances and the principles in issue in the European Convention, in the context of Article 10, are not, of course, *ad idem* with those in issue here and we do not suggest that. One of the differences is that the European Convention is concerned with the freedom of expression and we are not focused on the freedom of expression in that context. We are focused on access to information. But the analysis of the European Court of Human Rights, nevertheless, does in our contention provide some useful guidance. I go back to the *Markt Intern* case. I do not think that I need to take you back to the particular extracts at pages 136 to 138, but just to punctuate my submissions with four points that emerge from those extracts in that case which are set out on page 16 of my speaking note. The first is that States have a margin of appreciation when it comes to assessing the necessity for

interfering with the freedom of expression. Second, that this margin is essential in commercial matters and, in particular, in complex areas such as competition (paragraph 33 of the judgment) and the confidentiality of certain commercial information (paragraph 35). Third, that the margin is subject to European supervision - and again we accept supervision by the Tribunal in the context of OSPAR. Fourth, and most important for our purposes, at paragraphs 33 and 37, the court must, however, confine its review to the question whether the measures taken at the national level are justifiable in principle and proportionate as, otherwise, the court would have to undertake a re-examination of the facts and all the circumstances of each case and it is not for the court to substitute its own evaluation for that of the national authorities.

As I mentioned yesterday, the court was evenly divided on the point, the case going with the casting vote of the President. The central element of the dissenting opinions focuses on the weight to be given to the right of freedom of expression, a point which is not in issue in the same way in these proceedings. The case was not novel on the question of margin of appreciation. I do not propose to take you directly to the authorities that Mr Sands indicated in his speaking note but did not address orally. He may very well wish to do so in his reply. But I would simply note that, if one goes down the list of cases, the *Handyside* case, *The Sunday Times* case, the *Wingrove* case, the *Vogt* case, that each of those cases acknowledged that there is a margin of appreciation, they also acknowledged that a State has a discretion when it comes to legislating. There is a shift in these cases, which we accept and acknowledge, as to where the line is to be drawn in any particular case. In the *Wingrove* case, for example, the issue there was blasphemy in the context of a film called "Visions of Ecstasy", which depicted certain scenes of Christ and there were certain questions there about where the margin of appreciation should be drawn. The *Handyside* case, an obscene publications case, involved a book called "The Little Red School Book" and, again, the question was ~~not~~ "is there a margin of appreciation", but where the line should be drawn. In the *Sunday Times* case, which concerned the publication of data or reports on the thalidomide cases in the United Kingdom, again the question was not "is there a margin of appreciation", but where the line should be drawn. This is the point that we are putting in issue before you. We contend that there is a margin of appreciation. We believe that you have some discretion as to precisely where the line should be drawn and I will come in just a moment to putting forward particular submissions to what we think the function of the Tribunal is here.

I would make just one further point on margin of appreciation and the function of the

Tribunal just to fill out this issue a little further. I have taken you now to some trade cases and to some human rights cases. In the context of the assertions of privilege before international tribunals, whether it is legal professional privilege or commercial confidentiality or medical privilege, the issue of the role and function of the tribunal has been addressed fairly fully in an article by Judge Mosk of the Iran-US Claims Tribunal, writing together with Tom Ginsburg, which is published in the International and Comparative Law Quarterly. I have given you the reference to it there in the bundle. I do not propose to ask you to turn it up. I will just read an extract of the article into the record. The authors there addressed the question of business secrets privilege and contend that "even if not bound to do so by a choice of law analysis, international arbitral tribunals should accede to an appropriate privilege objection made in good faith".

They go on to address where the line ought to be drawn in particular circumstances.

"Of course, international arbitrators should not sustain a privilege objection if it is made in bad faith. Bad faith might be indicated, for example, if a government classified a document solely to make it immune from disclosure at the specific proceedings. The requirement of good faith invocation requires a more subjective examination of the party's privilege claim, and allows the panel to deal with the occasional situation when a party is asserting a valid privilege, but not in a manner that deserves deference. This is justifiable as the duty to act in good faith forms a general principle of law, including international law, and has been described as 'the foundation of all law'.

These considerations should help alleviate the concern that a deferential approach will lead parties to invoke privileges in an inappropriate manner, without creating too complex a burden on the tribunal. Because the tribunal need only satisfy itself that the privilege exists and is invoked in good faith, it can avoid complex balancing inquiries that slow down the process and impede consistency. Furthermore, as the party asserting the privilege is generally required to prove its existence, the tribunal will not need to conduct its own separate inquiry other than evaluating the evidence and law on the issue brought before it. Of course the arbitrators must assess whether the privilege asserted is properly applied. This assessment requires a determination of the scope of the privilege and considerations of exceptions and waivers."

I would simply say here that an evidential privilege asserted to withhold commercial confidential information from disclosure in arbitration proceedings is not the same as an assertion of commercial confidentiality as a matter of substantive law as we have in this case. But they both raise similar issues. The standard of review proposed by Mosk and Ginsburg in the context of evidential

privileges accords with the margin of appreciation/standard of review approach proposed or adopted by the European Court of Human Rights, the WTO Appellate Body and others. The appropriate test is an objective assessment reflecting the discretion on the part of a State to act in exercise of its rights.

I should perhaps just make one further point before turning to our specific view on the standard of review in this case and it is really just to inject a further word of caution about the cases that Mr Sands referred to either orally, but very briefly, or did not refer to but sit in the speaking note. That is that in our contention those cases are not on point. The *Mecklenbur*g case, for example, to which he refers, was a preliminary reference case in which very specific questions were posed to the European Court of Justice by the referring court. The European Court of Justice answered the questions posed. The *LaGrand* case, that is the death penalty case in the United States, which was heard in the chamber just on the other side of the Peace Palace, was focused on the performance by the United States of its obligations under the Vienna Convention of Consular Privileges and Immunities. The question there was did the United States perform its obligation. There was no standard of review issue that arose. Of course, it was an objective assessment of the facts.

In the *Heathrow Airport* case, the specific agreement in issue referred to the "best efforts" of the parties. On the basis of that case, the arbitral tribunal was required to interpret what was meant by "best efforts" and it came to a view that this meant reasonable efforts. This does not address the situation that we are here faced with. Mr Sands with all respect is speaking past us not to us on this particular point.

I come then to the question that remains and that is what is the implication of all that I have put to you for the function of the Tribunal in the present case? In our submission the role of the Tribunal in the present case is to assess whether the United Kingdom has acted properly in the exercise of its right in accordance with national law under the umbrella of Article 9, paragraph 3 of OSPAR. At a tangible level, this requires the Tribunal to assess whether the PA and ADL redaction exercises reflected on the face of the reports themselves, as well as in correspondence between the United Kingdom and Ireland, can be said to fall properly within the scope of the United Kingdom's discretion in the exercise of its rights in accordance with national law. The exercise does not, in our submission, require an item-by-item assessment of the redacted information. On the contrary, it requires the Tribunal to review whether the process of redaction and the information redacted in generic form is consistent with the requirements of Article 9, paragraph 3 of OSPAR. Absent an allegation of bad faith, this analysis could be undertaken by reference to the public domain versions

of the report. I pause there in the middle of paragraph 35 of my speaking note just to interpolate that this formulation very broadly mirrors the formulation by the panel in the *Wheat Gluten* case. I am not here suggesting anything that is unusual.

I would go on to say that, although we consider that it is entirely appropriate that the Tribunal and independent counsel for Ireland see the unredacted versions of the reports for purposes of reassurance that the redacted information is as it is alluded to in the public domain versions of the report. The Tribunal's task is to assess whether the United Kingdom acted properly and reasonably. Adopting the language of the European Court of Human Rights in *Markt Intern*, the function of the Tribunal is not to substitute its own evaluation for that of the various independent bodies at national level in the United Kingdom that initially addressed this question. It is to assess whether the measures taken by the United Kingdom are justifiable in principle and proportionate to the objective of Article 9 of the OSPAR Convention.

Mr Chairman, members of the Tribunal, that brings me to the end of the initial part of the submissions that I began yesterday afternoon.

I move on to address the law relevant to the application of Article 9 (3).

LORD MUSTILL: This might be a convenient moment, if it is not, please indicate. I just have a question on terminology. I do not want to spend excessive time on it, but the analysis is quite minute in this part of the case. I think that one has to try to be exact and I am sure you are.

I would like to take up with you the use of the word "discretion". It may just be a terminological point, there may be more in it. My understanding of the exercise of the discretion is the exercise by the decision maker of a choice of what to do. The traditional example is the grant of an injunction. Assuming that the criteria for the existence of the jurisdiction are satisfied, the decision maker is left with a choice whether to grant the remedy or not. That is essentially a judgmental exercise, if I could call it that. It may not be quite apposite, but I think that you know what I mean..

Different from that, it seems to me, at least, to be the question whether certain requirements are satisfied or whether a certain factual situation exists. Taking the former of those, an enquiry as to whether a course of action or activity would be reasonable in all the circumstances. That is not a judgmental activity in the sense which I have used. The decision maker is presented with a choice, but it is not a choice of what to do, it is with a range of possibilities from which he must select. I put this poorly but I hope you see where I am going. If not please say and I will try again.

In the latter situation which I have called objective, the reviewing body may well conclude

that a reasonable decision maker could have decided either way. You cannot say the decision was wrong, even though the reviewing body might have its own opinion about which was the correct one, nevertheless it would not intervene because a reasonable body could have reached that conclusion satisfying the criteria. That is not actually the same as the review body saying "Well, a reasonable decision maker could have decided to take this course of action or not judgmentally". That is, as usual I am afraid, a rather long preliminary to the question. I am wondering whether we are here concerned with a discretion at all in the accurate sense of the term. Assuming for the moment that Mr Wordsworth's points have both failed, as you do assume for the purpose of your argument, if you get that far we have to decide whether a breach of the treaty obligation is proved or not, and that seems to me not with respect to be a discretionary question at all, although it maybe that it is a question of a different kind, the second of the kinds I have identified, where a review body would not intervene even if it did not agree with what the decision maker had done. If that is totally obscure I will try and restate it. If it is not my question is do you cling to the word discretion in your argument which opens up all sorts of possibilities or are you content to rest your argument on the second of my bases, namely that if there is room for two sensible views then on the whole the review body should not interfere, end of long speech.

MR BETHLEHEM: I am not sure that I would, as you put it, cling to discretion but I am not sure either that we would step back from the first of your propositions. I accept though that there are questions that arise simply by the use of the word discretion. Perhaps I can put it in this way. Assuming, as we have done that Mr Wordsworth's argument fails, and that the United Kingdom has an obligation to provide access to information or make information available, our contention is that once the framework for that is provided, and we contend that there is a framework as Mr Wordsworth has said, the United Kingdom is entitled under Article 9(3) to provide that request for information may be refused in its national law. There are two, I suppose, elements of discretion that may arise in that context. I use discretion here in quotes because I am not entirely sure whether that is the precise word. The first "discretion" is the precise parameters of the legislation or the measures relating to commercial confidentiality. For example in the Environmental Rnformation Regulations there is a reference to commercial confidentiality as one of the reasons for exempting publication. That reference is set out relatively briefly, it is not elaborated upon. We might have by reference, for example, to international standards or other municipal standards, have set out a whole page indicating what we, the United Kingdom, meant by commercial confidentiality. So the United Kingdom as a first point was entitled

under Article 9(3) to frame the commercial confidentiality exemption in its domestic law.

We then come to the operation of the exemption, and I think here we come more closely to your second proposition. As Mr Plender has already indicated, and I think will return to later today, the United Kingdom was not obliged to commission the PA and ADL reports. It did so as part of the consultation exercise. Once the reports were commissioned we took the view appropriately that they ought to be made public, and a detailed exercise was undertaken to determine the precise scope of the information that could be made public. PA was initially requested to undertake an assessment and likewise with the ADL report. It was then discussed. We would not rule out that there are questions very close to the line as to whether a point of information was commercially confidential and whether it ought to be disclosed. You will see, for example, in Mr Rycroft's evidence - and he will be examined and cross-examined on this shortly - that BNFL took the view rather strenuously in respect of some items of information that they were commercially confidential and should not be disclosed. They were prevailed upon to disclose that information, they maintain to their detriment. So there may be small points on either side of the line where there is a true discretion, where the question would simply be has the United Kingdom operated within an acceptable margin. I hope that helps.

LORD MUSTILL: Yes. Thank you for taking the time to answer.

MR BETHLEHEM: I would like then to move on to the third part of my submissions and that deals with the law relevant to the application of Article 9(3). Article 9(3) provides that the contracting parties have a right in accordance with their national legal system to provide for a request to be refused on various grounds, and we contend that in the first instance this directs us to English law. The relevant questions we contend under this heading are first what is meant by the phrase "commercial and industrial confidentiality". There is simply a question of interpretation, what does the phrase mean in Article 9(3)(d). And then, second, in circumstances in which some but not all the information in a document is commercially confidential what as a matter of practice does the law require? In other words this comes to the question of whether redaction is appropriate or whether one simply has to either withhold the whole document or put the whole document in the public domain.

The preliminary question of course, or the root to both of these issues, is what is the applicable English law. The legislative framework in the United Kingdom relating to access to information encompasses a number of instruments, many of which Mr Sands has referred to and one or two that he has not. The key instruments are the Environmental Information Regulations of 1992

and there is the Radioactive Substances Act which as Mr Sands correctly pointed out we do not address in any detail in our written pleadings. He has raised the issue on the floor here and I propose to come back to it just to explain the context of the Radioactive Substances Act and I hope put that to rest. So there are the Environmental Information Regulations of 1992 and the Radioactive Substances Act of 1993. I would mention for completeness that there is also the Environmental Protection Act of 1990. There is a United Kingdom Freedom of Information Act 2000, and a Code of Practice on Access to Government Information, and there is also the common law.

I do not propose to address all of these because many of them are not relevant, but it is useful to put in place the various points on the horizon.

As regards the Freedom of Information Act I would simply say it is not relevant because it was not in force. There are a number of paragraphs in my speaking note which address aspects of it simply because Mr Sands made the assertion that had it been in force it would have availed Ireland in this case. Our contention is that it would not and, quite to the contrary, that the position would be much unchanged, that the material could have been redacted by reference to the Freedom of Information Act. The paragraphs are there in my speaking note and I would invite Ireland to come back to these by way of reply if it feels it needs to, or for that matter for you, members of the Tribunal, to raise questions on it.

Turning to the Environmental Protection Act which I touch upon in paragraph 8 of the speaking note at the bottom of page 4, once again this is not directly relevant because it does not address the issues with which we are concerned. I simply again out it in place on the horizon and note there are commercial confidentiality provisions in the Environmental Protection Act as regards waste management and pollution control. Wherever we look to the legislation which provides access to information there is always a corresponding provision that deals with commercial confidentiality.

We then turn to the two principal measures relevant to the exercise, the regulations and the Radioactive Substances Act. Mr Sands invited some clarification on the role of the Radioactive Substances Act, and let me see if I can attempt to give some clarification.

I would like to take you to the extract from the Act which is in tab 23 of the bundle that I handed up. The full Act is given in volume 7, tab 1 of our bundle, and here I extract sections 34 and 39. I should also say that the extract that we have put in which is drawn from the United Kingdom Government website, as you will see on the 17th October this year, has in fact been amended, not since the 17th October, it is just that the website extract is not entirely accurate. It is slightly

inaccurate on one minor point to which I will come in a moment.

The Radioctive Substances Act regulates the use of radioactive material and establishes various registration and authorization requirements. By section 39, which is in the bundle, and to which Mr Sands referred on Monday, it refers to the Chief Inspector and also refers to a Secretary of State. You may take it that both the references to the Chief Inspector and the Secretary of State now read as references to the appropriate agency which refers to the Environment Agency, and that is an amendment which was introduced by the Environmental Act of 1995. That is the only material point of amendment in these provisions.

Section 39 provides that the appropriate agency, the Environment Agency, shall keep copies of all applications made and all documents issued by it, and at the bottom of the page "shall make copies of those documents available to the public except to the extent that they would involve disclosure of information relating to any relevant process or trade secret".

The disclosure of trade secrets is addressed further in section 34, which is on the preceding page in the bundle, a section to which Mr Sands did not refer. That is no point of criticism, I am just drawing attention to the fact that it is here. Section 34 provides that the consent of the person carrying on the relevant undertaking is required when it comes to the disclosure of trade secrets, and we see that in section 34(1)(a), or, and I simply refer you to paragraph 1(c), save in connection with the execution of the Act. So section 34 imposes various constraints on the disclosure of trade secrets under the Radioactive Substances Act.

I simply make three brief observations. First there is no definition of trade secrets in the Radioactive Substances Act. Second, in principle, the Act applied to the PA Report as a document issued by the Environment Agency under the Act. Third, as Mr Sands correctly observed, the Environment Agency expressed some concern during the early stages of the consultation process to the effect that the provisions for the release of information to the public under section 39 of the Radioactive Substances Act were outdated, "making the Agency reliant on the company's co-operation to release information". They do not make direct reference but we assume that they are referring to section 34(1)(a). The reason for Environment Agency concern was the interaction between sections 39 and 34.

Sections 34 ad 39 of the Act do not bind Ministers. They refer simply to the Environment Agency. The Environment Agency's frustration reflected in the report that Mr Sands took you to addresses the particular constraints that apply to the Environment Agency rather than a more

fundamental impediment to the disclosure of information.

In practice the Act was not the basis on which the redacted versions of the second PA Report and the ADL Report were prepared and published by Ministers. As a matter of policy, the Government wanted to publish as much of the information as possible subject to the requirements of commercial confidentiality. In deciding to do so, and undertaking the redaction exercise, the relevant Departments thus had regard both to the Environmental Information Regulations and to the Code of Practice on Access to Government Information, both of which establish disclosure obligations subject to exemption in the case of commercial confidentiality. The analysis was that the same exemption from publication would operate under both instruments. The decision to publish the Reports subject to redactions thus proceeded by reference to a composite appreciation of these two measures. I should add that, one of the reasons for proceeding in this way, rather than under the Radioactive Substances Act, is because a view was taken that these measures, the Code of Practice and the Environmental Information Regulations, gave greater flexibility in releasing the information in question. The appreciation to tease out from this I would submit is precisely the opposite of that proposed by Mr Sands. The Radioactive Substances Act could have been relied upon. It could have been relied on, for example, to restrict information. It was not, however, in some measure because of the concerns expressed by the Environment Agency to which Mr Sands referred. The public domain versions of the reports were prepared and released pursuant to a composite appreciation of the Government's disclosure obligations under the Environmental Information Regulations and the Code of Practice. The reason for doing so was to ensure that as much information as possible, consistent with the requirements of commercial confidentiality, was made publicly available.

I turn now to the Environmental Information Regulations. For present purposes I would simply mention that Regulation 4(2) of the 1992 Regulations was amended by the Environmental Information (Amendment) Regulations in 1998, and both are in the same tab in the annexes to the United Kingdom's memorial. I do not propose to take you to those. I simply refer to it.

I have a number of preliminary observations in paragraph 16 of the speaking note and I would only make one, but the others stand for purposes of any reply that Ireland might wish to make.

The one preliminary observation I would make is that Mr Sands made much on Monday in his observation under the Radioactive Substances Act of the fact that the United Kingdom has not accepted that the information excised from the PA and ADL reports is information of the kind governed by the 1992 Regulations. Having heard Mr Wordsworth on the matter yesterday you will

not be surprised at the United Kingdom's position. Mr Sands went on to suggest that the redaction process could not have taken place under the Regulations as the United Kingdom denies that the Regulations apply. The reality is quite simple with respect. The United Kingdom does not accept that the information redacted from the PA and ADL reports is information on the environment for purposes of the regulations, as Mr Wordsworth has made plain, but in setting out to publish as much of the information as it cold reasonably do consistent with the dictates of commercial confidentiality, the United Kingdom nevertheless had regard to the terms of the Environmental Information Regulations and the Code of Practice. There is no inconsistency in our approach.

Mr Chairman, perhaps I should mention simply for ease of your reference when it comes to deciding how to manage the proceedings that I do not propose to speak in detail to the rest of my note, I am going to take you to a number of elements but there will be large parts that I will simply refer to. I will not therefore be as long as the ten or 12 pages suggest. I hope to go through it fairly quickly, but I am in your hands as to whether you want to rise for a few minutes at any point.

THE CHAIRMAN: May I ask what fairly quickly means?

MR BETHLEHEM: I would imagine probably another 20 to 25 minutes.

THE CHAIRMAN: I think the Tribunal would appreciate a five minutes stretch.

(Short Adjournment)

THE CHAIRMAN: We will resume.

MR BETHLEHEM: Mr Chairman, members of the Tribunal, to pick up where I left off, and this is turning to the detail of the Environmental Information Regulations, I do not propose to take you to the extracts in the bundles, but I have set out the relevant provisions in my speaking note on page 8. The relevant Regulation is Regulation 4. Regulation 3 establishes an obligation to make environmental information available subject to the provisions elsewhere, and the provisions elsewhere include Regulation 4. I will just highlight a number of points.

Regulation 4(1), "Nothing in these Regulations shall require the disclosure of any information which is capable of being treated as confidential." That language is important for reasons that I will come to in just a moment. 4(b) "Authorise or require the disclosure of any information which must be so treated". Again, that is important. The reason why the language is "capable of" or "must be" so treated as important is because those categories are dealt with differently in Regulation 4, paragraph 2 and Regulation 4, paragraph 3. Regulation 4, paragraph 2 provides that 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 would affect the confidentiality of matters to which any commercial or industrial confidentiality attaches, including intellectual property.

Regulation 4, paragraph 2 is a provision which refers to commercial confidentiality and that is information which is capable of being treated as confidential.

