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

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

BETWEEN

IRELAND — Applicant

v

UNITED KINGDOM OF GREAT BRITAIN
AND NORTHERN IRELAND — Respondent

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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 FIVE
PROCEEDINGS
(REVISED)

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THE CHAIRMAN: Good afternoon, ladies and gentlemen.

As you will recall, we had reserved a few moments before the final presentation by the United Kingdom to allow for any questions that the Tribunal might want to pose to Professor Sands.

MR GRIFFITH: Professor Sands, I would just like to explore with you briefly your position on whether we have to identify that any law of the United Kingdom is to be regarded as the law for the purposes of Article 9 under which the contracting parties have ensured that the competent authorities are required to make available the information as defined under sub-article 2. Is it your contention that we have to identify the particular regulations for example the Environment Regulations being those that exit for this purpose, or is it the case that, in the absence of identifying particular regulations rather than, say, a composite approach, it is your contention that there is then no law which meets the requirements of sub-article 1?

PROF SANDS: I think that our position would be this. The first point is that one only gets to national legal system and applicable international regulations when you get to the 9(3)(e) bit of the decision, namely whether the right has been exercised in an appropriate manner. The next step is to identify what are the national legal systems and the applicable international regulation. The United Kingdom position is that the national legal system is the Environment Information Regulations, as I understand it, and they accept, as I understand it also, that the applicable international regulations include Directive 90/313. The language of 9(3)(d) indicates that it must be both. It is not national legal systems or applicable international regulations. One must ensure that they are in accordance with both.

With regard to national legal systems, there is, of course, an issue on the table as to whether or not the United Kingdom has implemented specific statutory or other provisions which were intended to implement into domestic English law the requirements of Article 9.

I think that our position has to be that for the purposes of the 9(3)(d) exercise, and only for those purposes, it may not be necessary to determine whether or not the United Kingdom - for those purposes only, I make it absolutely clear - whether the Regulations do or do not implement Article 9 or the Directive. There is another way of getting around to that and the way, I think, to get around to that is by starting with applicable international regulations, where there is no disagreement between the parties, that the applicable international regulations are or include Directive 90/313. That would be the starting point. One then looks to which domestic law implements Directive 90/313 and gets to the position that those are the Environmental Information Regulations, which in the relevant part for this

exercise include the same standards as Article 9. In that way - and only for these purposes, I am putting it in that box, because I have not thought through what the broad consequences would be of a determination or non-determination for other parts of the exercise, but for those purposes, it would appear, just against that background, not necessary to determine whether the Regulations do or do not implement in a formal sense Article 9 of the Convention, because they implement the Directive, which by consensus is part of the applicable international regulations.

MR GRIFFITH: For the purpose of your submissions do we have to identify whether the redaction was pursuant to Regulation 4(4) of the Environmental Regulations or, perhaps, pursuant to a Ministerial discretion by the two Ministers? Is that a matter of relevance for us to determine or does it make no difference? There was a redaction, but is it necessary to determine whether there was any domestic law of the United Kingdom pursuant to which that redaction occurred?

PROF SANDS: I think that there are two distinct elements here. We have relied on the references to Regulation 4(2) in the PA report and elsewhere, in a sense to establish the fact that those Regulations were relied upon in the redaction exercise that was taken by the initial body, which presumably would have been the Environment Agency at first stage. But, of course, ultimately the decision was taken by the Ministers. What happened, as we recall it, is that in 1999 they indicated that the redactions went too far and subsequently a revised published version was put into the public domain, including what we say is very limited material which is new but which Mr Plender has indicated a disagreement on. I do not believe that there is before us any evidence as to the basis upon which the Ministers then acted beyond the Environment Agency's decision itself, but I would have to go back and look precisely through the record. I do not recall immediately whether or not we have any information. We have proceeded on the assumption that the Ministers applied and considered to be applicable the same standards that were applied by the Environment Agency.

MR GRIFFITH: I am not quite clear whether that carries with it that your position is that the Ministers can be regarded with respect to the final decision, which I would see as the only one with which we may concern ourselves in making our decision, whether or not they are acting in terms of Article 9(3) in accordance with the UK national legal system by reference to particular regulations rather than pursuant to a general Ministerial power of supervision, and, if it is the latter, is it part of their concern to identify whether Ireland or the United Kingdom has to carry in the submissions to us which case it is or is it irrelevant?

PROF SANDS: I suppose that we would say at the end of the day that it does not matter because the same standard is contained in Directive 90/313. We say that that is the same standard as the Article 9 OSPAR standard. It does not matter for practical purposes, in terms of the standard you are to apply, which of those instruments they presumed themselves to be acting upon when they took their decision, because it was the same standard, and it is the same standard of review which you are called to apply when you get to that stage. Of course, it is only at that stage (the 9(3)) that you have to look at the applicable standard.

MR GRIFFITH: So your approach is that, on any view, there is a basis for confidentiality to be dealt with under 9(3) either by reference to laws which might be said to be part of the national legal system or part of the international regulations and you do not have to take it any further.

PROF SANDS: Could I ask you to repeat the question, so that I am absolutely precise about what you are asking me?

