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 IRELA ND — Respondent

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OCTOBER 21ST TO 25TH, 2002

SMALL HALL
THE PEACE PALACE
THE HAGUE
THE NETHERLANDS

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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)

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DAY FOUR
PROCEEDINGS
(REVISED)

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THE CHAIRMAN: Good afternoon, ladies and gentlemen.

MR BRADY: There are two matters that I would like to deal with at the outset. The first is that it is my understanding that Ireland and the United Kingdom have agreed that, you, sirs, will be giving an interim award dealing with issues that I think were referred to in a meeting yesterday relating to, I suppose, essentiality, the legal issues that exist between the parties. It is my understanding that that is the agreed position between Ireland and the United Kingdom.

THE CHAIRMAN: Excuse me, if I may interrupt just to clarify, the understanding was that the Tribunal might elect, with the agreement of the parties, to give an interim award. It may also give a final award. It has not yet reached that issue. Depending on the content of the award, it could be interim, but it could also be a final award.

MR BRADY: I appreciate the significance of what you are saying and the understanding is that you may be giving an interim award, but what consequences flow from that depend on the content of the award. I accept that entirely.

The second issue is a different matter and somewhat personal, in the sense that I would like to inform members of the Tribunal that, unfortunately, I cannot attend the function that you have organised tomorrow evening. It is with the greatest of personal regret that I cannot attend the function. I, unfortunately, will have to depart from these rooms at approximately 4.30. I am sure that you will appreciate that it is not to do with the pressure of the arbitration, but rather the pressure of commitments that I have at home. If you see me rushing out the door at 4.30, I am sure that you will understand that it is not in spite of anything that has happened during the course of the arbitration. I am grateful for your indulgence and your assistance to me personally throughout this arbitration.

With that, members of the Tribunal, I propose to commence the closing submissions or reply on behalf of Ireland. At present what I propose to address are a number of distinct issues that arose in the course of the submissions by my learned friends on behalf of Her Majesty's Government and, in particular, to address the issue of the arbitration's jurisdiction and, secondly, the position with regard to Ireland and its right to bring this case, pursuant to Article 9(1), and I will then have some general comments to make with regard to observations made by my learned friend, Mr Plender, when he opened the case on behalf of Her Majesty's Government.

I have prepared, I hope in the ease and to facilitate the speed of the presentation of this arbitration a written submission, which I hope has been handed to the members of the Tribunal. What

I initially propose to do is to spend some brief period of time dealing with the contention raised on behalf of the United Kingdom that the arbitratal Tribunal does not have jurisdiction to direct that information less than the sum total of the deleted information can be given to Ireland in the course of this arbitration. If I am not doing an injustice to this contention, it reduces itself to this proposition that, in advance of the initiation of this arbitration, Ireland had made no prior demand for specific information. It had, on the contrary, simply sought the entire of the ADL and PA reports, with the unredacted material revealed.

What I propose to demonstrate to this Tribunal is that, in fact, that submission is, with the greatest of respect to my learned friend, a misunderstanding and a misapprehension of the issue brought before this arbitration, the issue between the parties and the pre-existing dispute in relation to the information that Ireland seeks and access to which we have been denied by Her Majesty's Government. You will see, and again I intend to adopt similar modus operandi, instead of simply reading out my submission, I will refer you paragraph by paragraph to the points that I wish to make.

Starting at paragraph 1.01, I identify what we understand to be the gravamen of Her Majesty's case in relation to the jurisdiction point. That is that we have demanded the totality of the reports unredacted.

I then move on to paragraph 1.02 to deal with what we say is that the heart of the flaw - I say that with the greatest of respect to my colleagues - in the British case, and it is this. What is this case about? It is about access to information. Information is the word that you see used in Article 9. What Ireland seeks is information. The forms in which information are stored are manifold. You will see, sirs, when you look at Article 9(2) that it, in fact, identifies the many types of storage of information, of data. It can be on computer disk - I say that by way of illustration - it can be in the written form or in some other electronic media. The issue that I have to address is that, when Ireland seeks information, what it is looking for is information. The medium through which that information is stored is irrelevant to the content of what is being sought, ie the information. In this particular case, the information is stored, as we know, on the reports and specifically the redacted portions of the reports. It may also be stored on word processors and it may also be stored in electronic format, which led up to the production of these reports.

But when you actually tear down what is the nature of Ireland's application, you will see that what Ireland was looking for, and is looking for, is information that is contained in the reports. It is

our respectful submission that, in looking for information and, in turn, describing its source, where it is located (ie in the reports) it was an application for information.

I now want to refer to paragraph 1.03 and specifically to take the members of the Tribunal to the nature of your jurisdiction, because, I think, one of the points that was generated in the course of exchanges with Lord Mustill was the possibility - and I put it no stronger than that - that, if the Tribunal was to direct the release of part of the information rather than the whole of it (ie all of the redacted information) that it may be acting beyond its jurisdiction.

I will address that initially by looking at what is the origin or genesis of your jurisdiction. That, of course, is to be found in Article 32 of the OSPAR Convention. Again, for ease of the parties, you will find at paragraph 1.03 that what is set out there are the provisions of the arbitration clause. Of course, it is a wide arbitration clause. I do not propose to read through it in any great detail, but it is clear from Article 32.1 that it relates to any disputes between the contracting party relating to the interpretation or application of the Convention and so on and so forth. It is a broad, all-embracing terminology with an extensive amplitude in terms of the disputes encompassed within the purview of the clause.

I now ask you, sirs, to focus on 32.3(a). There is a phrase in this which I believe is of some considerable important to this jurisdiction submission. I have again, in the interests of clarity of exposition, underlined what I perceive to be the operative clause in relation to the jurisdiction matter that I am currently addressing. You will see, sirs, at 3(a) the procedure and the mechanism for identifying the dispute the subject of the arbitration and, perhaps, with your permission, I will read out the entire clause.

"At the request addressed by one contracting party to another contracting party, in accordance with paragraph 1 of this Article, an arbitral tribunal shall be constituted.

The request for arbitration shall state the subject matter of the application including, in particular, the articles of the Convention, the interpretation or application of which is in dispute". I shall come presently to that document which is the initiating document in so far as arbitration is concerned.

Then we go on to the next page and you will see sub-paragraph (b) and the procedures that apply in relation to the arbitration. Or course I mention en passant that this is an arbitration in context of an international convention and you have uncharacteristically for commercial arbitrations drawing

an analogy a procedure whereby other contracting parties are for instance notified of the information received by the Commission about a dispute, and indeed in sub-paragraph (9) of Article 32 have a right to intervene. I simply mention that to demonstrate the special nature of the jurisdiction that this Tribunal is exercising in inter-state disputes.

I now will deal with what I say is the meat and substance of our contention, that there was a prior dispute in existence, looking for specified information, and I start with the preliminary observation that while looking for information as specified we did not waive, and are not to be taken as waived, or as having said that if we do not get it all we will never be satisfied with some of it. I am going at this stage to look at a very small number of letters, there are only three or four, to set the context to the request that ultimately as made and submitted to the Commission and that ultimately led on to this arbitration. If I can trouble you, sir, and I can assure you that this is a faithful promise, it will be the last bundle of documents that I will ask you to look at in the course of the arbitration, and if you can take me on good faith on that I would ask you to go to Ireland's annexes to the memorial and section 4 which deals with the correspondence, because there are about four or five letters with some passages in them which I think will assist the Tribunal in satisfying itself that the contention about the absence of jurisdiction is not legally sound.

You will see in paragraph 1.04 that I have identified four Irish letters and one UK letter that I say are germane to the resolution of this jurisdiction issue, but I want to address the Tribunal on some preceding correspondence, but to do so quite quickly. I would ask the Tribunal to go to page 137 of the booklet which is in divider 4. That is the commencement of the letter, and again in the interests of speed I will take you specifically to the paragraph which I say is pertinent to this issue. If you look at page 139 - and sometimes you find that the pages at the bottom are a little obliterated, I see Lord Mustill has the same difficulty as I have - it is a page which starts at the top "Where it affects". I do not know if the members of the Tribunal have that.

I just want to go to the penultimate paragraph, again just to set the context to the subsequent correspondence and then the request and, indeed, the pleadings.

"The Irish Government considers that information on the proposed MOX plant" - and I emphasise the word "information" - "has been erroneously withheld on grounds of commercial confidentiality. The effect of this is to make meaningless the effort to justify the proposed plant on economic grounds. There exists no objective basis upon which to test the Minister's provisional

measures".

It goes on to say that, if they proceed with authorisation, what the consequences will be.

Then you will see at the end, "For the purposes of ascertaining in accordance with Directive 88/36 EURATOM as amended whether the proposed MOX plant is economically justified and pursuant to 90/313 the Irish Government further asks that the Government of the United Kingdom provide it with an unedited and full copy of the PA report".

Our request is for information, the medium through which it is stored is the report.

The next letter to which I wish to refer or a passage in it I should say is a letter from Stephen Brown of the DETR of the 30th July, page 146. Again, I go straight to the relevant paragraph. It is fortunately in the course of this litigation one of the shortest letters that I have had to read, but it reads as follows.

"After careful consideration, we have come to the conclusion that we are unable to meet the Minister's request". Of course, the Minister's request refers to a full and unedited version of the PA report. "As you will know, the full PA report has not been put into the public domain because it contains commercially confidential information. Disclosure of this information would cause BNFL unacceptable commercial harm which Ministers wish to avoid".

I then ask you to go to page 154. This is a letter of some importance in the context of the argument advanced by the United Kingdom. That is a letter of 25th May. I am, with your indulgence, going to read large chunks of this letter, again it is important in terms of the factual matrix against which you are to construe the request for arbitration. It is page 154. I shall proceed, if that is convenient.

"I refer to Stephen Brown's letter of 7th December 1999 concerning the provision of information relating to the MOX consultation. Given the importance of this matter, the Department has been concerned to obtain the opinion of leading and junior counsel on the legal implications of the United Kingdom's refusal to provide Ireland with information deleted from the PA report which has been put in the public domain for the purpose of last year's MOX consultation."

The Department has been advised by leading and junior counsel that there was no justification in law for the refusal of the United Kingdom to provide Ireland with the information requested. The Department considers that such refusal is inconsistent with the United Kingdom's obligations inter alia under ..." Then it mentions a number of Directives.

The next paragraph: "Specifically, the Department considers that, as a matter of EU and international law, the United Kingdom is under an obligation to make available all the information set forth in the PA report which has so far been omitted. The Department further considers that the refusal cannot be justified on grounds of commercial confidentiality invoked in your letter of 17th December last. Initially and for present purposes relating to the United Kingdom's obligations under Article 9 of the OSPAR Convention, Ireland reiterates its request to be provided with the following information" - the following information is being sought. "Relating inter alia to production and sales volumes, start dates ..*. which has been omitted from the PA report.

1. Details of sales volumes", etc, etc."

It identifies then where it is in the PA report

2. Annual production capacity and so on and so forth ... PA report.

4. Figures of sales volumes, so on and so forth.

5. Plant capacity and commissioning

6. MOX transport, number of voyages per year.

"The Department has been advised that there is no justifiable basis under the OSPAR Convention for refusing to disclose this information. Specifically Article 9 of the OSPAR Convention provides" and it sets out Article 9. I am not going to read through that Article.

Then you will see that it is in the context of that letter of 25th May, which plainly on its face is looking for information which is identified and categorised and the source of which is then attributed to the PA report that Ireland then goes on to outline the position under the OSPAR Convention and the powers available in terms of having disputes resolved. The last paragraph on that page draws attention to Article 32 of the OSPAR Convention. "This provides inter alia any dispute relating to the interpretation or application of the Convention which cannot be settled otherwise by the contracting parties concerned, for instance, by means of inquiry or conciliation within the Commission, shall at the request of those contracting parties be submitted to arbitration under the conditions laid down in this Article.

"The Department would welcome an opportunity to engage in an exchange of views".

It then goes on to talk about meeting. If you look at the last sentence in that paragraph, the third last paragraph of that letter, you will see then what it says,

"Ireland would reserve its right to invoke the arbitration procedure envisaged by Article 32 of

the OSPAR Convention."

That, in my respectful submission, is laying the ground work for saying, "Let us try to resolve it amicably as mandated by Article 32. Let us invoke the procedures". But this is the information we are looking for. We tell you where you can find it, but this is the information we are looking for.

The next letter, very briefly, is another laconic letter. I pay tribute to Mr Wood's brevity of expression in this letter. You will see, sirs, what is said, referring to their letter, "We recognise that your Government has very strong interest in BNFL's activities and future plans and we really need to maintain a close and productive dialogue on radioactive waste management and other issues of common concern. Nevertheless, the UK Government does not wish to prejudice the commercial interests of an enterprise by disclosing commercially confidential information. We note that you set out in your letter of 25th May, but, nevertheless, believe that the disclosure of the information which you have sought will cause harm".

The next letter is letter of 9th February, on page 158. Again, I will refer to two or three paragraphs.

"Referring to .....Daly's letter of 25th May to Mr Richard Wood of your Department, the letter reiterated my Government's request to be provided with certain information omitted from the PA report concerning the justification for proposed MOX facility. The letter also drew the Government's attention to certain provisions of the 1992 OSPAR Convention, including Article 32. On 2nd June, Mr Wood informed Mr Daly during a meeting in Dublin that the UK Government had received its own legal advice on the disclosure of information. Mr Wood stated that this advice suggested that the UK authorities had made sufficient disclosure and that no further information could be provided on the PA report. Following the response, Mr Daly was advised to raise the issue at the OSPAR Convention meeting in Copenhagen. At the OSPAR Convention meeting Mr Daly referred to the correspondence with the United Kingdom about the economic justification of the proposed MOX plant and the information which was being withheld by the UK on the grounds of commercial and industrial confidentiality. He also indicated that Ireland had received legal opinion from leading and junior counsel to the effect that the information should be disclosed in accordance with the terms of Article 9 of the OSPAR Convention. He informed the Commission that Ireland reserved its position and the right to pursue the matter further under Article 32 of the Convention in the event that the matter could

not be settled directly between the United Kingdom and Ireland."

Then we go to the next page, page 159 to the last full paragraph, "in conclusion, it now appears that a dispute exists between Ireland and the United Kingdom as to the interpretation and application of Article 9 of the OSPAR Convention. Once again, I invite your Government to disclose the information requested in the letter of 25th May or, alternatively, to propose appropriate means for resolving our differences. In the absence of information or early resolution of our differences, my Government reserves its right to invoke the procedures envisaged by Article 32 of the Convention. It is my personal hope that you might take steps to address Ireland's request so that there will be no need for Ireland to initiate further procedures."

Then page 168. This is a letter to Mr Wood from Renee Dempsey of 7th August 2001. If I go to the second paragraph, again for the interest of speed, "From a preliminary analysis of the report, it seems that just as in the area of PA Consulting reports, there is a considerable amount of important information omitted, apparently, on the grounds of commercial confidentiality." Obviously, this is the letter arising after the publication, I think in late July, of the Arthur D Little report and this represents a further request for information and, of course, as you are aware, originally we initiated arbitration by way of a letter and submission on 15th June, some time before this letter.

I then ask you to go to the third paragraph, "AS you know, we are totally opposed to the commissioning of the MOX facility and in this regard we wish to be in a position to assess the justification of the operation of the facility in advance of its commissioning. Due to the omission of economic data in public domain versions of both PA and ADL reports, it is not possible for us to make an independent analysis of economic justification for this plant. It is our opinion that the omissions cannot be justified on grounds of commercial confidentiality. In this context, we would be very grateful if the Department would pass on to my Department a full version of the ADL report. In the event that a copy of the full report is not provided, Ireland reserves its right to amend and extend its application in the OSPAR application filed 15th June last to include the information omitted from the ADL report".

Then if you could go to page 171 and then also 173A which I will address together. Page 171 is a letter from DEFRA to Ireland. The second paragraph, "AT the outset, I should make it clear that my authorities do not accept that the information excised from the public version of the ADL report is information falling within the scope of Article 9(2) of the OSPAR Convention. Nevertheless, it wishes

to explain the reasons for which the information was excluded and the manner in which this was done". They then go on to outline their reasons and, of course, whether they are good or bad are matters that are before this Tribunal.