Regulation 4, paragraph 3, "For the purposes of these Regulations information must be treated as confidential" - there is no discretion, if I can use that word with a little trepidation, there is no discretion here, information must be treated as confidential - "if and only if in the case of any request made to a relevant person under Regulation 3, it is capable of being so treated and its disclosure in response to that request would ... involve a breach of any agreement" - for example, a confidentiality undertaking - "or (c) the information is held by the relevant person in consequence of having been supplied by a person who - (i) was not under, and could not have been put under, any legal obligation to supply it to the relevant person, (ii) did not supply it in circumstances such that the relevant person is entitled apart from these Regulations to disclosure it; and (iii) has not consented to its disclosure". That provision may, for example, relate to information provided to BNFL by people abroad, in other words, not under compulsion of these Regulations, and in those circumstances there is no discretion. The information must be treated as confidential. Finally, over the page, Regulation 4, paragraph 4, "Nothing in this Regulation shall authorise a refusal to make available any information contained in the same records as, or otherwise held with, other information which is withheld by virtue of this Regulation unless it is incapable of being separated from the other information for the purposes of making it available".

If I may simply try to summarise Regulation 4, paragraph 4. What it is saying is that you do not simply take a document and make an appreciation of the document as a whole and, whether it is on a quantitative or qualitative assessment, say, "Well, this document contains X volume of confidential information, therefore it must be treated as completely confidential or completely disclosed". Regulation 4, paragraph 4 contemplates a redaction process, a process whereby one removes the commercially confidential information and publishes the rest.

As Mr Sands indicated on Monday, the application of the Regulations is addressed in the Guidance Note on the Implementation of the Environmental Information Regulations produced by the Department for the Environment, Food and Rural Affairs (DEFRA). He took you to a number of paragraphs. I do not propose to take you back to that document. I would simply propose that you look at the document in full and all the relevant paragraphs. Those are paragraphs 40 to 44, paragraph

45, paragraphs 55 to 63 and, perhaps, you may like to look also at paragraphs 67 to 69. The most important of which are punctuated in my speaking note.

I would also simply make the observation - and I think that this emerges from the *Birmingham Northern Relief Road* case - that these Guidance Notes are not binding. They are guidance notes.

I have a number of observations on these Regulations. First, the Regulations require requests for information to be refused where disclosure would be in breach of a confidentiality undertaking or were the information was provided by a third party on the basis that it remains confidential. It requires that. I should add here by way of tangential explanation that, going back to Lord Mustill's question to me before the break, we would say that that was within our discretion, to legislate in that way.

Second, the Regulations do not require the disclosure of information which would affect commercial confidentiality. In other words, there is an assessment of precisely whether disclosure is required, an assessment of the information itself.

Third, the Regulations explicitly contemplate a process of redaction of documents to ensure that information is not withheld simply on the grounds that it is contained in the same record as information that is confidential. That is Regulation 4, paragraph 4 to which I referred just a moment ago. (It is the *Birmingham Northern Relief Road* case, which indicates that these are guidance rather than authority).

The Regulations were in issue in the *Birmingham Northern Relief Road* case and Mr Sands took you to various passages or referred you to various passages. I do not think that the Tribunal was asked to turn up the case. He referred to various passages on Monday. I do not propose to take you to it again, but I would draw specific attention to three elements of the judgment of Mr Justice Sullivan in that case. They are set out in paragraph 20 of my speaking note.

First, Mr Justice Sullivan accepted that a derogation must be construed strictly. The judge noted, however, that the objective of the measures was not merely to ensure freedom to access to information but also to set the basic terms and conditions on which such information should be made available. It was not simply a question of construing an exception narrowly. The purpose of the provisions on commercial confidentiality was to ensure that rights are protected. That is at page 18 of the judgment.

Writ large in the context of our argument this really comes back to the interaction between

Articles 9(1) and 9(2) of OSPAR and Article 9(3), and the submissions that I have put to you last night and this morning, that there are two competing rights. This is not a question of a principal clause and an exception, but two rights which have to be balanced.

This has various implications for burden of proof. We have heard something of that from both Mr Sands and Mr Fitzsimons on Monday. I will make a concluding point on that at the end of my submissions.

Mr Justice Sullivan also indicated in the course of his judgment that some kinds of information were presumed to be commercially confidential, and the references that he made there were to prices and payment details. Of course, that is on point here, because, at least in part, some of the redacted information that we detect from the public domain versions refer to such matters.

Third, Mr Justice Sullivan accepted, indeed not only accepted but he endorsed the process, that a process of selective redaction of a document which contains information that is commercially confidential is explicitly contemplated by Regulation 4(4).

Moving beyond the Environmental Information Regulations, I would also simply draw to your attention the Code of Practice on Access to Government Information, which is addressed in our written pleadings, in our countermemorial. There is some further comment on it in my speaking note. I do not propose to go through that, but simply to highlight that the Code of Practice includes exemptions 13 and 14, which apply to commercially confidential information and information given in confidence. That is again part of the broader framework.

Questions of commercial confidentiality have also been addressed under the common law. Mr Sands referred you on Monday to the judgment of the Court of Appeal in *London Regional Transport*. If I recall correctly, in particular, he urged the Tribunal to look at the judgment of Lord Justice Sedley in that case.

In that case the Defendants, alternatively referred to as Defendants and Respondents in the face of the case, were the Mayor of London and Transport for London. They had commissioned a report concerning the economic viability of the London Underground and, for those of you, perhaps, who are not close to the situation, there is a debate in the United Kingdom about a public private partnership in the funding of the underground and this was a report that addressed the matter. The Defendants wished to make the report public, but were enjoined from doing so on the grounds that this was necessary to restrain a breach of confidence. The injunction was discharged on the Defendants' undertaking not to publish any part of the report except a redacted version. The issue

before the Court of Appeal was whether disclosure of even the redacted version of the report was prevented by confidentiality agreements.

The case was heard at first instance by Mr Justice Sullivan, once again. He was persuaded that the redacted report could be made public on the grounds of public interest. He was upheld on appeal - and there are two judgments in the Court of Appeal. The significant point for present purposes is that the Court of Appeal accepted that the redacted information was plainly commercially confidential. In other words, it is the United Kingdom's contention that the case stands in support of the proposition at English common law, mirrored in Regulation 4(4) of the Environmental Information Regulations, that, at common law, in circumstances in which a report ought on public access to information grounds to be made public, but contains commercially confidential information, the appropriate approach will be to publish a public domain version for the court in which the commercially confidential information has been redacted. This is precisely the approach that the United Kingdom adopted in respect of the PA and ADL reports. We stand squarely on that aspect.

I would just add one further comment which is not in the speaking notes, but will emerge no doubt miraculously from the record in due course, that the approach of the Court of Appeal in this case, in accepting redacted documents, was noted by the Court of Appeal in the recent proceedings brought by Friends of the Earth, challenging the justification decision in respect of the MOX plant, explicitly as regards the redacted ADL report. In other words, in the Court of Appeal judgment in the *Friends of the Earth* case, the redacted ADL report was in front of the court and the Court of Appeal was not asked to decide on questions of redaction, the Court of Appeal referred to that report in a manner which suggested that it viewed this to be a standard normal approach. The Court of Appeal simply indicated that a "suitably redacted version" of the ADL report was published. For the transcript reference, that is to be found in the United Kingdom annexes at volume 2 of those annexes, tab 8 at paragraph 10, but I do not propose to take you to that.

Mr Chairman, members of the Tribunal, I turn then from English law to applicable international regulations. We have accepted that you can and indeed should look at Directive 90/313 under the heading of "Applicable international regulations", as Mr Wordsworth has taken you through it. I was going to make two brief observations on the point. I do not propose to do so. They are in the speaking note at paragraphs 25 and 26, if Ireland would like to come back to those in reply, it may wish to do so, or I am happy to respond to questions from the Tribunal.

I turn then to wider illustrative principles of law.

Mr Fitzsimons very fairly in his presentation on Monday indicated that we do not suggest that wider instruments of international law are directly relevant, simply that they may contain useful guidance for present purposes. I hope that I have made that point very, very explicitly. We do not stand on any of these international instruments that we draw to your attention. We simply do so in the event that it may assist the Tribunal. I should say that, at least in our view, the approach that we are putting to you by reference to international law is rather different from the approach that Ireland puts to you by reference to the Aarhus Convention. The Aarhus Convention, as has already been pointed out, although in force has not been ratified by either United Kingdom or Ireland. We contend that the Aarhus Convention is one amongst a whole range of international treaties. It is not the single guiding light or the last word on this particular matter.

As regards international instruments, I would make a number of propositions. First, Mr Sands, in his opening remarks on Monday, drew attention to a long list of international instruments, some of which are binding, some of which are not binding, simply as a matter of form, going back to General Assembly resolution in 1946, if I recall correctly. In our countermemorial, in Appendix A, we drew attention to 28 instruments that require the disclosure of information and this is an impressive list, running from one extreme, the Chemical Weapons Convention, all the way through to trade treaties and environmental treaties and others.

What is evident in respect of every treaty which requires access to information that we have been able to find, and I do not want to hang myself on the basis of treaties that we have not been able to discover, but what is evident in respect of every treaty that we have been able to find which requires an obligation to provide information is that it is accompanied by an exemption, cast in various forms, permitting the disclosure of information to be withheld on grounds of commercial confidentiality. They go hand in hand. Access to information - exemption in respect of commercial confidentiality. The point is that international law, reflected in a wide range of international instruments, accepts that public access to information and transparency must be balanced against rights to maintain confidentiality.

The second proposition that I would make here is that, in keeping with this right of balance, the exemption from disclosure on grounds of commercial confidentiality is frequently cast in terms of a right. In my observations yesterday afternoon, I drew your attention to a number of international instruments where this was not the case for purposes of highlighting the particular language in the OSPAR Convention. But there are very many instruments where the language is similar to the OSPAR

Convention, in other words, it is cast in terms of a right. I have indicated four illustrative examples of that in my speaking note at page 14, drawn from a number of environmental agreements, all referencing a right. There is a much longer list which would be evident from a review of our materials.

The formulation of the exemption as a "right" is material. I think that I have already lifted the veil on this particular argument in my remarks this morning. It is not a question of an obligation on States to provide access to or disclose information subject to an exception on grounds of commercial confidentiality. This is not in our submission the proper construction of the instruments. Commercial confidentiality is a right. It is not an exception to be construed narrowly. It is part and parcel of the rule which invariably sets out two competing rights that must be balanced. The general thrust of the rule is in favour of disclosure. We accept that. But this is subject to the safeguarding of the right to confidentiality in certain circumstances.

Mr Chairman, members of the Tribunal, I wonder whether I might just at this point, as it is probably a convenient juncture, simply respond to the burden of proof argument that Mr Fitzsimons put to the Tribunal in his remarks. The suggestion put to decide is that the burden of proof is upon us. It is a very small point. I would simply draw the Tribunal's attention to Article 12, paragraph 1 of the Rules of Procedure of this Tribunal, which provides quite properly that "Each party shall have the burden of proving facts relied on to support its claim or defence. The Tribunal shall determine the admissibility, relevance, materiality and weight of the evidence adduced".

I do not go further on that point at this stage. Ireland makes various submissions. It has the burden of proving those submissions or at least establishing that they have legs. We, on the other hand, have got the burden of proving or establishing that our submissions have legs.

The third proposition is that the right to withhold disclosure on grounds of commercial confidentiality is frequently cast, as in the OSPAR Convention, in terms of a right to be exercised in accordance with the national law of the State concerned.

I have already made fairly detailed submissions on the point. The reference to national law in these instruments must be taken to imply a margin of appreciation to States to determine the precise parameters of the exemption.

Both Mr Sands and Mr Fitzsimons on Monday sought to undermine the proposition by suggesting that this could not be, as this would undermine the integrity of the entire system. They were setting up a slippery-slope argument, each contracting party would legislate capriciously in order to permit information to be withheld much more generally. In Mr Fitzsimons's speaking note, the point

was put in the following terms.

"The definition of the term 'commercial confidentiality' cannot be left to national legal systems. If this were permitted, scope would exist for contracting parties to widen the meaning of the term so as to subvert the aims and objects of the OSPAR Treaty."

We do not say that the right to act in accordance with national law is unrestrained and free from oversight. As I have indicated, we are here before the Tribunal this week engaged in just such an exercise of oversight. But at the end of the day States must exercise their rights in accordance with national law under the umbrella of international law. We accept that within the margin that we have, or the margin that we have under national law, operates under the umbrella of international law. The task of the Tribunal in these proceedings, in my submission, is to assess both whether the United Kingdom acted properly in accordance with its own law and whether the law is consistent with the rights and obligations laid down in the OSPAR Convention. I would simply make the point that the natural conclusion of Mr Fitzsimons's submission is that one or other conception of commercial confidentiality ought to prevail quite specifically. I am not sure whether we on this side read that as a proposal that, for example, the conception of commercial confidentiality in Irish law, for example, is the correct interpretation. It is different from the interpretation in English law. Whether we look at Irish law, English law or French law, it differs.

Fourth, and I make the point lightly, simply because we have heard a comment from the other side that the ownership of BNFL is important. I simply to make the point lightly by reference to the international instruments, that commercial confidentiality avails both private and public enterprise in international instruments. The best illustration of this is to be found in the GATT Agreement, which not only address confidentiality in the context of the GATT generally in Article X, paragraph 1, but also quite explicitly in Article XVII, paragraph 4(d) which addresses state trading enterprises, enterprises that are government owned.

Fifth, by reference to the international instruments, I would simply make the point that commercial confidentiality is nowhere comprehensively defined. There are, nevertheless, a number of common and useful indicators that may assist the Tribunal in defining the scope of the term. I have set out in my speaking note, drawn from our written submissions, but pulling together a number of disparate threads of it, six different definitions, very closely related terms, but six different formulations of the commercial confidentiality exemption by reference to a number of international instruments. I do not propose to go through those in any detail, but I would make one point on these

instruments.

As you will see, these definitions are all drawn from trade instruments. I have not put down in the speaking note references to environmental conventions. The reason for this is that, given the sharp focus of international trade treaties on commercial matters, it is generally in these treaties that attempts have been made to try to define a commercial confidentiality exemption with a little bit more specificity. It is interesting, and I do not say more than this at this stage, that in international instruments concerned with the environment, States have been most willing and perhaps even insistent on including clauses which simply provide for commercial confidentiality to be exercised in accordance with national law.

A sixth point on international law is that it is also possible to deduce from a review of international instruments various forms of information that are considered to be intrinsically commercially confidential and a particularly good illustration is to be found in the WTO Agreement on Preshipment Inspection, which identifies as commercially confidential internal pricing, including manufacturing costs, profit levels, etc. There is quite a lot of guidance, we submit, that the Tribunal may draw form these international instruments.

By way of conclusion, I make one or two very brief remarks on comparative and national law and I do so with some hesitation, at least on aspects of the national law that we attempted to describe in our Appendix B. We on this side are not persuaded of the propositions advanced by Ireland on the basis of the material that they have set out in their reply. We do not think that there is anything to be served by an extended debate between us on the law of jurisdictions and none of us on either side are experts on them, certainly members of the Tribunal will be considerably more knowledgeable. I would simply make three very brief points.

The first, and I do not elevate this material above any other in the section, but I simply draw attention to the fact that the antecedent legislation of both Directive 90/313 and Article 9 of the OSPAR Convention is the French law of 1978 concerning access to administrative documents. We have included that in our bundles together with some French decisions, simply for purposes of, if you like, the broader travaux of circumstances of conclusion and Article 32 of the Vienna Convention, you may like to have regard to that.

A second point is that, as the conclusions set out in our counter-memorial indicate, there is a divergence between the approaches of States on the question of the threshold of harm in the case of commercial confidentiality and the requirement of an additional public interest balancing requirement

over and above the balancing intrinsic to the legislation itself.

I do not seek to make a point of substance here, but simply to observe - perhaps it is a point of substance, I am not sure - but I simply observe that it is precisely in those circumstances where the law varies that international tribunals have been inclined to adopt a margin of appreciation. In support of that proposition, I would simply refer the Tribunal to a case put into the record by Ireland, which is the *Handyside* case. That is the Little Red School Book case and the obscene publications. There reference was made to the variation across Council of Europe States of laws and perceptions relating to morality. It is precisely in those circumstances in which margin of appreciation operates.

Here by reference to the survey of national law that we have introduced and those introduced by Ireland, there are clearly some differences. We do not need to resolve those differences on our side. We simply need to establish the point that there are differences and, therefore, the margin of appreciation operates.

Then the third and concluding point is that the conclusions set out also in our countermemorial at paragraph 5.35(iii) indicate that there is a good deal that can be deduced from national decisions on the question of commercial confidentiality concerning categories of information that is properly cognisable under the commercial confidentiality exemption. It is also common to see, in the municipal context, the publication of commercial documents in public domain versions with sensitive commercial information redacted. I would here simply draw reference but not address a document that is included at tab 7 of additional bundle 8. It is a document at tab 7 of additional bundle 8, which is an example of a document in the public domain produced by the US Department of Commerce in which material was redacted. It may be that Mr Plender will wish to take you through that later on.

Mr Chairman, members of the Tribunal, that concludes my presentation for today. There may very well be questions, but let me thank you for the patience overnight, yesterday and today, with which you heard my submissions. I think that, if there are no questions, we will probably wish to proceed to the witnesses and then Mr Plender will be making some remarks at the end.

MR GRIFFITH: Mr Bethlehem, you did not press my patience at all. I read overnight the extracts from Yutaka Arai-Takahashi that you referred to several times. Although there are only extracts from that and I have not read the entire thing, I had the impression that the subject matter is margin of appreciation in the human rights and freedom of expression context. Is that the correct impression?

MR BETHLEHEM: The book itself covers margin of appreciation in human rights law under the European

Convention and there is, in fact, a survey of all of the various provisions. The extracts that we have included, and we can certainly make fuller extracts available, if you will find this of assistance, are simply some extracts right at the beginning to identify the scope of margin of appreciation. My recollection is that probably around about pages 6 or 7 Mr Takahashi identifies that the margin of appreciation is not limited simply to the European Convention system, but has also been picked up by the American system of human rights, the European Court of Justice and the WTO. It is partly to illustrate that point. Then there are some references in respect of the freedom of expression under Article 10, but we would be very happy to make fuller references available.

MR GRIFFITH: It is not exactly clear the extent to which you use the margin of appreciation in the context, wherever that context may be found, as a launching post to apply a similar doctrine with respect to the issues here or whether your submission is that it is well established that the same approach of margin of appreciation would operate with respect to an issue of confidential information.

MR BETHLEHEM: The specific reason why I drew attention to the *Markt Intern* case, which was a freedom of expression case, was because the court in that case indicated in its view that margin of appreciation would operate specifically in that commercial confidentiality situation. If I recall, that is somewhere around about paragraphs 35 or 36. We do not, as I indicated at the start of my submissions stand on the particular formulation set out by the European Court either in the *Markt Intern* case or in *Vogt* or in *Handyside*. In fact, we quite explicitly would say that margin of appreciation, if you are persuaded that it is material to your deliberations, where precisely the margin of appreciation is is a matter for you. I have made some submissions by reference to the *Wheat Gluten* case, the WTO case and that may be germane. But we do not stand on the Article 10 case on *Markt Intern*. As a final point on that, I would simply note that in both the material that we have submitted and the material that Mr Sands has submitted, there are a number of cases under Article 10, *Markt Intern*, *Handyside* and *Wingrove*, which is the Visions of Ecstasy case (all of them Article 10), identify the margin of appreciation at a slightly different point. Our case is that there is a margin of appreciation and that ought to be identified. We put forward propositions as to where it ought to be, but not strictly relying on these.

MR GRIFFITH: I had not understood you to contend, though, that it is a freedom of expression case.

MR BETHLEHEM: No, we do not.

MR GRIFFITH: Is it necessary, if I can ask you another question, for a State to have domestic laws to comply with its obligations in respect of Article 9(3)? Perhaps while you are thinking, I could enlarge on that. I understood Mr Wordsworth indicated yesterday that it was the Environmental Information

Regulations 1992 which were the relevant domestic law. As I read your submissions, you rely upon a raft of legislation and regulations and then indicate that in this case there was special attention given at the Departmental and then Ministerial level to engage in the redaction process to provide what you say is a result entirely in compliance with domestic law and requirements of proper practice and also complies with any requirements of oversight which might be applied or granted by this Tribunal to see whether or not there has been a satisfactory compliance with the application of the Article 9(3) regulation. That is as I understand the submissions. What I would like to know is whether it is the contention of the United Kingdom that it is necessary to have a precise or an accurate legislative or ordinance regulation, however it be in practice, in place to comply with the requirements to enable the exception of Article 3,

MR BETHLEHEM: If may reply to that from two different perspectives and then perhaps explain the perspectives. As a matter of United Kingdom law, if I can put it in these terms, constitutionally, it would have been open for the United Kingdom not to do anything in implementation of its treaty obligations, not to incorporate in any legislative form the OSPAR Convention into English law. As a matter of international law to the extent that you may conclude that there is an obligation in Article 9(1) or (2) along the lines that Mr Wordsworth has suggested, then of course there would have been an obligation to ensure that there was a national legislative framework.

The import of Mr Wordsworth's submissions would be that if there were no domestic legislative framework providing for access to information, and also for access to information to be refused, then Ireland may very well have been able to initiate proceedings alleging a breach of Article 9 for failure to give effect to Article 9, establishing a framework for the provision of information.

Our submission, as Mr Wordsworth made yesterday, is that we did not have to adopt specific legislation because the view was taken that a legislative framework in the form of the environmental regulations was already in place. Just to deal with the tangential point that you raise, that emerges from my response on the question of the Radioactive Substances Act, we doubt, as you have heard, that the information requested comes within the scope of the Environmental Information Regulations. We took the view that we wanted to put as much of that information into the public domain as possible. We did not feel that it was necessary at that point to identify with great particularity the proposition that we were relying upon because we looked to the Environmental Information Regulations and the Code of Practice, we took the view that both of those required the disclosure of information subject to an exemption for commercial confidentiality, and on the basis of a

composite view of those provisions ministers made the decision to publish the redacted versions that you have seen.