MR GRIFFITH: I was concerned to deal with the situation of what if it could be said that there is no provision in the national legal system which applied for the purpose of confidentiality? What would be the position then of the operation of Article 9(3) if one could not identify, as it has not been clearly identified yet, with clarity at least to me, what is the national legal system provision. It seems to me that your answer is that that remains uncertainly. It does not matter because we say that the applicable international regulations give a clear answer and we do not have to go further. Is that a clear summary?

PROF SANDS: That is a clear summary. That is a very fair summary. Beyond that, I would add that, of course, if the determination is that there was not any applicable national legal system, the United Kingdom's case encounters an obstacle in relation to the standard it has set itself, namely that Article 9 amounts to nothing more than to put in place a national domestic regulatory framework.

MR GRIFFITH: What I was really wondering was whether if you got to the position that the international regulations were not applicable, unless you could identify some specific provision of the national legal system, which did the work that an Article 9(3) provision could do you would be left with no such provision and therefore there would be no basis for applying a confidentiality exclusion because there was no applicable law to carry it. That might be a theoretical position. So far in submissions it has not been made clear to me as to what was regarded as the applied law of the national legal system in this case. I am anxious to ensure whether or not that is something that has to be considered to a

final conclusion.

PROFESSOR SANDS: Logically your position as stated must be correct, yes.

MR GRIFFITH: But you say it does not matter because the answer is in the international regulations?

PROFESSOR SANDS: Yes, that is what we are saying

THE CHAIRMAN: Thank you very much, Professor Sands.

MR PLENDER: Mr Chairman, gentlemen, in responding to the submissions made by Ireland yesterday I can be relatively brief. Our answers to some of those submissions will be found in our counter memorial and our rejoinder which the Tribunal has read, and in our previous oral argument which the Tribunal has heard. I have no intention of repeating the arguments that have already been presented by myself, by Mr Bethlehem and by Mr Wordsworth. Nor shall I deal with each and every one of the detailed issues of fact to which representatives of Ireland referred in the course of their closing speeches. One example is the point made by the Attorney General about the number of maritime transports. The suggestion appears to be that the figures given to Ireland by the United Kingdom privately or in public cannot be reconciled, or alternatively that now that some figures have been made known in public there could be no justification for the refusal to disclose others at an earlier date. The Tribunal can see for itself that the various figures to which the Attorney-General referred relate to different categories at different dates.

I intend in the course of my address to deal, first, with this Tribunal's terms of reference. I shall then have some brief comments to make about witnesses, before considering the issues arising under Article 9(1) of the OSPAR Convention, the issues arising under Article 9(2) and certain of the issues arising under Article 9(3).

I turn first to your terms of reference. The dispute on which this Tribunal is requested to adjudicate is defined in the Amended Statement of Claim dated 10th December 2001. You will find it for convenience, though I do not ask you to look at it now, in the memorial of Ireland, annex 0, page 2, paragraph 2. Under the heading "Subject Matter of the Dispute", Ireland states that "[t]he dispute relates to the United Kingdom's failure to provide information to Ireland pursuant to a request for information by Ireland under Article 9 of the OSPAR Convention." The dispute is further and explicitly defined in the same Statement of Claim at paragraphs 29-30. The dispute arises from - and is defined by reference to - Ireland's claim that the United Kingdom is obliged to supply the information

that Ireland requested. The request defines the dispute.

I make that point principally because there has been some comment by Ireland about the adequacy or otherwise of the means by which the United Kingdom transposed its obligations under Article 9 of the OSPAR Convention into domestic law. The Attorney General for Ireland made the point yesterday, stating that "the OSPAR Convention has been inadequately transposed into UK law". Transcript Day, page 4, line 17. That is not the dispute before this Tribunal. It might have been. Ireland might have brought a claim under Article 32 alleging a failure by the United Kingdom to put into place an adequate domestic framework to deal with requests for information. It did not do so. This issue is not before the Tribunal. It is not the dispute with which this Tribunal is seised.

Second, there is the issue of critical dates in this case, of which the Tribunal will be aware. The OSPAR Convention entered into force between Ireland and the United Kingdom on 25th March 1998. Nothing done before that date plainly could amount to a breach of the Convention as between these two States. That date, the date of entry into force of the OSPAR Convention, was after the publication of the first public domain version of the PA report in 1997. Ireland submitted its Request for Arbitration on 15th June 2001. That was the latest date upon which dispute between the parties crystallised in relation to the PA report. The dispute in relation to the ADL report crystallised on 5th September 2001, when the United Kingdom refused to supply to Ireland, at its request, complete and unedited copies of that report. However, Ireland's claim that the United Kingdom failed to give adequate reasons, as I observed in my first address to this Tribunal, was made for the first time in its memorial dated 7th March 2002. That is long after the proceedings had commenced. Assuming in Ireland's favour that this is a matter for determination by this Tribunal, the dispute as to reasons crystallised on that date.

I have taken some time to lead the Tribunal through the dates, because it is important that the Tribunal bear them in mind since, following the publication of the public domain of the PA and ADL reports, some of the information which was redacted from them has become public. An obvious case is the date for the return of MDF fuel from Japan. For reasons of security as well as commercial confidentiality, that date was not made public prior to the return of the fuel. Now that the return has taken place, the date is of course in the public domain. In several cases, data that were excised form the PA report were made public in the ADL report ... Mr Chairman, Professor Sands wishes to interrupt.