The final letter - and I promise that this is the final letter - is on page 173A. It is a letter from again Mr Wood, slightly longer than his last one. He goes on to make a very simple point in relation to this. It is just the first two paragraphs. This is the missing letter that I referred to in the opening. There were three letters of that day.

MR PLENDER: It is in tab 6 to the United Kingdom's counter-memorial.

MR BRADY: I am grateful to my learned friend. This letter is a bit like a bad penny, it keeps coming back to cause problems. This letter is of significance because, in my respectful submission, it explodes comprehensively the arguments advanced by Mr Plender. What does this letter say?

"Further to the letter today regarding the arbitration proceedings initiated pursuant to article 32 of the Convention I should like to make clear that the United Kingdom does not accept that the information which is the subject of Ireland's statement of claim is information of the kind contemplated by Article 9(2) of the Convention. It is therefore not information to the disclosure of which Ireland is entitled".

You will recall, sir, in my opening that I adverted to the fact that this letter, although it does not say so on its face, refers back to one of the earlier letters of the 25th May 2000 which set out five categories of information at the top of the second page. I will not re-read that letter but I am just going to ask the Tribunal to go back to Ireland's request of the 25th May 2000 which you will find on pages 154 and 155. If memory serves me right Mr Plender did indeed acknowledge that the letter of the 13th September from Mr Wood was a response to that letter of the 25th May 2000. Let us take those two letters and look at them side by side, juxtapose these letters almost. Look at the last sentence of the first page of that letter. It is absolutely crustal clear that Ireland is requesting that it be provided with the following information, and it sets out the information on the next page in five separate categories.

That is what we were looking for and that is what the United Kingdom has rightly or wrongly said you are not going to get.

The letter of the 13th September is particularly instructive for this reason; not only does it say we are not entitled to the information in our statement of claim, but it goes on to give reasons, specific reasons, in relation to each of those categories. Each of those five categories is dealt with in

the letter of the 13th September and reasons are advanced for those five categories.

I now wish to take the Tribunal to - and I will honour my promise and put away that book in terms of the correspondence - the document that initiated this arbitration, the onset argo of your jurisdiction, and it is of course the request for the constitution of an arbitral Tribunal. You will find it right at the beginning of the booklet you have been looking at. It is our annexes to Ireland's memorial of 7th March, just in front of divider 1. Again in the interest of speed I just want to take you to three specific paragraphs. Paragraph 13 of the submission to arbitration. You will see there the reference to the letter of the 15th May that I have referred to. You will also see set out there the categories of information being sought. The documentation then goes on to deal with a variety of other matters, and adds into it, because this is the amended submission, our claim arising out of the publication of the ADL report.

I now want you to go to the relief that is sought and that is to be found on pages 13 and 14 of the entire pagination of the document. It is under the rubric "relief sought". "For these reasons Ireland requests the arbitral Tribunal to order and declare (a)" - and I think this is important to focus on - "that the United Kingdom has breached its obligations under Article 9 of the OSPAR Convention by refusing to make available information deleted from the PA report and the ADL report as requested by Ireland". You then go on to look at sub-paragraph (b) and it adds in an additional relief, that as a consequence of the foregoing that the United Kingdom shall provide Ireland with a complete copy of the PA report and the ADL report; alternatively a copy of the PA report and the ADL report which includes all such information the release of which the arbitral Tribunal decides will not affect commercial confidentiality within the meaning of Article 9.

Then the final document on this which is relevant is Ireland's memorial, and the members of the Tribunal will recall the provisions in the memorial, I think Lord Mustill referred to it. If I could just refer to the memorial if it is convenient to the members of the Tribunal, or you can look at it when you are considering the submission. Ireland seeks the reports or alternatively such part of the reports. If I could refer to paragraph 161.2 -- you will recall this so I need not read it. Then there is one matter which in my haste I went over. Going back to my submission to bring this rapidly to a conclusion, paragraph 1.06 of the written submission, you will see that Ireland in its memorial, paragraph 29, says that the United Kingdom has consistently refused to provide that information in whole or in part. Paragraph 38 again makes it crystal clear Ireland's should view as much of the information provided

without damaging the interests of customers or vendors etc, and the information can be provided in an aggregated or partially aggregated form so that specific sales prices and specific plant costs should remain secret. And there are a number of other points are set out, by any reasonable standard the withholding of the information from the reports has been so broad that it is contrary to article 9. The wholesale exclusion cannot be justified, and it sets out the relief we are seeking. Then paragraph 1.07 outlines our position.

If I make with the greatest of respect to the erudition of Mr Plender categorise the United Kingdom's on this as really amounting to the following; that it is a case of what we sometimes colourfully say in the Irish courts all duck or no dinner. We either get it all or we get nothing. I certainly hope to be attending some type of a dinner with something on the plate, but in my respectful submission the contention advanced on behalf of Her Majesty's Government is without substance, is without merit and when analysed against the factual matrix and the full and overall context of the request for arbitration, you, sirs, have the jurisdiction to direct the disclosure of information, subject obviously to making other findings, which is the totality or less than the total. The claim for the whole includes the less.

That completes my submission on that part. I will now address the next section of my closing submissions and I should point out that Mr Sands will also be addressing the members of the Tribunal on international law aspects. But there is one aspect of it which I would like to address which has been so eloquently presented by Mr Wordsworth in the course of his presentation here the other day, and that relates to Ireland's locus standi, and I use that term in the sense we really should not be here and we have no right to be here, and that our claim is essentially misconceived. I will address that because this is likewise a challenge to your jurisdiction, and I say for reasons which I will explore presently that it is not a sustainable challenge.

I think what I propose to do again is to take you to the written submission in the interests of speed, paragraph 2.01, where I identify the nature of the issue adverted to by Mr Wordsworth. Then at paragraph 2.02 I may some observations that at the risk of appearing trite I will refer to very briefly. Obviously we contend that Article 9(1) imposes a duty to ensure and that in effect creates a right of access to information. It imposes an obligation on contracting parties. A corollary of the obligation is the existence of a right. The obligation is mandatory. It is an obligation to ensure, and I emphasise the word "ensure", that the competent authorities are required to make available relevant information.

That is information that must be made available to a natural or a legal person.

Here I think it is helpful to look at what is not in dispute between us. What is not in dispute between Her Majesty's Government and Ireland is that Ireland is a natural or legal person. Ireland is a person with a right to apply for this information. It is a separate matter as to whether it is entitled to get it. But it has a right to apply for that information.

It also follows from the broad description of the term natural or legal person that individuals or companies as well as states may make an application to competent authorities for this information.

I now move on to paragraph 2.03. I have just identified for the Tribunal the class of persons who are entitled to apply. The next issue that arises is this, and I hope this is of assistance to the Tribunal in resolving this issue. Let us look at the other side of the coin: to whom is the application made? We go back to what the Convention is about, or at least this part of the Convention is about. It is about access to information, it is about getting information. It is in my submission self-evidently true that the application for the information is made to the competent body or competent bodies who have possession of the information.

I go on at 2.03 to emphasise that point and also to advert to the fact that depending on the constitutional or administrative arrangements at any given stage it is conceivable that there is more than one competent authority that has factual possession of the information. It is a sine qua nom of the right to get information that you apply to the person or prisons who have the information. If it transpires that there is one or more persons with the relevant information what is the consequence of that? I think a common sense solution commends itself and that is that the applicant has a choice. He can go to one or he can go to both seeking that information, if he is entitled to that information in the first place.

I move on then in paragraph 2.04 to address a further point. Her Majesty's Government has accepted I think quite properly that the Ministers who made the decision of the 3rd October 2001 are for the purposes of OSPAR competent authorities. Ministers of the Crown of the United Kingdom Government; they are the competent authority. They have as a matter of fact possession of this information. That is an important fact and it is an important point of distinction in terms of some of the arguments so eloquently presented by Mr Wordsworth. It has not been denied and could not have been defined that the Ministers of the Crown, the UK Government, have these reports. Accordingly it follows that it is to the United Kingdom Government that Ireland was entitled to apply. In fact in the

case of the ADL report you will recall it was the Ministers who themselves commissioned that report. They were the people who had the report, they had possession of the report, and indeed ultimately they had possession also of the PA reports.

On a common sense basis, and I am trying to apply this with an eye to the practicalities of it, what was Ireland's choice? Ireland's first port of call, and probably its only port of call when you look at who commissioned the ADL report, was Her Majesty's |Government. We wrote to Her Majesty's Government and they quite rightly engaged with Ireland over whether we were entitled to this information or not and ancillary matters in that regard.

Going to 2.04 what is the position in the UK, and what may be the position in other countries like Iceland or Norway; it may well be that there are a variety of competent authorities that have ordered the information. It may well be that in certain circumstances you do not have Ministers of the Government discharging duties in possession. They may set up and entirely independent self contained quango - and I do not use that term in a pejorative sense - but they may set up a body that is utterly independent, and that it alone and it exclusively has possession of these documents. So where do you go? That is your port of call in that regard. But this case is different because Her Majesty's Government exercised a residual jurisdiction and will become clear in a moment.

So in my respectful submission when you look at it from that context and from a practical context, and we look at the decision of the 3rd October 2001, it is quite clear that it was the Ministers of the Crown who had possession of the information which we contend is within the purview of Article 9(2), and let us assume for the purposes of this argument that that is correct. Therefore, and I am at the 6th line from the bottom of 2.04, Ireland have the right in our submission to apply to the United Kingdom Government for the information and we say the UK Government had a duty to give us that information.

I want to refer the Tribunal briefly to - and I am not going to open the document, I do not think it is necessary, but you can look at it in due course - the role of the Ministers here is a significant role. You will see in the decision of the UK Ministers of the 3rd October 2001 at paragraphs 29 to 34 the role and the function that the UK Ministers performed. It is in tab 22 of the booklet that has been handed in to you as part of our closing. I am sorry for the proliferation of booklets in this arbitration but perhaps if I can take you to pages 29-34 of the decision. It is really only a page and a bit. The relevant decision maker. "Under the 1980 and 1984 directives when considering applications under

the Radioactive Substances Act 1993 the agency was under an obligation to consider the justification of new practices which might give rise to exposure to ionising radiation.

"Under the 1993 Act the relevant Secretaries of State had the power to call in an application for their determination only in respect of applications for new authorizations", and of course this was a variation. "Where the application concerns an existing authorization the Secretaries of State's powers are limited to directing the agency to exercise their powers in a particular manner". Since BNFL's application in November 1996 related to variations to existing liquid and gaseous discharge authorizations" - that would presumably be from the Sellafield site - "the relevant Ministerial powers were those of direction. Accordingly, the agency in November 1998 when referring its proposed decisions in respect of the justification" - and then goes on to deal with what happened. The last sentence, "The Secretaries of States when deciding" etc "did so on the basis that they chose not to exercise their powers of direction under the 1993 Act".

Then the next page, 32, "However, following the adoption of the 1996 directive (which came into force on 13th May 2000) the UK Government decided that decisions in respect of justification should be taken by the appropriate Secretary of State rather than by other regulators. The UK has notified the European Commission that it intends to implement the justification requirements of the 1996 directive into UK law by means of regulations amending the existing Ionising Radioactive Regulations."

Then 33: "In the meantime the Government has decided that until such implementing regulations come into effect, the allocation of responsibility for determining justification should be consistent with the draft regulations which were notified to the commission. Accordingly, in October of last year, the Minister for the Environment wrote to the Chairman of the Environment Agency informing him that, in future, justification decisions would be a matter for the appropriate Secretary of State rather than the agency." etc. And any decision on justification will be taken jointly between the Secretary of State for the Environment, Food and Rural Affairs and Health. Therefore the decision rested with the Secretary of State for Environment, Food and Rural Affairs and the Secretary of State for Health. One can readily appreciate the acknowledgment of why it was that UK Ministers were competent authorities.

I then move on at the risk of acting too hastily to deal with further issues that arises, and that is section 3 of the submissions, choice of forum and remedies.

I start off with what may seem something of a self evident and obvious dichotomy and that is there is obviously a difference between a remedy and the forum in which you obtain that remedy. What we are concerned with at this juncture is the question of the forum within which a remedy can be pursued. Of course, a remedy is pursued if there is a right to that remedy.

I observe at paragraph 3.01 that some of the discussion before the Tribunal has identified the issue in terms of a choice of remedies. The correct characterisation of it is, in fact, a choice of forum. To put it another way, in what circumstances must a dissatisfied applicant pursue his grievance before the courts of a contracting party and within the framework of the legislation or administrative arrangements purportedly put in place under the terms of Article 9(1). Is a contracting party confined in its choice of forum? It is not.

The clear dichotomy is between the individual or company who applies for information to a contracting state and where the contracting state applies for information. I will now seek to elaborate on the arguments as to why that difference of status impacts on the right of Ireland to come before this Tribunal.

Section 4 of my submission deals with Ireland as an applicant. On the premise that the State as a juridical entity has a right to seek information within the ambit of Article 9(2), it is now necessary to address or examine how that right is exercised. The right is posited. How does Ireland exercise that right. I will also address what remedy a contracting party possesses and, in addition, in which forum they may seek that remedy.

Paragraph 4.0.2 - as outlined above, the competent authority may be an independent agency - the much abused quango - or, as in this case, the contracting party itself, the Ministers. In the former case, the case of a quango, a contracting party (ie the Irish Government) applies to the independent agency. In the latter case, it applies directly to the UK Government or another contracting party. The independent agency and the contracting parties may both be competent authorities. That is the position on the facts of this particular case in respect of the PA reports and it, obviously, follows from what I said earlier on that Her Majesty's Government is also the coherent authority in relation to the ADL report.

Its application to either body may be refused on the following bases. (A) the competent authority might misdirect itself as to the correct interpretation of the laws which are properly implemented under Article 9. Obviously, it has a right to refuse, but that is the end of the matter.

(B) The fact that the OSPAR Convention has been inadequately transposed into UK law. In those circumstances, what is the remedy and what is the forum where that remedy can be obtained? It is our contention that Ireland, as a contracting party, is entitled to invoke Article 32. The UK's contention is that Ireland's claim is misconceived. That proposition on our understanding of it derives from the contention that Ireland's forum for a remedy for a wrongful refusal of information is confined exclusively to seeking legal relief in the courts of the United Kingdom or those of any other contracting party. For that argument to be sustained, one is led inexorably to the following corollary. That is that a sovereign state, which is a contracting party, that has itself directly sought information from another sovereign state - and those are the facts with which this Tribunal is challenged, in this case the UK ministers or one of its independent agencies - has no right to a remedy other than through the domestic court system of the state in which the refusal was made.

Let us now probe that contention. Is Ireland solely and exclusively confined in vindicating its rights under the OSPAR Convention to the UK courts? Was it the intention of the contracting parties to waive or abandon their right to ventilate this issue before the Arbitral Tribunal? The State is not obliged in international law - and Professor Sands will elaborate and amplify this point - to exhaust local remedies in the State against which it has a legal grievance. Nonetheless, the consequence of the United Kingdom's contention is that Ireland would, indeed, be subject to that duty. However, there is nothing in the plain and ordinary language of the OSPAR Convention - Articles 9 or 32 thereof - which would justify that interpretation. ON the premise that there is no duty on a sovereign State to sue another State or its emanations for a violation of international law in the court system of that State, where does one find that duty clearly and unequivocally imposed on a contracting party under the OSPAR Convention?

Another way of looking at the issues is as follows. Is the effect of the OSPAR Convention such that Ireland is obliged to sue solely and exclusively in the courts of the United Kingdom? It is respectfully submitted that there is nothing in the wording or the context of the OSPAR Convention that requires Ireland or any other contracting party to pursue its grievance before a domestic court.

I now move on to deal with the other side of that coin as quickly as I can. The non-State applicant. It may seem trite to say that the private citizen has no right to enforce the OSPAR Convention. He or she is not a party to the Convention. Only contracting parties have rights and obligations under that Convention, including the right to invoke the arbitral mechanism under Article

32. This dichotomy is of importance.

I propose now to illustrate, as a matter of practical reality, how private demands for information can come before this Tribunal, but, in doing so, sirs, let me say, moving off the script, that, in addressing this issue, I am conscious of the following, that Ireland's contention and the conclusion of our contention is not intended to open the floodgates to enable anyone who has a grievance to come before this court. You will see, sir, that in the case of a private individual or a company that applies domestically for information and is refused it, wrongly refused it, it can go before the local court or it can come to a contracting State, which may or may not take steps to come before this Tribunal.