MR GRIFFITH: I notice in part of your written submissions to us that you mention before the Freedom of Information Act come into force that would be an absolute bar if it applies to any information being made available. Is it your contention that were this matter to arise after the Freedom of Information Act came into force then there would be no redaction, there would be an absolute bar on the information being made available?

MR BETHLEHEM: I am sorry, I am not sure that I follow that. It is certainly not our contention that the Freedom of Information Act would simply be an end of the story. Mr Sands has suggested that the Freedom of Information Act would mean that the information is put in the public domain, we take the view that it is not because the Freedom of Information Act contains some provisions which are mandatary and some provisions which are discretionary. But there are clearly arguments that maybe had as to the precise interpretation of those sections.

MR GRIFFITH: If I could take you back to Regulation 4 of the Environmental Regulations, of course sub-regulation 3 is an absolute bar, it is in mandatory terms. Do you contend that such a bar would be in compliance with your obligations under the Treaty if there were capacity to redact as is provided for in sub-regulation 4?

MR BETHLEHEM: Let me see if I understand the question correctly. You are asking me whether the provisions in regulation 3 of the environmental regulations which defer to a primary statutory legislation, would mean that the environmental regulations would not operate in these circumstances, because the Freedom of Information Act would trump them.

MR GRIFFITH: My question is whether it would be an operation of the exception under Article 9(3) where you have in accordance with the national legal system that confidentiality is preserved with respect to this commercial information.

MR BETHLEHEM: Yes.

MR GRIFFITH: To have an absolute prohibition in terms of regulation 4(3) without the capacity to redact under 4(4|) which has apparently been applied here by the ministers.

MR BETHLEHEM: Yes, I think that is what we are saying. That regulation 4(3) which addresses very limited circumstances, circumstances in which information is provided either in confidence on the basis of a confidential agreement, or by people, for example foreigners who are not subject to the jurisdiction, that in those circumstances it is within our margin to legislate absolutely for the exclusion

of that information. And I would say further that I am not sure, and I would be happy to check this and come back to you on it, I am not at all sure that the United Kingdom is in a position any different from any other state that has adopted freedom of information legislation.

MR GRIFFITH: I am just on the Environmental Regulation at the moment.

MR BETHLEHEM: I was assuming that the two interacted.

MR GRIFFITH: At the moment you do not have freedom of information.

MR BETHLEHEM: Then perhaps I have answered the question.

MR GRIFFITH: So you say it would be in compliance with the capacity to create an exception if the national legal system had an absolute bar in the terms of Regulation 4(3), without a redaction provision as in Regulation 4(4).

MR BETHLEHEM: Yes, in those circumstances I think that is what we are saying.

MR GRIFFITH: Is it your contention that in fact those Environmental Regulations do not apply?

MR BETHLEHEM: I think you have heard two submissions on that point in the alternative, and I cannot go beyond that. Mr Wordsworth has said that it is the United Kingdom's position that the environmental regulations do not apply because the information is not Environment Information. We say that in respect of commercial confidentiality that we looked to that. I would say that there is a broader legislative framework and non-statutory framework as well which is relevant. As I have suggested there is the Radioactive Substances Act and there is also the Code of Practice. So, if this is where the question is taking me, it is not to say that if our position is that the Environmental Regulations do not apply have we done anything to implement or to give effect to the OSPAR provisions. We contend that there is a framework within English law. I would go further and say if it was the contention of Ireland that we have not fulfilled our obligations under Article 9 to put that framework into place, then that is the case that should have been brought. That is not the case that was brought.

MR GRIFFITH: I understand your latter point but I take it that your submissions runs to saying that if in fact this had been a determination by the two ministers that is in accordance with our national legal system which applies for the purposes of Article 9(3).

MR BETHLEHEM: Yes.

MR GRIFFITH: One last question. Having regard to your reliance upon the *Argentina Footwear* safeguards articulation by the GATT Tribunal, dealing with the issue of saying the local authority has examined all relevant facts and provided a reasoned explanation.

MR BETHLEHEM: Yes.

MR GRIFFITH: Would you indicate where we find a reasoned explanation in this case?

MR BETHLEHEM: I can indeed and I think I have given some indication of that in the bundle itself. Our view on the explanation in the first instances is to be found -- and I should also say that this is addressed in our Counter-Memorial because Ireland in its Memorial raised the allegation that we have not furnished reasons. Our view is that first of all the reasons are set out on the face of the PA report and in the footnoted references in the ADL report which indicate precisely why the information was redacted. Furthermore, there are perhaps a brief but two pieces of correspondence which are indicated in paragraph 35 of my first note between the United Kingdom and Ireland from the United Kingdom's Richard Wood to Ireland on the 5th September, and also from the United Kingdom's Michael Wood to Ireland of the 13th September. It would be our contention that we have acquitted that obligation to give reasons in Article 9(4), and that is the submission in terms that is put in our written submissions.

MR GRIFFITH: That is really additional to the counter memorial references, because I think the legal adviser's letter was after the date of the counter memorial.

MR BETHLEHEM: No, the legal adviser's letter was 2001. Mr Chairman, we would propose now to proceed immediately to the very brief examination in chief of our witnesses and then pass on to cross-examination by the other side. Mr Plender will return once the examination and cross-examination process is at an end at the end of the day to make our final submissions. If you are happy with that we would like to proceed with the examination in chief of Mr Rycroft first of all.

MR JEREMY RYCROFT: Called

Examined y Mr Wordsworth

MR WORDSWORTH: Mr Chairman, with your leave I will ask a few very brief questions of Mr Rycroft.

First, Mr Rycroft, you have prepared two statements in this matter, one dated May of this year and one dated August in this year.

A. That is correct.

Q. Can you confirm the truth and accuracy of those two statements?

A. Yes, to the best of my knowledge and belief.

Q. Would you tell the Tribunal a little bit about your position and role at BNFL?

A. I am the Commercial Director of the Spent Fuel Business within BNFL. I have had a number of posts within BNFL and I have held this particular post for about the last four or five years.

Q. Could you assist the Tribunal on the question of your ability to give evidence on the question of

whether disclosure of information in the PA and ADL reports would cause harm to BNFL's commercial interests?

A. I have operated in the nuclear business for about 12 years in the commercial role. During that period of time I have probably won business worth towards #1b with very substantial contracts and nearly always involving substantial legal support in the drafting of those contracts. So I have some familiarity from a commercial point of view of the importance of commercial confidentiality.

Q. What is your view on whether disclosure of the redacted information would cause harm to BNFL's commercial interests?

A. I am clear that it would cause harm and in fact the changes in redaction created harm for BNFL, created actual harm.

Q. Could you tell the Tribunal whether you have had any personal involvement in the redaction process either in terms of the ADL or PA report?

A. I had no direct involvement in any of the individual redactions. The Department is almost 100 strong. This process has gone on for 12 years and the way it has been managed is that an individual has had this as a project for two or three years. It has been an individual job of a named person that has changed I think three or four occasions. Obviously as head of the Department if there are controversial issues I review those; if there are policy issues I would determine them. But I was not involved in the mechanics of actually going through the document and crossing out or including words.

Q. One final question. Did BNFL have the final say as to what was redacted from the reports?

A. Certainly not; the final say was the decision of the Department of Environment, Transport and Regions.

Q. Thank you, Mr Rycroft.

THE CHAIRMAN: Mr Rycroft, before we go further, this is an arbitration Tribunal and we do not administrate oaths here. But witnesses understand that they must speak the truth. Do you understand that?

A. I understand that and fully accept it.

MR FITZSIMONS: Mr Chairman, members of the Tribunal, one housekeeping point at the outset. I had understood that we had agreed that Ireland would be entitled to cross-examine Mr Rycroft in relation to the unredacted material and that that was to take place for everyone's convenience at this point in time at the outset of Mr Rycroft's evidence. I can defer to the end of his evidence if that is more

appropriate.

THE CHAIRMAN: Mr Fitzsimons, would it be convenient for you at this point to conduct that interrogation?

MR FITZSIMONS: It would, but as I say I am quite happy to leave it to the end, if that suits the Tribunal, because it does involve clearing the room.

THE CHAIRMAN: As a practical matter will it be possible to segregate those questions from your other cross-examination?

MR FITZSIMONS: it would, yes.

THE CHAIRMAN: Then we will proceed now and then we will reserve those issues.

CROSS EXAMINED BY MR FITZSIMONS

Q. Mr Rycroft, I see that you have been with BNFL for 31 years, so you have a lot of experience.

A. Correct.

Q. And I see that you have spent time at the Tokyo office of BNFL?

A. No, I was responsible for setting it up and managing it and then visited Japan fairly regularly, but I was not resident in Japan.

Q. You have told us you were not involved at all in the final consultations that we have heard about?

A. People ibn my department were responsible for it as an individual project, so I was aware of major developments in it.

Q. Were you in charge of your department?

A. Indeed.

Q. So you were aware of what was happening?

A. Correct.

Q. I take it therefore that you would have been a final decision maker when serious decisions had to be taken?

A. When decisions on redaction were taken they were taken in discussion between the project officer and the person involved in DTR. So that was a closed process at which I was not present and therefore did not have the final say.

Q. But you were aware of the basis upon which the redactions were being made, namely the 1992 regulations?

A. Yes, in principle.

Q. I want to refer you to a statement in your evidence, and in fact I am going to go through part of your

statement of evidence. If I could ask the members of the Tribunal to take up Mr Rycroft's statement. I will be referring to the first and second statement and volume 9 of the documents as well as the ADL report during the course of the cross-examination. I want to ask you some questions about your statement. Go to page paragraph 2.2 of your statement, please. There you say "I wish to say at the outset that the central assertion in the MacKerron report, namely that BNFL has a monopoly on the use of customers' separated plutonium stored at Sellafield is wrong". So you contest that assertion?

A. Yes, I do.

Q. You explain your reasons for this opinion in the following paragraphs; is that correct?

A. Correct.

Q. At paragraphs 2 and 3 you refer to the fact that his assertion is wrong because reprocessing can take place elsewhere and transports of separated plutonium can take place.

A. Correct.

Q. You say that transports of separated plutonium for MOX manufacture have performed safely and securely between Sellafield and Dessel and Sellafield and Cadarache in the past.

A. Correct.

Q. What do you mean by in the past?

A. That would be during both the 1980s and 1990s.

Q. So no such transports have taken place since the 1980s and 1990s; to be more precise where the 1990s are concerned when was the last transport of the powder that constituted separated plutonium between England and France or England and Belgium?

A. I do not have the precise date in mind, but I accept it was a few years ago. The addition I would like to point out is that transports between France and Belgium have taken place and have continued to take place to the present day. So international transports do indeed continue to take place.

Q. In terms of quantities what quantities were transported?

A. In the past these run to tonnes quantities.

Q. And the form, you can confirm it was powder?

A. Yes, what is known as plutonium dioxide.

Q. I think there is no realistic hope of transport of separated plutonium being permitted by the authorities in the United Kingdom having regard to recent events in particular?

A. I am afraid I totally disagree. In preparing my report I mentioned that we do not expect the Office of Civil Nuclear Security in the UK, which has recently been set up to oversee these issues, to have

difficulties with approving transport. In fact we have had informal contact with that office and they have confirmed that they have no objection in principle to transport.

Q. I think in your second statement at paragraph 2.4 you say that there is one example of a proposed transport and that planning is under way.

A. That is correct.

Q. There is one example of a proposed transport. Is that so, one only, according to your second statement?

A. Yes, there is one confirmed. What I wanted to add and what was in my mind was I think there will more in future, and that is a judgment I make on my knowledge of the market. So I do not believe it will be an isolated case.

Q. But of course as you correctly point out that can only take place if permission is given. Mr Varley says that permission for such a transport would take from three to five years to obtain. Do you agree with his evidence on that point -- and that assumes that permission would be given of course.

A. Yes, I would hope it would be the lower end of the range, but in the nuclear world approvals sometimes do take a very long time.

Q. What is your view of the effects of 9.11 and the present world problems on the likelihood of permission being granted -- what is your view?

A. My view is that the authorities have reviewed the situation in the light of 9.11 and that it is a technical issue to decide whether increased security is needed and what that security could be. But in my view it in no way prevents the transport of plutonium.

Q. In your view?

A. In my view.

Q. And have you any explanation as to why such transports have not taken place between Britain and France or Britain and Belgium for some time in the 1990s but quite a number of years ago?

A. Very simply because they have not needed to because we are building a Sellafield MOX plant and the construction of the plant in general reduces the need for any transport to Europe.

Q. Let us go on to 2.4 of this statement and you offer as a further explanation that the plutonium will be manufactured into MOX at Sellafield. However, the separated plutonium is owned by the customer and not by BNFL and the selection of the MOX manufacturing facility is made by the owner of the plutonium. You offer this as a second reason as to why BNFL does not have monopoly - is that right?

A. Correct.

Q. How much MOX has been manufactured to date at Sellafield?

A. In the MDF facility it is a small number of tonnes and the SMP is just starting its ramp-up, so again it is a small amount of material.

Q. Going on the next paragraph, 2.5, there you give a further reason for contesting Mr MacKerron's monopoly thesis. You refer to swap-type arrangements. You say that these have taken place in the past. These relate to plutonium, of course, in the past?

A. That is correct.

Q. Could I suggest to you that the quantities involved in swap arrangements have been small?

A. That would be incorrect. The swaps involve volumes equivalent to orders, so equivalent to, say, the MOX part of the reactor reload, so it is definitely significant quantities.

Q. Could you translate that into actual quantities?

A. It is hundreds of kilogrammes of plutonium.

Q. Hundreds of kilogrammes?

A. Yes.

Q. And no more than that?

A. In total I would expect swaps to be running at over a tonne, but on individual orders I think about some hundreds of kilogrammes. I can do the calculation if the court needs to have it more precisely. I can sit down and work it out, but it will take me a few minutes to do.

Q. No, we can proceed with that. Going on to 2.8, you say that the customer utilities own the plutonium and decides which combinations of fuel vendors and MOX manufacturers to enter into a discussion with. Is that so?

A. Indeed.

Q. You go on over at the top of the next page, still in paragraph 2.8, to say, "It is possible, with two main European fuel vendors and three MOX manufacturers, for a European facility to seek offers from six different combinations of MOX supply." You have put that forward as a possibility and no more than that?

A. Well, five out of the six have actually taken place. We have had combinations of both Westinghouse ABB as fuel vendors with, if my memory is correct, I think, the Belgium and, of course, the UK, and we have had combinations of Framatome and Siemens with all the MOX vendors.

Q. You go on to 2.9 and there you appear to indicate that somebody has suggested that BNFL might

somehow or another exploit its monopoly position. One suggestion has been made to that effect so why do you raise that as a possibility?

A. My feeling was that that was implied. This was not the normal market and that BNFL could exploit its position with limited competition. My view of the MOX market is that it is more akin, say, to an aero-engine market or an airframe manufacturer. We have one or two large competitors in what I was always taught was regarded as monopolistic or oligopolistic competition and, therefore, different rules apply. Basically prices in those kinds of markets tend to be determined by supply and demand. Hence, if you look at a company like Rolls Royce, if the airlines are ordering, aero-engine prices are high and Rolls-Royce is in a strong position; post-9/11 with reduction in airline orders, they are in a weak position and their prices drop. You see a cyclical supply and demand effect in this kind of market, but it does not mean that BNFL is in a monopoly position. It is quite the opposite. In my view, the customers in this market are the dominant forces. They are much larger and more powerful than BNFL. They receive the money from sales to the public and they are at the beginning of the money chain, so the customers are the dominant players in the market. I would argue that the French competitor, COGEMA, which already has a large plant built and has more state support than in the UK and has depreciated that plant recently (written down the value of its plant) with a large home market, is in a very strong competitive position. If I had to typify BNFL's situation in the MOX market, it would be one of David and Goliath.

Q. That was a very long statement that seemed to come from the heart, but I simply asked you a question relating to your suggesting that someone else suggested or might suggest that BNFL would exploit its position. You are aware that no such suggestion has made in Mr MacKerron's evidence.

A. I accept that that is the case. It is the kind of argument that it is certainly used and it is the kind that I have heard being used. I was perhaps being a little defensive and I apologise if it was not actually included in Mr MacKerron's statement.

Q. That is quite all right, Mr Rycroft. We move on to 2.10. I will just read that out. "BNFL is also seeking to obtain further reprocessing and MOX business from new post-baseload reprocessing agreements. Whether any such contracts will be achieved remains to be seen, as there has been a move away from reprocessing in certain European countries, such as Germany and Sweden. Japan is constructing its own reprocessing plant and is also making progress with domestic interim storage options for spent fuel".

Very, very frankly you paint a fairly gloomy picture of the prospects for reprocessing at

Sellafield for the future, is that not so?

A. I simply tried to paint an objective one. I think that there are significant prospects in Asia and Japan, because they are committed to recycling as a resource management strategy. Different countries have different reasons for choosing interim storage or reprocessing. I personally respect that choice. I believe that it is a customer decision. But it does look as though Japan will pursue and continue to pursue the reprocessing option and I respect that, but it is true in Europe, where deregulation has increased and energy is relatively plentiful and there are less concerns about security of supply, then it is true that it is less likely within Europe that there will be further contracts. One possibility remains the French market and, although the French market has been relatively closed to external suppliers, I think that we will see over the next few months the French market is starting to open up to other suppliers.

Q. Could I ask you a question regarding contracts? Other than renegotiation of contracts with British Energy, when did BNFL assign its last reprocessing contract for fresh volumes of spent fuel?

A. That will be a considerably long time ago. My memory is of the order, excluding British Energy, of ten years ago.

Q. 1993/94?

A. Of that order. It was before I joined the Department, but that is broadly right. Certainly for any significant volume that would be correct.

Q. Mr Varley, doing his best to make enquiries, felt that it was 1997, so that is not correct, I do not think.

A. I would defer to Mr Varley's judgment on this. As I say, I had not joined the Department until after those dates. The main contracts were negotiated from as early as the seventies right through. Some contracts were negotiated in the mid to late eighties. I cannot recall something as late as late nineties, but if my memory is defective there, I am sorry.

Q. Has the order book gone up or down in the past ten years?

A. With the British Energy volumes it has gone up, but in other respects it is stable.

Q. Has British Energy contracted to purchase MOX?

A. No, it has not.

Q. Is it likely to?

A. That is uncertain. They have plutonium separated at Sellafield. They have indicated, if I remember rightly, that they could burn plutonium most easily at Sizewell, so there is an option of them burning plutonium as MOX at Sizewell, but at present they have taken no decision.

Q. British Energy is Britain's largest utility, I think - energy company?

A. It is its largest generator, not its largest utility.

Q. Largest generator. Is it not a fact that British Energy is now opposed to reprocessing and has decided that it wants its plutonium to be stored and not reprocessed and turned into MOX, because reprocessing and MOX are too expensive?

A. It is correct and in the media, I think, it has been recorded that British Energy is under enormous financial pressure because of a collapse of the UK electricity market which has led to coal, gas and nuclear suppliers all having severe financial difficulties, because they are subject to a very competitive market where the customers are more powerful than the suppliers. I would add that I think their choice of back-end strategy is not at issue. The issue for British Energy is what it can afford to pay when electricity has dropped to the lowest price in Europe and significantly lower, say, than the prices for certain other forms of energy.

Q. Is not the problem for BNFL, and indeed other suppliers, that MOX prices are high and that the utilities simply cannot afford them?

A. I have never said that the market was not challenging. I think that that was the very point that I was making, that it is a challenging market, but I am confident that I can win the orders that have been referred to in the various justifications.

Q. In relation to British Energy, I have to put to you that the British Energy commitment or stance against reprocessing and in favour of storage predates the current crisis?

A. They have had an increasing price pressure. They have raised issues with us. We have direct contacts with British Energy which others in this room do not have. I can assure the Tribunal that British Energy's concern is financial and not strategic.

Q. I just repeat the question. My question is very simple. The British Energy stance against reprocessing and in favour of storage predates the current crisis.

A. I am sorry, I was not challenging that, but I am saying that their opposition is not based on a strategic view of the merits of the two back-end alternatives. It is based on a review of what they want to pay in terms of fuel cycle costs, so it is financially driven rather than strategically driven and I know that from my own personal contacts with members of British Energy.

Q. The answer is yes?

A. The answer in my view is what I have said.

Q. I move on to paragraph 2.12. There you say that "for the reasons given above and in the remainder of my

statement it was and remains imperative that commercially sensitive material relating to MOX is not made public. To do so would cause serious damage to BNFL's business and to the economic case for MOX". I want to note that in passing. That is your view?

A. Yes, indeed.

Q. Let us go on to 3.16, please. There you say, "As with the exercise performed by PA in order for ADL to conduct its review and advise DETR, BNFL agreed to make all relevant information available to ADL on condition that ADL and its staff agree to be bound by strict terms of confidentiality which they did".

A. Correct.

Q. I am sure that you have read the ADL report.

A. It is some time ago and I would not profess that I have a detailed memory of it.

Q. Do you recall ADL's formulation of their confidentiality role on the first page of that report? The ADL report is at annex 3(a) in Ireland's memorial. Do you have the table of contents?

A. Yes.

Q. You see there that ADL says in relation to the changes (the second sentence) "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 operation or to the economic case for the Sellafield MOX plant itself." Do you know who instructed ADL to redact on that basis?

A. The Department obviously set up the contract, so I assume - although I do not have direct knowledge of it - the requirement was a Departmental requirement. Certainly, in our relationship with ADL, as with our relationship with PA, we took the view that their investigators must be covered by confidentiality agreements as well and we required individual signatures to make sure that our information was protected within PA and ADL.

Q. If there was a witness from ADL here, the explanation for this could be given, is that not correct?

A. I certainly assume so, yes.

Q. Can we move on to paragraph 3.20 of your statement? I want to read that out. You say, "I believe that during the five year history of the SMP authorisation process, BNFL has had no option but to agree to the disclosure of commercially confidential information relating to the SMP economic case, which has potentially caused damage to the company and the economic case for SMP. The reason why BNFL had no choice but to agree to further disclosure was that without such agreement the

authorisation process would have been delayed even further. There is no doubt in my mind that further disclosure of material which has hitherto remained commercially confidential would cause serious damage to BNFL and the economic case for SMP for the reasons set out in the next section below". Then you set out reasons.