PROF SANDS: I just point out to the Tribunal that this is the very first time that we have heard this argument that has been made in the reply stage and my understanding of convention is that new legal arguments ought not to be raised at the reply stage, precisely because we have no opportunity to address them in any way. This has never come up before.

THE CHAIRMAN: We take your comment into consideration.

MR PLENDER: Mr Chairman, I believe that I am responding to the first part of the Attorney General's reply given yesterday. But what I am saying at this particular point is not a legal argument at all, it is an observation of fact or state of affairs that I simply draw to the Tribunal's attention and also to those of my learned friends.

It is a fact, verifiable on the face of the PA and ADL reports that some of the material excised from the PA reports was made public in the ADL reports and it is also possible that, with the passage of time, information excised from the two reports may enter into the public domain.

My purpose in mentioning this is certainly not to raise a new submission of law, it is simply so that members of the Tribunal and independent counsel of Ireland will be aware that the unredacted highlighted version of the reports that they have seen reflect the situation as it was when the public domain versions were first published. If the Tribunal should ever have to consider the justification for making excisions, it would need to address that issue at the relevant date and the date relevant in the case of the PA report would be 15th June 2001 and that in the case of the ADL report 15th September 2001.

I now turn briefly to the question of witnesses, responding particularly to Mr Fitzsimons's submissions of yesterday.

Before responding in turn to those submissions, I should like to make a brief remark on the question of evidence. This is an international tribunal, not a national court. The Tribunal will, no doubt, want to approach the determination of fact in the way that international tribunals do. In doing so, perhaps unusually for an international tribunal, it has in this case had the benefit of some important witness testimony.

As for the witnesses, I have three points to make. First, the suggestion was made by Mr Fitzsimons yesterday that Mr Rycroft, in his Second Witness Statement, had fabricated two examples of actual damage caused to BNFL by reason of the disclosure of confidential information in the PA and ADL reports. I refer particularly to the transcript of oral testimony Day 3, page 48, lines 9 to 10

and Mr Fitzsimons's submissions yesterday, Transcript Day 4, page 43, line 16 to pager 44, line 15.

It was suggested that the United Kingdom was complicit in this fabrication, in that, as he put it, the United Kingdom found it "necessary ... to produce examples of facts that would be consistent" with its case. Those allegations were not put to Mr Rycroft. They are wholly unwarranted. It is perfectly clear that Mr Rycroft gave examples of actual harm suffered by BNFL in response to the point made by Ireland, in its Rejoinder, that no such examples had been given. He did so despite misgiving arising from the fact that the disclosure of the harm suffered by BNFL would expose BNFL to further commercial risk.

The United Kingdom invites the Tribunal to conclude that Mr Rycroft was an open, truthful and credible witness on points of fact. He explained the reasons why the information redacted from the PA and ADL reports was and remains in the great majority of cases confidential. Mr Fitzsimons had ample opportunity to put to Mr Rycroft detailed questions about the redacted information. Indeed, Mr Rycroft himself volunteered to give more information on the subject, but was not questioned. There is no basis at all for inferring that Mr Rycroft fabricated evidence and should it become relevant the United Kingdom would invite the Tribunal to reject that allegation.

In the case of Mr Wadsworth, Ireland does not challenge the reliability of his testimony. He was the one witness who had prior and substantial experience of looking at and dealing with commercially confidential documents and the actual process of redaction. It is submitted that it is appropriate to pay particular attention to his evidence, particularly his evidence that where the number of producers in a given market is limited, competition may become more intense, so that the harm from disclosure of confidential information would be all the greater.

In the case of Dr Varley, the Tribunal will note that there are significant divergences between his evidence and that of Mr MacKerron. Mr Fitzsimons acknowledged that Dr Varley had specialist knowledge but challenged his evidence on the grounds that he is "unlikely to be ever capable of altering his own mindset", and that he was “simply not an independent witness, and his evidence and the content and tone of its bears this out”. (Day 4, page 45, lines 8-19). On the contrary, the United Kingdom submits that he was entirely independent and a reliable witness. He had detailed knowledge of the nuclear industry, including the MOX fuel market and competition in that market. He was also familiar from his own professional activities with the relationship between BNFL and its competitors such as Belgonucleaire and COGEMA with both of which he was also familiar.

Where there is a conflict between the evidence of Dr Varley and M<r MacKerron the United Kingdom invites the Tribunal to prefer Dr Varley.

I can now turn to the issues of law in this case. Article 9(1) of the OSPAR Convention provides that the contracting parties shall ensure that their competent authorities are required to make certain information available. Addressing that language Mr Sands placed great store on the distinction between obligations of result and obligations of conduct. In our submission that distinction does not assist in the resolution of the dispute before this Tribunal. The point is simple. The United Kingdom and Ireland disagree on the nature of the obligation under Article 9(1). Does it require contracting parties to supply specific items of information as Ireland contends, or does it require contracting parties to take such legislative or administrative measures as may be necessary to ensure that their competent authorities are required to make that information available, as the United Kingdom contends? In the course of his address yesterday afternoon Mr Sands acknowledged that the difference is one of ascertaining the nature of the obligation incumbent on the parties. (Day 4, page 58 line 17). In the United Kingdom's submission as developed by Mr Wordsworth the obligation contained in Article 9(1) is clear. It is not an obligation to supply specific items of information. it is an obligation to ensure that contracting authorities are required to make information available. That follows from the plain and ordinary meaning of the words in the provision. Indeed, the United Kingdom;'s interpretation appeared yesterday afternoon to be accepted by the Attorney-General for Ireland; Day 4, page 16 line 7-17 and page 19 lines 6-13. He stated that Ireland was entitled to require and receive specific information from the United Kingdom in this particular case because the Government of the United Kingdom was in effect the competent authority. But neither the nature of Ireland's request nor the nature of the final decision on redaction can change the scope of the underlying obligation under Article 9(1). If the obligation is to take such legislative or administrative measures as may be appropriate to ensure that the competent authorities are required to provide certain information, and if it is not alleged, at least as the subject of these proceedings, that the United Kingdom has failed to put those legislative or administrative measures in place, cadit quaestio.