I go on at paragraph 5.02 to elaborate on this argument. An application by a person/company may be made to the competent authority of the State for the relevant information. Let us assume such application is refused. It is now necessary to examine why there is such a refusal. There are two potential scenarios. The contracting party has failed to fully and properly implement OSPAR or the contracting party has, in fact, fully and properly implemented OSPAR, but the competent authority has misdirected itself in law as to its correct interpretation or has misdirected itself in respect of material facts.

In the hypothetical case posited about, one would be dealing with a wrong inflicted on an application. Because the wrong has occurred, we must now address the question of the remedy available to the applicant. IN the case of the United Kingdom, the OSPAR Convention is not part of its domestic law. Thus the applicant cannot compel the performance of the United Kingdom's obligations under OSPAR. What remedy does the wronged applicant possess? It is patently clear that the wronged applicant does not qua citizen or company, possess a direct remedy against the United Kingdom under international law and OSPAR. The applicant must then seek the aid of a contracting party to commence proceedings under OSPAR to compel the United Kingdom to comply with Article 9 of the Convention. I think that it is reasonable for you, sirs, to presume that each contracting party will act in good faith, that it will not mount frivolous or vexatious claims against other contracting parties and will only bring claims that are of substance. The floodgates are well and truly closed.

I will now deal with the second situation. That is where there is an error made by the body which has refused the information to an applicant who is a person or a company. The remedy there, at

least one of the remedies - and I do not have to go any further - is obviously to apply in the local courts of the competent state for the appropriate review of judicial or administrative action.

I now move on to a further point addressed by Mr Wordsworth, I think, and that is the question of the European Union. Of course, we are aware that Her Majesty's Government's contention is that the Environmental Information Regulations of 1992 implementing the Directive in question was in part relied upon by the United Kingdom as a performance of its duty under Article 9. You will note, of course, the very carefully worded phraseology used by my learned friend, Mr Bethlehem about the composite basis upon which we approach this particular adjudication. If the 1992 Regulations do not accurately transpose EU law, of course there is a remedy. Of course, the United Kingdom can be brought before the European Court of Justice for its failure to transpose EU Directives into domestic law. And, of course, in certain circumstances, which it is not necessary to explore here today, some Directives, even if not transposed into domestic law, can be directly enforced. But that is an argument of only academic significance at this stage. However, the fact that there is a remedy in relation to a separate Directive before the European Court of Justice is not dispositive of the issue as to whether this court is vested with jurisdiction. It does not address that point. In my submission, it could never have been the intention of the contracting parties that, because there may be some parallel right under a separate legal order to enforce disclosure of information under EU Directives, that that is outside the jurisdiction of this Tribunal.

In Paragraph 6.02 I make a further point which we say with respect detracts from the validity of that contention and it arises in this way. The OSPAR Convention relates to an area that extends beyond the territory or jurisdiction of the European Union. It includes Norway and |Iceland. They are not members of the European Union and they have no recourse to the European Court of Justice. Their rights stem from Article 9 exclusively. The same words contained in the same Convention must have the same meaning for all contracting parties. If it had been intended to circumscribe the rights of those contracting parties who are members of the European Union to come before this Tribunal, that could very clearly have bene said. No such words are to be found in the language of the Convention.

6.03. There I go on to make a point that has already been dealt with and again I will be brief. It is this. The submission, as I understand it, was to the effect that, when you look at the EU Directive, 90/313, it uses language which is similar, if not identical, to the language in the OSPAR Convention and it is then urged upon you that, because under a separate legal order (ie EU law) you

find this similar substantially the same wording that that justifies an interpretation that the only obligation of the United Kingdom is to put in place a legal framework. To try to summarise their case, and at the risk of doing injustice to it, the British case is that their obligation is to ensure that they provide a legal system. It is not to ensure that they provide the information.

I say that the attractive argument advanced by the English does not stand up to analysis for this one reason. When you look at Article 4 of the EU Directive , it very, very clearly identifies that the remedy for a breach in the failure to supply the information is to be provided domestically. I go on to deal with that point at paragraph 6.03. Ireland's contention is fortified by the existence of Article 4 of the EU Directive and the omission of a similar article in the OSPAR Convention, but our argument is augmented by the fact that there is an arbitral mechanism, the OSPAR Convention. There is a dispute resolution mechanism in OSPAR. Of course, the fact that there is Article 4 in the Directive does not preclude inter-State applications at the European Court of Justice level, but, as I have said, OSPAR has its own arbitral mechanism.

Let me pose a problem. Again, to try to look at this in a practical and common-sense way with a view to facilitating the operation in an effective way of the OSPAR Convention.

What happens if Iceland had sought this information? Is it to be contended that Iceland cannot invoke Article 32 or is it to be contended that Iceland can but Ireland cannot? Is Ireland to be precluded from invoking the arbitral power because of its membership of the European Union? That we say is not correct. Article 9(3) is the next issue that I wish to address briefly. It is this. If Ireland has a right on the special facts of this case - and I emphasise "the special facts of this case", because Her Majesty's Government is the competent authority, they have the documents - so Ireland has the right to say, "look, we want this information." The problem is posed, how then does the British Government say, "Very well, we give you this, but we cannot give you that because it is confidential"? Does the British Government in this case, on the facts of this case, find itself snookered because it has not introduced legislation to say, "Ah, if this is confidential, we don't have to give it to you". That, in my respectful submission, is a conundrum which is resolved by the following analysis. It is this. Article 9(3) is a power. It enables you, it is an enabling provision. It is not obligatory. It enables contracting States to say, "We are not going to give you this type of information". There is a dispute as to whether they are right, but let us leave that out of the equation for the moment. When you look at it in that way, and where on the special facts of this case you are

dealing with a sovereign Government application to a sovereign Government application, how does Article 9((3) fit into the regime or scheme that I have urged on this Tribunal as being the correct interpretation? It arises in this way. The British Government is the sovereign Government. We are not dealing here with some independent statutory body which must act expressly within the powers conferred on it by statute or otherwise be condemned for acting ultra vires. Inherent in its sovereignty is the right to say "we will not give it. We will exercise the power in 9(3) to refuse it on the grounds stipulated in 9(3)". I deal with that in paragraph 6.05 and in my respectful submission that analysis supports the contentions that I have advanced.

I now move on to say, and I appreciate the time constraints under which we are all operating, to deal with paragraph 7. I am conscious that I am imposing on the Tribunal, if the Tribunal wishes to rise at any stage, I am also conscious of the time that I have, but, if you will bear with me, I will try to get through this fairly quickly.

I come back to I suppose essentially the philosophical underpinning of our case. In some respects, this part of the submission is an appeal to the Latin maximum -forgive me my Latin, it is a bit rusty - but ubeus irreremedium - where there is a right there is a remedy. I may not have pronounced that correctly, but I know that the members of the Tribunal will all understand its legal implications.

Let us look at this issue of rights and remedies between contracting parties. That is what we are here for. We are not here for some other issue. This Tribunal obviously will decide this case on its particular facts and in the context of its particular issues.

Article 9 imposes duties on contracting parties with correlative rights in respect of those duties. States who are contracting parties have duties. They also have rights. If you proceed from that premise, you then move on to the next issue, where is the remedy and what is the remedy and where do you get the remedy? As I observe in 7.01, rights are vested in contracting parties. The obligation to ensure that competent parties provide information is mandatory. I set out again the relevant passage. But what happens where a Contract State - the sovereign State - says, "no, we are not going to do it, clear off, leave us alone"? What does the other contracting State do? Well, they are not going to go to war over an issue like this, so let us look at how international disputes of this nature are to be resolved.

I go on at 7.01 to say that this is not a Convention which creates rights without remedies. You only have to look at the structure of the Convention to realise that this is so. Because it is not

just, as I think Mr Bethlehem said, the freedom of access to information treaty, but maybe I am being unfair. He said that it is not a freedom of access to information treaty. This is a convention with a multiplicity of rights. But to serve who? I just pose that question. Why did the States get together, assume a burden, set up a commission, have to report to that Commission? Who are they protecting? Whose rights are being protected? It is not just the States. IN this case Ireland is engaged in this dispute with the UK, but this is about not just Ireland's interests and the UK's interests, but it is about the interests that the world and this generation and future generations have in preserving the maritime environment. Let us just look at the light motif of this Convention. Polluter pays, precautionary principle - I know dumping goes back a long time - reducing emissions and so on and so forth. That is not in there for the fun of it. That is there to protect the interests of people and generations and, in fact, society at large. I think that you have to look at that and you have to look at it then in terms of why do States come looking for remedies? This is not like the World Trade Organisation where there is a row over economic tariffs or pure financial matters affecting the pockets of one conglomerate or one large State as opposed to another small State. This has implications way beyond what is happening today and way beyond fixing next year's budget. It is a Convention in our respectful submission that does not dictate to Ireland or any other contracting State into which forum it must go looking for its remedy. As I observe that the Convention creates rights without remedies, Council Directive 90/313 does prescribe a specific remedy in the form of judicial review, unlike OSPAR. There is no requirement to select the forum. But it does provide for an arbitration mechanism and it is for the contracting State to decide whether it wishes to invoke that forum. It is not for any other contracting State to tell us that we can only sue in one forum and no other.

At 7.02 I go on to draw a contrast between the Directive and the Convention and note how unstructured that contrast is. The reason for that is as follows. As has been observed, the OSPAR Convention is not simply a freedom of access to information treaty. It provides for many other obligations, rights and duties. Thus, by way of illustration, Article 2 imposes on the contracting parties the obligation to take all possible steps to prevent and eliminate pollution, to take all necessary steps to protect the maritime area, to cooperate, to apply the precautionary principle and so forth. It establishes a regulatory body and it sets out the duties of that body at Article 10. In short, the OSPAR Convention is a regime providing for the imposition of obligations and rights combined with a mechanism for supervising its implementation (Article 10).

In 7.03 I maintain that it is, in essence, a self-contained code. The arbitral mechanism, is one which can only be initiated by a contracting party. It is respectfully submitted that its jurisdiction can be triggered where a State complains of either improper implementation or is itself a party which has been refused information by another contracting party or its emanation. Otherwise one is forced to the conclusion that each contracting party has accepted that it can only seek a remedy for the wrong in the domestic courts of another contracting party. That interpretation is not warranted by the wording of the OSPAR Convention and is inconsistent with the established principle of international law which Professor Sands will deal with in greater detail.

I then finally come on to the ambit of Article 32 and I have already identified that it is a very wide arbitration clause.

I now want to deal quickly with one issue that arose yesterday and it is moving somewhat away from the pure legal issues. It may have arose two days ago. It is this.

It is to do with the shipments issue. I want to be careful not to refer to information - and, as you are aware, I have not seen the unredacted versions - but a number of matters arose on day 2, page 52, line 11 to page 53 line 11 which require clarification and comment here.

The United Kingdom has made much of their offer to provide Ireland, in confidence, information on the projected annual numbers of marine transports of MOX fuel and are using this to illustrate what might have happened had Ireland sought individual items of excised information as distinct from the all or nothing approach which they allege constitute the Irish claim. The UK says it has had difficulty in persuading Ireland to accept the offer. First, the United Kingdom's offer was not unconditional. It is an offer subject to strict terms of confidentiality, so strict that Ireland would be left in a position where if it agreed to them and obtained the numbers it could not derive any benefit or use from having the numbers. In particular, Ireland would not be able to refer to the numbers in litigation that Ireland might wish to pursue in relation to, for example, the United Nations Convention on the Law of the Sea or in relation to the justification issue. There is a long series of correspondence in this issue. I am not going to open it, because I do not want to go into issues that may still attract a degree of confidentiality. That has been handed in and Professor Sands can deal with any questions that you have on that.

This eventually culminated in a meeting in the Foreign and Commonwealth Office in June of this year and our letter of 15th July (front of Shipping Issue Bundle) in which Ireland proposed a

mechanism for dealing with the use of such information in litigation, which proposal the United Kingdom accepted.

In particular, I call your attention to the paragraph of the second page of the letter of 15th July which I set out for convenience.

"However Ireland considers that the better course of action would be to put that portion of the argument and specific information in question into a separate pleading document which would itself be treated as confidential and would continue to be treated as such by both parties and the Tribunal throughout and after the hearing or, if this is at issue, until such time as the Tribunal had determined that the material was not subject to confidentiality requirements. This would entail that any portion of the hearing relating to that argument and that information would of necessity have to be held behind closed doors."

The United Kingdom in reply to this letter disclosed the number of transports. I am not going to refer to that letter. You have it, it is confidential and I am not going to deal with it at this stage.

This fact I can now disclose in public because quite extraordinarily , on day 2 of these proceedings, the United Kingdom publicly revealed for the first time that it had furnished the numbers to Ireland. I quote from the transcript at page 53 lines 6 to 11.

"As the Tribunal knows the United Kingdom supplied to Ireland the information which was excised from the PA report, and it has subsequently supplied to Ireland on the basis of confidentiality further information so as to bring the figure up to date. This is material which we would have been very happy to supply to the Tribunal, but we were a little surprised to find that Ireland having accepted confidentiality did disclose it, even to so reliable a source as this Tribunal without first mentioning to us that they proposed to do so."

I do not mean any criticism of that, I hasten to add. I say quite extraordinarily because the United Kingdom had at our meeting in June insisted that the fact that such information had been given to Ireland was also to be treated as confidential. Ireland had accepted that condition as is clear if one looks at the top of the second page of the letter of the 15th July.

Further I reject the accusation that Ireland had breached the undertaking of confidentiality in respect of the fact that the United Kingdom had given us the number. As is patently clear from the passage of the letter of 15th July, which I have quoted above, and which the United Kingdom,

accepted by giving Ireland the number we were fully entitled to disclose the numbers to this Tribunal.

The allegation by the United Kingdom that Ireland has breached confidentiality is incorrect.

Finally, it is instructive for the Tribunal to reflect on the number which was given, a number which it must be remembered was contained in the redacted reports and compare it with the numbers which they have subsequently given (letter dated 17th October 2002-Confidential and Sensitive Letters) when we sought clarification. If the number can change in such a manner, one has to wonder at which the United Kingdom or indeed BNFL is so insistent on protecting numbers which no longer seem to reflect the current position. And this is not even taking into account the numbers, which were published by Mr Norman Askew and Mr Millar in the press and which were referred to in evidence yesterday.

There are just some housekeeping matters. Mr Fitzsimons who is dealing with one aspect of the case enquired as to whether or not you will need submissions on fact in relation to the evidence in light of the suggestion that you might make an interim award. Secondly, Professor Sands will be dealing with international law and, in particular, the Article 9 issues. I know that I have dealt with many of them, but he will be addressing them. He will not be, hopefully, repeating the arguments. Subject to whatever procedures you wish to take, with your permission, I propose to ask Professor Sands to make submissions. I am sorry, maybe Mr Fitzsimons could address you.

MR GRIFFITH: Mr Attorney, I thank you for your submissions. In paragraph 6.05 you made a submission that the Article 9(3) is an enabling power. This might be a question that I should raise with Professor Sands, so please defer it to him if you feel it appropriate. Is it Ireland's submission that, as an enabling power, the right of the United Kingdom as a contracting party to take advantage of it in accordance with the national legal systems, as it is provided in Article 9(3), must, in fact, have a particular or several laws, so that, in the absence of the law, there is no provision that can be relied upon to take advantage of the exc eption? I say that in the context that, for myself, I am not yet clear as to whether any particular law or aggregation of laws are stated by Ireland or by the United Kingdom, for that matter, to be required. I understood your submission to be that the decision here was made by the two Ministers under an executive power? I wonder whether you could make some submission as to whether or not you would contend that this is an exercise of how the contracting party of the right in accordance with its national legal system when it is merely an exercise of its executive power at that level, apparently not pursuant to any law or regulation.

MR BRADY: If I could deal with that point, perhaps indicating that, in anticipation that this would become an issue in the course of these exchanges, it is agreed that Professor Sands will, in fact, be dealing with that issue. That is not to side step the issue, but he will be addressing that very specific point.

MR GRIFFITH: Thank you for that very clear answer.

MR BRADY: Thank you very much.

LORD MUSTILL: A very brief question, Mr Attorney. I have been following your argument clearly and grasping it, I hope, but I lost contact with it briefly at the end of paragraph 7.01. In the very last sentence, I may have misunderstood it ...