I want now to go to your second statement and paragraph 3.2 of your second statement, please. In paragraph 3.2 of your second statement, "The second MacKerron report complains that my first witness statement failed to say what actual damage has been done to BNFL and the economic case for SMP as a result of the release of commercial confidential information from the PA and ADL reports to date. Although disclosure of such damage would risk yet further damage, I am prepared to give the following examples". Then you give two examples. Is that not so?

A. Correct.

Q. Where did these examples come from, because in your earlier statement you were talking about potential harm and now some months later you are telling us of actual harm?

A. They clearly happened before my first statement. That is clear. The difficulty for me in this whole case is that I am trying to protect the release of what I believe to be confidential information. The easiest way to prove my case is by revealing that same confidential information. I find myself in a particularly difficult position as to how much I can say. In the first submission I talked in general terms, I have gone further in my second submission and the evidence is there in the second submission, that I believe in one set of negotiations to a significant extent and in other negotiations to a lesser extent I ended up making price concessions that I would not otherwise have made.

Q. Do I take it from that that you see no conflict between your two statements on this topic?

A. I had not done, no.

Q. You had not seen a conflict?

A. No, but I am not a lawyer.

Q. In your first statement you said that the forced disclosure during the process had potentially caused damage to the company, in other words, that damage might occur in the future, and in the second statement, prepared a couple of months later, you give what you say are specific examples of actual damage. I am just trying to discover why you are not able to remember the few examples at the time that you made your first statement.

A. When you are in protracted negotiations over a period that lasts up to a year, with a very major utility, and you are personally involved in those negotiations, there is no way you forget what happens. I totally

reject the idea that there was a lapse of memory. I find that offensive. But the issue was in the first report was how to defend the position that I believe that information about customers, about contracts, about prices, about sales volumes, about capacities, should not be revealed. I reveal less in the first statement. I did not think that it was inaccurate. Because of the exchange of letters and the rejoinders and the replies which is a new process for me, I did review what I had said in the first statement and decided that in the circumstances it was the balance of advantage for BNFL was to give more information. It was as simple as that.

Q. Can we take it then that at the time that you made your first statement it was the balance of advantage for BNFL that guided you?

A. Yes, I think that that is the case. I can see that I am going to regret saying that, but that was the case.

Q. I am afraid that, as a result of it, I have to put to you that the balance of advantage for BNFL appears to have resulted in your making - I will just call it - inaccurate statements in your first statement.

A. I think that they are accurate, but they do not reveal all the information. I am at a loss as to what I can do in a situation where I am trying to protect customer confidentiality and contract details. If it is helpful to the Tribunal, I know that we have a planned session at the end to go into camera, I would be prepared in that session, if it is just to independent counsel, to give full details of what happened in those negotiations. I will make that offer to try to clarify the situation.

Q. Let us assume that those problems existed. Why could you not have said in your first statement that the forced disclosure had caused damage to BNFL instead of saying had potentially caused damage to BNFL. That would have solved your problem, would it not?

A. It certainly would have solved today's problem. I accept that. I felt that it was an accurate statement at the time. I was concerned to put into the public domain information that leads to the conclusion - a customer was able to exert very strong pressure on me. I see that as a disadvantage for me when then dealing later with other customers and there is some disadvantage in what I have put in 3.2 in my second statement if other customers read it. Hopefully 3.2 does not give too much away, but I saw it as potentially damaging.

Q. Can we take it that the balance of advantage approach is a BNFL approach, not just you as a member of BNFL, but that is the approach that has informed BNFL in relation to the consultation processes and in relation to these proceedings?

A. I think that it is correct to say that throughout the proceedings were keen to protect our interests and our position was very much to look at things that we think could potentially damage BNFL and then our

view was that, if there was potential damage, we would not want those to pass into the public domain. Obviously, the regulator took a different view and took it very strongly and we had some difficult debates. We have given some of the reasons why it was difficult and ultimately I guess there would have been the potential for legal action and, again, that would have caused delay, as the discussion on the redaction caused delay. Our conclusion was that we had to accept and could not further challenge the position of the regulator.

Q. The first of the two examples that you give at paragraph 3.2 relate to disclosing the five conditions on MOX manufacture imposed by Japanese customers confirms to certain European customers that their business was of increasing significance to SMP which enabled them to put pressure on BNFL in negotiations to reduce its prices for MOX fuel.

A. Correct.

Q. Are you familiar with Mr Varley's firm?

A. I have not used them recently. We have used them in the past, particularly for training of young commercial people. They have a good service and good knowledge of the basics of the industry.

Q. Mr Varley describes his farm as the world's leading consultancy in nuclear matters.

A. I think that is a reasonable description.

Q. And they have presumably - and I am subject to correction - an office in Japan?

A. Yes, I think they have a number of offices. I do not remember where, the UK, Continental Europe, Russia and probably Japan and America.

Q. Mr Varley's firm apparently advises members of the nuclear industry about what is going on and in various situations?

A. Correct.

Q. You are not seriously suggesting that Mr Varley's firm would not have been able to discover in Japan the five conditions that are imposed?

A. I am not sure. I would defer to Mr Varley on what he managed to find out. Those conditions were confidential and they were passed to us in confidence and the organisation who passed them to us was also something that we kept confidential, although subsequently it entered the public domain, I am not quite sure how, I doubt from BNFL. But our intention certainly was that that should remain confidential. Clearly if there is going to be delay in orders from the Japan part of the business it was evident that that would be advantageous to European customers and our intention was to avoid that being published.

Q. You say the name of that organisation is in the public domain.

A. I understand it is now in the public domain.

Q. What is the name?

A. It is something that has moved into the public domain recently. It is the Overseas Reprocessing Committee who passed them to us.

Q. And when did it enter the public domain with that information?

A. As far as I am aware relatively recently. We became aware that that had passed into the public domain relatively recently.

Q. You say that it was the disclosure of the five conditions on MOX manufacture that caused you BNFL problems, the ones you have referred to generally there. Are you suggesting that the customers of BNFL were not fully aware of the appalling problems that BNFL faced with regard to its Japanese market as a result of the falsification incident?

A. I am not sure I would accept your definition of the situation. Clearly BNFL had a difficult time in Japan, but before this date Kansai made a statement that the relationship between BNFL and Kansai was back to normal. So the information on the public record was that after a period of months in which they stood at arm's length from us, they made an announcement that relationships were now normalised. So the public accessible information was that the relationship was back to normal. The ORC conditions emphasised that there were still more work to be done. I do not have the ability to check the knowledge of European customers and how much they had penetrated and who had contracts with NAC. The prudent thing for me was to assume that the release of this information would damage and my genuine belief is that the release did indeed create damage.

Q. The second problem you referred to, I just want to ask you one question there. When did that problem occur?

A. This was earlier. this was during the third consultation when information on business contracted, business reserved, business under offer and remaining business was tabulated, and also a breakeven volume was quoted. So that gave an indication effectively that those who were not contracted but were in the reservation and under discussion areas were in a very strong position to demand good terms because it was clear that their contracts would take us above the 40 per cent level for the breakeven.

Q. Why is there no reference in the ADL report to these particular problems that caused losses, you say problems for BNFL?

A. I cannot remember whether there is a reference in the ADL report but the consequences of damage are recorded in the ADL report and again in the in camera session that you wish I can point to the data in the ADL report that identifies the scale of the damage.

Q. Just to be clear I have not asked for any in camera session, but we will deal with that if necessary later. Again to return to the question which I did not put clearly maybe; there is no indication I suggest to you from the ADL report that ADL were informed of the fact that the first release of information caused damage to BNFL, and if so does not that mean that they were not told about it?

A. I genuinely do not know whether they were or were not told. What they were told was what the position was on contracted business, what the prices were for that contracted business and what our price assumptions and volumes were for other business, and then they set about reviewing and validating it. So my own belief is that no material evidence was withheld from them.

Q. To use your phrase the balance of advantage from BNFL's point of view would have pointed to not providing them with this information. Is that not correct, because it would have hurt the economic case for MOX?

A. No, I do not agree with that. ADL were under a confidentiality agreement to us very carefully drawn up to make sure they did not use the information we gave them. We had a very open approach with ADL where they gathered a lot of information about BNFL's customers and as I say these events pre-dated ADL and therefore as they had access to all the contract pricing data to make their assessment they were very definitely aware of the consequences of the event and I would be surprised, but I cannot be sure, whether anyone explained the background to it. I am sure if they had seen it as relevant or our team would have seen it as relevant, it would have been communicated to ADL.

Q. Let us move on and sum up. Are you really saying that you do not know whether ADL were told about it, that as a result of the first disclosure of information by the Government that BNFL suffered damage under the two headings you have mentioned, in other words the British Government damaged its own company, BNFL. Was that stated as such to ADL or was it not, or do you know?

A. The answer is I know the consequences were communicated to them and they passed into the evaluation and the calculation of the value of the business. So I am absolutely sure that key factors were communicated to ADL and that the consequences therefore went into their calculation of NPV, and it is one reason why their NPV is different from PA's NPV, among a number of others. I do not know whether the degree of detail was given to ADL. No, I do not know.

Q. Key factors, consequences, was the cause of the consequences notified to ADL?

A. I apologise if I am repeating myself but it seems to me that I have made very clear that I am sure the consequences were communicated. I have no memory and no evidence as to whether the cause was.

Q. No evidence, so I will put a final question on this topic. Why was the cause not notified to the British Government?

A. As I said I do not know so I cannot answer a question that assumes that it was not done.

Q. And you have never asked yourself that question particularly when you are considering the balance of advantage of BNFL when you framed part of your statement?

A. To me if you look at the massive assessment that was done by the consultants, and the number of factors that had taken place, they are basically focusing on the future value of the business and it is about perceptions of market, perceptions of price, likely volumes, all those kind of things. When something is already an historical fact and is fed in as a piece of contracted business I do not see it as having the significance that you do.

Q. Can we deduce from that there are no letters that went to the United Kingdom Government and no internal memoranda within BNFL that established the cause and effect of the damage that you refer to in your second statement but not your first; these documents do not exist?

A. Again the consequences are included in the ADL report, the Government reviewed the ADL report, it based its decision on that report, so I believe that all material evidence the Government was aware of and took into account.

Q. We will move on. At paragraph 4 of your first statement you refer to Mr Varley's eight categories and discuss each in turn. I will not take you through them all but could I suggest to you that in your consideration of each of them you support Mr Varley's view by reference to competition and customers. Is that fair?

A. That sounds reasonable.

Q. I want to take you up on one of those paragraphs, paragraph 4.4, where you speak of the possibility of potential new competitors in the centre of 4.4, the disclosure of prices would provide potential new competitors with invaluable market information thus facilitating new market entry. I have to suggest to you that it is quite nonsensical to talk about potential new competitors or of facilitating new market entry because separated plutonium is an essential commodity for new competitors and there is no market in that product?

A. There is separated plutonium at a number of reprocessing plants. It is possible that reprocessing plants will have further orders. One potential new entrant would be Russia. It already is a reprocessor

at Mayak. It has done some MOX work in the past although not a lot. It is possible that the Russians would enter the market. They have systematically entered the uranium market, the enrichment market, basically by pricing themselves below USEC prices. They then entered the fuel market partly in collaboration with Framatome I think as was mentioned yesterday. So they had progressive entry into the whole fuel cycle market, and currently Russia may well be offering a service to take spent fuel back. So I believe it is not beyond the bounds of possibility that Russia would wish to enter a recycling and MOX market, and having a good understanding of the likely income from the MOX market is something that any new entrant to a market would love to have.

Q. You can only speak in terms of a possibility. Is that not so?

A. Yes, I do not challenge that, but if you are running a business potential threats are something you do take account of in running that business. Running businesses is often dealing with large degrees of uncertainty and it is about managing risk and taking judgments on things and protecting the company that you work for and trying to make sure that it remains profitable in what is a very difficult and competitive market.

Q. If I could move on to paragraph 5.4 of your statement. I will pass from that as I have an incorrect reference. You are saying somewhere in your statement "Many MOX manufacturing contracts are still to be negotiated".

A. It is certainly correct.

Q. In terms of the quantity of firm contracts that BNFL have at the present time I want to refer you to a statement that we are informed Mr Norman Askew made recently reported in the Independent on the 18th December 2002. This is book 9, divider 2. The second paragraph. "After a locomotive finally nudged a five ton consignment of rejected plutonium into a shed at BNFL Sellafield plant after a humiliating voyage back from Japan the company's chief executive .... said advance orders for their reprocessed nuclear fuel accounted for 40 per cent of capacity at the new MOX reprocessing plant". Is that an accurate statement?

A. Yes, that is a fair statement.

Q. Is it an accurate statement as distinct from being a fair statement?

A. It would include both firm contracted business and business that is covered by reservations. I am not sure that the contracted percentage is quite as high as 40 per cent.

Q. So the phrase advance orders is a little bit unfortunate in that it gives the impression of firm contracts, but that is not accurate?

A. It is not something I realised I was going to be questioned on and it is not a figure I carry in my head, but the best help I can give the Tribunal is what I said.

Q. In terms of firm contracts it is an exaggerated figure, if I can describe it in that fashion?

A. I think it is an accurate figure in terms of stating advance orders, but we can choose different words.

Q. You have already said it is not accurate in terms of advance order and you have referred to reservations. Reservations are statements of intent but not binding contracts. is that not so?

A. Yes, I would accept that definition.

Q. Can you not help us on the percentages?

A. If I had been given notification I could easily have checked it. I am afraid I do not have the number available.

Q. What position do you hold in BNFL?

A. Commercial Director for this business.

Q. Are you telling the Tribunal that you do not know as commercial director of BNFL the quantum in percentage terms of capacity of firm contracts that BNFL have at the present time. Is that your evidence to the Tribunal?

A. It depends how precise you want the number. If you are asking for a broad number I believe that is correct. There have been some slight changes in volumes, there have been some detailed renegotiations. What I am currently involved in is going through our European customers securing contracts. It was very important during the approval process to be aware of this number and I am afraid that the things that are important to me now are profit margins, loading of the plant and normal commercial issues you would expect people to be involved with.

Q. The answer is you do not know the amount of advance orders at the present time?

A. Not more accurately than that. I accept that that is a broad figure. It is broadly correct, but it may well include some reservations as well as firm contracts.

Q. I want to move on to divider 3 in the same book. This is another statement I want to put by you. It is from the Guardian of the 18th September 2002. I want to go down to the fifth paragraph and just read it out, and you can let me know if it is accurate or not. This is Norman Askew speaking. "He confirmed that up to 8 annual shipments of MOX fuel, mixed oxide fuel, the product of the reprocessing of spent nuclear fuel rods, could leave Sellafield in coming years". Eight annual shipments. Is that accurate?

A. Again my memory is this happened at a briefing at Sellafield, and this is based on an internal briefing I

had. I was not present there but someone in the audience said "is it true that there are about eight movements", and someone, I am not even sure if it was Norman Askew, my informant said it was the head of the site, said Yes, that is an indicative number, or words to that effect. It has then been reported as a firm number. I have to point out that it is not a firm number. It is an indicative number. It was given under pressure in front of the press.

Q. Let us put it this way. Advance orders meaning firm contracts at 40 per cent and eight annual shipments which seems a pretty good figure, those figures indicate strong business at BNFL, and it would accord with the balance of advantage for BNFL to create that impression. Is that not so?

A. I do not see it that way. There are two separate events. We worked up to reach the target of 40 per cent, and that is roughly where we are. I do not have a precise number but with the delays in opening the Sellafield MOX plant there has been some variation of volume and I have not recalculated a precise figure, but certainly 40 is a correct indicative figure. Again under pressure in front of the press where people wish the nuclear industry to be open (and you have the difficult challenge of openness versus things that might in other circumstances be regarded as commercially confidential or even confidential from a security issue) the decision of the chief executive and his team was to confirm an indicative number. That shows the sensitivity about the number going out into the public domain. Quite the opposite of being bullish, it was a matter of trying to be helpful to people who were concerned about the issue to help them size an issue and not fear that it was a larger issue than perhaps they feared it was.

Q. We can pick up from those comments that you are fully aware of these releases of information into the public domain and had thought and considered them in the context of commercial confidentiality since they occurred?

A. Frankly not in the case of the first one. That one had slipped my memory. Certainly the second one which happened relatively recently, yes, it was a matter of concern because in a sense it is me and my department that is trying to maintain the commercial confidentiality issue. In a large company of thousands of people things do not always go 100 per cent to plan.

Q. This is the Chief Executive of the company who feels quite free to release this information. Is this not indicative that it is his view that this information if released will not do any harm to BNFL?

A. It was not as simple as that. It was not something that the Chief Executive or BNFL raised. My understanding is that it was a question at the meeting and you always have that difficult position and I have been in it myself, whether you actually confirm something which in previous times you tried to

keep confidential, and that confirmation was a loose confirmation, that it was an indicative number, and that was their judgment under pressure in a public meeting. I respect the decision my chief executive made.

Q. Could I ask you to turn to divider 1 in the same book, book 9.

THE CHAIRMAN: I think the Tribunal would like a stretch for give minutes. We will continue if you are close to finishing the open session.

MR FITZSIMONS: Could I ask one more question of the witness, because this will finish off the segment.

THE CHAIRMAN: We are not trying to hurry you.

MR FITZSIMONS: I appreciate that. Divider 1 is a transcript of a television interview. If you could turn to page 3 of that transcript and moving up from the bottom, John Snow, Captain Malcolm Miller. I want to focus on that statement, that is the third sentence up from the bottom. Who is Captain Malcolm Miller?

A. He is responsible for transport operations within BNFL.

Q. He says "Well, we have got a business with Japan and the average would be about one voyage per year for the next ten years or more". Here we have the chief executive and we have Mr Malcolm Miller who is in charge of transport, both feeling free to give transport details to the press. Surely you cannot suggest that in those circumstances that information is commercially confidential?

A. First let me explain the statement by Malcolm Miller, head of transport. Malcolm Miller operates PNTL which is a joint venture company between BNFL and COGEMA for moving spent fuel from Japan to the UK and moving MOX from the UK to Japan. The Japanese have committed themselves to manufacture of MOX in Europe. They have reserved their position on whether it is all done at Sellafield or Melox or BN or elsewhere, but they have made statements in public, and these are a matter of public record, that the plutonium will be made into MOX in Europe. The only route back to Japan with that MOX is on a PNTL ship, so Malcolm Miller is exactly right, although he cannot be precise about timescales, that all the European MOX will move back to Japan with PNTL and on our current plans it would equate to that rate. But that relates to the fact that there is a Japanese statement about where they make MOX and it is a joint venture with the French -- and it is the only transport company that can move MOX to Japan.

Q. And none of that information is commercially confidential?

A. The existence of PNTL and its role in moving spent fuel to Europe and MOX to Japan - my belief is that it is already in the public domain. It is a limited company and records are at Companies House, so

I do not think there is an issue there.

(**Short Adjournment)**

MR FITZSIMONS: Mr Rycroft, could I ask you to go to your second statement, and I want to refer to part of paragraph 2.6 of that. I want to bring you to the final sentence in paragraph 2.6, the very final sentence, and really the second part of the final sentence, but I will read out the entirety of it. You say, "In any event, to the extent the above assertion from the second MacKerron report is correct, the absence of the required price differential between BNFL and COGEMA demonstrates the impact of competition between them in the MOX fuel market."

Can I take it from this that you know the COGEMA price?

A. No, I do not. Reading that, I think that the point that I am trying to make is that, if there is a price differential, then there is a risk of plutonium being moved. This is really saying the reverse. If no customers wish to move their plutonium, that will be a demonstration that the threat of moving led to prices being relatively close.

Q. I see, so it does not mean what it says, is that what you are saying? The absence of the requited price differential between BNFL and COGEMA demonstrates the impact of competition between them in the MOX fuel market. That is a very straightforward statement that I read as saying that there is no price differential between the two, meaning that you know the prices.

A. No, certainly I do not know the prices. There is no way that I could know the prices. On re-reading the drafting, I recognise "would" before "demonstrates" would have been better drafting.

Q. It would still mean the same thing, I am afraid. However, I move on. There is just a final matter now to conclude. Paragraph 3.1 of the same statement, and just to check a comment you make, in the final paragraph of 3.1, you say "My firm belief, based on my commercial experience in the MOX fuel market, is that there is substantial competition between BNFL and COGEMA both generally and in the MOX fuel market in particular".

Is that as far as you can put it? That is just a belief on your part?

A. There are two elements of this, I think. One is general competition between the groups - there is BNFL Westinghouse group and the Areva Group, which is the Framatome COGEMA Group. As in a number of mature high-tech markets, it is moving towards something of a duopoly plus other national players. That is certainly not a unique feature of the nuclear industry. Therefore, on reactor build, on reactor services, on fuel, there is intense competition between these two groups. The suggestion that there is not competition I find totally misplaced. The MOX market is starting to open up and it is a relatively

new market for us (we are a relatively new entrant) and my belief, on looking at the market as a whole and the fact that there is no expansion of nuclear power, but it is a relatively static market, is that this is going to be a competitive market with the customer having the whip hand. Therefore, my belief is that that will extend to the MOX market as well, that it will be a competitive market.

Q. You have a belief that it will be a competitive market, that is as far as you can put it?

A. Well, it is based on working in that market for 12 years, so, yes, it is a belief based on substantial experience.;

MR FITZSIMONS: Thank you, Mr Rycroft. I have no further questions for this witness.

THE CHAIRMAN: Before we go into closed session we will have redirect or do you want to put that off?

MR WORDSWORTH: We have no questions thus far in re-examination.

THE CHAIRMAN: I understood from Mr Fitzsimons that he had not asked for a closed session in response to a remark by the witness.