The United Kingdom's interpretation of this provision is supported by the fact that the wording of Article 9(1) was deliberately based on the wording of directive 90/313. As Mr Wordsworth explained a directive is by definition a measure that leaves to Member States the choice of form and method for its implementation. A Member State discharges its obligation under a directive by putting

in place the appropriate legislative or administrative measures. It would be inapt to prescribe by directive that a Member State shall supply on demand particular items of information. In such a case there would be no choice of form and methods. As a matter of European Community law the proper means of conveying the obligation for which Ireland contends would be by regulation, but the Member States of the Community chose not to use a regulation; they chose to legislate by directive. They did so because a directive is the appropriate instrument for the obligation that they sought to impose. It may be inferred that the parties to the OSPAR Convention intended to assume an obligation of precisely the same character. That is particularly so given the wording of Article 3(1) of directive 90/313.

In the course of his address yesterday afternoon the Attorney-General suggested that it would be illogical if contracting parties to the OSPAR Convention, not being Member States of the European Community, were to be subject to a different obligation from contracting states which are parties. (Day 4 page 22 line 7-15). Of course we accept that Article 9 of the OSPAR Convention imposes the same obligation on all parties, but the point made by the Attorney-General proves precisely the United Kingdom's case. Contracting parties which were also Member State of the European Community were under an obligation under directive 90/313 to put in place the appropriate legislative or administrative measures to require their competent authorities to supply information.

The contracting parties which were not Member States of the Community were not subject to that obligation. It would indeed be undesirable if OSPAR contracting parties that were also Member States had an obligation to put into place the appropriate legislative or administrative measures, to require their competent authorities to take certain action, while OSPAR contracting parties not being members of thew Community had an entirely different obligation.

The Attorney-General also raised the question of whether it was contended that in certain circumstances Iceland could invoke Article 32 of the OSPAR Convention whereas Ireland could not. (Day 4 page 23 lines 6-9). I shall change his example from Iceland to Switzerland because Iceland is a Member State of the EEA and is accordingly subject to an obligation similar to that of Member States of the EEC.

There is however an important difference between the position of states belonging to the Community and states not belonging to it. The difference arises from the obligations that Ireland has assumed under Article 192 of the EC treaty. If I understood him correctly Mr Sands submitted

yesterday that Ireland could have gone to the European Court to seek delivery of the PA and ADL reports on the basis of directive 90/313. He referred in that connection to the existence of a limited number of cases before the European Court of Justice concerning disputes between Member States (Day 4, page 64, lines 1-2). But the submission that he makes on that point if I have understood it correctly is misplaced. Ireland could bring proceedings in the Court of Justice complaining of the United Kingdom's failure to disclose particular documents only if the United Kingdom were under an obligation prescribed by Community law to disclose or reveal those documents. There is no such obligation under Community law. The relevant obligation under Community law is to put in place an appropriate legislative or administrative framework. That is an entirely different matter.

Ireland next argues that there is no remedy in English law as the OSPAR Convention is an unincorporated treaty and unincorporated treaties cannot be the foundation for rights and duties justiciable before English courts. The point is sound as far as it goes, but it does not go far. In order that a treaty should be justiciable in English courts it is not, of course, necessary that express reference should be made to the treaty on the face of the domestic legislation. That is axiomatic. It is by no means uncommon in the United Kingdom for a treaty to be implemented by legislation that makes no reference to it.

As Mr Wordsworth noted on Tuesday the United Kingdom took the view that it had fulfilled its obligation under Article 9(1) of the OSPAR Convention to put in place a domestic system for dealing with requests for access to information by the enactment of the Environmental Impact Regulations. Since the wording of the directive was the origin of Article 9 of the OSPAR Convention it was no great leap to conclude that the regulations were effective in implementing the United Kingdom's obligations under Article 9 of OSPAR. It is simply not sustainable to say that as no reference was made to Article 9 of OSPAR on the face of the regulations, the regulations cannot be taken to give effect to the United Kingdom's obligations under Article 9. The Tribunal is not greatly assisted by Ireland's reference to exhaustion of local remedies. The United Kingdom is not saying that Ireland cannot bring its claim for specific information yet, but would be able to bring that claim at some uncertain date in the future, if a claim had been brought before the English courts but rejected (see transcript Day 4 page 20, lines 1-3). At any stage Ireland may bring a claim to the effect that the United Kingdom has failed to meet its obligation under Article 9(1) to put in place an appropriate regulative framework. At no stage would Ireland be entitled to bring a claim for specific information

before this international Tribunal. This follows solely from the nature of the obligation under Article 9(1), it has nothing to do with exhaustion of local remedies.