MR BRADY: If your Lordship bears with me, I am sure that your Lordship has not, but would you also bear in mind that this publication is the fruit of quite intense typing in the early hours of this morning ...

LORD MUSTILL: It is not a criticism at all. I just wanted you to help me whether perhaps it slipped a cog or whether I have slipped a cog. Your argument, which I can fully follow up to that point, says OSPAR does not create a right without a remedy, the directive does create a remedy, that is a domestic remedy or contemplates a domestic remedy.

MR BRADY: Yes.

LORD MUSTILL: Then you go on to say that OSPAR does not prescribe a domestic remedy. Then you go on to say that it does not provide for an arbitration mechanism to dispose of inter-state. It is perhaps the word "not" at 2 o'clock in the morning!

MR BRADY: I am sorry to say it was 1 o'clock at lunch time today! But your Lordship is absolutely correct, to my embarrassment.

LORD MUSTILL: Please do not think I was trying to show up the document which is very clear. I just thought I had completely come unstuck.

MR BRADY: if I can express my gratitude to your Lordship because I would be massively embarrassed if that was recorded as my submission in due course.

MR GRIFFITH: Mr Attorney, I so enjoy your brogue that I would like to ask you another question. As regards the shipments issue I read your submissions, but is there anything that Ireland requests of the Tribunal other than to have regard to them and consider the issue of whether or not there is an entitlement for open disclosure of shipments as part of the relief to which Ireland is entitled. Apart from that issue do we have to do anything on the shipments issue.

MR BRADY: Just bear with me. To give you the benefit of my brogue as perhaps I might not answer the

question as clearly as you put it. It is essentially in the language of the courts in Dublin, and I suspect in the Strand, a comment on a remark made by opposing counsel, and we are not as such looking for any additional relief based on what was said by Mr Plender and based on what we had previously said. It is I suppose referring to the political world putting the record straight.

If you do not have any further questions I would like personally, although this is not the end of the Irish submission, but on my own personal behalf thank the three of you for listening to what I am sure at times was a very tortured piece of submission and indeed a lengthy and complex arbitration. I think both the United Kingdom and Ireland are grateful to have available to us to deal with these knotty issues such a distinguished jurist as yourselves, and I would like to thank you for the application of your skill and genius in this matter. All I will say is - and this is utterly neutral - I have no doubt but that you will get it right! Thank you very much.

THE CHAIRMAN: Thank you very much, Mr Attorney-General, that was a very clear exposition. The Tribunal will take a five minutes stretch and then we will deal with the question that was posed on behalf of Mr Fitzsimons.

(Short adjournment)

MR FITZSIMONS: Sirs, before I come forward I would just like to enquire as to whether or not you need my assistance now. It has been agreed amongst the Irish team that I will deal with the evidence, and in the light of the procedure that is now to be followed I am not sure whether or not the Tribunal needs my assistance.

THE CHAIRMAN: Thank you for your question, Mr Fitzsimons. The efficient order which was discussed yesterday outside of this room was that it would be economical and logical for the Tribunal to address the questions arising under Articles 9(2) and (1) or 9(1) and 9(2) first, and if a finding were made for the United Kingdom on those two issues that would yield a final award. If a finding were rendered in favour of Ireland's submissions on those two Articles then Article 9(3), and in particular much of the factual evidence would become relevant. The Tribunal had expressed the view, subject to the agreement of the parties, that a sequential procedure of this sort would provide for an orderly disposition of the issues.

In that respect evidence exclusively related to Article 9(3) would not be urgent at this phase of the arbitration. However, any factual evidence that might be relevant to a determination under Article 9(2) would be relevant. I hope that clarifies the issue.

Since we are dealing with a procedural issue I notice that the United Kingdom agent has a question.

MR MICHAEL WOOD: Thank you, Mr Chairman. Mr Chairman, I just wanted to clarify the United Kingdom's position on this matter since the Attorney for Ireland mentioned there was agreement between the parties on this. Our position, which I conveyed this morning, is that we do not at this stage see the need for a two-stage approach. Even if the Tribunal were to find against us on Article 9(2) and Article 9(1), we consider that on our approach to Article 9(3) the Tribunal already has sufficient evidence and argument to reach a conclusion. If the Tribunal comes to a point where it considers that it is necessary to proceed by way of an interim award, we would have no objection to proceeding in that way. Thank you.

MR FITZSIMONS: Mr Chairman, I wonder if I could intervene at this stage just to deal with the question of 9(3). As we understood it the proposal was that the Tribunal would either make a final award or an interim award on 9(1), 9(2) and the legal aspects of 9(3). I just want to be sure that that is correct.

THE CHAIRMAN: Yes. What Mr Fitzsimons has expressed I think is not inconsistent with the position that has just been expressed by Mr Wood, that is that the legal questions relevant to 9(3) would certainly be critical in this phase. The concern of the Tribunal was that the possibility of a line by line examination of redacted data in terms of Article 9(3) would require evidence and argument that had not yet come up. It had not come up to some extent because the parties had not joined issue on that. The United Kingdom's argument in chief is based on Article 9(1) and 9(2), and the United Kingdom's consistent position in the correspondence has been that one does not reach Article 9(3), though it one did the United Kingdom says that certainly its behaviour is consistent with the requirements under the Convention.

The position of Ireland has been that this has been essentially a Article 9(3), at least in the written submissions. It is only in the oral argument that there has been a thorough and very useful joinder of issues with respect to 9(1) and 9(2) for which the Tribunal is grateful. The Tribunal was looking ahead to the contingency ex hypothesi of having to make decisions with respect to detailed redactions in the two reports, matters on which we have not heard extensive argument, and for which argument and briefing would have been quite useful. In that respect the Tribunal had proposed that a two-step or two-chase arbitration be kept in mind, bearing in mind that the award that would follow this procedure might well terminate this dispute, and obviate advancing two questions arising under

Article 9(3).

MR MICHAEL WOOD: Thank you, Mr Chairman. Mr Chairman, I clearly understand that if there were to be an interim award it would, as counsel for Ireland said, deal with 9(2), 9(1) and the legal principles involved in 9(3), but we do feel that we have addressed 9(3) both as to the correct approach to 9(3) and as to our point that if our approach was adopted we would not get to the stage of line by line, so we think that if you accepted our submissions on 9(3) in their entirety we believe that there is already sufficient evidence and has been sufficient legal submissions for you to reach a substantive conclusion on 9(3). So I would not wish that to be excluded ab initio as it were.

That was the only point I was trying to make.

THE CHAIRMAN: I understand and I do not believe there is any difference in this respect to what you have just said and what Mr Fitzsimons has said. I think Mr Fitzsimons was referring to entering into the details of evidence that the Tribunal is currently contemplating for a hypothetical second phase. But I do not think he is excluding joining issues on the United Kingdom's arguments with respect to Article 9(3). As I hear both statements I think there may be a convergence between them.

MR FITZSIMONS: Lest there be any ambiguity on the basis of our understanding of what is proposed it would not be necessary for me to make any submissions now in relation to the evidence, for example, a case that I might make in relation to the evidence of thew witnesses who gave evidence over the past two days. But at a later stage if the Tribunal was to decide not to make a final award dismissing the claim but to render an interim award and enter into a new phase, at that stage I would then expect to have to make submissions on the evidence that has been taken here. Unless the Tribunal expects me to make those submissions now.

THE CHAIRMAN: You have heard Mr Wood's understanding and that is as I understand it that certain threshold questions concerning Article 9(3) have to be decided even if one, based on the decision, would then advance to the more detailed examination of particular redactions and the evidence relating to them. When you say there is no need to present evidence you mean even with respect to the general issues concerning Article 9(3)?

MR FITZSIMONS: I am sorry, Mr Chairman, I am possibly going to repeat myself again. As I understood it the Tribunal was going to deal with the legal aspects of 9(1), 9(2) and 9(3). If it reaches 9(3) it will make findings of law in relation to the manner if the application of that article. The next phase would be the consideration by the Tribunal of the application of that law to the facts. The legal findings if

made would give guidance to the parties as to what range of submissions were required in relation to the fact, but we assume that that includes submissions of the type that would be made today if the arbitration was to proceed to a completion.

If we are under a misapprehension in that regard I would appreciate if we would be told that that was the case. I should say I am perfectly happy to proceed to make submissions on the evidence and have prepared submissions on the evidence if required, but it seems unnecessary to tender them if the Tribunal is possibly going to make an interim award.

THE CHAIRMAN: This is quite an important issue obviously and could limit the rights of one or both parties to present their case, so let us recess for five minutes. I would like to consult with my colleagues on this issue. We will come back.

(Short adjournment)

MR FITZSIMONS: Mr Chairman, before you say anything on behalf of the Tribunal, when you recessed it was raised with me that the Tribunal may have, or I did not remind the Tribunal lest it was necessary, of the fact that this situation arose as a result of our proposal to prepare a colour coded copy of the redacted material so that we could make submissions in relation to different parts of the redacted material. That has not been done, so quite obviously we are not in a position to make submissions now on that, and that should be associated with my previous argument because if any submissions on the facts are to be made it would seem to make sense to have them all at the one time. That would mean a deferral of the factual submissions until the later phase, if there is a later phase and if the final award is not rendered in the mean time. So just in case that aspect of the situation was not at the forefront of your minds I just wished to draw it to y our attention. I apologise for not doing that before now.

I should say that Professor Sands reminds me that if it was necessary of course to revert to the previous proposal we could work through the night - Professor Sands I see offering! - on the redacted copies to achieve the old situation. But we would hope that that would not be necessary and that the situation as proposed could be the order of the day, with the consent of everyone.

MR MICHAEL WOOD: Thank you, Mr Chairman. I am grateful to you for allowing me to speak before you indicate your decision. I would like to recall that the whole of Mr Bethlehem's presentation on Tuesday evening and Wednesday dealt with the question of the interpretation of Article 9(3) and the principles that should apply, and that Mr Plender yesterday dealt with the application of Article 9(3)

as we see it. It is our position that, if the Tribunal reaches the point of considering the merits of the withholding of information under Article 9(3), it should do so by reference to categories, and we consider that we have made sufficient submissions of law and that there has been sufficient evidence for the Tribunal to reach a final conclusion, if it agrees with our approach.

I fully accept that if the Tribunal decides that the way to proceed is line-by-line looking at each item, then an interim award would be the correct way to go.

It also seems to me that if there are arguments to be put forward by the Irish side on, for example, the margin of appreciation issue, this would be the time to hear them. But my own feeling is that the most satisfactory way to proceed and perhaps the safest way to proceed since we cannot predict what decisions the Tribunal will come to on the issues of principle would be for Ireland to present its position, which it clearly has already prepared, on these issues at this stage. Thank you.

THE CHAIRMAN: Again may I say that I think there is a considerable convergence between the positions expressed by the claimant and respondent.

The Tribunal believes that any material, arguments or evidence, that is relevant to a construction of 9(3), the interpretation of 9(3), should be considered now. What the Tribunal expressed in the meeting yesterday was its concern about the possibility of finding itself in deliberation and on one hypothesis having to engage in a line-by-line analysis of the propriety of particular redactions, and were that task to fall on the Tribunal, were that to eventuate, the Tribunal concluded that it had not heard argument on this. There is evidence in the record for sure and the Tribunal would not need additional evidence, but it had not heard argument.

What the Tribunal proposed was that that particular issue, which is contingent on a variety of other sequential decisions, that particular issue be reserved in one construct of events for a second phase of the arbitration, understanding that depending on a variety of possible decisions one might never proceed to that phase. One might terminate the arbitration sooner.

Going back to the question that Mr Fitzsimons raised, material that Mr Fitzsimons would have prepared with respect to anything concerning Article 9(3) except for discussion of specific redaction and their propriety under the OSPAR Convention should be raised now. This is the time for it. The other issues would not be appropriate. I think it fair to say that that is consistent and would lead to a joinder of issues with the essential arguments that Mr Bethlehem made, since he did not engage in a line-by-line review and defence of particular redactions other than general categories.

My colleagues observes that were a partial award to be issued there would not be further evidence. The evidence is in the record, we do not need any more information, but we have not heard argument on that evidence. We have not been led through that. Were that requirement to arise the Tribunal would need such instruction in order to render an appropriate decision.

I apologise for any confusion that may have arisen out of our discussion yesterday. I confess that I had not seen the two letters from the parties that arrived at 10 o'clock this morning, but just had the contents read to me over the telephone. I think in fairness to Mr Fitzsimons there should be a recess of 15 or 20 minutes to permit him to review with his team the evidentiary material that he has prepared to determine the extent to which it is relevant to this phase of the arbitration. If any of it should prove to be relevant, and it may be that Mr Fitzsimons and his team will conclude that none of it is.

May I say as well that we have stopped the clock during this entire intervention, so it will not prejudice the time that will be counted against Ireland.

MR MICHAEL WOOD: I appreciate that, Mr Chairman, and I appreciate your emphasis on the fact that we have not really heard enough about individual items line-by-line. But as I said our contention is that it is not necessary to get to that stage, the Tribunal can decide on the substance of 9(3) if it gets that far on the basis of categories. So we would at least hope that the Irish side would engage with the categories as we put forward our argument both in Mr Bethlehem's submissions and in Mr Plender's submissions on the application of our approach to the facts of this case.

THE CHAIRMAN: Just to repeat the Tribunal is interested in hearing such evidence as is relevant to 9(3) up to a line by line examination of the unredacted material and a determination of whether the redactions were consistent with the OSPAR Convention.

MR GRIFFITH: Mr Wood, as I understood your submission then, you reiterate the view of the United Kingdom that if we are with you on all your categories then there is no disclosure to be ordered on the application of the Article 9(3) issue and what you content is that if we are disposed to admit those arguments then there is no alteration to the redactions made and that will result in a final award. Is that so?

MR WOOD: Yes, it is indeed.

THE CHAIRMAN: You will see that the Tribunal is extremely sensitive to the issue of fairness and would like this matter to be thoroughly clarified, and that is why we have conferred even in the midst of this

proceeding. I want to repeat so that it is clear that the procedure that is being taken is entirely contingent, there is no assurance of a second phase. The Tribunal may well find when it sits to deliberate that it can make a decision on Article 9(1), 9(2), the categories of 9(3) and that would be a final decision. What we are concerned about is a contingent situation in which one were to advance beyond all of those questions to the need for a line by line examination and it is that that we think has not been argued, issues have not really been joined on that. The evidence is in the record and it is on that which we would hope, if it arises, there would be additional submissions. But I would not want any confusion about the notion that we are definitely going to that additional phase.

MR FITZSIMONS: Mr Chairman, we were under no allusion on that count, we know that the Tribunal is putting forward these possibilities in the alternative and that the Tribunal may well decide to make a final award on one or other of the first two articles. We are fully conscious of that and we are discussing this topic subject to that possibility. But I am afraid Mr Wood's recent submission has introduced new confusion because he is talking of categories from the United Kingdom perspective, Dr Varley's eight categories. We in this context are talking about a different set of categories, and indeed not the categories that are in our memorial at paragraph 75. We are talking about the categories as indicated to the Tribunal, namely opinions of ADL and PA in their reports, information, facts furnished by third parties and then the third category is of course information, facts furnished by BNFL. If the Tribunal decides having considered everything to proceed and give an interim award on the basis that Mr Wood wishes the issue to be decided on the evidence at this stage would be on the basis of our categories, that is as we see it. But our wish is that if we are to proceed and make submission in relation to the evidence that we be in a position to do so following a colour coding of the redacted copies so we can at least in making submissions on the evidence make them relevant to the three categories I have mentioned. I should say that the second phase then would presumably involve a break down as within those categories, if it took place.

THE CHAIRMAN: The Tribunal is well aware of the fact that as is often the case different parties have different characterisations of the dispute, the intellectual problem and of course remedies, and so it is perfectly clear that with respect to categories Ireland has put forward one list of categories and the United Kingdom has submitted a different list. With respect to the determination of issues relevant to this phase it is your categories that are to be defended, the other categories that are to be criticised, and all we are saying is that with respect to a line by line examination of whether a particular redacted

material was appropriately withheld under the OSPAR Convention, that is a matter that will be subject to later submissions and would not need to be raised now. If there was a misunderstanding and you would like to have an opportunity to colour code the redacted version for purposes of arguing about the propriety of the categories that would be appropriate is this phase of the arbitration. (Pause)

The Tribunal would appreciate from the parties, going back to what we said yesterday, arguments on the earlier questions in this sequence, 9(1), 9(2), margin of appreciation and 9(3) and so on. All of these would be issues that, depending on how they are decided, will then lead up to the question of specific redactions. This is the argument that we think is appropriate. I should emphasise that the Tribunal ultimately will have to do what it thinks is fair and right under the law that governs it. These are the issues that seem to present themselves at this stage.