MR FITZSIMONS: That is so. I do not think that that issue arises now. It related to another aspect of the evidence, but it does arise in relation to the redacted information. The Tribunal will recall independent counsel for Ireland have seen the unredacted copies of the PA and ADL reports and I have just a few short questions, if I am permitted, to put to Mr Rycroft in relation to the redacted information.

THE CHAIRMAN: Then I think that all of those who are not under the understanding of confidentiality to leave the room.

(The hearing continued in closed session)

(See separate transcript)

MR BETHLEHEM: Mr Chairman, with your permission I would like to call Mr David Wadsworth.

MR DAVID WADSWORTH:

Examined by Mr Bethlehem

Q. Mr Wadsworth, in your curriculum vitae attached to the first of your reports you indicate that you have done a good deal of work as an expert accountancy adviser for a number of governments including for the United Kingdom in the nuclear energy sector. In your second report in the footnote you indicate that you lead the Deloitte and Touche team in the work that it is currently doing for the British Government in the nuclear energy sector. Would you elaborate on that briefly for the Tribunal and indicate whether you consider yourself to be able to address the matters covered in your report as an independent expert?

A. Over the last ten years I have on a number of occasions in respect of the nuclear industry, acted for

the British Government as accountancy adviser on the privatisation of British Energy. I acted as accounting adviser to AEAT on the sale of that business by the DTI. I acted as financial adviser to the DTI on the integration of Magnox Electric with British Nuclear Fuels, and on the 5th July I was appointed to lead the team advising the DTI on the restructuring of BNFL. That particular contract has not yet been signed, though we have been awarded it, and I have not done any work or had any contact with BNFL under that contract to date.

I am also advising the DTI currently on the financial difficulties that British Energy are currently having, I do not believe that any of those engagements detract in any way from my ability to give expert advice on the area under question at the moment.

Q. In paragraph 4 of your second report you indicate that while economic theory may have an important theoretical contribution to make when it comes to questions of commercial confidentiality that commercial practice should be given greater weight. Would you please elaborate on this and could you indicate what practical experience you have of addressing questions of commercial confidentiality?

A. I do not wish to enter into an economic debate because I am not an economist although my economic background goes back a long way. What I offer are observations from commercial practice. I am a partner in a corporate finance group of Deloitte and Touche and in that role regularly advise companies on the purchase and sale of businesses. Most of those types of transaction involve considerations of commercial confidentiality. On disposal of a business if one is acting for the vendor information is regularly withheld on the first round or two rounds of the sale process, and certain confidential information is only made to a preferred bidder. If I am acting on the buy side we frequently are looking at information where confidential information has been withheld and trying to make use of that information which has been made available to build up a picture of the business so that one can make an informed bid on it. That occupied the principal part of my professional activity over the last ten to 15 years.

Q. Are there are characteristics of BNFL and its business that put it in a special position when it comes to determining whether information relating to its business models and key business variables should be considered commercially confidential?

A. Yes. I think BNFL and particularly the SMP are one of a category of businesses where you have a very large and expensive production plant that is producing one or a very limited range of products and selling that to a very limited range of customers. Typically there is also little competition in those

areas, so financial information or commercially confidential information on those sort of businesses tends to be unusually closely guarded by comparison with some other commercial sectors.

Q. You have not seen the unredacted versions of the PA or ADL report. Is that correct?

A. I have not.

Q. In your experience do you need to have sight of commercial information in order to determine whether it is properly to be regarded as confidential?

A. It is always better if you can see the information so you can make a specific determination on each particular item, but I think as a general rule on the information that is before us, for the very large part of the information one can determine relatively easily whether it is in a category that should be considered commercially confidential or not. If you wish I can turn to the ADL report and just indicate some of the areas where one would have a clear view on that.

Q. We will leave it to the Irish side if they would like to pursue that point. In your view as someone who has had frequent experience of addressing issues of commercial confidentiality is the information redacted from the public domain versions of the PA and ADL reports properly to be regarded as commercially confidential?

A. I think it is clear that in most cases, yes. There are other areas where I would need to see the information in the context to properly decide that.

Q. Thank you.

THE CHAIRMAN: Mr Wadsworth, before you begin; you appreciate you are about to be cross-examined by counsel for Ireland. I presume you understand that in an arbitration we do not administer an oath but witnesses are expected to tell the entire truth and that is a matter on their honour. Do you understand that?

A. I understand that, and I intend to.

CROSS-EXAMINED BY MR FITZSIMONS

Q. I will be referring to Mr Wadsworth's two reports in the course of my cross-examination. Mr Wadsworth, just a small point. What was the date of your second report, because there is no date on it?

A. I am afraid I cannot tell you that with precision. I would need to check with the instructing party.

Q. Did you furnish it in July or August of this year?

A. It would have been in August.

Q. One brief point, just to establish the facts. You very carefully in the footnote to your second

statement refer to your appointment in relation to the liabilities management authority to act as an adviser having tendered for it. When did your firm Deloittes tender for that post?

A. We were invited to tender early in June.

Q. Early in June?

A. Yes, we submitted the tender in mid-June, and were awarded it on the 5th July.

Q. What date in early June?

A. I cannot tell you I am afraid.

Q. Your first report was 5th June 2002.

A. That is correct.

Q. And you cannot say whether it was before or after that when you were invited to tender?

A. I cannot, no, but it was a public tender where a number of parties were presenting for the work.

Q. Do I gather from the history of your association with the Department and undertaking these commissions that have been referred to that you would have had to have a fair amount of contact with BNFL?

A. Just thinking back over the different assignments. In respect of AEAT there was no contact with BNFL at all. In respect of the privatisation of British Energy there was no direct contact with BNFL at all. In respect of the integration of BNFL and Magnox it was I would characterise it broadly as an adversarial position against BNFL because the transaction was being done against their wishes to some extent.

Q. Moving on when were you requested to assist in relation to these proceedings?

A. Again I cannot recollect precisely but my recollection would be it was in the early part of this year so it would have been in the first quarter of 2002 would be my recollection, but I cannot say with certainty.

Q. What were you asked to do?

A. What I was asked to do is basically essentially what was set out in paragraph 3 of my first report which was to express my opinion on the Mackerron report in support of its argument that the excision of the information omitted from the public domain was justified or not. So paragraphs 2 and 3 essentially set out my terms of reference.

Q. Did you ask to see a copy of the unredacted report?

A. No.

Q. Why not?

A. Because I was told that was not part of what I was asked to look at. I was asked to look at the information in the bundle of documents that was provided to me.

Q. Who told you that you were not to see that document?

A. I am not sure that I was actually told not to see it. It is a sort of negative thing in that what I was asked to look at was the bundle of information that was your memorial which comprised three or four lever arch files being your submission and 18 or 19 attachments. That is what I was asked to look at.

Q. So you were not told not to look at the unredacted report. I repeat my earlier question. Why did you not ask to see the unredacted report so that you could check the validity of Mr Mackerron's assertions?

A. Again I repeat I looked at what I was asked to look at. I believe I was looking at the same information that Mr Mackerron had looked at and on which he based his judgments. If |I had looked at the redacted version, if I had been allowed to look at it, I would have had information that was not available to Mr Mackerron.

Q. I see from your CV that you are the senior partner in Deloitte and Touche, one of the largest accountancy firms in Britain and you have enormous experience as detailed in your CV. I take it you would be aware as an accountant having regard to roles accountants fulfil that all information available should be put before an accountant before an opinion is formed and advice is given?

A. I looked at all of the information that was made available to me.

Q. That is the fourth time you have made that statement. I will ask you for the last time and I will then move on; why did you not ask for the full unredacted report so that you could check the validity of Mr Mackerron's assertions?

A. Because Mr Mackerron was making his assertions on the basis of looking at the unredacted version and I wanted to make sure that I was looking at it on the same basis as he was.

Q. Mr MacKerron was making his assertions, I think you mean to say on the basis of the redacted versions.

A. Yes.

Q. Surely it must have crossed your mind that with sight of the unredacted version that you could have demolished his case, or possibly have demolished his case?

A. I chose not to do that. I chose only to look at the same information that he had looked at.

Q. Let us move on. Your first statement on paragraphs 12 and 13; in this very first paragraph you set out a number of statements of fact but preface all of them by saying "I understand that"; and then

paragraph 14 "I am informed that". Then paragraph 15 is the phrase "has been independently confirmed". Paragraph 16 there is the phrase "This is evidenced by the fact that the parties enter into arm's length commercial negotiations". Can we take it that all of the information in these paragraphs is information that was given to you?

A. That is correct, was given to me and is also just based on my general background knowledge of the BNFL and nuclear industry, but principally based on things that were given to me.

Q. On a point of clarification at paragraph 15 you refer to two internationally recognised firms of consultants. I take it that is a reference to PA and ADL?

A. That is correct.

Q. And I think you broadly conclude that Mr Mackerron simply did not take into account all of these matters.

A. That would appear to be the case.

Q. So your opinion is based upon an acceptance of the information that you were given and the accuracy of that information?

A. That is correct.

Q. I want to go back to paragraph 11, the final sentence, just again for certainty's sake. "I regard the report [Mr MacKerron's report] as conceptually flawed in its approach and as dismissive of certain relevant and important facts". I take it that the "certain relevant and important facts" are the ones that we have been talking about?

A. They are.

Q. You say "conceptually flawed". Could you explain that, because you do not explain that anywhere? What do you mean by "conceptually flawed"?

A. Because it relied solely on analysis of competitive economics and I think that that is not the only factor or not even the most important factor in this particular case.

Q. You are very careful to say that you are not an economist and I take it that you would defer to Mr MacKerron as far as economics are concerned?

A. Probably, yes, if it is a question of economics.

Q. Again, the same page, going back to paragraph 12, and the second sentence, you say, "The existence of competition is not a pre-condition for commercial confidentiality". Do you see that?

A. I do.

Q. Have you read the reports of Dr Varley and Mr Rycroft?

A. I have.

Q. They emphasise competition and its importance in the context of commercial confidentiality. Indeed, make it a critical element of consideration of that issue. Do I take it that you disagree with them?

A. I do not disagree with them. I think that what I do is to say that competition is one of the conditions, but there are other conditions which one may take into account in determining commercial confidentiality. I would say that I probably go slightly further than they do in the definition, but I would not disagree with them.

Q. But you make this very strong statement, "the existence of competition is not a pre-condition for commercial confidentiality".

A. It was made in the context of saying that commercial confidentiality does not only require there to be competition. There may be other factors that give rise to a requirement for commercial confidentiality.

Q. I have suggested to you that that was the difference between Dr Varley and Mr Rycroft and yourself, but we will agree to differ on that. Just going to paragraphs 5 and 6 of the same report, there at paragraph 5 you set out the PA report definition of commercial confidentiality. If we just run briefly through that, or the opening words of it, the first one "Allow or assist competitors", etc. The second one, "Allow or assist competitors", etc. Third one, "Allow or assist new competitors", etc. Fourth one, "Allow customers or competitors to understand", etc. Fifth one, "Breach of confidentiality requirements with the customers or vendors". Leaving aside the final one, the first four of the PA consultancy view of commercial confidentiality involves competition. Is that not right?

A. It does.

Q. You then I think go on to say that their definition (in paragraph 6) does not go far enough. Is that not so?

A. That is correct.

Q. I want to go to your second report now, paragraph 4. I will just read it out, "While economics may have [Mr Bethlehem inadvertently said 'while economic theory may have'] an important theoretical contribution to make, commercial practice is particularly relevant and where it appears to conflict with economic theory should, in my opinion, be given greater weight".

Can we take it from this that, when you say that the PA definition did not go far enough, that what you really meant to say was that commercial practice should rule the question in any case of whether or not an item of information is commercially confidential?

A. I do not think that it should necessarily rule it, but I think that it is a very important factor which should be taken into account given the circumstances of any case.

Q. Commercial practice really means what it says, what businessmen do, is that not right? Here you are saying is what businessmen do appear to be given greater weight and economic theory where there is conflict. Is that not correct?

A. I think that that is correct, yes.

Q. How is commercial practice to be policed, if not in part by economics?

A. I think that economics provides a framework against which business practices are measured. I do not think that economics polices commercial practice.

Q. I take it that you would be aware that in competition or anti-trust law economics and economic theory play a major role. Is that not so?

A. I am aware that it does, yes.

Q. Commercial practice is certainly policed by competition law - is that not correct?

A. It is a factor in the policing of competition law. It is an element against which it is measured and judged.

Q. So where there is a conflict between commercial practice and the economic principles of competition law, commercial practice has to give way not the reverse - is that not so?

A. I think that that is a legal matter, not a practical matter.

Q. But is that not so? Can you not accept that proposition, because you have asserted the contrary at paragraph 4 of your second statement?

A. I am speaking as a commercial practitioner not as a lawyer.

Q. You are a witness, I am afraid, and you are a very experienced accountant who must know all about these matters, Mr Wadsworth. Would you please answer the question?

A. I think that the question in any particular case has to be a question that is tested by a judgment. Ultimately the judgment will be made on a comparison of what the economic theory says against what the commercial practice is.

Q. If we now talking about judgment - whose judgment - a businessman's judgment or the objective judgment of someone who is required to assess an issue of whether or not there is commercial confidentiality?

A. I would look at it in the first instance from the businessman's judgment, because it is his interests that he is seeking to protect.

Q. So your view then - and you are entitled, of course, to your view - is that a businessman's opinion must be given precedence?

A. I do not think that that is what I said. I said that I start from the premise that it is the businessman's judgment that should be taken in the first instance. If the businessman's judgment runs counter to

competition law, then ultimately it is the legal process that will decide which is the correct judgment.

Q. If a businessman's judgment runs contrary to, say, the 1992 Regulations, I take it that you agree that the 1992 Regulations should prevail?

A. I am not familiar enough with the 1992 Regulations, but I would not argue that the businessman's judgment should prevail over the law.

Q. If this businessman in the exercise of his judgment decided that the balance of advantage lay with claiming commercial confidentiality, I take it that you agree that that would not be a proper exercise for judgment?

A. A business judgment in my experience is always to seek to preserve your position as much as you can. You do not make judgments on behalf of others which would be disadvantageous to you.

Q. Nobody could disagree with that. You would agree with the proposition then that the businessman would exercise the balance of advantage in his own favour in exercising a judgment?

A. That would be my experience, yes.

Q. Just finally, Mr Wadsworth, could I suggest to you that your definition of what standards should be applied to commercial confidentiality goes beyond anything that either Mr MacKerron or Dr Varley or, indeed, even - well, I will leave Mr Rycroft out of it - but anything that Dr Varley or Mr MacKerron has opined having regard to your last statement?

A. I am not sure I understand your question.

Q. You see, BNFL is a business.

A. Yes.

Q. You have told us that the businessman will always exercise a balance of advantage in his own favour when claiming commercial confidentiality. Well, neither Dr Varley nor Mr MacKerron, certainly, would agree with that. Does that leave you with that opinion on your own? It is still your opinion, is it?

A. It is my opinion. I think that I should perhaps qualify it slightly. I think that the commercial confidentiality is always a balance of judgments and there may be other issues which make people treat things that they might otherwise consider as commercial confidentiality and be prepared to put them in the public domain.

Q. Why have you decided to qualify your earlier statements?

A. Because I do not think that I made that clear, perhaps, in the first instance.

Q. You actually did make it very clear. The Tribunal has heard the evidence. Finally, I want to put a proposition to you. If people say something is commercially sensitive or commercially confidential,

should such a claim be immune from being objectively tested?

A. No, I do not think that it should be immune from being objectively tested. In fact, I think that commercial confidentiality and withholding of information in normal business transactions is regularly tested. In most commercial transactions, it would be to some extent a degree of horse-trading between the parties.

Q. Would you agree with the proposition that a notion of commercial confidentiality and any claim to rely upon it connotes a consequence of harm, if commercial confidentiality is breached?

A. I think that the reason that one would claim commercial confidentiality is the belief that, if that information is put into the public domain, there will be a degree of harm. I think that in any disclosure or any voluntary giving up of commercial confidentiality, the benefits of that have to be weighed against any harm that might be done.

Q. I take it that you would agree that two parties cannot make something commercially confidential by simply signing a contract to that effect if no harm could ensue from the release of that information?

A. I think that that is probably a legal matter rather than an accounting matter. It seems to me that, if two parties contract not to disclose information and to keep it confidential, that they would be bound by that contract, whether or not the release of the information would cause harm or not, because they entered freely into the contract. As I say, that is a layman's view. I think that it is a legal matter.

Q. But you would agree that any such claim made on such a basis could be tested?

A. Yes, I see no reason why it should not be tested.

MR FITZSIMONS: Thank you, Mr Wadsworth.

MR BETHLEHEM: We have no questions.

THE CHAIRMAN: Thank you very much, Mr Wadsworth.

(The witness withdrew)

MR PLENDER: Mr Chairman, members of the Tribunal, the United Kingdom final witness is Dr Varley.

DR GEOFFREY VARLEY

Examined by MR PLENDER

MR PLENDER: Dr Varley, is it correct that you are a nuclear physicist by training?

A. That is correct.

Q. And you have worked in the nuclear industry for some 26 years?

A. That is also correct.

Q. What is your current post and employment?

A. I work for a company called NAC International , which is an American-owned nuclear fuel services and consulting company. The company has three main business lines, including engineering and design services, which includes the provision principally of spent fuel storage solutions; site transportation and field services division, which makes transportations of spent nuclear fuels and other related fuel services; market information and information products division of which I am a member, which provides business advice on an independent basis to suppliers, utilities, agents, governments and others in the worldwide nuclear fuel cycle industry. My current specific position is as manager of European consulting operations.

Q. Does NAC ever perform services for BNFL?

A. BNFL being part of the worldwide nuclear industry, yes, we do and we have over a period of, perhaps, two to three decades, just as we have provided consulting services to more or less every utility and every supplier and many others around the world, including BNFL's competitors and customers.

Q. Does NAC compete with BNFL in any nuclear-related market?

A. Yes, we do and we have. In the spent fuel storage solutions market we are a direct competitor. In the site transportation and field services area we are a direct competitor. I could, if necessary, cite contracts where we have directly gone head to head against BNFL for one of those contracts.

Q. Does NAC provide any services to COGEMA or Belgonucleraire?

A. Yes, we have done and we continue to do so from time to time in terms of standard information products and also individual consulting support in a range of different subject areas.

Q. Have you visited the MOX plant facilities of COGEMA or Belgonucleraire or both?

A. I visited both of the COGEMA facilities in Cadarache and Melox and also the facility of Belgonucleraire in Dessel.

Q. Yesterday Mr Fitzsimons handed to the Tribunal a written statement prepared by Mr MacKerron of eight propositions stated to be not contradicted by yourself.

MR FITZSIMONS: That was not a statement prepared by Mr MacKerron. It was my speaking note with eight questions of fact or issues of fact taken from paragraph 1.3 of Mr MacKerron's evidence, as the note states.

MR PLENDER: I am perfectly happy with the fresh phraseology. I will try to get it right. A note prepared by Mr Fitzsimons on the basis of Mr MacKerron's statement setting out eight propositions not contradicted by yourself. Is there any one of those statements with which you particularly disagree?

A. Perhaps I would like to highlight for the Tribunal in relevance to this case that item 4, which says, "Only

COGEMA France (commercially incorporating the small plant operated by Belgonucleraire) and BNFL are commercial scale suppliers of MOX." I would disagree with that statement in more than one way. First of all, I think that it overlooks or dismisses the presence of Belgonucleraire in the market. They, in fact, have the longest standing and most varied history of commercial MOX production. Notwithstanding the fact that they are 40 per cent minority shareholders in the COMMOX marketing venture, COGEMA being the other shareholder, they do compete with COGEMA and they do compete with BNFL. Therefore, I think that it is a misrepresentation of the competitive position of Belgonucleraire in the MOX market.

Q. Are you able to accept the other statements without any qualification?

A. No, I am not. There are some where I have absolutely no comment and agree and then there are others where I believe that there are some slight factual inaccuracies or the picture painted is incomplete and, therefore, somewhat misleading.

THE CHAIRMAN: Before we proceed, could you give us the page in the transcript that you are referring to?

MR PLENDER: It was a separate sheet handed by Mr Fitzsimons. I have it only as a separate sheet handed in.

MR FITZSIMONS: It is an integral part of my speaking notes. It was the last part of my speaking notes. The Tribunal received them all. You will recall the exchange with the Chairman.

THE CHAIRMAN: It is in the transcript. I would like to get the page so that the Tribunal can follow this.

MR PLENDER: I was not proposing to ask any more questions about it.

THE CHAIRMAN: The question has been asked and I would like to note it. While that is being searched for, Dr Varley, you have been in the hall and you have heard the other witnesses testifying, so I want for the record you to acknowledge that you appreciate that we do not administer an oath in an arbitration. The witness is expected to tell the entire truth. This is a matter of the witness's honour. Do you understand that?

A. I understand and I accept that in full.

THE CHAIRMAN: Thank you.

MR PLENDER: I do have one final question to the witness. Will you please tell the Tribunal what the remit given to you by the United Kingdom is in this case?

A. I was asked to comment on the excisions of information from the PA and ADL reports and specifically to consider the extent to which those excisions were justified on ground of commercial confidentiality. In relation to that, I was instructed to read not only the PA and ADL reports but also to read the reports of Mr MacKerron and, in the context of preparing my expert independent opinion, to make a critique of

Mr MacKerron's work and relate it to the primary request from the United Kingdom Government.

Cross-examined by MR FITZSIMONS

MR FITZSIMONS: I should say that I shall be referring to Dr Varley's two statements. Our book 9, the ADL report and Mr Rycroft's statement. They are the only documents to which I will be referring.

We are aware, Dr Varley, that you spent 14 years with BNFL and your firm does consulting work for them still.

A. I worked for BNFL for a little over 12 years from 1975 until early 1988 and I have now worked for about 14 and a half years with NAC International . It is correct that we have done work for BNFL in a number of different areas over a long period of time.