The corollary of this remark is that the Attorney-'General's argument under the rubric "a right without a remedy" falls away. There is a right under Article 9 and there will always be a remedy under Article 32 where there is a breach of a corresponding obligation. One is not forced to the conclusion that a contracting party can only seek a remedy for the wrong in the domestic courts of another contracting party. (Transcript Day 4, page 25 lines 24-29). The right that Ireland seeks to enforce is correctly enforced pursuant to the United Kingdom's domestic legislation. The right corresponding to the obligation under Article 9(1) - to ensure that competent authorities are required to make available information as defined therein - is correctly enforced before an Article 32 Tribunal.

In a question to Mr Sands this afternoon immediately before I was invited to speak Mr Griffith stated that it was not clear to him what is the applicable national provision on which the United Kingdom relies. May I refer him to paragraph 3.12 of the United Kingdom's counter memorial? The United Kingdom there stated "The United Kingdom has taken the legislative or administrative measures necessary to give effect to Article 9 of the OSPAR Convention in accordance with Council Directive 90/313. It has enacted and put into force the environmental information regulations 1992 which provide for the disclosure of a wide range of information including but not limited to the information envisaged in Article 9 of the OSPAR Convention". The position of the United Kingdom was and remains that it has taken the appropriate legislative or administrative measures to give effect to Article 9(1) by the enactment and implementation of the Environmental Information Regulations. It is however a non sequitur to infer from the existence of the Regulations the corollary that that which is sought in the present case is information within the meaning of Article 9(2). That is because the scope of the Environmental Regulations is wider than that of Article 9 of the OSPAR Convention.

At this juncture, I can, therefore, turn to Article 9(2) of the OSPAR Convention.

LORD MUSTILL: You are turning away from 9(1) to 9(2) so perhaps it would be convenient for me to raise a worry. Incidentally, what you have just said was what I was putting, without necessarily putting it as correct, to Professor Sands yesterday, namely that the fact that you have got the Regulations did not mean that they were necessarily there in the shape of acceptance that this information fell within the scope of Article 9. It is two different questions. What are the Regulations there to do? Secondly, what is the position about this information? I will leave that because I am not expressing any concluded

opinion, but that is what I was trying to say yesterday and you said it better.

MR PLENDER: Your Lordship was very clear yesterday and, if you may flatter me by saying that I put it better, the way that I have put it I have put it because I understood and wished to respond to your Lordship's point.

LORD MUSTILL: Obviously, nobody expresses a concluded opinion. I just make that preliminary point. I would like to go on to something else that has been worrying me all the way through and I think that this is the last chance to raise it, hoping to deflect the suggestion that English judges, past, present or future, are lexicographers by inclination. We are agreed, I think, that we have to start by reading the words of the Convention. All this is to do with your proposition that I have adopted from time to time during interventions for the purpose of argument in answering questions that there may be an obligation to put in place a domestic regulatory framework. The expression of the concept has been different from time to time, but the idea surfaces throughout the UK's argument and it is called up in what you immediately finished saying. That is the background.

Now the foreground. We have got two verbs in play in Article 9(1). The first is that the United Kingdom shall ensure that their competent authorities do something. The second verb is are required to make available the paragraph 2 information. I think that I know what "ensure" means. It means make it happen. The United Kingdom is obliged to make it happen, that the competent authorities do what then follows. I do not find for myself much difficulty with that, but I am rather perplexed by the words "are required to make available" - note "are required to make available" - "the information described in paragraph 2". If you compress the effect of the two verbs, you get the position that the United Kingdom has got to make it happen, that the competent authorities are required to make the information available. Let us just test this with an imaginary report of 1st May in a particular year and assume that it was information and that it was outwith the exceptions. Now, it could be said, as it seems to me, that the words "are required to make available" call up the notion of the person who calls the shots, writing to the competent authority and saying, "I require you to disclose the letter of 1st May", because that is what it looks like in English to me. Not "I require you to put in place an administrative structure in the framework of which you will decide whether to make available the information, but I am requiring you to disclose this particular piece of information", because I think that, if you require somebody to do something, normally you are insisting on their doing it. It assumes that you are in a position to insist.

What worries me is that, although I am perfectly familiar with the general idea which you advance for the UK of European Community law that the law does not reach directly down to the individual case, but reaches only so far as setting up a system. I wonder whether that is what Article 9(1) is actually saying. That is, as usual, a long question. It may admit of a short answer. Will you essay one please?

MR PLENDER: I shall certainly try to be brief.

LORD MUSTILL: No, that was not meant to put pressure on you, I was just apologising really.

MR PLENDER: Your Lordship is quite right in saying that the opening words of Article 9(1) refer to two distinct obligations. There is the obligation on the contracting parties to ensure and an obligation on competent authorities to make available. The first obligation is one derived directly from the words of the Convention and are accordingly governed by public international law. The second obligation is one which is imposed and must as a matter of public international law be imposed on the competent authority by the contracting State in accordance with the national legal system and applicable international regulation.

LORD MUSTILL: That I understand.

MR PLENDER: Thus the person who calls the shots, I recollect your Lordship's words, is the person demanding the information.

LORD MUSTILL: No, it serves me right for using informal expressions. I could not think on the spur of the moment a correct description of the person who was doing the requiring, that is to say, say, the Minister. The person with authority. Please do not be misled.