MR BRADY: Thank you, Mr Chairman. We are happy to proceed in that manner.

THE CHAIRMAN: AS I said before, we are prepared to recess if you need time to reconsider the structure. I know that you dealt with the possibility of not presenting, that is why you occasioned these questions, but, if you would like a recess ...

MR FITZSIMONS: As I understand it, the Tribunal is proposing not to take any submissions in relation to evidence, but to proceed to the submissions that you have just mentioned. You did mention some moments ago that we could proceed to colour code, but yesterday the Tribunal indicated that it did not want that, but I assume that that has now been overtaken by the direction that you have just given, that you seek simply argument, legal argument, essentially, on 9(1) 9(2) 9(3) and then either there will be a final award in which case the arbitration is over or there will be an interim award in which case we will return and make submissions on the facts which, of course, involves submissions in relation to the burden of proof as it applies to each of the redacted pieces of material; submissions involving the burden of proof would have to be made, hopefully, not for each item, but, perhaps, categories of them at that point in time.

(Pause)

THE CHAIRMAN: Mr Wood, did you have a question?

MR WOOD: Mr Chairman, slightly earlier I think you indicated that we should address all matters up to a line by line analysis. We will come to that and at a second stage we will deal with it line by line if the

Tribunal's conclusion make that a necessary exercise. On our side we feel quite comfortable about that. Perhaps, since there was no letter this morning and I merely related my views by telephone, could I just read out the precise language that I used this morning?

THE CHAIRMAN: Thank you.

MR WOOD: I said that "As things stand at present, the United Kingdom does not see a need for a two-stage approach. Even if the Tribunal were to find against us on 9(2) and 9(1), we consider that on our approach to 9(3) the Tribunal already has sufficient evidence and argument to reach a conclusion. Any question of costs could be dealt with after the award through written submissions." Then we went on to say, "Of course, if the Tribunal reaches a point where it considers that it is necessary to proceed by way of an interim award, as outlined by the Tribunal yesterday, the United Kingdom would have no objection. Following any interim award, we would like to have a directions meeting or conference call with the Tribunal." But the essence of our point is that we do consider that, if you accept our submissions, Mr Bethlehem's submissions on the correct approach to Article 9(3), then you have had Dr Plender's submissions on the application of that approach to the evidence and the facts as they emerged from the witnesses and from our written pleadings. We would not want you to exclude, a priori or rather at this stage, that you would reach a decision on the substance of 9(3) if you came to that. We fully accept that, if your decision requires a line-by-line consideration, then there would have to be a second stage.

My own view of the matter is that the safest course for Ireland, but, of course, it is entirely up to them to address as they came prepared to do, I think, today, the substance of 9(3) up to the line-by-line analysis, which obviously they are not in a position to do at this stage. Thank you.

MR FITZSIMONS: We came prepared to address the Tribunal on the basis that there was not going to be an agreement from the United Kingdom to what the Tribunal proposed, but, since there is apparent agreement, in the sense that the United Kingdom would be prepared to accept a direction from the Tribunal to proceed in the manner as proposed, that, of course, raises the question that we have raised. This proposal resulted from our indication that the Tribunal to deal properly with the evidential issues arising under 9(3) would have to have before it evidence of the different categories of redacted material, in other words, as we proposed, a marked-up copy showing odd pieces of redacted material or opinions of third parties and so on.

In the absence of that exercise having been carried out, we would be at a disadvantage in

making submissions involving, for example, a burden of proof and other matters and we simply would not be in a position to make proper submissions on the evidence, because it would involve this additional exercise. That is why the Tribunal's proposal was so attractive to us. It appears to us that, basically, no useful purpose would be served by making submissions on fact in the particular circumstances.

Having said that, I wonder whether the Tribunal would consider a recess for us to discuss this privately with the Tribunal, but I am in your hands in that regard.

MR GRIFFITH: Mr Fitzsimons, you have indicated that your primary approach would be reference to the three categories of information. Is that not so?

MR FITZSIMONS: Three amongst many.

MR GRIFFITH: Are you in a position to make submissions about the principles of whatever categories on the basis that it is asserted that the facts later analysed may support?

MR FITZSIMONS: Professor Sands, who has been dealing with this matter on the question of colour coding, advises me that we are not in a position to make such submissions without having engaged in the colour coding exercise.

MR GRIFFITH: Could we have the position that, either the Tribunal if it gets that far, stops before considering the contrary positions between the partes on categories and just indicates? It does not go further than that. Or else we go through everything.

LORD MUSTILL: Could I possibly put an idea on the table? The partes should trust the Tribunal to act fairly in the light of this stage at which its deliberations have been able to reach. We are not dealing with contingency upon contingency and the more we plan in that way the more we are liable to find that we have left out the one thing that happens that nobody had provided for. Could perhaps the parties not trust the Tribunal to get as far as it can in the light of the material that has bene argued it. The parties know that we shall decide 9(1) and 9(2), they can be confident of that, and that that may be the end of the matter. If it is not the end of the matter, the Tribunal can then consider how much further it can, with propriety and with absence of surprise, go. If the Tribunal assures the parties that it will make no award beyond those that we have indicated without notice to the parties, so there is no surprise, no one gets an unwelcome shock, apart from the shock of finding that they have failed to succeed, but that the award is in a shape that they had not anticipated. Then it may be that all this will be academic and that all this elaborate planning is going too far. We should simply say that, if we can make an

award, we will make it, a final award. If we cannot make a final award, we will make an interim award. We will make sure that the parties know what we are doing and alert us of any problems that may arise. I have said it three times, I will not say it again.

THE CHAIRMAN: I think that it is a very wise suggestion, but I do not think that it answers the quandary that Ireland finds itself in as just how to use the time that it has this afternoon.

I think that it would be useful if we did speak together, perhaps rather than returning into another room, if everyone else could leave the room. We will just talk to the agents and counsel.

(**Private discussion between Tribunal, agents and counsel**

and then the hearing continued)

MR FITZSIMONS: Mr Chairman, members of the Tribunal, as has been indicated I will be making submissions in relation to the evidence that has been adduced during this hearing. Before doing so, I would just mention for the purpose of the record that, in view of the procedural arrangements that have been discussed, I will not in my submissions be directing any comment or argument towards either items in the redacted material or categories of those items. If the Tribunal decides not to render a final award on the issues arising from the law, arising from 9(1) 9(2) or 9(3), an interim award will presumably be rendered, at which stage we will return to deal with the evidence under those umbrellas. At that stage the question of submissions only will, of course arise and arrangements will have to be made for Ireland to have access to the unredacted material to enable it to prepare its submissions. That may or may not happen depending upon what view the Tribunal takes of the legal argument on the earlier provisions of the Convention.

We have prepared a closing argument and I think that you have been furnished with a copy outline of my submissions. As you will see from it, I will be dealing with certain matters that are relevant to the question of evidence.

Firstly, in relation to the burden of proof, as I argued in participating in the opening of this case, there is a heavy burden of proof on the United Kingdom. That burden of proof, in our submission, has not been discharged. It was incumbent upon the United Kingdom to satisfy the Tribunal that, as a mater of certainty in our submission, the United Kingdom will immediately suffer harm if the redacted information or part of it is released into the public domain - or released to Ireland, I should say, because Ireland is the party seeking the material.

We have made our legal submissions on the burden of proof and you will have to consider

the evidence in the light of those submissions. The evidence before you is both oral and documentary. The key evidence is, of course, the evidence of the witnesses. For Ireland you have heard Mr Gordon MacKerron, an economist. You have seen him, you have read his detailed statements of evidence, the second of which deals in detail with the written statements of the United Kingdom witnesses. There can be no doubt about his background and qualifications to make his arguments and present his opinions. We reject utterly the unfortunate - and I will not describe it in any other way - attempt by the United Kingdom to smear Mr MacKerron at the opening of his evidence, but I ask the Tribunal to take that event into account when considering the weight to be attributed to his evidence. Why did the United Kingdom think it necessary to make such an attack upon Mr MacKerron, with his pedigree which you have heard. He has performed important tasks in the nuclear industry area for the United Kingdom Government in recent years, as outlined to you. He is a citizen of the United Kingdom. He is not a member of the nuclear industry. He comes here as an independent economist to present his views. He does not make the case that he is an expert in the nuclear industry in the sense that Dr Varley is. He presents his evidence as an economist with particular expertise in the market, if I can describe it as such, of the nuclear industry in general. He has verified his potential in that regard by his experience.

This attack that was made upon him, in my submission, should be viewed as an attempted, if extremely feeble, pre-emptive strike to try to create in the minds of the Tribunal that somehow or another Mr MacKerron was a suspect person in terms of giving evidence on issues of the type that arise here.

That is something which clearly and manifestly is light years away from the facts. As he explained, the work that he did in connection with the various reports that were furnished was done on a professional basis. Of course, as we know, people are entitled to earn a living.

Professor Sands is appearing as counsel for Ireland. Is the same type of remark to be made in respect of him though in a different context? Is he not entitled to appear for Ireland? Is Dr MacKerron not entitled to give evidence for Ireland without being attacked in this most unpleasant and, I submit, unwarranted way? You have to ask yourselves the important question why was this done? I submit that there is a very simple answer. It was done because the United Kingdom are fully aware that they are not in a position to answer his evidence. This is borne out by the fact that in cross-examination, Mr Plender addressed matters in only five of the 27 pages of Mr MacKerron's written text, that is

leaving out introductions, conclusions and appendices. I think that speaks volumes. But it particularly speaks volumes of the witness, because he was not engaged by counsel for the United Kingdom on what we submit were the principles, he says, advanced by him in his evidence. Mr Plender for some reason was unwilling or unable, more likely in our submission, to attack him on the merits of those arguments.

I, of course, have to say and allow that everyone in this Tribunal - counsel - are affected by time limits and Mr Plender may well say that, if he had had more time, he would have dealt with more. But I answer that in this way. He could have used the time he spent attempting to smear Mr MacKerron and using voluminous documents that were presented during the course of this hearing to deal with the merits of Mr MacKerron's arguments. Instead he proceeded in the other manner.

I will be reverting in due course to particular aspects of the United Kingdom's submission in relation to Mr MacKerron's evidence to deal with them on a fact by fact basis.

But let us move on to the other witnesses. Mr Rycroft, you have to take a view in relation to him. Mr Rycroft presented two statements. He gave his evidence here and you have seen him. He is the commercial director of British Nuclear Fuels, after 31 years in the company. He occupies a senior position in this huge combine. He told you in the course of evidence that he did not know the number of firm contracts that BNFL now has (day 3, page 55, line 27 of the transcript). You will recall those exchanges. This is the senior commercial director of the company. He also appeared to be unsure of when the last contract for fresh volumes of spent material was concluded by BNFL. You will recall that, when I asked him, he said, "About ten years ago" and then, when I mentioned that Dr Varley had said 1997, he immediately deferred to Dr Varley. Now, why would witness as to fact who is the commercial director of this company do this? I submit, and I will develop this a little bit later, that he perceived 1997 to be a more favourable year from the company's point of view in terms of presenting evidence. I submit that it is inconceivable that he, the commercial director of the company, could not be aware of information in those two categories. I ask you to infer, therefore, that his reluctance to give straight evidence on these two important issues is associated with the fact that Dr MacKerron has given specific evidence on these points. He was not prepared to accept that Dr MacKerron was correct and, in consequence, he simply gave the answers that he did, which I submit were unreliable and not accurate.

I should just say for the record that his evidence in relation to being unsure of the last contract is at

Day 3, page 45, line 5 and line 11.

Of course, the most extraordinary piece of his evidence related to the question of whether or not damage had occurred as a result of the force, the imposition upon the British Government of a requirement that more information be disclosed.

You have that at Day 3 page 47 line 20, Day 3, page 49, line 27. You will recall the way he dealt with that. In his first statement he said that if further information is released there potentially would be harm done to BNFL. In the second statement he says "I give the following examples of harm", and he refers to two items of harm. I asked him had he forgotten those at the time of his first statement, and he was quite indignant at that suggestion, that he had a very good memory and of course he remembered them at the time. He was asked why were they not included and then we heard him use extraordinary phrase, or not extraordinary, but the phrase, in that context and in another context, that he was considering the balance of advantage to the company. In other words if you accept his evidence in relation to the second statement when he made his first statement he considered it advantageous to the company to give evidence that was simply not in accordance with the facts.

Accepting all of that it was clear that he was not worried by the fact that he had done something like that. He of course asserted that the words did not really mean what they say.

But there is another possibility, and the other possibility is this, namely that his first statement is accurate and his second statement on this topic is incorrect. That would be consistent with the United Kingdom acknowledging and realising and being fully aware that they have this heavy burden of proof and that it was necessary for them to produce examples or facts that would be consistent with a case that damage had occurred as a result of the release of the small pieces of extra information during the consultation process. But you of course have to take a view on these issues. But what there is no doubt about is that Mr Rycroft's evidence in his two statements cannot be reconciled. He was telling the truth in one and he was not telling the truth in the other.

He did not appear to be in the least bit phased by all of this. You might take the view that he is a company man and he would regard it as perfectly reasonable to defend the company in all circumstances and that may explain his approach.

He has spent 31 years in the nuclear industry for the company and that again may explain why he has to demonstrate his loyalty in such an extreme way.

If you take the view that he was less than frank, if I can put it at its mildest, then I submit that you should take the view that the rest of his evidence is unreliable. If he is prepared to support the company to such an extent, to go to such extremes, then the rest of his evidence has to be considered in that light.

Let us move on to Mr Wadsworth. Mr Wadsworth was independent of BNFL. He is not in the nuclear industry and we will ignore the fact that he is doing commissions as an accountant. He is an accountant. He was straightforward in his evidence. He defers to Mr MacKerron where economics is concerned. He presents a business man's view of commercial confidentiality, and indeed was very frank as to the extent of that. But in my submission his definition of commercial confidentiality is simply too wide; but one must respect his frankness for being prepared to express his views. He gave the business man's view of commercial confidentiality which essentially is it is as far as a business man can manage to stretch it, and that is certainly not the law under the relevant regulations.

So where Mr Wadsworth is concerned I submit that his evidence does not support the UK case and should be disregarded for the purpose of the exercise that you will have to engage in.

Dr Varley. He mad strong criticisms of Mr MacKerron in his text. He did not cast slurs on him or attempt to smear him, but he used extremely strong language in his written text as you will see in rejecting his arguments, instead of adopting the normal stance of an expert witness, an independent expert witness, "I do not agree".

His evidence given here you will have observed was in absolute terms throughout and you will have observed that he gave way on absolutely nothing that I put to him. Everything for Dr Varley appears to be black and white, certainly where the nuclear industry is concerned and the issues in this case are concerned. Clearly Dr Varley is a very brilliant person and has most impressive qualifications. But he has been in the nuclear industry all his life. He is part of the nuclear industry. He was formerly with BNFL. Part of his living comes indirectly from BNFL and companies like them. What I would say about Dr Varley is that whilst of course he would perceive himself as giving evidence as an independent witness that he really is unlikely to be ever capable of moving outside his own mindset and I think you can take that view from those aspects or features of his evidence that I have referred to. Even the weakest parts of his evidence where he had to concede the case of transportation, that it was only feasible, he saw a bright future. Even in the case of the poor future for reprocessing which Mr Rycroft effectively agreed with Mr MacKerron, he sees a bright future. On the MOX UOX

disagreement he disagreed with Dr MacKerron but I would submit that on that topic manifestly Dr MacKerron's evidence is preferable. So there is now after the evidence a direct conflict and you will have to take a view of Dr Varley. But I would ask you to take the view also that in respect of his evidence it is unreliable for the reasons I have mentioned.