Q. I am not suggesting that there is anything wrong, Dr Varley, do not worry. Have you yourself been involved in recent years in your firm's contracts with BNFL?

A. I cannot remember the exact last time that I was involved in something with BNFL. I guess, sadly, we probably have not had as much business from them as we would have liked.

Q. When did you receive the commission, can you give an indication?

A. I believe that I was first contacted somewhere around the end of March this year and I believe that an agreement actually to retain my services was made in April this year.

Q. When you were retained and instructed, could I ask you why did you not ask to see a copy of the unredacted report?

A. I was provided with a bundle of documents to use as a basis for the work that I was requested to do. In addition, I noted that in my position as an independent market analyst and consultant, it seemed inconceivable that BNFL would consent to the provision of all the unredacted information - or the redacted information - to me and I was happy to go along with that, because being an independent consultant I would not want to be bound by overbearing confidentiality agreements that might inhibit my ability to subsequently make a living.

Q. I can fully understand that. Is it possible, Dr Varley, that there is another reason? Is it possible that you may know a lot of the information that is redacted from the report, having regard to the nature of the work that you do, namely acting as a consultant for international nuclear industry clients, including, as you have told us, COGEMA, Belgonucleraire and others?

A. I think that the short answer to that is, no, but I should just explain why I say that. For example, there are pieces of information redacted which relate to prices. I may have some idea of a range of prices that might apply but would not necessarily know the specific price applying in a particular piece of

redacted information. I may have some idea about overall volumes of business, but not necessarily the detail of the timing of those. I think that the short answer is, no. I do not know and, if I had some idea, they would be estimates in general.

Q. Do I take it then that none of your customers ever disclose their prices to you, including COGEMA, BNFL and other either nuclear power companies or, alternatively, utilities who buy from nuclear power companies? None of them have ever told you the going rate, so to speak, for products that we are talking about here?

A. Life as a consultant and the way we operate tends not to be quite so simple and direct where one can ask a question and get a direct answer and, in particular, suppliers tend to jealously guard the commercial nature of their business and do not divulge details of prices and other things - or costs. In the course of interacting and networking with a wide range of suppliers and utilities around the world, over a period of years one builds up a knowledge and experience where one can make educated guesses, one can take individual pieces of information from different sources. You can try to build a jigsaw that hopefully will come to some conclusions. The range of information divulged by suppliers and utilities varies form the almost completely opaque to the relatively transparent. That is just the nature of the market. Generally, most players do not want to operate in a completely opaque market, they want to have some transparency and, therefore, inevitably, some information gets out and it is our job as expert consultants to try to make something helpful and useful out of it to help the industry make its business decisions.

Q. Let us look at it in a different way. I take it that as a careful witness, Dr Varley, you would acknowledge that, if you had seen the unredacted sections of the report, it is possible that it could have made a difference to your opinions?

A. I do not think that it would have made any difference whatsoever to my opinion or analysis. In reading the versions with information excised, I confirm, as did Mr Wadsworth, that the vast majority of the information so excised was very clearly what it was shown to be, an open parenthesis with a price missing or a number of tonnes or a timing or something like that. I understood the nature of the information and did not need the detail.

Q. Let us be clear then. You have proceeded on the basis that the only matters excised from the report are figures?

A. No, that is not the case.

Q. There is no text?

A. That is not the case. There are parts where clearly some text has been excised. However, on the basis of the context of the entire report, there was normally a pretty good indication of the nature of the information that would be there. The only thing that was unsure was where, for example, whether there were three words or three paragraphs or three pages worth of information there to explain the point.

Q. You have some hard things to say about Mr MacKerron in your report. I do not mean to say that you cast any sneers at him or anything unpleasant like that. But you are fairly severely critical of him.

A. Certainly, in approaching the work, I can confirm that there was no personal attack meant on Mr MacKerron. I am sure that he is a lovely man ....

Q. I am not suggesting for a moment that you made any personal attack, not for the moment. I made that very clear. But you engage in some fairly strong criticisms of his evidence?

A. Yes, indeed. I looked at his evidence and his analyses and his conclusions and I was bound to point out in areas where he was completely factually wrong that he was completely factually wrong. If he had misconstrued or misinterpreted the nature of statements that the UK side made or other things said elsewhere, then I was bound to point those out. From some of his analyses and conclusions about nuclear fuel services markets, for example, it was clear to me that his understanding of those markets was not adequate and sufficient to draw correct conclusions. So I pointed out, with the benefit of greater background and knowledge, what the correct assertions and conclusions should be. I was just trying to be factual.

Q. I appreciate that. You have heard Mr MacKerron deferring to your expertise in technical matters, but, of course, you agree to differ, so to speak, on the markets, even the markets in the nuclear area. You are not an economist, Dr Varley, is that not so?

A. I am not an economist.

Q. You are obviously a very highly-qualified nuclear expert, but I take it that you would defer to Mr MacKerron on economic matters, he being the expert economist with many years experience, academic and practical?

A. If I was required to enter into a debate or discussion with Mr MacKerron on economic theory and economics was the crux of that, then I feel that I would defer to him. Where it is something related more to practice in nuclear fuel markets, then I think that I have considerable expertise which is pertinent, as evidenced by what I have written in making critiques of Mr MacKerron's work, and I feel that I have greater relevant expertise in some of those.

Q. You are not prepared to defer to his economic knowledge then?

A. I defer to him in areas where economics and economic theory are the applicable field of expertise. If there was an area where it is some other kind of expertise, of an economic and market nature, but more of the nature of commercial practice in nuclear fuel markets, then I do not think that it is necessarily the correct thing to defer to him, but in some areas I would.

Q. You are aware that Mr MacKerron's specialty is economics of the nuclear industry.

A. He has applied his economic expertise to the nuclear industry, but, in applying his economic expertise and experience, I believe that he makes mistakes, because his understanding of the nuclear fuel cycle and markets is lacking in certain areas.

Q. I see. We will agree to differ and proceed. At paragraph 2.83 (page 24) of your first statement, you say the following: "Suppliers and utilities alike for at least the last 15 years have exhibited great interest in information about MOX production costs, plant capabilities, market supply and demand, contractual terms and conditions, etc. Indeed many have purchased consulting advice from NAC [your firm] on costs, prices and other commercial information related to the MOX market". You then go on to express the view that this alone demonstrates quite clearly the fact that details about MOX production costs and contractual terms and conditions have commercial value. Consultants are able to offer their estimates on projections of all the key information. Disclosure of the actual details in some key areas would enhance the accuracy of the main results by eliminating uncertainties.

You are saying there really that the information you have is not as good as hard information.

A. That is correct. We do our best to have an informed view of the key parameters, but we do not normally have access to the actual information.

Q. I take it that the same comment would apply to the opinions expressed in the PA and ADL consultant reports, they are consultants expressing their opinions and they would have equal status as yours - is that not correct?

A. I was clearly not part of the PA or ADL consulting exercises. Correct me if I am wrong, but, as I understand it, they were given a considerable amount of information under terms of commercial confidentiality by BNFL and then offered things like their opinions as to whether or not some of that information and assumptions by BNFL were reasonable and correct. That is quite a different thing to me and my company searching for indications and ideas through our worldwide network to determine what we think a price might be or a volume or timing or whatever.

Q. Do you agree, as Mr Wadsworth did, that the prospect of harm is essential to the notion of commercial confidentiality - the prospect of harm arising from a breach?

A. Commercial confidentiality is normally there to avoid harm to the party protecting disclosure, yes.

Q. And you agree, therefore, that you cannot make something commercially confidential by simply contracting that it is to be so if no harm can result from the release of that information?

A. I think that I would make two comments in response to that. First of all, I would reiterate what Mr Wadsworth said, that there may be a legal issue whereby, if two contracting parties have entered into a contract freely and agreed in that contract not to disclose any details of the contract or its contents, then there may be a legal and binding requirement for non-disclosure, but that is a legal argument and I am not a lawyer or qualified to answer that. It seems like commonsense. The second point is that the information itself in some cases is contained within legal and binding contracts. If disclosed by one party this could disrupt and damage commercial relations between that party and the other party, which would constitute harm.

Q. We move on. You will recall that I raised this point in my opening. Why did you re-categorise the information that was redacted and identified by Ireland in 14 categories at paragraph 75 of its memorial, why did you re-categorise the redacted information into eight categories?

A. I did so for practical reasons. When I was requested by the UK Government to undertake this exercise, they were keen that the report I presented was coherent, easy to understand and not repetitious. Had I used 14 categories, I believe that it would have been inefficient and would have led to an awful lot of repetition. In addition to which, I was asked to consider all pieces of excised information and, in going through the list of 14 and comparing them against the redacted information, I believe that there are two categories of information that are not covered by the list of Ireland. The others naturally fall within the remaining six categories that I have. For example, there are several references to volume-related business that naturally fall into one of my categories relating to business volume. It is just a pragmatic and practical manner to help the presentation of the analysis in the clearest manner possible. It was nothing conniving or strategic or anything like that, it was just simply for practical reasons.

Q. Did you have any discussion with anyone about the form that your report should take, having received the instructions?

A. I took guidance from the UK legal team in terms of roughly how to structure it in relation to the way in which they thought that the Tribunal proceedings would go and the way in which the information would be dealt with and, once again, for clarity, to try to help the members of the Tribunal.

Q. The UK legal team would manifestly, I have to suggest to you, as lawyers, have identified the 14 categories

in paragraph 75 and informed you that that was what you were to deal with.

A. I do not recall being so advised. I was asked to inspect the PA and ADL reports thoroughly, inspect every piece of excised information and to then formulate groups that I personally thought, as an independent expert, would facilitate a sensible presentation of information.

Q. So you were requested by the UK legal team to you, yourself, formulate groups of information that would in your view represent the information that was redacted. That request was made of you?

A. Yes, that is correct.

Q. I just formally put it to you, and I accept that you have to deny it, but it is dealt with in the written pleadings or in the exchanges of documents, the memorials, we have suggested that you have left out five items. I think that you have disagreed with that and I am not going to go over them again. That is the position, I think.

A. That is correct, yes.

Q. I want to go on to paragraph 4.23 of your report, page 41. There is just one sentence in that paragraph, 4.23, the bottom of the page, where you say, "As long as plutonium can be transported the market must be competitive, just as the LWR uranium fuel fabrication market is". I want to ask you to pause there and come back to paragraph 2.5 at page 8. Here, as you can see, you are dealing with competition in the MOX market and I am going to take you through this section of your report. Paragraph 2.5 is on the same theme as paragraph 4.23. The third sentence, "A pre-requisite for such direct competition to take place is that separated plutonium can be transported from a processing site to a MOX fabrication site of a competitor, eg from Sellafield to Dessel or Melox or from La Hague to Sellafield." And then you go on "The following paragraphs present a commentary on plutonium transport and conclude that such transports between the United Kingdom and the Continent are feasible." So can we take it that in those two paragraphs that you are saying that transport is critical to competition?

A. No, that is not correct.

Q. Can I bring you to paragraph 2.78. With the transportation of separated plutonium possible in either direction between the United Kingdom and Belgium or France a competitive market for MOX fabrication clearly exists. These are three examples which make very strong statements indicating that transport from Sellafield to the Continent is a pre-requisite to use the term used by you in paragraph 2.5, to competition?

A. No, you have misinterpreted my words and I think what I have written at length in the reports sets out

the clear context, that competition can manifest itself in many different ways, and one is internal within the MOX market, in the form of head to head competition between MOX fabricators. In order to do that or in order to have that type of competition then the transportation of separated plutonium from one location to another is required. However, even if that is not possible for whatever reason, and I do not believe it is impossible, it is feasible, and I declare that, then there are many other ways in which competition manifest itself in the MOX market, and therefore transport of separated plutonium is not a pre-requisite for competition in the MOX market.

Q. Are you doing yourself justice, because you are very careful in some of the language you use in your reports, and in this context the furthest you are prepared to go at paragraph 2.5 is that transports between the United Kingdom and the Continent are feasible, which is lower than possible, and that is after having said that a pre-requisite for direct competition is transport?

A. Word crafting and interpretation of the English language is a vexed subject, I guess, and I might interpret the word "feasible" as more powerful than possible in fact, because having looked at the technical issues, the economic issues and then the institutional or political infrastructure within which that would have to operate I concluded, after speaking with experts in that area, that it would be feasible to do it rather than just a vague possible. It depends on how you interpret the word possible I guess.

Q. The ADL report if I could refer you to paragraph 1.1.3, page 11: "Transporting plutonium dioxide powder is politically unattractive because of proliferation concerns associated with such transport. This is a barrier to moving plutonium dioxide powder from Sellafield from MOX production elsewhere." Your use of the word feasible is absolutely on all fours with the opinion there expressed, maybe feasible in the sense that anything is feasible, but that it is really not attractive or likely for the reasons that ADL have given to you?

A. I think that is an incorrect inference from what I have written. If I refer to the sentence you have just read out, I sec them, I hear them and I understand them but they for me are simply an opinion from somewhere. I looked into the technical issues, the economic issues and I discussed with an experienced transporter who has transported plutonium bearing materials, and formed the opinion that whilst recognising there are political and institutional issues that would have to be addressed they could be overcome and I could refer to the statements made this morning made by Mr Rycroft, who has had direct dialogue with relevant authorities in the United Kingdom, and he also indicated that it should be feasible.

Q. I did not catch the name you just mentioned.

A. Mr Rycroft from this morning mentioned I believe that he had spoken with relevant authorities who would be involved in the approval of such transports and gained a positive indication from those authorities as to the likelihood of them being approved.

Q. You mentioned you spoke to experts in the area. I take it you are referring to others there, you have mentioned a shipper or a transport person, can we take it that this part of your report is not based on your own knowledge?

A. Which part of my report? You referred to three different parts.

Q. All comments in the report related to transport.

A. There are many different comments that I make in there. Some regarding the technical issues, some regarding the economic issues and some regarding other issues, and many of those relate to existing knowledge that I had before I started doing this work and one or two parts of it related to specific information where I felt it necessary to take advice from someone who was more experienced in the specific area I was addressing. Notably how long would it take for a licensing process for a transport cask and for licensing of the proposed routes and the actual shipping of that plutonium.

Q. In the final sentence at 2.5 you say "In turn the feasibility of such transports immediately provides one basis for declaring that the MOX fabrication market is a competitive market. Here you are mixing feasibility and actuality in the one sentence. Would you not agree with me that if something is simply feasible that actually means it does not exist as a fact at the present time?

A. Let me give you a little bit of context and understanding of that. I believe on the basis of my investigations that it would be possible today for a utility to enter a procedure to establish a route for and execution of the transport of separate plutonium from one location to another, say Sellafield to Continental Europe, Belgium or France. Therefore that is a current option. Even the threat of that option in negotiation with a MOX supplier could provide commercial leverage and therefore that introduces immediately an element of competition, and should an amicable agreement not come as a result of that kind of commercial leverage and threat then it would be entirely at the disposal of the utility customer to begin the process of trying to license a transport of separate plutonium.

Q. I am going to paragraph 2.8, first sentence. "A transport of separated plutonium between the United Kingdom and the European Continent has not been licensed in recent times, although such transports have taken place in the past." You go on in the final few words "European transport company with an experience of transporting plutonium bearing materials it is clear that such a shipment is entirely

feasible". You are going a little further there, it is entirely feasible now. But we are still at less than possibility stage. Is that not so?

A. No, as I explained a few moments ago you are misinterpreting my use of the word feasible.

Q. I suggest not, because if we go down to paragraph 2.13 you say "although a licence application to make a shipment of separated plutonium has not been submitted recently at least one customer has investigated the feasibility". That is a correct statement in the English language. People investigate whether something is feasible or not, so it does appear that you do know what the word means.

A. In that particular paragraph it is used in a slightly different way. At the time of writing this document that particular utility I believe had concluded its investigation and I spoke with the transport organisation who had been involved in undertaking that exercise, and the conclusion was at the end of that that it was indeed feasible.

Q. The next sentence in paragraph 2.13, you finish again with the word feasible. Going on to paragraph 2.15 you say "In summary the transport of separated plutonium between the United Kingdom and Continental Europe is feasible. It is estimated that the lead time to gain all of the necessary approvals for a first of a kind shipment would be in the range of three to five years. Is the latter sentence information you obtained from another party?

A. The specific piece of information relating to the three or five years time horizon was a conservative estimate offered by this experienced transport company with whom I consulted. Just for the record to help clarify for you since I have used this word feasible and it is creating some difficulties for you, I could easily have said, for example, that the transport of separate plutonium between the United Kingdom and Continental Europe is an alternative that is open for utilities to pursue and adopt.

Q. Mr Varley, it is not causing any problems for me, your use of the word feasible.

A. Then I misunderstood you.

Q. One final point on that. Nowhere in your discussion of transport in your report is there any consideration of the economics of transport or economic issues relevant to transport.

A. That is factually incorrect. I believe in one or other of the reports, and I would have to look through to find it, I did mention that on the basis of my knowledge the cost of transporting separated plutonium would translate into only a relatively small percentage of the overall cost of purchasing a MOX assembly.

Q. I concede you are correct. You have refreshed my memory on that point. I think that you also say in the report that Dr Mackerron's assertion that the transport of MOX is more expensive than the

transport of uranium oxide fuel is not necessarily incorrect. That is how you put it.

A. Can I ask if you are talking about fresh MOX fuel and fresh uranium fuel or spent MOX fuel and spent uranium fuel? There is an important distinction.

Q. It is your statement. I am not referring to a particular paragraph so I will pass from that. Can I go on to paragraph 2.16, and here you are considering competition with reference to new reprocessing and MOX business. You say in the first sentence, "Another way in which competition can enter the MOX market is when a new reprocessing deal is signed". I have to ask you the same question I asked Mr Rycroft. Other than renegotiation of contracts with British Energy when did BNFL last sign a reprocessing contract for fresh volumes of spent fuel?

A. I believe I stated in one of my reports, I made a reference to I think 1997 which was the last time when new business was negotiated, new volumes were agreed with British Energy, not renegotiations but new business volumes, and prior to that my recollection would be that post baseload business was signed with BNFL and COGEMA around 1989, and prior to that baseload business was signed around 1979 and some earlier commitments were made as well.

Q. Mr Rycroft, the man who was asked this question first, said about ten years ago, but when I referred him to your opinion even though he is BNFL and the commercial director said he would defer to you. He apparently did not know, or at least we take that from his deferring to you. In your evidence I think you say that from the enquiries you have made. Where did you make those enquiries?

A. I believe I contacted British Energy directly just to confirm my understanding and recollection that 1997 was the appropriate date.

Q. Can you confirm to me that the new volumes were the contracts related to reprocessing or storage.

A. My memory does not serve me fully in terms of the exact timing and structure of the nuclear industry. Of course British Energy used to be in two different parts of Nuclear Electric and Scottish Nuclear, and originally there were contracts signed by Scottish Nuclear with BNFL, separately contracts signed by Nuclear Electric and later on they were all consolidated once British Energy became the overall company owning all the assets of Scottish Nuclear and Nuclear Electric. Some of the contracts involved further commitments to reprocessing, some contracts included the flexibility to either reprocess or store, and I believe, and I would have to confirm in records, but I believe some of those flexible contracts were at the discretion of the utility and some parts of the contracts were at the discretion of BNFL.

Q. Of the 1997 contracts we rely on what you say on that, were they for reprocessing or storage, or do

you know? If you do not know say so.

A. I do not have all of the details of that in my head. I would be able to clarify it given time, and access to my records, but I am clear that those contracts did contain new commitments to reprocessing.

Q. And you have relied for this information again on third parties, as you have for your opinions in relation to transport?

A. I have relied on reference to internal records at NAC International which have been gathered over a period of time and also by reference to colleagues and reference to third parties to try and get a confirmed informed picture of the situation. In fact I suppose I would have to say that all of the information which my company gathers about the nuclear industry almost be definition has to come from third parties because we are dealing with parties external to ourselves.

Q. Is it the position that your report in general is based upon third party information that may or may not be correct?

A. No, I do not think that is a fair representation at all. My reports contain facts and they contain a lot of analysis using those facts and the practical knowledge of how the nuclear fuel services markets operate.

Q. I want you to go to paragraph 2.10 of Mr Rycroft's first statement. "BNFL is also seeking to obtain further reprocessing and MOX business from new post baseload reprocessing agreements. Whether any such contracts will be achieved remains to be seen, as there has been a move away from reprocessing in certain European countries such as Germany and Sweden. Japan is constructing its own reprocessing plant and is also making progress with domestic storage options first spent fuel". Could I suggest in the first place, Dr Varley, that Mr Rycroft is in a better position to assess the future for reprocessing from BNFL's perspective than yourself?

A. No, I do not think that is necessarily correct. We have an extensive network of contacts with key people around the world and we analyse and judge markets and being independent consultants with a complete overview from all dimensions, not just from the BNFL perspective, I think we possibly in some respects have a better view of what the market potential is.

Q. So where BNFL future reprocessing business is concerned you are saying that Mr Rycroft, the commercial director of BNFL, has completely misjudged the market?

A. I am certainly not saying that. Mr Rycroft has given you an indication in paragraph 2.10 of his first report that there is uncertainty relating to the prospects for future reprocessing business and as in many business segments there is uncertainty. For example, if I could refer you to how things can

change rapidly. If I go back to 1997 Washington International Energy Group, a firm of independent energy consultants in the United States, forecast that 40 per cent of the United States nuclear reactors would have to close due to deregulation and the opening of the electricity markets. Just two years later in 1999 when it became apparent that this was not going to happen, they said something along the lines Oh boy, how things can change in two years, and the reality today is that very few stations closed, they are all thriving in this market, ten have already obtained plant life extension licenses to go from 40 to 60 years of operation, and another 16 have submittals already in and another 23 at least are already in the pipeline waiting to get those relicenses. Therefore making projections about doom and gloom in the future sometimes is a bit dangerous. Forecasting the future in the nuclear fuel services industry is littered with other examples of famous reversals. All Mr Rycroft is doing is indicating there is uncertainty, but not stating his specific judgment about which way it will turn out.