MR PLENDER: The requiring in that sense is the Member State - the contracting party - which must require - that is to say, impose an obligation upon - its competent authority.

LORD MUSTILL: Yes, you read me correctly.

MR PLENDER: And it must impose that obligation by its law, which must be a law in accordance with applicable international regulations, but it is an obligation imposed by national law upon the competent authority.

LORD MUSTILL: All right. Keep going.

MR PLENDER: Then the person desirous of obtaining information has a right governed by the applicable national law so long as that applicable national law is consistent with the applicable international regulations to obtain the information.

LORD MUSTILL: Yes.

MR PLENDER: The two obligations must be perfect obligations, but they are not identical obligations because they exist at different levels.

LORD MUSTILL: I agree with that, but it is not quite what I was asking. If I interrupt you half way through, let me try to repose the question if the Chairman will permit. I am using your time but it will be deducted from it so do not worry. The applicant for the information goes to the host state, as it were, and says, "It is your job to ensure that the competent authorities are required to make the information available. Get ahead and ensure it. See that it happens. Turn the wheels of your national legal system so as to require the competent authority to hand the information over." That seems to me what the words are actually saying and I do not know where you, and possibly myself, have got the idea from that this is anything to do with installing a system. All that it says should happen is "You are obliged to ensure something" and that something is requiring" - requiring - the competent authority to make the information available. You do not do that by putting a system in place. You do it by making it happen.

What is worrying me and has worried me throughout is how you transmute the words "are required to make available the information" into "are required to set up a system which will examine in the context of the relevant Community law" - if there is any - "and the national law the information described", because systems can slip a cog. That is the crucial difference. They do slip a cog from time to time. It may not matter here, but I felt that I ought to raise this before we go away, because otherwise I would still be worrying about it after we broke up. Could you help me with this, please?

MR PLENDER: I hope that I can, but I am not certain that I can remember the opening words of your question which are actually quite important to the answer. May I do my best?

LORD MUSTILL: Yes, it was an awfully long time ago. My questions are so long. Try your best, please, Mr Plender.

MR PLENDER: A person desirous of obtaining information must be able to address himself to a contracting party to vindicate the right, albeit a right under national law, that the Convention envisages that he shall have to require certain information.

LORD MUSTILL: Yes.

MR PLENDER: But he can do so. He can apply, for example, to the courts of the Member State to do precisely that. What is required, if I can avoid that word - what is imposed by the Convention upon the

competent authorities - is that they should be required. The information may be in the hands of any number of organs or institutions of a Member State. It may be, for example, in the hands of a local authority. The Convention is silent as to the institution within the Member State which may hold the relevant information and the institution of the Member State which will compel that institution or agency to divulge it. These are matters that can only be regulated by the national legal and administrative system. Where the object - final result - of Article 9(1) is to ensure that a private individual shall have access to information in the hands of a local authority or agency of a Member State, that final result is realised where the national state has in place a mechanism for the vindication of his right, and he has that where the applicable national system makes available methods by which the particular body holding the information can be compelled to divulge it.

LORD MUSTILL: I will return to this once more and then I will allow everybody to get on with Article 9(2). There is a casa sumissus there, which is that a system properly installed does not work properly in the individual case and, if the demanding person goes to the contracting party and says, "I want you to perform the first two lines of Article 9(1), get ensuring", if I may put it like that, and the contracting State says, "Well, we have got this mechanism which regulates the disclosure of this kind of information, go and apply to it and set it in motion" and the demanding party does set it in motion, but, unfortunately, does not produce the desired result. Is it the case with the United Kingdom that in that situation the contracting party has satisfied the obligation of requiring the competent authorities to make available the information when it has not been made available?

MR PLENDER: No.

LORD MUSTILL: Even though there is a good system. If you want to know what I mean by a good system, I will say a system which is conformed with the contemplation of Article 9 or of the Directive .

MR PLENDER: I come back to my first answer, but not, I hope, to a repetition of it.

LORD MUSTILL: No, do, because you have got to try to get it into my head.

MR PLENDER: The obligation to ensure is the obligation of public international law. What is to be ensured is a requirement imposed upon the appropriate agency of the Member State. That requirement is imposed by national law. The obligation on the State is to ensure that competent authorities shall have a requirement. It can only be for national law to determine and vindicate the requirement. One asks whether in a particular case the requirement has been vindicated by national law consistently with international law, but one has to contemplate at least two categories of case. The first is the category

where the implementation by national law of the particular requirement takes the form of a definition of information and of procedures by which a person may have access to it and of standards for determining the application of all the exceptions in Article 9(3), which is within the range of possibilities properly open to the Member State. In that event, though an individual may be disappointed by the outcome, he cannot complain of a breach by the Member State of its duty to ensure that competent authorities are required. The other possibility, of course, is the converse, where the Member State in enacting and implementing the domestic rules which impose the necessary requirement upon the local authority so defines the procedures or the circumstances for the application of the exceptions under Article 9(3) or otherwise implements its obligation beyond the range of possibilities contemplated by the article. In such an event, there is a breach of Article 9(1) and that is a matter of which a contracting party may complain as against another contracting party, but that is not this case.

LORD MUSTILL: Thank you, you have answered my question very clearly. Thank you for your patience.