Dr Varley unfortunately is simply not an independent witness in this case and his evidence, the tone of it and the content of it bears this out. You heard Dr MacKerron deferring to him in technical matters and I have no doubt about that, and Mr MacKerron deferred and accepted corrections from Dr Varley. Did you feel at any time during his evidence that there was the slightest possibility that in any circumstance Dr Varley would defer in any way or agree in any way with any part of Mr MacKerron's evidence. I submit to you that on the contrary this would simply not have been a possibility because of his mindset. I should emphasise that I am not suggesting that he is a charlatan or anything like that. He is what he is, he is part of the nuclear industry. he will resist I submit any attempt to attack any aspect of the nuclear industry and show great loyalty to it at all times. I submit that his evidence here was given in that way and that you should view it accordingly.

Finally in relation to that you will recall the final paragraph of his paper that I referred to. There was in our submission a clear conflict between that paragraph and the evidence on the same topic he gave here.

Those are the witnesses. Just some brief further points because time is short and Professor Sands has a lengthy argument on the legal issues to deliver. You will see that at (c) of this submission I refer to the evidence of Gordon MacKerron, not put to him in cross-examination, and you will see that we say that M<r MacKerron's evidence contains three major I would describe them as critical arguments, and no questions of substance were put to him in relation to those arguments.

You might contrast that with the fact that I as I had to to meet the case made and notwithstanding the risks cross-examined Dr Varley on the principal issues that he raised, his thesis for contending that there was competition in the market. The three areas are as listed here. In considering what is the relevant market for MOX that it is not the general market for nuclear MOX fuel, because MOX is consistently more expensive than MOX for a given customer at a given time. The relevant market is the market for managing separate plutonium in which BNFL has an effective monopoly over existing reprocessing customers. We have given you the references in Mr MacKerron's statement that were not addressed in our submission in cross-examination of him.

Secondly the issue of the more restricted market for MOX and the fact that they cannot compete with each other for the reasons given here. Again we have given you the references.

Thirdly, the fact that customers can gain no advantage in relation to the relationship with BNFL if data especially aggregated data is released. One would have thought that there would have been some level of detailed cross-examination of Dr MacKerron on these issues. The United Kingdom had nine hours as did we. We used 4 and a quarter hours I think on our cross-examination. The United Kingdom could have used their time to properly meet the case made, and the consequence of their not doing that is that I submit you should in considering whether the United Kingdom have discharged the burden of proof infer from this failure to cross-examine on key issues that Dr MacKerron's evidence was considered by the United Kingdom to be such that the United Kingdom would be unlikely to defeat his opinions in cross-examination. You will take account of the fact here that no equivalent economic evidence was tendered on behalf of the United Kingdom.

Yesterday Mr Plender in closing put into you his closing submission. This is an interesting document. It is a closing submission. But clearly a great deal of the content of it could have been included in the opening. Again, we come back to the time spent by the United Kingdom on their submissions. A great deal of this document, which has the appearance, certainly a great deal of it, of having been pre-prepared - that may or may not be correct - but a great deal of it contains material that ... I am sorry should not have said before Mr MacKerron gave evidence. But material that we could have dealt with in cross-examining the witnesses for the United Kingdom. However, that is comment by way of an aside.

We are in a position to deal with quite a number of the paragraphs in Mr Plender's skeleton argument. As you will see from this outline submission, we have listed the paragraph numbers of not all of the paragraphs but most of them and we have rebutted the arguments made. I can go through each of them in detail, but I am sure that it will not be necessary. For example, the first one at paragraph 3 of Mr Plender's closing argument - summation at the end of the UK's case - her asserts that customer and other confidentiality based upon agreements with BNFL are covered by commercial confidentiality. We make a simple point here. Yes, there are assertions of this type on the paper, but there is no evidence, in my submission, or at least no satisfactory evidence, to verify these alleged written contracts or undertakings or agreements. Mr Rycroft did make a reference to certain types of agreements falling within this category, but, of course, he has not produced them. Nowhere in the

English case is there a single letter, memorandum, document verifying these agreements. There are the references in the paragraph of Mr Plender's case that he relies upon, but these, in my submission, are not evidence. Without such evidence, the United Kingdom has not discharged the burden of proof where this - well, I do not want to get into categories, but it has not discharged the burden of proof on this level and we reject Mr Plender's submission at paragraph 3 of this reason.

You have this document and the various arguments are here. I will just deal with two more isolated examples. You can consider the others at your leisure.

Going to paragraph 5 here, we say Dr Varley's categorisation in eight different categories from the 14 put forward by Ireland is not a simple factual exercise. It was not entirely Dr Varley's responsibility, because it was possible to know from the report what was omitted. We furnished 14 categories. Dr Varley in his evidence tells us that a decision was taken at a meeting with the legal advisers that he should proceed in a different way and not meet the case made by Ireland. As I say, for the reasons set out here, Mr Plender's comments on this topic are simply not borne out. I mention, of course, what I mentioned in my opening, that we submit that from this decision to try to rewrite the categories that you can reasonably infer that this was a strategic decision designed to muddy the waters and make it more difficult for you to consider the evidence on an issue-by-issue basis.

If it is in order with you, I would like to leave the arguments as presented here dealing with each category with you and you can consider them at your leisure. We have dealt item by item with the submissions of Mr Plender, many of which, as I say, in our submission, should have been included in the opening argument.

Just to conclude, therefore, as far as the evidence is concerned, you, of course, have the difficult task of assessing the evidence and the witnesses. For the reasons that I have given I invite you to hold that the United Kingdom has not discharged the heavy burden of proof placed upon them. They have not demonstrated, in my submission, that harm has occurred or will occur as a result of any disclosure of information or part of the information.

Those are my submissions. Thank you.

THE CHAIRMAN: Could you clarify something for me? I would like to go back to the general issue of economic justification on which you focused in your review of the evidence. My question does not relate to whether economic justification comes under the OSPAR Convention, because we have Ireland's arguments that are spelt out in detail in the memorial and in the reply. My question goes to

what the appropriate standard is for economic justification. The material that you have just reviewed focuses on the economic justification of a firm, of a company. In the ADL report, which is your document 3A, page 103. Unfortunately, every page in this document is 103. It is 103(1) - the Executive Summary. This is Ireland's annex 3A submitted October 3rd. It is the first page of the executive summary. I am particularly interested in your analysis of the third paragraph. The overall question addressed in this study is "Will SMP have a net economic benefit?" This is referred to as the national economic interest case. The national economic interest case looks at SMP from a UK plc viewpoint as opposed to a BNFL plc viewpoint. Could you comment on that?

MR FITZSIMONS: As I understand the position, Mr Chairman, the exercise required was that there had to be a justification from the economic perspective so as to warrant the view being taken that the benefits of the MOX plant were at least equivalent to the economic benefits.

THE CHAIRMAN: Supposing the analysis showed that BNFL were not a profit generating enterprise, would this paragraph mean that, nonetheless, it would be economically justified, at least under the analysis conducted here?

MR FITZSIMONS: I would submit that no undue significance should be given to the reference to UK plc. This exercise was carried out within the United Kingdom and I think that the point being made by the author is simply to say that the ADL were attempting to carry out an objective assessment and were not looking at the issue solely from the BNFL viewpoint and that, in other words, they were imposing their own view and not the view of BNFL. This presumably was their instruction from the Government who commissioned them. The issue that you have raised does, of course, highlight the fact that the United Kingdom have not called any economist to give evidence on this issue. They have not sought to meet by an appropriate witness the economic case made by Mr MacKerron when, in our submission, they should have done. That, again, is relevant to the burden of proof.

THE CHAIRMAN: Thank you for that clarification.

PROF SANDS: The only documents to which I will be referring are in Ireland's Judge's bundle 1. Because of the time I am not going to take you to many documents. I have not got a speaking note, I have simply a one-page outline which is reply submissions, with ten points on it and conclusions. That is what I am going to direct my submissions to. What I have tried to do is, in listening to what has been said over the last week, really identify the core legal issues, having regard to the submissions of the United Kingdom, having regard to the questions posed by the Tribunal.

Just before I get to those, can I just very quickly dispose of a number of factual matters? The first one with which I would like to deal is that it was said on behalf of the United Kingdom - and I can actually quote Mr Plender - "the excised material has nothing to do with safety standards". That is Day 2, page 57, 1.26. He went on to say that it has got nothing to do with Ireland's UNCLOS case, the protection of the marine environment. Just to clarify on that, if you turn to tab 25 of this bundle, you will find some extracts from the OSPAR Convention. If you turn to the third page there, you will find appendix 1. What appendix 1 does is that it describes what parties, including the United Kingdom, are to imply in terms of the best environmental practices, best available techniques. If you just look at best available techniques, you will see that it says, "It therefore follows that what is best available techniques for a particular process will change with time in the light of technological advances, economic and social factors, as well as changes in scientific knowledge and understanding". Of course, what this implies is that there is a change in technology standard. You have to use best available technology and you have to use best environmental practices. What you would expect to find, if we were to read the full PA and ADL reports, is an indication of how that is complied with in the economic case for the MOX plant. Of course, nothing can be said about that in this forum. But that indicates, if you like, one of the reasons why Ireland would like to have sight of the PA and ADL reports. Of course, if it is the case that there is nothing in the PA and ADL reports about changing technological standards, that would plainly be a matter of concern for Ireland's concerns about the marine environment.

Belatedly, if I could just take you to the tab 20, which is an extract from the Environmental Statement of the US MIXOD fabrication, a plant which is not yet constructed, I should say, and in preparation and there e will be a very significant environmental preparation according to US standards. On the second page there, if I could just take you to the second paragraph, "Because the mixed oxide fuel fabrication facility does not use process, storage or treatment ponds, it is essentially the same process, there will not be any liquid effluent released to the environment."

Mr Plender laid great store on the tiny minuscule discharge from MOX. The fact is that it is possible today to build and operate a MOX plant which makes no discharges - the zero discharge option. Why is the United Kingdom not applying it and why has it not updated the technology it has decided to follow since 1993 - nearly ten years ago? There is no proposed change in technology. Those are two issues which indicate to us why we are concerned. Indeed, there are many other

examples.

I want very quickly also just to clear up two other factual matters. Mr Plender said that Ireland did not participate in the fifth consultation. That is not, I am sure for perfectly good reasons, entirely accurate. Ireland did participate and that is set forth in paragraph 53 of Ireland's materials.

Those are just a number of factual clarifications. There are others but the time is limited.

Let me turn to the first of my ten points. The first point is this. It is plain now that the United Kingdom Ministers applied the 1992 Regulations in deciding to redact information from the PA and ADL reports. You will have noted that in its written pleadings, the United Kingdom was extremely careful not to indicate the legal basis for the decisions that were taken and it was the subject of another question today. Notwithstanding its argument that Article 9(1) merely requires, according to the United Kingdom, an obligation to put in place a domestic regulatory framework.

On Tuesday, Lord Mustill asked Mr Wordsworth to identify the United Kingdom's regulatory framework and plainly this question posed a real difficulty for the United Kingdom. Because, if Mr Wordsworth answered, "There is none", then Ireland succeeds, for the simple reason that, on its own argument, there is no framework according to which the United Kingdom can ensure disclosure. So Mr Wordsworth could not say that there is none. He then had two options. He could either argue the Radioactive Substances Act 1993 or he could argue the 1992 Regulations and he came to his second fork in the road. But, of course, he could not say the 1993 Act, because, on its face, that plainly does not implement the OSPAR Convention and cannot be said to implement Article 9 of the OSPAR Convention. Indeed, by this time Mr Plender had already confirmed that redaction had not been made pursuant to the Radioactive Substances Act 1993 at our encouragement and suggestion that it had been. We were very pleased, of course, by the answer that he gave, which was the one that we expected and the one, evidently, that Lord Mustill expected. Mr Wordsworth, therefore, had only one option and that was to say the 1992 Regulations - and he was pressed and pressed and pressed. In answer to Lord Mustill's question, what was the system that was put in place in order to require the competent authorities to make the information available (Day 2, page 102, lines 18 to 21) he had to say, "The UK says that it is the Environmental Information Regulations 1992". But it is what happened next that is I think more instructive and telling. Lord Mustill said, "I thought you would say that. That is that what you say is the United Kingdom's compliance with Article 9(1) which is justiciable before us, but, in fact, no breach has been shown." It is the word "breach" which I may

respectfully suggest is particularly important. Mr Wordsworth answered: "Precisely so". (Day 2, page 102, line 22 onwards.

The response that Mr Wordsworth gave, that there had been no breach, assumes that the Environmental Impact Regulations are applicable. Mr Wordsworth confirms in his answer what section 1.3 of the PA report shows, which makes it abundantly clear that the agency took account of the exceptions in the Regulations. But the reason, of course, that the answer is the wrong answer, from the United Kingdom's perspective, and why none of us have actually been able to get them to say it in express terms, is that, in order to be applicable the information concerned, that is the PA and ADL reports, have to be information within the meaning of the 1992 regulations. So with confirmation of the applicability of the 1992 regulations and not only its applicability but its application by the Ministers, two things necessarily inexorably follow.

First, the argument that the PA and ADL reports are not information within the meaning of the 1992 regulations collapses totally, because if the PA and the ADL reports are information within the meaning of the 1992 regulations they have to be information within the meaning of the EEC directive and also obviously within the meaning of Article because to all intents and purposes the definitions are the same.

Secondly, and even more significantly, what consequence follows from Mr Wordsworth's answer is that the UK is actually subject to all the requirements of the 1992 regulations, in deciding whether to redact information, which if of course by reference to the 1990 directive, and it is therefore also bound to have regard to the 1992 guidelines. So a lot of consequences hinge on your decision if we are right that it is now evident that the 1992 regulations not only were applicable but they were applied.

The United Kingdom recognised the dilemma. Mr Bethlehem could not say in express terms that the regulations were applicable and had been applied because if he did he destroyed Mr Wordsworth's earlier argument that the 1992 regulations were not applicable because the reports were not information. So what did Mr Bethlehem say? I think it is worth quoting his words very precisely. "The public domain versions of the reports were prepared and released pursuant to a composite appreciate of the Government's disclosure obligations under the environmental information regulation and code of practice". Composite appreciation, a wonderful formulation. What does composite appreciation mean?

We take those words to mean they were applied. This came up in questioning between Mr Griffith and Mr Bethlehem, Day 3, page 36 line 28 and page 37 lines 1-2.

Finally just to confirm the point in his cross-examination Mr Rycroft, who after all is the only witness of fact here, and the issue is not only whether they are applicable but whether they were applied, which is a question of fact, was involved in the following exchange under examination by Mr Fitzsimons: "(Q) But you were aware of the basis upon which the redactions were being made, namely the 1992 regulations? (A). Yes, in principle.". Day 3, page 40, line 9. The next piece of evidence then that the regulations were actually applied.

So the position is now, we say, absolutely clear and we refer you back to all the material that is in our memorial and in my statements made on Day 1.

We now come to another problem because the environmental information regulations did not actually implement Article 9(2). Mr Wordsworth said that they did. Day 2, page 93 lines 1-2. I quote his exact words: "the Regulations needed to implement Article 9 fit within the Regulations needed to implement Directive 90/313." In other words the regulations implement Article 9. But I am afraid he is wrong about that and I think he knows he is wrong on that because the regulations expressly mention only directive 90/313. They could have mentioned Article 9, particularly when they were amended in 1998, but they did not, and of course as Mr Wordsworth knows and the United Kingdom knows very well, unincorporated conventions are not actionable in the English courts. Indeed I took the liberty of inserting - having appeared a couple of weeks ago in the Court of Appeal in London in front of the Master of the Rolls in a case opposite the Foreign and Commonwealth Office, (we were all under pressures of time last week in preparing our statements) - I took the liberty of simply cutting and pasting what the Foreign Office skeleton argument in that case said, and it is the paragraph I have put in: "It is axiomatic that the treaties which have not been incorporated into English law by Parliament cannot create rights or duties under English law and are not enforceable by the English courts". Self evidently that is a correct statement of the law and I take it that the Foreign Office position has not changed on that. So the simple position is that Ireland could not rely on Article 9 of the Convention before the English courts. That is correct statement of the position as a matter of traditional English law.

Let me turn to point 2 on my list. Point 2 is that the function of the Tribunal is to interpret and apply the Convention, and what I should say is that I have arranged my points in terms of a

general part, three points on the general part, and then one point on Article 9(2). two points on Article 9(1), and the rest on Article 9(3), all under legal points. This is the second general point, the function of the Tribunal is to interpret and apply the Convention.