Q. One might have expected in reading these reports to find references to and reliance upon the market, if we can describe it as such, in the United States. I think the United States is mentioned by name maybe once or twice in all of the reports. Otherwise it is not mentioned. I have to suggest to you that this is for the very good reason that there is no commercial reprocessing in the United States, and any waste problems are projected to be solved by the building of giant storage reserves.

A. The United States in the past was developing reprocessing technology, in fact they probably would be world leaders up to a certain point. Then there was intervention by the US Government, but ultimately it was not a banned activity but for economic reasons the US utilities in their own specific context in America with their economies of scale decided they did not want to go down that route, and there was nothing prohibiting them from doing it. Currently they are working towards, if it is consummated, the Yucca Mountain Repository where the idea is to place spent fuel in containers in long term interim storage. Whether or not that turns out to be a final solution is another question.

Q. I have to suggest to you that plans for that repository are at an advanced stage at the present time.

A. The actual permission to operate that repository has not been given, but even if it is, and I hope it will be, then...

THE CHAIRMAN: Mr Fitzsimons, we have gone on for an hour and a half. I think it would be useful to take a ten minute break at this point, and you can then pick up on the question you have posed.

MR FITZSIMONS: It is a non-issue and I will withdraw the question if necessary for the record.

THE CHAIRMAN: If you can re-introduce the question.

MR FITZSIMONS: I will reintroduce the question, certainly.

(Short Adjournment)

MR FITZSIMONS: Dr Varley, just before the break I had put it to you that the Yucca Mountain proposal for a huge storage repository in the United States was at an advanced stage and you replied that it was not even licensed. Then you were about to say something else. There was an interruption. Could you feel free to continue with what you say?

A. You are correct, Yucca Mountain is a project that exists in the United States for what I believe would be called long-term interim storage and potentially that could ultimately be turned into a repository forever. The project is not finally licensed to go ahead. It may well do and, if it does, so be it. That is a decision that the United States, its industry, its politicians have made in the context of their situation in their country.

Q. Just to finish with this, the fact that the United States is not mentioned in any of the reports, effectively, bar one or two, there are simply mentions of the names in a passing manner, can we take it that that means that the United States, whatever markets exist there, are not in consideration in the context of the position which arises here?

A. The United States has a geographical market for services, but they are part of a world market for uranium enrichment, fabrication and so on. In relation to this case, the United States was not mentioned because they do not have utility customers with reprocessing contracts and plutonium to recycle in the same way as European and Japanese utilities do, save to say for the fact that one utility is participating in the recycle of MOX fuel produced from downgraded weapons plutonium.

Q. That answers my question, thank you, Dr Varley. I want to go back to your report, paragraph 2.18. I am going through these various categories that you address in the context of suggesting that there is competition in what you assert is the MOX market. At 2.18 you discuss what you have described as open versus closed cycle competition, but, in fact, if we go to 2.19, you do not really discuss it, you simply say that it is a very complex subject and the economic results can vary from utility to utility as well as from country to country. That is really a topic for an economist, is it not? You do not discuss it, really.

A. No, I would not say that it is a topic exclusively for an economist. The reasons why the relative costs and merits of the financial aspects and the technical aspects vary from country to country, utility to utility, is because there are variations in procurement practices, in the technical nature of the reactors and fuel that they operate, the nature of the existing infrastructure in the country, the licensing and environmental infrastructure and other things, so they are issues that determine, for example,

generating cost for a utility under certain circumstances and in one case it could be that, operating with a closed cycle, gives them the best overall strategy for their situation and in other circumstances it may be that the open cycle is determined to give them the best strategy.

Q. Going on to (d) on the next page, paragraph 2.21, "Cross-sector leverage". You appear there to be referring to ancillary business, if I can describe it as that, of a company such as MOX. Is that correct?

A. I would not describe them as ancillary businesses. The fuel fabrication businesses and the uranium businesses of companies like COGEMA, Framatome ANP, Westinghouse, the Reactor Services activities and so on are major businesses, where they compete.

Q. But I think that your theme there is to indicate that the manner of participation in what you describe as the MOX market can be influenced by commercial activities in associated markets in which the same companies are involved?

A. That is true and I can illustrate that in two ways for you. One is the situation whereby, if one of those companies, say, BNFL or Westinghouse, are negotiating with a client for something to do with a MOX contract and at the same time they are trying to negotiate a contract for fuel fabrication of uranium fuel or offering enrichment services or something else, then, clearly, if they are dealing with the same customer, then their responsiveness, the attractiveness of their commercial offers in one area might be looked at as a whole by a customer. There can be some cross-sector leverage. The utility could say, "Well, I will give you the MOX business as long as you give me a concession on this other one". The second level is whereby MOX fuel is normally sold whereby the primary contractor is a supplier, like Framatome ANP. They place a subcontract with a MOX manufacturer, who could be BNFL or Belgonucleraire or COGEMA. At the same time as contracting for the MOX, it would be usual for the primary contractor to be also negotiating for the balance of the reload fuel, which is uranium fuel. The two go together and the attractiveness of the overall package is the combination of the MOX and UOX prices and, therefore, there is clearly a link and cross-sector leverage.

Q. You say that there is clearly a link, but, in fact, as in respect of open versus closed cycle competition, new reprocessing and transport, you are talking of what is feasible or you even use possible in your opinion rather than what is happening in terms of giving concrete examples.

A. If I understand your question correctly, and please correct me if this is wrong, you are suggesting that the concept of new reprocessing business in a closed cycle context is something that I am declaring is feasible or possible but not actually happening. Is that what you are suggesting?

Q. No, I am talking about your discussion of it. I thought that I made that quite clear. Your discussion here in

relation to open versus closed cyclic competition, because clearly there are the two cycles - no one disputes that - and your discussion of cross-sector leverage is engaged in a context of these practices being possible and feasible. Yes or no is the answer.

A. I do not see any link between cross-sector leverage and the open and closed cycles.

Q. I am not suggesting that there is a link. I am suggesting that you are putting forward these arguments as possibilities - as activities that are feasible. Yes or no?

A. All of these things that I have described are things which happen in the market.

Q. I see, OK, we will move on. Timing of demand for MOX fabrication. Now, here you say that MOX is dearer than uranium oxide, UOX, is that not correct?

A. Did you say dearer - more expensive?

Q. Yes, more expensive.

A. In the majority of cases, MOX is more expensive than UOX, yes.

Q. And you say that prices in the future could be lower.

A. That is correct. That depends on what happens in terms of offers by the MOX suppliers and also the trends and evolution of uranium and UOX related market prices.

Q. I take it that you would agree, as a matter of economic fact, that it is not possible, for example, to tell anyone what the prices would be in five years time?

A. Prices for what?

Q. Prices for the MOX.

A. Just in terms of MOX, then one can determine some basis for suggesting what the prices might be by making estimates of production costs, considering the market competitive situation, the supply and demand situation and prognosticating what that might mean, just as we do when we look at uranium oxide fuel related markets, looking at the fundamentals of supply and demand, the techno-economic status of uranium mines of enrichment facilities, competitiveness, consolidation and so on, then we do routinely make forecasts of prices and price trends and where we think they are going.

Q. Can I take it then that there is no disagreement between us? I said to you that it is not possible to say what prices are in five years time. You say that it is possible to prognosticate, in other words, it is possible to say what possibly might be price levels in five years time, but one cannot do any better than that. Yes or no, please. You know we are under time constraints, Dr Varley. You have been giving me very long answers since we came back, you were not giving me long answers beforehand. Will you please just listen to the question and answer.

A. I am sorry, I am not intentionally trying to give you long answers, I am trying to be helpful. The answer is that you can estimate the prices. I cannot be sure what they are in five years time.

Q. Let us move on to the next section, which is commercial deals. That is paragraph 2.27. Here we have the list of substitutions, swaps and loans, assignments. Do you have that?

A. I do.

Q. You tell us about substitution and explain it in paragraph 2.28. Essentially, one is talking about a circular deal, if you like. Is that not correct?

A. Yes, I guess so. It is just sort of a convenience, if customer-owned plutonium is not available early enough, then some other material is substituted temporarily and then paid back later. It is a kind of loan really between the supplier of the MOX service and the utility rather than, say, a loan between two utilities.

Q. So it is not an example of competition in the MOX market, in that it is a deal between BNFL and a utility (full stop). Is that not correct?

A. No, if I could explain. The option for the supplier of MOX, say, BNFL, to offer this substitution service could be an inducement for the utility to recycle and have their MOX manufactured earlier rather than later. Therefore, depending on the commercial terms of that, it could be something that attracts the business earlier rather than later. That is part of making a competitive offer.

Q. Yes, but it is of no relevance to the real issue of competition in this case, that is to say competition between BNFL and COGEMA or any other reprocessor. Is that not so?

A. No, I do not think that that is necessarily so. For example, a utility could have plutonium located in La Hague and available - that is the COGEMA site - to be turned into MOX early and BNFL may not recover the utility's plutonium or that utility would not get an allocation of plutonium until later. BNFL, because they wished to try and load their plants in the early years, may offer something like a substitution to try and attract their business at SMP earlier than the utility would fabricate MOX at the COGEMA facilities. That would be competition.

Q. That is your opinion. I suggest to you that that view is not correct, reading your own description of a substitution, but we move on to swaps.

Swaps, as we know from Mr Rycroft, occur where plutonium is concerned and you appear to speak of swaps in the context of small quantities and small MOX fabrication campaigns. You say that, from a commercial point of view, the utility motivating for such a swap may have to offer some financial incentive. So financial incentives are not obligatory where swaps are concerned - is that not

so?

A. Did you say financial incentives are not obligatory?

Q. I started by using the term obligatory, but I hope that I changed it to say that financial incentives are not the absolute norm in swap transactions.

A. Well, I am not a party to the details of specific swap transactions, so I do not know all the details of what are concluded there. The purpose of writing those words was to indicate the way in which, through a swap transaction, benefit could be gained by one or more party or shared between them and so on.

Q. I quite understand why we are talking about swaps, but I am just referring to your own words. From a commercial point of view (paragraph 2.30) the utility motivating for such a swap may have to offer some financial incentive. Maybe, you meant to say something else there, but you are saying there that this does not happen in every case. I am looking for your confirmation that that is so.

A. I would say that that is the case. In some swaps the deal may naturally bring benefit to both parties. In others it may bring benefit to only one and a neutral position to the other and that other party, in order to be encouraged to engage in it, may need some sort of financial incentive. In other words, a part of the pie from the other one.

Q. But the financial incentive is a deal between the two utilities and does not involve BNFL, if BNFL is involved in the swap transaction. In other words, the competition, if you are talking about competition, is not competition in the MOX market as such?

A. No, that is an incorrect conclusion. Clearly, for a utility if they have plutonium recovered in Sellafield, the easiest practical alternative would be to have that plutonium converted into MOX at Sellafield, also in the Sellafield MOX plant. However, if the commercial terms offered for MOX fabrication by BNFL are considered not sufficiently attractive, then the utility may seek a swap deal in order to be able to transfer its MOX business that would otherwise have been with BNFL to another facility and thereby gain financially. Therefore, there is a competitive element between the utility and BNFL, encouraging BNFL to come up with its best offer.

Q. OK, we will move on. I have made my point there.

Loans. A number of plutonium loan deals have been executed in the past, so we are talking about a type of transaction that has occurred in the past, that is not current at the present time or not?

A. I am aware of loans that have happened in the past and it could be something that is happening now and I do not have any details of specific contracts that are happening now, but it is a tactic or an option that the utilities have open to them.

Q. It is another option or possibility?

A. It is a common practice and they may or may not be taking advantage of it.

Q. Over the next page, 2.33, assignment. If we could go down to 2.35. You say, "For the MOX fabricator an assignment deal could result in a reduction of the volume of MOX fuel fabricated for a given amount of plutonium which could result in a financial loss." These assignment deals then, can we take it, are not that attractive?

A. One of the assignment deals that I know about is financially attractive for the parties involved and in that specific case I believe will have resulted in a reduction in the volume of MOX fuel manufactured by BNFL and/or Belgonucleraire.

Q. At (g) you go on consider UOX/MOX price interaction. This seems to be an important argument for you, having regard to the time spent on the matter, and, of course, it is an important point in Mr MacKerron's evidence.

You speak here of the difference in pricing between MOX and UOX and projected developments. I have to suggest to you that at the present time the price of MOX is much dearer than UOX and this means that there is no competition now. The products are not in the same market.

A. There is no single price for MOX. MOX prices range enormously depending on the contracting parties, reactor type, fuel type, batch size, the duration of the contracts and so on. There is no single MOX price to compare with UOX prices. But, on the basis of my information, the most competitive offered MOX prices are in the region of - in some cases, I believe, they are a little lower than some of the more expensive UOX prices in the market.

Q. A little lower, you do not say that in your report. You use the phrase "overlap". Why now are you using this type of language "a little lower" instead of the neutral "overlap"?

A. They mean one and the same thing, that the range of MOX prices overlaps, whereby the lowest MOX prices are lower than the highest UOX prices. It is the same meaning.

Q. How is it that you happen to know UOX prices? How is it that you happen to know what UOX prices are?

A. Because, for example, there are uranium price indices published in the marketplace. There are prices indicated for conversion services, for enrichment services and, through our consulting activities, we have a good feel for what the range of UOX fabrication prices are. Therefore, we can construct a UOX assembly price.

Q. The fact is that UOX prices are known - is that not correct?

A. Are low, did you say?

Q. No, are known. In other words, there is a market in UOX and, because there is a market, the prices are known, as you have told us there are indices.

A. There are indices for some of the components of a UOX assembly, but there are no indices that I am aware of, no published information, about the fabrication activity and, similarly, there are no indices published about the MOX fabrication activities. So in terms of the fabrication activities, it is like for like in the UOX and MOX markets.

Q. It is your thesis that MOX and UOX are in the same market - is that not correct?

A. They do compete in the same market in the sense that it is a market for fresh fuel assemblies to go into the reactor.

Q. That is in a particular sense. I thought that they were in the same market or they are not in the same market and, if they are in the same market, why are UOX prices freely available and MOX prices are, on your evidence, secret?

A. UOX assembly prices are not freely available. It is just that there are market indices for some components that make up the UOX assembly price.

Q. I do not think that you have answered my question. For a market to exist and for people to participate in that market, prices must be known, prices of UOX are know, prices of MOX, on your evidence, and apparently, are not known. I have to suggest to you, as Dr MacKerron has argued in his report, that this on its own is definitive evidence of the fact that MOX and UOX are in different markets.

A. The reality in the market for procurement of uranium assemblies is that procurement generally takes place in the form of different segments of the market. So people in general do not make a contract to buy full fresh assemblies. They may contract separately for uranium concentrates, another contract for conversion services, another contract quite separately for enrichment services, which produce enriched uranium that can then go to a fuel fabricator and the fabrication activity is conducted under yet another separate contract. Therefore, there are four market segments or sectors that are involved in the procurement chain. Sometimes contracts may be made for a complete fresh assembly containing EUP (Enriched Uranium Product), but that tends to be a minority of the market. So you are characterising the UOX market in a way that is not really reflective of the way procurement activity proceeded.

Q. One more time and then I will move on. I will only ask the question one more time. For the reasons that I have given, I suggest to you that the MOX market and the UOX market are different markets - now, yes or no?

A. No.

Q. Thank you. I will move on. Did you deliver a paper to the World Nuclear Fuel Market between 2nd and 4th June 2002? This is in book 9, divider 4?

A. Yes, I did.

Q. I want to bring you to the penultimate paragraph of that paper and the last page, the last sentence in the penultimate paragraph, where you say, "It may seem more of a stretch but MOX could even become competition for UOX fuel. With governments having to deal with plutonium liabilities, it is possible that attractively priced MOX assemblies could be offered to the market. I want to go to your statement number one, 4.43, page 47. You say, having analysed the issues in detail and Mr MacKerron's comments, "Based upon the above analysis, the upper range of the of the UOX fuel costs is within the lower range of MOX fuel costs and MOX accordingly may compete with UOX fuel."

I just add to that that is the concluding section of a discussion - we see at the top of page 41 - "Issue of competitiveness of MOX in the future". I have to suggest to you that the evidence given already and the statement made here is not consistent with what you told the attendees at this conference in June 2002 as indicated by the final sentence of the penultimate paragraph.

A. That is not correct. It may be due to a misinterpretation of what is said in my paper. The paper was addressing the overall procurement situation, security of supply for utilities and security of supply at attractive prices and how that might develop in the future and things that buyers and suppliers could do. In this particular situation, I was trying to be a little visionary and suggest that for utilities who hitherto have either only had their own plutonium recovered in reprocessing and/or utilities who have not recycled any plutonium as MOX because they have not engaged in reprocessing contracts, that either or both of them might in the future be offered by governments, effectively, with plutonium stock piles that they want to dispose of, MOX assemblies manufactured using that stock pile of plutonium at prices which are attractive in comparison with UOX prices. This could be an additional source of supply of fuel for their reactors, over and above anything to do with the existing market for MOX which relates to plutonium separated under reprocessing contracts entered into by utilities. There is a very specific statement suggesting that they could keep their eyes open and watch out for opportunities like that.

Q. Are you saying there in that sentence - "It may seem more of a stretch but MOX could even become competition for UOX fuel" - that that does not mean what it says, because in your lecture you cover a

broad range of topics and the lecture does not concentrate on the topic that you indicated a moment ago?

A. That is correct, but ...

Q. Does this sentence mean what it says or does it not?

A. It means what the reader perceives it to mean. My meaning of it was that for those utilities who may not be familiar with using MOX and they may perceive that there are obstacles or they may not have thought of it and, therefore, I was trying to say, "Why don't you spend a little bit of time thinking about whether or not that might become an option?" So for them in their current state of mind, it is a bit of a stretch and it does seem a bit unlikely or, maybe, they have just never thought about it, and I was encouraging them to think about it. That is all that was meant by that.

Q. Dr Varley, your first statement is dated 5th June 2002. This lecture was given within three days before that. I have to suggest to you that that sentence is totally at variance or is seriously at variance with the contents of your statement and the thesis that you advance in it.

A. I am sorry, I have to disagree, because, as I qualified it in the paper in Berlin, this specifically related to government stockpiles of plutonium, whereas in my statements made and submitted to this Tribunal, I was talking about in the most part competition issues relating to MOX manufactured from separated plutonium recovered in commercial reprocessing contracts by utilities in Europe and Japan. A different market altogether.

Q. The Tribunal will take a view on what you say in the article. Your perspectives generally, Dr Varley, understandably, with your background and qualifications, career - and I say this perfectly understandably - would be entirely, if not passionately, in favour of the nuclear industry - is that not correct?

A. I work in the nuclear industry or I have worked in it and now act as an independent consultant advising the nuclear industry. Irrespective of any personal views, I offer independent advice on any given situation or circumstance.

Q. I take it that you would agree that everyone has perspectives approaching problems or issues?

A. I do and, in terms of nuclear power, I can see benefits of nuclear power; I can equally see benefits of other energy forms.

Q. Could we go back to the same lecture, the fifth page? The title of the passage is headed "Generic issues". Down to the second paragraph, you are speaking about Australia. "Australia is perhaps the most notable example of how political intervention can inhibit the development of a new uranium mine. In

the past three mines policy imposed by the Australian Labour Party was a serious inhibition. Today the situation is somewhat different. The incumbent Government does not impose any such restraint. However, environmental issues and the rights of indigenous populations have introduced negative inertia to the progress of any proposed new developments". That is a wonderful phrase - negative inertia". What you appear to be saying there is that environmental issues and the rights of indigenous populations are standing in the way of progress, progress meaning proposed new developments, and you regard that as a result of negative inertia on the part of the Government. Is that not a fair description of what you mean in that statement?

A. "Negative inertia" I think really sounds like a strange phrase. I was not talking about negative inertia by the Government, I was talking about these interventions by various groups as holding back the pace of projects that were to be initiated by uranium mining companies. So they were not able to progress at the same rate as they had originally planned.

Q. With respect, the previous sentence speaks of the incumbent Government that does not impose any such constraint, a change of policy from the previous Government, and then you speak of negative inertia that can only be related to Government policies and you are, effectively, criticising in that sentence. Is that not so?

A. No, I think that you are misunderstanding what I have written. The three mines policy was a specific piece of legislation which forbade the development of any mines beyond the three that were operating. That was then, effectively, repealed by the incumbent Government, so that no longer stood in the way. However, completely aside from any Government legislation, there are various groups who come along with objections on grounds of tribal rights or environmental concerns and there would be due process within Australia's infrastructure - institutional environment - to hear those views, and that, inevitably, causes delays through due process and so on and slows down the progress of the project. That is completely separate from a piece of Government legislation.

Q. You are saying that, but the words speak for themselves, but, in any event, the phrase "negative inertia" gives us a clue to your own view on this issue - is that not correct - that this inertia is negative and that these issues and people are standing in the way of proposed new development in the form of uranium mining in the nuclear industry? Is that not correct?

A. You have to understand that I was presenting this to an audience of very knowledgeable people in the nuclear fuel cycle industry and, therefore, I was talking to them in a language which they understand and not preparing a document with legal standing to go to a Tribunal. I used phraseology which they

would understand and, because it was something that would have a negative impact related to the suppliers in Australia - or prospective suppliers - then, of course, it was a judgment about being negative.

Q. Yes, they came to listen to your views and these were your views - is that not so?

A. These were my views based on careful analysis.

Q. Are you familiar with Australia? Do you know it well?

A. I have never been to Australia. However, I am aware of the ....

Q. Well, I take it that you do know that the indigenous peoples of Australia have a particular link with the land, they live on it, travel it and the land to them is of very great importance. You do know that, I take it?