MR PLENDER: I turn now to Article 9(2). Ireland dealt with Article 9(2) briefly in its reply and I shall be brief also. Ireland's main point was that, since the United Kingdom referred to the Environmental Information Regulations when assessing commercial confidentiality, the redacted information must be environmental information within Article 9 (2). Day 4, page 25, lines 14 to 25.

There are a number of non sequiturs in that reasoning. As Mr Bethlehem noted on Wednesday, the United Kingdom had regard to the Regulations when it came to assessing how much information could and should be put into the public domain. That was a balancing exercise, conducted on the premise that there should be placed in the public domain the greatest amount of information consistent with the requirement to maintain commercial confidentiality. That does not, of course, amount to acceptance by the United Kingdom of the proposition that the information in question fell within the scope of the Regulations or the OSPAR Convention. It is perfectly possible and proper to take account of analogous legislation when conducting an exercise that is not actually governed by it.

Ireland also places great weight on one answer given by Mr Rycroft, who is not a lawyer, to the effect that he understood the 1992 Regulations were applied in the present case. Relying on that answer, Ireland reverses the position that it adopted on Monday (when it suggested that those Regulations were not applied). For the record, the United Kingdom sees nothing inconsistent between the passages in the Proposed Decision that Ireland took you to on Monday and the statement made

by Mr Bethlehem on Wednesday. For the record, there was no concession on that point by Mr Wordsworth.

Prof Sands did not deal with any of Mr Wordsworth's submissions on the ordinary meaning of Article 9(2) on the applicable principle of interpretation, on the fact that the Aarhus Convention definition of 'environmental information' constitutes a new development or on the rationale behind the *Mecklenburg* decision. In the last respect, Professor Sands continued to maintain that the definition of information in Article 9(2) is the same as the definition in Directive 90/313, whereas it has been shown that that is incorrect. (Transcript Day 4, page 58, lines 1 to 2).

One new argument has been added: it is said that the measures under Article 9(2) include preparatory acts taken to put the measures into operation, and that the PA and ADL reports are preparatory acts in relation to a measure affecting the environment. Day 4, page 58, lines 10-14. Nothing was offered to support this assertion. The United Kingdom did not accept that preparatory acts are "measures" within the meaning of Article 9(2) or, indeed, that the two reports are preparatory acts in relation to a measure affecting the environment.

THE CHAIRMAN: Mr Plender, may I suggest that we take a 5-minute stretch at this point?

MR PLENDER: Yes.

(Short Adjournment)

MR PLENDER: Mr Chairman, gentlemen, I now turn to Article 9(3) of the OSPAR Convention and in particular to the argument advanced by Mr Bethlehem on the issue of margin of appreciation.

On this Mr Sands made a number of points. He began by suggesting that the commercial confidentiality exemption required a two stage analysis. First a factual determination as whether the release of information would affect commercial confidentiality and second on the premise that it would affect commercial confidentiality a decision as to whether or not to disclose the information. The object of this analysis was to provide a foundation for his argument that the first question, the appreciation of whether disclose would affect commercial confidentiality, is a question of fact. I quote from him: "Is not one which is formed in any way by national legal systems and applicable international regulations". He concedes however that the decision as to whether or not to disclose information is a matter for national law.

That argument cannot be correct. Certainly the question whether or not the release of information would affect commercial confidentiality is a question that has to be addressed in an

objective manner. Mr Sands' reference to the Birmingham Northern Relief Road case on this point is indeed appropriate, but this question can only take place by reference to national law. The Birmingham Northern Relief Road case was a case before the English High Court. The framework within which the Judge addressed the questions with which he was faced was that of English law. By comparison with the Birmingham Northern Relief Road case this case poses at least two antecedent questions. The first is what is the framework of law within which the question of commercial confidentiality is to be determined.

The answer to that follows from the chapeau to Article 9(3) of the OSPAR Convention which provides that contacting parties have the right to provide for requests for information to be reused where it affects commercial confidentiality. By the express terms of the Convention the law applicable to this question is in the first instance national law. There is nothing in Article 9(3) either in its chapeau or in its sub-parts, to suggest that national law is relevant to only one element of the exercise and not the other.

The second antecedent point is more telling. States have a margin within which they can legislate in exercise of their right in Article 9(3). As Mr Bethlehem observed on Tuesday in response to a question by Lord Mustill (transcript Day 3 page 17 lines 19-28) the United Kingdom may have chosen to legislate in implementation of the commercial confidentiality exception by defining the term in great detail, including reference to items of information that should presumptively be considered to be confidential. By reference to some of the international instruments to which Mr Bethlehem made reference that would have been an entirely defensible approach. Just as easily some of the explanatory detail in the DEFRA guidance notes could have been included in the environmental information regulations. In the event commercial confidentiality is not defined in any detail in the environmental information regulations.

Against that background when a Tribunal such as this is faced with the question of whether the commercial confidentiality exception applies in the circumstances of a particular case it just cannot answer that question in the abstract. It must answer it by reference to national law. What is the meaning of commercial confidentiality within the applicable national law? Has the contracting party legislated in exercise of its right to provide for information to be refused? There is no necessary reason for it to do so. The right to refuse disclosure is after all a right, it is not a duty.