The United Kingdom has not taken issue with Ireland's statement that the function of this Tribunal is to interpret and apply Article 9 of the Convention. Nor has it taken issue with Ireland that what this requires is for the Tribunal to do three things, and I have tried to elaborate slightly and more precisely what I said on Monday's statement.

First of all to interpret Article 9(1), 9(2) and 9(3) of the OSPAR Convention. That we submit is your first function.

Your second function is to make a finding on the facts in issue between the parties, and we say your third function is to apply your interpretation, the fruits of your first function, to the findings of fact.

I will come to the interpretive function shortly, but for the present let us just stick to the facts, that is function 2, if we might call it that. What are the findings of fact that the Tribunal is called upon to make? The United Kingdom did not contest Ireland's submissions that the questions of fact which the Tribunal must make are two in number, two questions of fact.

(1) Are the PA and ADL reports information within the meaning of Article 9(2)? And if the answer to that question is Yes the second question is: Will the release of the information or any part of it affect commercial confidentiality, which takes us on of course to all the issues of competition.

We say that these are findings of fact to be determined on an objective basis. The United Kingdom has not disagreed and nor has it sought to distinguish the applicable English law which is reflected in Alliance -v- Birmingham Northern Relief Road, and I wonder if I could take you briefly to that. It is tab 11 and it is quite instructive. This is a judgment of 1998. It is as far as I know a correct and present statement of the law in England. It is a judgment of the Queen's Bench Division, Mr Justice Sullivan, July 29 1998. If you could turn to page 12 of that. I have taken you to this before but it seems to me fairly definitive once you accept that the environmental information regulations apply and that they become pertinent in your interpretation and application of Article 9(3)(d) since on the United Kingdom's own case they have only to apply English law. So we say what they have to be applying is this case, and they have not demurred from that view.

Left hand column, bottom paragraph: "Mr Howell on behalf of the claimant accepts the

regulations do confer an element of discretion upon the relevant person in this case the Secretary of State if the information which is requested falls within regulation 4(1)(a)" which we are not concerned with for present purposes. "Whether it falls within that regulation is for the court to decide, but if it does then the Secretary of State has a discretion as to whether to disclose. In exercising that discretion he would no doubt bear in mind the guidance given by his department in 1992." Pause there, those are the 1992 guidance notes that you have already been referred to. "Mr Sales on behalf of the Secretary of State accepts that whether the agreement contains information which relates to the environment and whether it may or must be treated as confidential are to be determined on an objective basis by the court".

Then moving down a bit to the judge's view: "I accept Mr Howell's submissions in answer to question 1. The language used in the regulations is clear. Whether information which relates to the environment is capable of being treated as confidential; and if so whether it falls within any of the categories in regulation 4(3) are all factual questions to be determined in an objective manner". I will come in due course to what is left in terms of what one might call discretion or margin of appreciation, because it maybe that that does make a reappearance, but for present purposes what is clear as a matter of English law, if I was appearing before you in an English court, these issues, 9(1), 9(2), issues, and indeed that part of the 9(3) issue which goes to the question of whether it affects commercial confidentiality, are all questions of fact. No issues of law in that. On the United Kingdom's own case that is the law you should be applying.

Now, that is also the approach I would say in the European Court of Justice. I can take you to the Mecklenburg case but I will not, you have seen it enough, and that is at paragraph 21 of the Mecklenburg case where the question of does the information fall within the EEC law, that is a question of fact and is treated as a question of fact.

Can I apologise for taking you so fast through this material? I think that I have got about 30 minutes left and still quite a lot of material to get through.

MR GRIFFITH: You have until 7.35.

PROF SANDS: In that case, I can slow down a bit.

I was commenting on the place of the distinction between fact and law and its importance and the importance of its consequences, particularly for the question of the exercise of discretion. I think that Lord Mustill (Day 3, page 16, line 17) called it essentially a judgmental exercise, which he

went on to say "is different from the question of whether a certain factual situation exists". Of course, what we are saying is on the 9(1) and the 9(2), but the 9(2) issue and part of the 9(3) issue are simply questions of fact.

There was also the question that Lord Mustill addressed to me on Monday regarding paragraph 50 of my speaking note. He asked me if I could explain how, if there is a margin of appreciation, the supervising body can ignore the margin of appreciation and go straight to the merits? That was day 1, page 75, line 4. I am grateful for that question because it has really forced me in the last three or four days to focus on being precise as possible in a sort of scientific logical way on the distinction between these different issues. It is one of the challenges, I think, of this case of really trying to break this down to the nub core issues and separating out the various bits. I think that it will be clear that our position, and I hope that that is what I said, is that you only get to margin of appreciation after you have decided questions of fact. The European Court of Human Rights case law which you have been drawn to applies margin of appreciation in relation to legal issues. That is because before the European Court of Human Rights factual questions have been aired in the national courts. If the margin of appreciation, if one wants to call it that, or the question of discretion, applies at all - and we say that it does not - Mr Bethlehem was not able to identify a single decision of an international arbitral tribunal or international court of justice applying straight pubic international law, which is what you are called to apply, in which that approach had been taken. All the cases to which he referred were European Court of Human Rights cases which we say are simply not relevant, because of their particular circumstances, or the World Trade Organisation. I will come back to the World Trade Organisation, but, perhaps, I can mention that very briefly now.

What Mr Bethlehem did and I thought did with great elegance and authority was take you through some of the decisions of the WTO, but the one thing that he did not do was take you to the actual Agreement on Safeguards, which is at tab 21 of your bundle. If you go to the Agreement on Safeguards, it is Article 4(2)(a) - Article 4 "Determination of Serious Injury or Threat thereof", paragraph 2(a) says, "In the investigation to determine whether increased imports have caused or are threatening to cause injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry", and so it goes on. What the WTO bodies had to do was interpret whether or not the process of evaluation had been properly carried out according to the relevant

standard of review. It was not required to do as we are here charged with, decide a question of fact. The WTO cases, we would submit, do not materially assist in this context. What we say does assist is the English case law and it is most curious that our learned friends from the United Kingdom direct you to a great deal of international jurisprudence from forums that we say are actually of no relevance to these proceedings, actually at all, not even by way of assistance, by analogy, but they do not take you to their own case law, notwithstanding the fact that they say that English law applies. This is one of the great ironies for this side of the table of the way in which they have presented their case.

My point three I have already dealt with in part. WE say at point three that the issue of discretion or margin of appreciation can only arise in relation to legal issues and not determinations of fact. I have taken you to ?Article 4(2)(a) and made the comment already about the absence of authorities on analogous situations that you are currently faced with.

What we do accept is that, if the issue of discretion or margin of appreciation could come up at all, it can only be in one matter and that is on the question of the conditions under which an OSPAR party exercises its right, pursuant to Article 9(3)(d) to refuse disclosure, but, as I shall seek to show, the exercise of that right can only occur after there has been a finding of fact that the release would affect commercial confidentiality. It is only at that point that a discretion, as one might call it, could arise. But, of course, the exercise of that right, which may or may not have a discretion attached to it, is subject to the normal requirements of English law. I shall something more about that in due course.

My fourth point is in a sense already made and it is the only point that needs to be made in relation to Article 9(2). That is that the PA and ADL reports and I would add the information contained in them, just to be absolutely clear, are all information within the meaning of Article 9(2) of OSPAR. We say that the argument to the contrary is really pretty difficult to get off the ground. It is confirmed by the PA report, which is evidence, which, as you recall, expressly refers to the application of the 1992 Regulations. Secondly, there is the Environmental Agency's draft decision of 1998, which we are now told confirms that they were applied. Then there is Mr Wordsworth, who confirmed that, but, of course, this is submission and not evidence, the only evidence that you have in front of you is the PA report, the Environment Agency's draft decision and Mr Rycroft's statement, all say the Regulations were applied - not only applicable but were applied. From that with no evidence on the other side, and since it is a question of fact, we simply do not see any basis for an argument that it is not information within the meaning of Article 9(2). The argument collapses.

If for some reason that is not sufficient, we say, with the greatest of respect to the other side, it must be sufficient. All the authorities we directed you to on Monday and, in particular, the *Mecklenburg* case and the *Birmingham Northern Relief Road* case, European Court of Justice and the High Court Queen's Bench Division, confirm the very broad definition that is given to information and, just to be clear, to all intents and purposes, the definitions in the Directive , the Regulations, the Act, they are the same definition. They all confirm a broad approach to definition on something which is going to affect the Irish Sea, written information on an activity or measure which adversely affects the Irish Sea. They make it, I think, abundantly clear that, if this was before the English court or if this case was before the European Court of Justice, as a matter of fact, those bodies would find that these two reports were information on an activity or measure which adversely affects the Irish. We are happy to go either way. It could be by reference to an activity, the operation of the MOX plant - I have already indicated today that, contrary to its American counterpart, which has no emissions to the environment in a liquid stream, this one will. Mr Plender gave you the figures. That is not in issue now. Or we are happy to take it on the basis that what is at issue here is a measure and the measure is the process of justification. And measure, we say, includes also a preparatory act taken to put into operation the measure - *Mecklenburg* was also concerned with preparatory acts.

If the PA and ADL reports are not preparatory acts in relation to a measure affecting the environment, it is very hard to see what is.

Turning now to Article 9(1), I have two points on this. The first point, again not contested by the United Kingdom - the UK has not taken issue with Ireland on this - that the obligation in Article 9(1) is an obligation of result. We differ on what the result is. The UK takes the rather narrow view that the result is to put in place a domestic regulatory framework and that is sufficient - that is the end of the matter. That is the result that is to be achieved. We say, of course, that the obligation of result is not the actual delivery of a system but the actual delivery of the information. That is the difference between us. Under the Convention, what we say that obligation of result means is that the United Kingdom has an international legal obligation to achieve the result that its competent authorities make the PA and ADL reports available. IN this case the competent authority is the State itself. So the UK has to ensure that the UK makes the information available The Attorney General put the matter far more eloquently than I could. But the simple point is that it has a duty to deliver information, not to deliver a domestic regulatory framework. There is nothing in Article 9 about

putting in place a domestic regulatory framework or having been put in place a domestic regulatory framework. Mr Wordsworth heroically tried to distinguish the situation with the European Community context, but, of course, the fact is that the Directive includes two provisions, which are very material, Article 4 and Article 9, in relation to creating a system for judicial or administrative review and putting in place a domestic regulatory framework. The Convention does not have equivalent provisions. Of course, Articles 22 and 23 were also invoked and there is reference, it is true, in one of those articles - I forget which - to domestic regulatory framework. But, of course, that is different. That is one of those boilerplate provisions. In almost all international conventions, certainly all multilateral environmental agreements to do with reporting. Every three years a State might provide a report on X, Y and Z and it is just listed as one of the things that it should have done. Of course, if the United Kingdom is right, then the consequence of its argument is that every convention which has that provision in, and there must be hundreds if not thousands, now becomes, according to their argument, a convention which requires you to put in place a domestic regulatory framework. I suspect that that is not the intention that the United Kingdom meant to achieve since it is party to many conventions in which the domestic regulatory framework has not been implemented, nor is it required to be implemented. I can think of a number of conventions in the field of the environment.

Now, where the drafters of the Convention intended to establish an obligation of conduct along the sort of *Heathrow Airport* lines, they did so. It is instructive, I think, to have a look at Article 7 of the Convention. I am not going to take you through it now. But Article 7 of the OSPAR Convention establishes a duty on the parties to cooperate. Plainly, that is an obligation of conduct. If you read Article 7 next to Article 9, or if you read Article 7 next to Article 3, which is the obligation to prevent pollution, not to discharge into the marine environment and so on, you get a clear sense of the distinction. It is plainly an obligation or result. We say that, since Article 9 (1) is plainly an obligation or result, its objective cannot be achieved merely by the putting in place of a domestic regulatory framework. That action alone patently cannot make available the information that is here requester, for the reasons again that Lord \Mustill, whether by cogs going along or other ways, indicated that domestic regulatory frameworks sometimes do not deliver, sometimes for very good reasons, sometimes for less good reasons. We say that that is the same approach applied in the *Heathrow Airport* arbitration, which again is one of those cases that the United Kingdom is not rushing to take you to for the very simple reason that the approach of that very distinguished

Tribunal in this very same building is identical to the approach we are urging upon you in relation to analogous provisions. I have taken you a couple of times on Monday to that so I am not going to go back to that.

Why is it important to characterise Article 9(1) as an obligation of result? The reason is this. If we have persuaded you that Article 9(1) is an obligation of result, the cause of action under Article 32 of the Convention is founded upon a failure to achieve that result. The cause of action is founded upon a failure to achieve that result. That is sufficient, we say, to bring Ireland home within Article 9(1). I will come back to that shortly.

Just to conclude on this fifth point, we would again cite you another case, which I took you to previously, a case again in this building, coincidentally, maybe that bodes well for Ireland, I do not know, that is the *LaGrand* case. Germany versus the United States. Similarly, the International Court of Justice, effectively, interpreted Article 36(1)(b) of the Vienna Convention on Consular Relations as creating an obligation of result. When that result was not achieved after lengthy domestic proceedings, it has to be said, going right up to the United States Supreme Court, Germany without having to exhaust local remedies, obviously, could come to this building and bring an application premised on the view that the result had not been achieved. That was the simple approach. I am not expressing a view on the merits or demerits of that court's judgment on the substance, but on the approach, in our submission, that is the right approach.

Our sixth point is that Ireland's right under international law is to enforce the United Kingdom's Article 9 obligation to ensure that the competent UK authorities make the information available.

THE CHAIRMAN: I think that we should take a five-minute stretch.

(Short Adjournment)

LORD MUSTILL: I had not wished to interrupt the very difficult task that you are performing at very high speed - and clinging on - but can I go back to the very beginning to make sure that I have not misunderstood something that you said. It may be quite clear when I read the transcript. It is virtually the first point that you made. You recalled the colloquy between Mr Wordsworth and myself in which essentially I tried to encapsulate his argument by saying that there was a local remedy but they had not availed themselves of it and the other obligation was to put in place a system - and they had done, so no breach. Do you remember that I used the words?

I had thought that you were deducing from this the fact that Mr Wordsworth said that there was no breach, some kind of acceptance on behalf of the United Kingdom that there was an obligation to put a system in place and, hence, that the 1992 Regulations were conforming with an OSPAR obligation which the United Kingdom implicitly accepted did exist.

I would just like to put on the table the fact that I do not follow this because it might well have happened, I do not say that it did, that the United Kingdom could have put in place a regulatory system which would have conformed with the OSPAR duties if they had applied. But it does not tell you that it did apply. That seems to me a post hoc ergo proctor hoc incorrectly applied or have I misunderstood what you were saying? Do not take a lot of time because we really have not got very much, but did I grasp your argument, because I ought to put on the table that, if I did, I have problems with it.

PROF SANDS: Perhaps I was not as clear as I should have been. That was not the point that I was relying on Mr Wordsworth's statement for. Again, can I apologise if I read words too carefully. I have learned in the course of these proceedings that words that are written on our side - and this is said in the best possible way - are chosen with absolute precision and I know, my Lord, that your words are also chosen with precision.

LORD MUSTILL: This is what is worrying me. I was trying to express as best I could what I thought Mr Wordsworth might have been saying and he was faced with this, if they were imprecise, they were my words. I do not mind having them picked up at the least, I just want to make sure that I know what you are saying, that is all.

PROF SANDS: I am relying on the exchange to establish the point not that they were applicable, but that they were applied. That is my point, because, once the United Kingdom says that they were applied, whether were applied as implementing the Directive or whether they were applied as implementing the Convention or whether they were applied as implementing both, they cannot plausibly argue that the information in respect of which they were applied is not information within the meaning of Article 9(2).

LORD MUSTILL: I have to come back on this, because of the possibility that they were implementing neither, because, according to one of the United Kingdom's arguments, there was nothing to implement, because the OSPAR Convention did not apply. You have turned the thing backwards - I am sorry, that sounds aggressive - your arguments skilfully proceed from the assumption that the Regulations were intended to be an implication to the fact that the United Kingdom accepted that the OSPAR

Convention did apply, hence subverting one of their arguments on 9(1) and 9(2). That is how I understood what you were saying, what seems a year ago, but I think it was about an hour and a quarter, actually, that is not meant to be rude, you are doing brilliantly, say it again so that I understand it, please.