A. I am aware, not in detail, I am not a great student of that, but I am aware in general terms.

Q. But, in so far as you are concerned, and this is where we get back to your perspective, where nuclear matters are concerned, it does not trouble you in the slightest that the rights of these peoples are to be set aside in the interests of the nuclear industry. Indeed, you speak of negative inertia in the context of these rights even being considered by the authorities.

A. I was referring entirely to the market consequence of those actions. I was not being judgmental about whether or not it is right or wrong.

Q. It is your phrase "negative inertia". Now, environmental issues, similarly, do we have a clue here to your attitude towards environmentalists who may stand in the way of what you call progress in the nuclear industry?

A. No, you do not. I must repeat that these remarks were in no way meant to be judgmental or indicating my view towards environmentalists or indigenous peoples. It was simply looking at it from the perspective of what the impact would be on uranium mining developments and from that perspective, if they were successful in blocking things, it would be negative for those projects, but in no way judgmental about whether they have a good case, a bad case or should be taken care of. It is a totally separate issue in my personal opinions and no part of that. It is a dispassionate description of market issues.

Q. I suggest to you that by extension that you have a similar perspective vis-a-vis parties who seek

information on the activities of companies such as BNFL.

A. Could you explain what sort of parties you are talking about seeking what type of information?

Q. Parties seeking environmental information.

A. I am not an environmental consultant and, therefore, I would not be putting myself up to advise on environmental issues.

Q. Well, I am sorry, I am suggesting to you that you would have a similar perspective now, either you would or you would not.

A. A similar perspective to what? I just said that the things that I said in my paper were absolutely divorced from any judgmental issues about the environment or indigenous people. Therefore, I did not express any view.

Q. I see. Then can we deal with it this way? You disagree with me when I suggest to you that by extension your perspective vis-a-vis the Australian scene can be applied by extension to your perspective in the context of the issues that arise in the present case?

A. Mr Fitzsimons, I am really trying to help you. I hope you do not think that I am being obstructive here. I have not expressed any view or position regarding environmental matters in the paper, so I cannot translate it to the current case.

Q. Well, I have been trying to put it as gently as I can. I will just put it simply. I put it to you that you have come to these issues with a closed mind and your opinions are not independent, because you make your living from the nuclear industry and it is in your interest that information of this kind is kept secret, because your business functions on the basis of supplying precisely that type of information to third partes.

A. I have to refute the allegation that I have come with a closed mind. I do not have a closed mind. It is impossible to operate as I do, as an independent consultant, unless I go into situations with an open mind. That is exactly the added value that I and my colleagues bring to clients by coming in with new ideas and with an open mind. If you do not call it how you see it and tell the truth, you rapidly get found out that you are of no value. The fact that we have been in business for so long demonstrates that we actually do bring added value and most or all of the issues that we provided consulting advice on relate to very largely the nuclear fuel services market, not environmental issues, and, therefore,

taking views and being judgmental about environmental concerns of indigenous tribes and so is not the crux of our business.

Q. Can we move on to paragraph 2.66 of your report, please. You will see at 2.65 you are talking of a "Summary of Prospects for Future Reprocessing Business". Paragraph 2.66 the second sentence reads, "Today a majority of utilities are still adjusting to the new pressures of competitive electricity markets. Many consider that reprocessing and MOX fabrication at prices that have prevailed until now are unattractive options when compared with the near-term costs of interim storage plus financial provisions for the discounted cost of an ultimate solution". That is your view - is that not so?

A. That is.

Q. Going into the next paragraph 2.67, "However, the broader picture of ultimate disposal is underdeveloped in a majority of cases and utility positions and choices potentially will change." That is as far as you can go, is that not so?

A. Yes, it reflects the reality, that people are still thinking and deciding what their best strategy is.

Q. Why do you go this far at all if the position is clear at the present time?

A. The reason why I put some of this background material in is because I found in reading Mr MacKerron's report that he made judgments about the way the future would be that seemed to me unreasonably certain. I wanted to reflect the real situation in the market whereby there are many alternatives and many factors to take into account and that, really, utilities out their in the real market actually have not decided which way they are going to go and, therefore, today's situation and the recent past is not necessarily going to foretell the future and what they will ultimately decide to do in their back-end strategies. I was trying to give a more broad and balanced perspective.

Q. A broad and balanced perspective - you are effectively guessing what might happen in the future, is that not so?

A. No, in very short form I am reflecting that there are many factors that will be taken into account by utilities in determining what is their optimum economic technical strategy.

Q. The first sentence of 2.68 says, "In the intervening period there will be a need for extended storage." That I take it comes from you as your opinion and does not come from any other source.

A. It is just a fact that nuclear reactors have spent fuel storage pools built into their reactors which have finite

capacity and, if they do not at some point ship fuel away to a reprocessing plant, then, if they want to carry on operating their reactor, they will have to find something else to do with the fuel and that would be putting it in storage for some time. This is just a fact.

Q. You call it a fact, but I have to put it to you that it is a fact that you have introduced yourself to support your theory in the previous paragraph that the position will potentially change in the future. Is that not so?

A. Many things in life change and I have reflected an example before, that common wisdom can be turned on its head and I could quote other examples for you if that would be helpful.

Q. Thank you for that, Dr Varley, because I have to suggest to you that many of your comments and propositions in your report, and of course we cannot cover everything in the time, are framed in that manner. The language you use is heavily qualified. You speak in terms of what is feasible, what is possible, the future, you use the term potentially throughout. In this case the Tribunal is concerned with the market now. I have to suggest to you that your approach in attempting to attack Dr MacKerron's evidence is one that is going in a different direction from Dr Mackerron. He is speaking of the present situation and you are speaking of what is feasible, possible, potential in the future.

A. That is an inaccurate reflection of the report that I prepared. I did deal with the current situation, the way in which contracts are made or the secondary market transactions and so on, so I did deal with the current situation and then the reason why I gave these other views and background about where things may go in the future was because I was asked to give a critique of Mr Mackerron's report, and as I explained, I felt that many of his statements and judgments and conclusions were too dogmatic and definitive and not recognising the alternatives that are out there and that there may be more than one solution in the future. So it is simply to balance that up. It was additional material on top of addressing the current situation in the market for MOX.

Q. And you express this view notwithstanding the background we have gone over, and I will run over it quickly; British Energy now favours storage, in Germany, Switzerland, Belgium, Sweden storage is preferred. In France the Charpin report though you take issue with me on that, in Japan the recent Tepco scandal which has I suggest to you had a major effect on any possibilities for the use of MOX in Japan.

A. You have mentioned many things there. Could you tell me what your actual question is.

Q. I suggest to you that notwithstanding all of these things you are still saying that the future is bright for the industry; is that what you are saying?

A. I am saying the future is uncertain and there is more than one outcome possible.

Q. So there is more than one outcome, you will allow for that at least.

A. Indeed. For example you have mentioned Japan, and difficulties in gaining approval to load MOX. In turn because they are having similarly slow progress towards developing a centralised interim store for spent fuel they could before the very long future get into a position where they have a storage crunch in their rector pools and may have to resort to additional reprocessing contracts with European reprocessors. So it could be that delays in MOX could end up meaning more reprocessing contracts. It is a complex industry.

Q. In your second statement at paragraph 1.3 you deal with the liabilities management agency and you speak of the proposed list being speculative. You effectively decline to discuss on that ground. Is that not what you do in your report?

A. I do what?

Q. You decline to discuss the liabilities management agency and its implications for BNFL because you say it is a speculative proposal?

A. I commented on the statement made by Mr MacKerron and I thought it was an incorrect conclusion and so I stated it there. The LMA is speculative, it has not been put in place, and therefore the arrangements on how reprocessing will be managed or dealt with and whether there are possibilities for them to sign more contracts and so on is not yet determined, and therefore Mr MacKerron's statements which suggested that this would be an inhibition seemed to be premature, so I just made that statement.

Q. So Mr Wadsworth is advising on speculation, a speculative project. Is that right?

A. In what regard?

Q. Well, his firm Deloittes are advising in relation to this. They have gone through the tender process and are now advising the British Government on the liabilities Management Agency proposal.

A. I understand that but I think if you go back in the record you will find that the first notion of forming

some kind of liabilities management authority or something of a similar nature arose round about 1993 or 1994, and here we are in 2002 and there is still nothing like it. So there is a long way to go and the key thing is what will be the details of its structure, what will be the role of the assets that go into it, will they be free to contract for new reprocessing, will there be a financial incentive to do so. All of that has to be sorted out, and therefore I am remaining open minded about that and I found Mr MacKerron being close minded about it. I wanted to draw attention to that.

Q. But the way you deal with Mr MacKerron's evidence on it is to simply say it is speculative and you do not discuss it; you do not dispute his evidence as such.

A. I was asked to be helpful to the Tribunal in the whole process, to focus on the issues that are substantive in trying to reach the right conclusions about the MOX market.

Q. Let me ask you one final question. I take it, and correct me if I have asked you this already, if a party says something is commercially sensitive or confidential should such a statement be immune from being objectively tested in your opinion?

A. I guess it depends on the entire context of the situation. I am not a legal expert so I do not know. You have to put it in context.

Q. Let me put it in a different way. Do you think individuals should be permitted to subvert commercial confidentiality rulings by entering into agreements using the term for their own purposes?

A. I am really not sure how to answer that question. I believe in principles of fairness and reasonableness in all walks of life and if people engage in practices that are morally or otherwise corrupt then it is difficult to defend those.

Q. We are not talking about corruption or moral turpitude as far as I know, but we do know from Mr Wadsworth that business men when they take a decision as to whether something is commercially confidential do so on the basis that the balance of advantage shall be to them. Do you take the same view, that that is correct?

A. I would think it entirely reasonable that business men or women take a view that they will protect what they see as commercially valuable to them and as long as that is legal then that is up to them to do it. If it is illegal then they should not be allowed to do it.

Q. I am sure you know perfectly well that in the business world business men do not have lawyers at

their right hand all the time and business men take these decisions themselves, and as Mr Wadsworth told it they do so on the basis that they get the benefit of the doubt. Do you agree with that approach or not?

A. I believe that if they are doing it in a balanced and fair way that is to protect their business as they judge it, that is perfectly acceptable. If they do something that the institutional framework determines is not reasonable and there are procedures in place to bring them to book about that then it will be dealt with, but I understand why they would be motivated to look after their business and be cautious and prudent and maybe err on the conservative side.

Q. You call it the conservative side, they would favour themselves. Is that your language?

A. I would imagine that the majority of business people will if they are going to err on any side naturally tend to err to protect their business where they have any concerns. They may be unfounded concerns from time to time, but I would imagine that could happen.

Q. Do you agree with that approach, you yourself as a business man or an employee of a business?

A. I think it is a perfectly natural human thing to do, things which you feel protect your interests. I receive sometimes information which is sensitive or confidential even, and it is incumbent upon me to use that in a decrete way. I may just simply use it for internal judgment purposes and never disclose it to anyone else. You do things in a reasonable and fair manner.

MR FITZSIMONS: I have no further questions for the witness.

MR PLENDER: There is no re-examination.

BY THE TRIBUNAL

THE CHAIRMAN: I have just one question. Just to clarify the record for us, perhaps Dr Plender can give you the transcript from Day 1 and open it to page 93. This is an issue that Dr Plender raised before and it was the subject of some exchange between Mr Fitzsimons and Dr Plender. You will notice there that there is a proposal on the record that you do not contradict eight fundamental principles. You were referred to principle 4 when you were first presented as a witness, and you indicated that it was not an accurate statement. Could you review the other seven statements briefly for us and tell us if they in fact are issues of agreement between you and Mr MacKerron or they are not?

A. Yes, I can.

Q. Briefly please.

A. Item No. 1, reprocessing contracts. Many of them or most of them were signed long ago, some back in the 1970s, some in the 1980s. MOX contracts have only been signed much more recently, so the suggestion here that MOX sales in the world have been directly linked to the signing of prior reprocessing contracts is a bit of a misrepresentation. In some cases a MOX contract has been signed by one utility using plutonium recovered by another utility under its reprocessing contract. Therefore not a direct link.

Q. So you do not agree with that?

A. I do not agree with that. No. 2 is something that is close to accurate.

Q. You do agree with that?

A. I agree that that is a fair reflection on a world basis, yes. In individual countries the percentage is bigger.

No. 3 is not strictly accurate. Various different reactors are licensed for between 0 and 100 per cent of MOX use. In Germany for instance there are two reactors at Philips and Esar that are licensed up to 50 per cent. There was an historical rector, Carl in Germany, which was licensed for 100 per cent. There are other rectors that could be licensed --

Q. So you do not agree with that.

A. I do not agree, but it is partially correct. It does not give the whole story.

Q. Then No. 5.

A. In none of these countries mentioned is the use of BNFL banned and MOX is being recycled in rectors in all of those countries.

Q. You do not agree.

A. I do not agree. Then No. 6, I do not agree with the overall impression given. The rationales for reprocessing are much more complicated than presented here.

No. 7 I agree with that I think. As Mr Fitzsimons draw to my attention in one of my reports, I think paragraph 2.46 from memory in my first report, where I reflected an apparent general trend away from reprocessing, but note of course that things can change in the future.

Q. Does that mean you agree with that statement?

A. I substantially agree with that one. The last one I think is factually incorrect in the sense that it says "All reprocessing and MOX plants are majority government owned and controlled." The Cadarache reprocessing plant in Japan is owned by JNFL, which is a joint utility, private utility owned organisation.

Q. So you do not agree with that?

A. I do not agree in total, no.

THE CHAIRMAN: Thank you very much.

(The witness withdrew)

THE CHAIRMAN: Dr Plender, just before you begin in terms of allocation of time could the Secretary tell us what the position is? I am told 23 minutes.

MR PLENDER: I shall not occupy more. In my concluding remarks I shall review the state of the evidence on the confidentiality of the information excised from the ADL report and the PA report. I shall do so on the basis of Dr Varley's eight categories. It is, perhaps, inconvenient that the parties have not been able to characterise the excised material by precisely corresponding categories. But you have heard from Dr Varley this afternoon the practical reasons for which he adopted his eight categories. One important such reason was that it appeared to him, as he understood Ireland's 14 categories, that they did not satisfactorily cover the whole of the excised material. That is of some particular significance in view of the evidence given by Mr MacKerron in cross-examination.

In the transcript of the second day, pages 35-37, Mr MacKerron repeatedly gave it as his understanding that the eight categories described by Dr Varley comprised information for which Ireland had not asked. On the contrary, Dr Varley made it clear in his statements, and I hope pellucid in his answers today, that his eight categories comprise all of the excised data and he did not intend those categories to comprise data other than the excised data.

I turn therefore to the first category: MOX sales volumes including volumes of business secured and forecast. The evidence is that participants in the consultation process were given aggregated figures of the MOX sales volumes. Indeed they relied upon those in their representations. But the United Kingdom did not publish sales volumes in relation to individual customers since this would have given the customers an advantage in ascertaining BNFL's financial position and BNFL

competitors would have been able to target them. Mr MacKerron agreed that he had not found evidence of COGEMA making public statements of business secured and forecast in respect of MOX fuels: Transcript, day 2, page 35 line 23.

The second category comprises MOX sales prices including prices charged to individual customers. This is a category which requires little justification. The Tribunal may think it obvious that publication of negotiated or anticipated MOX sales prices would allow other customers to negotiate lower prices and would allow competitors to undercut BNFL. Mr MacKerron stated "It is not part of the case that I would make that one needs to know sales prices for individual customers and I would not ever expect COGEMA to disclose those". Transcript day 2, pages 35-36.

The third category comprises MOX plant capacity and production capacity. In this context it is important to bear in mind the term is "plant capacity" as opposed to "nominal capacity". Disclosure of plant capacity would give customers a negotiating advantage, according to Dr Varley and Mr Rycroft. If a customer knew the precise plant capacity of the MOX plant and the period within which it was to be realised it would know the value to BNFL of any incremental business. You heard evidence touching on this point ~~in camera~~ today.

The fourth category comprises production costs at the MOX plant. Of this Mr Rycroft said: "Specific references to costs by type explain that its disclosure would be valuable to both customers and competitors in helping to validate their understanding of SMP economics. Such references would also assist competitors in assessing BNFL's likely pricing levels and hence provide an advantage to them in the negotiation of their sales volumes". Mr MacKerron (transcript day 2 page 36 line 17) was asked whether this was information that COGEMA makes available and he answered "on the whole, no".

The fifth category comprises contractual details. Disclosures of details of contracts with individual customers would, as you have heard, often entail breach of contract with the customers where the contract contains a confidentiality clause. See for example Mr Rycroft's evidence, first statement, paragraph 4.7. To the question of disclosure of this information Mr MacKerron gave a straightforward answer. He said "it is a sensitive area and I would not expect it to be released". Transcript day 2, page 36, line 21.

The next category comprises statements given in confidence by utilities and others. Breach of a contractual obligation or of an undertaking would, the Tribunal may think obviously, impact adversely on BNFL's relations and future business prospects. That is the evidence of Dr Varley and Mr Rycroft. Mr MacKerron's view was that "Unless the parties have consented subsequently to the release, or the party that gave the information, it would not normally be appropriate to override confidential agreements of that kind." Transcript Day 2, page 37, line 3.

It is necessary to say a little more about outputs from economic models, for in the case of these outputs the particular problem arises of extrapolation. The word "opinion" has sometimes been used of the excised data. If that word was used to encompass other outputs from economic models, then it must be used with particular caution.

At page 6 of my skeleton argument, I have set out a table. The table comprises figures. It may be compared with a table on page 64 of the ADL report from which figures have been excised. The figures that I have inserted are wholly fictional, but they are there to demonstrate one means by which extrapolation of actual data may be made on the basis of a business model. I have chosen my figures for ease of arithmetic more than for similarity to actual fact.

Suppose that the projected profit is stated at #300 million. A competitor or customer could make an estimate of the market price. It is true that there may be, as Dr Varley says, great variations in the market, but he may either be able to discover from a third party, or he may be able to make an estimate of a market price. Here I choose for ease of reference #1,000 per kilogram me of heavy metal.

Then there is the assumed or discovered total business volume. As with the last category, either this has to be something by which the competitor has come or something on which he makes an estimate. You are told the total revenue. That is part of the business case. You are told the total cost, so you can derive the total revenue by deducting the profit from the net value given, so the first column is completed rather easily.

Now, it is the second column which is significant. If the model had disclosed the manner in which a 20 per cent reduction in total revenue were reflected in profit, the competitor would know that there will be a #200 million profit on a #480 million turnover (that is take away 20 per cent from #600

million). So the total costs - fixed and variable - will be #280 million. Thereafter by a simple simultaneous equation, the competitor or extrapolator can work out the fixed costs and the variable costs. He does so by a simultaneous equation comparing column 2 with column 1. It is this inter-dependence of data which makes it so important for those who wish to protect their confidential information to bear in mind that the disclosure of one item may lead to the disclosure of another.

Mr MacKerron, dealing with this point, simply said, "I do not think it would be important to get these outputs from economic models". Transcript Day 2, page 37, lines 6 and 7. But he did not, as the transcript records him, say anything precisely on confidentiality.

The next category is BNFL's perception. If customers or competitors knew BNFL's perception of the market, (for example, at what time or following what event BNFL expected its product to be the subject to a particular price pressure) then their negotiating position in relation to BNFL would be much enhanced. When asked if he had ever seen such material published in the case of COGEMA, Mr MacKerron answered, "No, I have not". Transcript Day 2, page 37, lines 12 to 16.

The United Kingdom set out in its Counter-Memorial provisions of United States law governing protection of commercially confidential data and Dr Varley, in his second report, gave an account of a trade action taken by USEC (The United States Enrichment Corporation) against Eurodif and COGEMA.

When cross-examined, Mr MacKerron said that he was aware of litigation and stated (Transcript Day 2, page 49, line 22) "It does not surprise me at all that COGEMA wishes to have [that] information protected." I do not now ask members of the Tribunal to look at the relevant material in the file, but I do ask members of the Tribunal in their own good time to do so. It will be found at Annex 8, tab 7. What you will there find is the publicly-available record of the response given to the Department of Commerce's questionnaire addressed to Eurodif and to COGEMA. The scale of excisions in that case exceeds, you may think by a substantial margin, the scale of the excisions in this present case, but comparison of scale is not the point that I make. The point that I make is simply to illustrate one readily accepted by Mr MacKerron. He said that it would not surprise him that COGEMA would wish to have this information protected. I hasten to add that this was the enrichment market and Mr MacKerron's evidence is based upon the proposition that the market is a competitive

market. You will, of course, bear in mind the difference of opinion between the experts on that point. But where there is a competitive market, the excision of such data, at least in the United States experience, is not unprecedented.

In concluding, may I simply remind the Tribunal of the context in which these issues arise? In deciding whether to exercise a right "to provide for a request for information to be refused, where it affects .... industrial and industrial confidentiality", the competent authorities of a contracting party must engage in an exercise of judgment or appraisal. Mr Bethlehem this morning called it discretion. For the reasons given by Mr Wordsworth, the function of this Tribunal is to determine whether the competent national authorities have been properly charged with their task. For that reason, and also for the reasons given by Mr Bethlehem, it is not the function of this Tribunal to consider the redacted information, singly or even collectively, for the purpose of determining whether this Tribunal would have reached the conclusion on the merits that was reached by the authorities of the United Kingdom in this particular case. Nevertheless, I submit that the Tribunal can, on the basis of the present evidence, be satisfied that the competent authorities of the United Kingdom were correct in concluding that the excised material "affects commercial confidentiality".

Those are the closing submissions for the United Kingdom.

THE CHAIRMAN: Thank you very much, Mr Plender.

The schedule, as you will recall, is that tomorrow at 2.30 we will resume to hear Ireland's reply. On Friday we will meet again at 2.30 to hear the United Kingdom's reply. As you all know, the Tribunal would like to invite counsel on Friday after we conclude the hearing to a brief reception out in the hall and we hope that you will all be able to arrange time to come.

We are adjourned until tomorrow at 2.30

(Adjourned until the next day at 2.30 pm)