PROF SANDS: It may be that I have read the language too carefully, but I read the answer that Mr Wordsworth gave precisely so to be premised on a question that you had raised, which assumed that the Regulations had bene applied.

LORD MUSTILL: All right, it will not go off of what I assumed. This case is not going to be decided on what Mr Wordsworth said. The United Kingdom's position is absolutely clear. It may be wrong on Article 9(1) and (2), but it is clear what they are saying. I made the point. I do not think that I did misunderstand you, actually. Please now get back up to revs and surge ahead.

PROF SANDS: I shall move on if I can remember where I was. I think that I was on point 6. Ireland's right under international law is to enforce the United Kingdom's Article 9 obligation to ensure that the competent UK authorities make the information available. That is to say, it is an international legal obligation not a domestic legal obligation. That is the point that I am making. Its only remedy under international law is before this Tribunal. The Attorney-General of Ireland made detailed submissions on the point and I do not propose to repeat them, but in response to Ireland's submissions the United Kingdom's argument is that all Ireland can do under OSPAR dispute settlement is obtain a declaration to the effect that the UK adopts a domestic regulatory framework, which, it says, it has done. It says that Ireland cannot obtain a declaration from this Tribunal that the information should be made available to it. That is without your jurisdiction. Some points are not in dispute, as the Attorney said. The UK is both a party to the OSPAR Convention and the competent authority for the purpose of Ireland's request. Secondly, Ireland is an OSPAR Convention party and it happens to be the requester of the information. It is the point that the Attorney made. What is in dispute is what is the cause of action and what is the remedy? We say that the relevant cause of action and the relevant remedy are to be found in international law not in domestic law. The flaw in Mr Wordsworth's logic, we would respectfully say, is that he begins at the national level and works up, so to speak - I do not say that in a pejorative sense - rather than start at the international level and work down. He starts on the premise of what is the cause of action domestically and what remedy is available in the English courts. WE say that that is the wrong analysis, but his simple point of conclusion is the proposition that Ireland

should not be better off than any other person making a request in relation to this information in the United Kingdom. We say that that is the wrong analysis. We say that the Attorney General earlier this afternoon set out the right analysis and it is the one, if I understood it correctly, and now I am going to be very careful in reading questions from the Bench, it underlies the question that Mr Griffith asked me on Monday afternoon, if it was not the Irish Government but an Irish national who was refused this information, could Ireland bring a similar application to this Tribunal? The answer, we say, has to be yes, just as the German Government was able to bring an application to the International Court of Justice in relation to the 1963 Vienna Convention on Consular Relations. WE say that that is a direct analogy. There are differences, of course, and we recognise and understand those differences. The Irish national would first have to bring proceedings before the English Courts, assuming a remedy was available and, as was indicated from the Bench, that would probably be to the Administrative Court by way of an application for judicial review. If he or she were to fail, assuming there was a remedy, Ireland could bring the case on his or her behalf by way of diplomatic protection to this Tribunal and the relief would be exactly the same. Not in order that the UK amend its domestic regulatory frameworks that the national from Ireland, corporate or a person, would end up going all the way back to the English courts and starting all over again. International law has some degree of commonsense in it and it must be clear that the remedy that the Tribunal can order is a sensible remedy and to simply envisage the possibility that all that is available to the Tribunal is to declare that the United Kingdom must put in place a new regulatory framework would not do justice to the Irish national situation and, respectfully, we say, would not do justice to the Irish Government's situation.

I would just say that we find nothing in the travaux preparatoire to the OSPAR Convention which indicates a different approach. It is apparent that not a great deal of consideration, if any, was given to all of these issues. Nor do we say that there are analogies in relation to the direct effect of a Directive . The only question of Community law that is pertinent is this. If Ireland had decided to proceed on the basis of the EC Directive , Directive 90/313, could it go to the European Court of Justice to seek a remedy of delivery up of the report? We say that the answer to that is yes and that there have been a small number of cases before the European Court of Justice of inter-State applications where analogous situations have arisen.

My seventh point is turning to Article 9(3), the simple point we make in relation to Article 9(1), adding up the bits, and the Attorney made the point, is that we see no basis for concluding that

the Tribunal has no jurisdiction, that the application of Ireland is in some way inadmissible or that this Tribunal cannot order the sensible remedy which lends itself to application.

Turning to Article 9(3) and our seventh point, and again the questions have been very helpful I think in teasing out what precisely 9(3)is about. We say, and this has required careful reflection, and I think it has been very helpful through the process of pleadings and oral argument to get to the nub of these issues, that Article 9(3)(d) requires a two stage analysis by the competent authority, by the State. Firstly a factual determination as to whether the release of information will affect commercial confidentiality, and if the answer to that is yes, and obviously only if the answer to that is yes, because if the answer to that is no it has to be released, but only if the answer to that is yes do you get to the next stage which is the decision on whether or not to release it. That decision, as I say on my next point, point 8, is a decision which is to be made in accordance with the national legal system and applicable international regulations.

On my point 7 we say that this first step is a question of fact on whether the release of information affects commercial confidentiality, and that is for determination by this Tribunal. We say that determination, a question of fact, is not one which is informed in any way by national legal systems and applicable international regulations. They do not add to the exercise of that factual determination. That is a matter you must conclude on having regard to the evidence before you.

The UK says that the determination of even this factual question - if I have understood them correctly and I apologise if I have not - is to be made in accordance with English law under the umbrella of interactional law, and I note here that the United Kingdom has moved quite far from its written pleading to the oral phase. In its counter memorial at paragraph 3.7 the United Kingdom said this: " A refusal to disclose information in a particular case pursuant to the relevant domestic law is not a matter governed by the Convention". But that position has apparently been abandoned and Mr Bethlehem said yesterday (Day 3 page 6 line 19) "We accept that Article 9(3) contemplates some form of review or oversight" by this Tribunal, and that necessarily must mean that the refusal to disclose information is a matter governed by the Convention. So there is a degree of common ground on that point.

But of course they say principally that all of this can be sorted out by reference to English law. But on their own case applying English law, Birmingham Northern Relief Road, this first stage of the analysis is a question of fact. So we have no difficulty with the application of English law to the

first phase of the assessment. English law points to your determination of this issue as a question of fact.

Point 8, assuming that you the Tribunal conclude that the release affects commercial confidentiality as a question of fact, the decision on whether to release the information has to be in accordance with national legal system and applicable international regulations. We heard what was said by Mr Bethlehem yesterday, that there is a right to refuse disclosure and that is correct, the Convention is absolutely clear. The only issue is under which conditions can that right be exercised? Is it a right which is entirely unfettered or is there some other limitation. We say that the limitation is a limitation imposed by national legal systems and applicable international regulations. So in deciding whether or not the right has been exercised correctly you must ensure that the right to refuse disclosure is in conformity with English law and with European Community law which are the two pertinent instruments. The 1992 regulations and the 1990 directive are relevant to the determination of this question. We are not anxious to encourage you to jump into a detailed examination of English law and European Community law, but it seems to us that that cannot be avoided, and in that regard obviously consideration has to be given to the case law as well as the legislation, and that does require you, we say, to look at Birmingham Northern Relief and Mecklenburg.

On this regard I think the parties are more or less coming to a common position, if I can put it that way, that the substantive requirements of the pertinent provisions of Article 9 of the directive and of the regulations are to all intents and purposes the same. They all point the same standard which is to be applied in determining whether the right has been properly exercised.

My ninth point, and I am coming right to the end now; we say that the Tribunal's function is to determine whether in exercising its right under Article 9(3) the United Kingdom has complied with its own national law and what does that actually mean; what that means as I have already said is that you look to the regulations, you look to the directive and you look also, as Mr Justice Saville said in Birmingham Northern Relief, to the 1992 regulations. The 1992 regulations require the United Kingdom to have shown - and this Tribunal to ensure that they have shown - that there are compelling and substantive reasons for refusing disclosure - that is the test (that is paragraph 40 of the 1992 UK guidelines) - that a refusal to release some or all of the information would not be unreasonable in the circumstances - so there is a reasonableness test and of course that does introduce an element of discretion it might be said (paragraph 55 of the UK guidelines). In this regard

we would say that one of the factors to take into account in applying the reasonableness test is why we are here in the first place, namely Ireland's direct interest in ensuring that economic justification is properly carried out. That is a factor we say should have been taken into account by the United Kingdom. I would say on that question there is no evidence before you that they have taken any account of Ireland's interests in those decisions - at least when they were taken in 1997 in relation to the PA report and 2001 in relation to the ADL report.

The third aspect, paragraph 57 of the UK guidelines, has BNFL provided cogent evidence of the need for protection. Remember we are not concerned here with cogent evidence before this Tribunal, we are concerned with cogent evidence being provided in 1997, and there is none. You have no evidence before you. Not cogent evidence, no evidence. No witness, no written evidence, no documentary evidence, nothing to show what the cogent reasons were or indeed what the reasons were in 1997 emanating from BNFL. There is nothing. The Attorney might have indicated that this is almost the case of the missing witnesses, the case of the missing evidence.

We would add to that paragraph 58 of the guidelines; can any of the material be obtained or inferred from other public sources. The answer to t hat is plainly yes, we have heard plenty on that. Can restrictions be limited in time in relation to some or all of the evidence. Can a release date be provided for - paragraphs 58 and 61. Absolutely nothing in front of this Tribunal to show that that was ever considered in the decision.

Can the material or some of it be made available in a form which would enable Ireland to form a view as to whether the plant was justified, while ensuring appropriate protection of BNFL's right to commercial confidentiality, and we want to be clear, there are conditions, there are circumstances, of course, in which commercial confidentiality justifies a refusal of disclosure. But we just do not know in this case because we have had none of the evidence at the time.

In the absence of evidence what conclusions are to be drawn? The United Kingdom has an extremely distinguished team of legal advisers. One assumes that they have turned their mind to the question of evidence. The only possible conclusion one could reach is that there is no evidence, because if there was evidence presumably it would be in front of us in relation to these factors, and its absence speaks very loudly.

On that point can I comment on Mr Plender's suggestion it was not until this week that Ireland raised the question of which witnesses came on behalf of the United Kingdom . If it raised it

with them earlier, they might have considered bringing some of these people or some of the evidence. WE say that it is not our job to make the United Kingdom's case. They have chosen how to run their case and produced evidence, but it is not evidence, which is dipositive on these issues. Other examples of evidence that we would have expected to have seen, beyond cogent reasons from Brit4ih Nuclear Fuels having been provided to the Environment Agency or to DEFRA or to PA and ADL in 1997 in respect of the PA report and 2001 in respect of ADL. No evidence from the Environment Agency itself. No evidence from DEFRA as to the cogent reasons which BNFL was required to provide. And no evidence in relation to any contracts in relation to confidentiality, undertakings of confidentiality.

The final point that I would make is this. It is point 10. We are concerned here with whether release would cause unreasonable damage to the economic case of Sellafield plant, to paraphrase the claim of the United Kingdom. We are not here - I am sorry, I had better rephrase that, I put that the wrong way around. We are here to decide or to participate in a process in which a decision will be taken as to whether release affects commercial confidentiality. We are not here to decide or to participate in a process which will determine whether the release would cause "unreasonable damage to the economic case for the Sellafield MOX plant itself". If we go to tab 24 of the Judge's bundle, I have really very nearly finished, just two documents, this is the table of contents of the ADL report. You will see right at the bottom "NB The footnotes in italics refer to changes made after the report was submitted to DEFRA. In the majority of cases, the changes have been prompted by the need to exclude from this published version any specific comments or figures whose publication would cause unreasonable damage to BNFL's commercial operations or to the economic case for the Sellafield MOX plant itself". Unless it be said that those are words of consultants without authority, over the page is a letter from Mr Richard Wood of DEFRA, 5th September 2001. If I take you to the third paragraph, the final line, "In particular, excisions have been made on the ground that the publication of information would cause unreasonable damage to the commercial operation of British Nuclear Fuels plc or to the economic case for the Sellafield MOX plant itself".

We say that these are two separate matters. Mr Plender briefly tried to persuade you yesterday that these were the same thing. But, again, we know that words are carefully chosen and the language "unreasonable damage to the economic case for the Sellafield MOX plant itself" is not the same as unreasonable damage to the economic performance or economic operation of the Sellafield

MOX plant". Material was excised which might cause damage to the economic case. What does economic case mean? Economic case means the process of justification. Economic case means the process of justification which is the process whereby the United Kingdom Government cannot authorise operation of the MOX plant if the economic case shows that the benefits are outweighed by the costs. Without the information excised, you cannot form an objective view as to whether the plant is justified or not. Might it be that the risk of causing damage to the economic case for the MOX plant, putting information into the public domain, is the real reason that the material has been excised. Could it be that there is fear on the part of BNFL and on the part of PA and ADL and on the part of the United Kingdom Government that publication of the report, in full or in such part as would allow an objective assessment to be made, would actually destroy the case economically for the plant. That is not a question obviously that I can answer.

I turn now by way of brief conclusion to what do we invite yo to do at this stage, having regard to the discussions that have taken place between both sides.

We think that there are three things at least that you could do if you were minded to do them at this stage. Firstly, you could decide - and we say that you should decide - that the PA and ADL reports constitute or contain information which is covered by the Article 9(2) definition. Secondly, we think that you could, and should, reject the United Kingdom's argument that pursuant to Article 9(1) and Article 31 of the OSPAR Convention, Ireland is not entitled to make4 this application, that the UK deliver up the PA and ADL reports or such parts of them as you consider the disclosure of which would not affect commercial confidentiality. Thirdly, and of course this was the subject that we were discussing earlier, and I wrote these words before they came out, but I think that we are heading in the same direction, you could, and we say that you should, set forth the standards which are to be applied in determining whether release of any information will affect commercial confidentiality - that is the factual part - and the conditions under which the United Kingdom's right to refuse disclosure, assuming you find that its disclosure would affect commercial confidentiality, you can define the standards which are applicable and could then be applied mechanically to the next phase, if hypothetically there was a next phase, to this arbitration process.

In relation to this last point, we would submit that the standards which you should apply and which are common to the Convention, to English law and to European Community law are amongst the following non-exhaustive list. Firstly, the presumption should be in favour of release. Secondly, any

restrictions must be justified on grounds which are narrowly construed. Thirdly, the burden is on the United Kingdom to show that a release of information will cause actual - not theoretical - actual ...

THE CHAIRMAN: You have exhausted Ireland's time. Sum up very quickly, please.

PROF SANDS: I am literally on the last two lines. The fourth point is that it is not sufficient to make a generalised claim. The UK must show that each and every item of information or categories of information types cannot be disclosed. Fifth, the UK must provide cogent reasons supporting a claim in respect of any information, disclosure of which is to be refused, including supporting evidence, and we note here that the evidentiary stage of these proceedings are closed after this phase.

Finally, that the exercise of the right of refusal must be in accordance with such other requirements as you identify in English law and applicable international legal regulations, the EC Directive. All would then be left to a second phase, if, hypothetically, there was one. It is the mechanical application of these standards to each and every item of redacted information or it could be done by category or in some other form and we are very open to suggestions as to how that can be done.

Can I conclude just personally to thank the three members of the Tribunal for having sat through not only my presentation today on what I know from having appeared in another place where the hours they sit are far reduced, personally I would like to express my real appreciation for the amount of time that you have each put in in relation to the proceedings and, on behalf of the Government of Ireland, indicate that we are available to assist the Tribunal in any way it requires. Thank you very much.

THE CHAIRMAN: My colleagues may have questions, but, in view of the lateness of the hour, I think that we will carry those over and, if you will be available tomorrow for five minutes at the beginning of the afternoon session, questions may be put to you on the things that you have said. I would like to clarify one point, though, going back to your point 4 before we adjourn.

Did I understand you to say that the OSPAR Convention is mentioned in the ADL or PA reports?

PROF SANDS: No, I did not.

THE CHAIRMAN: This is with reference to point 4, there is no mention of those? The legal basis that they so decide ...

PROF SANDS: I am not presently aware of any reference to those.

THE CHAIRMAN: Since some time may be necessary for some belated questions for Professor Sands, I would suggest that we convene tomorrow at 2.15 rather than 2.30, so that there is no loss by the United Kingdom for its rejoinder.

We are adjourned until 2.15.

(Adjourned until tomorrow at 2.15pm)