So in the United Kingdom's submission the construct advanced by Mr Sands is not

sustainable. The question whether information would affect commercial confidentiality can be answered only within the framework of national law. I would add for completeness, lest Mr Bethlehem's submissions on the point should be overlooked (day 3, page 13, lines 3-6) that it is well accepted that the margin of appreciation that avails the states extends to the area of legislation.

Mr Sands suggests that the United Kingdom has shifted ground on this point - yesterday's transcript page 64 line 22 to page 65 line 21. That is not the case. The passage in the United Kingdom's counter memorial to which Mr Sands referred was addressing the interpretation of Article 9(1), not Article 9(3) as Mr Sands implies. Mr. Sands accepts that the question of whether or not to disclose information is a matter for applicable national law. He could not do otherwise. He goes on to ask whether the exercise of this right in accordance with national law is unfettered. Of course it is not. Mr Bethlehem made it quite plain that it is not part of the United Kingdom's case to suggest that the exercise by a state of its right under Article 9(3) is unfettered. There are limitations of national law, of European Community law and of international law. The OSPAR Convention is an international treaty. Disputes submitted in accordance with Article 32(1) are by Article 32(2)(a) to be decided according to rules of international law. International law is therefore the umbrella under which national law rules on the question of commercial confidentiality are applied.

Mr Sands suggested on this point that the parties are more or less coming to a common position (yesterday's transcript page 65 lines 22-23). I regret I have to disappoint him. We are both looking at the same cases, the Birmingham Northern Relief Road case and the London Transport case, but we are coming to different assessments. We do not agree with Ireland's interpretation of Article 9(3) of the OSPAR Convention.

Mr Sands prays in aid the DEFRA guidance notes on the Environmental Information Regulations as if they were dispositive of the matter. They are not. As Mr Justice Sullivan observed in the Birmingham Northern Relief Road case the guidance is not authoritative as to the law. It sets out a sensible approach to a practical problem.

Let us then look at the sensible approach to a practical problem to see if it assists Ireland in this case. Mr Sands refers you first to paragraph 40 of the guidance notes and says that the Environmental Information Regulations require the United Kingdom to show that there are compelling and substantive reasons for refusing disclosure. (Day 4 page 56 lines 1-4). In fact what the guidance notes say is as follows. Paragraph 40: "The presumption is that environmental information should be

released unless there are compelling and substantive reasons to withhold it". I here interpolate that this is the sentence quoted by Mr Sands. The guidance note goes on: "The Regulations list the conditions under which a body can refuse access". Paragraph 34: "There are some general grounds for refusing access". Paragraph 44: "There are further specific grounds for refusing access. Some of these are discretionary, some mandatory". Regulation 4.2 lists those circumstances where the release of information maybe refused. Regulation 4.3 lists those circumstances where the release of information must be refused.

The guidance notes then go on to address the grounds on which access to information may be refused, including paragraph 55-61 commercial confidentiality. Commercial confidentiality is in other words one of the compelling and substantive reasons identified in the regulations for refusing access to environmental information.

Next by reference to paragraph 55 of the guidance notes Mr Sands refers to a reasonableness test. (Day 4, page 66 line 4-6). To describe it as a test is not quite accurate. The relevant part of paragraph 55 actually says: "There will be circumstances where the disclosure of information would prejudice the commercial interests of an individual or a business. There might be occasions when information produced for or by a body is confidential or whose ownership rests elsewhere, for example data generated by a Government laboratory for a private customer as part of a contract copyright material produced for sale. Bodies may restrict access to information on these grounds, but they should be careful not to restrict the release of the information unreasonably".

The United Kingdom does not shrink from this formulation, far fromit. The United Kingdom first through the environment agency and then through ministers have consistently sought to put as much information in the public domain as possible. The publication in 1999 of the public domain version of the PA report attests to this. Once it became clear that further information had been or could be disclosed a second public domain version of the report was produced. The ADL report went further still. As I mentioned at the outset of my submissions today, there is still more information that was once redacted that has become public over the past year. The United Kingdom considers that it is going the extra mile on disclosure. It sits rather uncomfortable always to be told by Ireland that it is dragging its feet in the matter.

In the light of the statement made by the Irish Minister for the Environment, virtually in the shadows of these proceedings on Monday, that Ireland's objective was to close down the MOX plant,

the United Kingdom might be forgiven for wondering on occasion whether Ireland is interested in the information that it seeks at all or whether its principal purpose is simply to harass the United Kingdom at every turn.

Next Professor Sands points to paragraph 57 of the Guidance Notes and says that BNFL has not provided cogent evidence of the need for protection. Day 4, page 66, lines 13 to 19. Paragraph 57 quite definitely does not contemplate the owner of the information providing cogent evidence of the need for protection to the person requesting disclosure of the information. That could, in certain circumstances, such as this case, be tantamount to handing over the information itself. On the contrary, what is contemplated is that the owner of the information provides cogent reasons for protection to the public authority from which the information is requested.

In this case, it is quite clear that this is what has happened. Mr Rycroft attests to this. The scrutiny process leading up to the preparation of the redacted version of the reports has been described in the United Kingdom's Counter Memorial. Ministers were persuaded of BNFL's case for protection on very many points. They were not persuaded on some and required disclosure in the face of objections from BNFL. Mr Rycroft's evidence is that the disclosure of this information has actually caused commercial harm to BNFL. This has not been an exercise of BNFL coming to Ministers in some kind of collusive arrangement that would see information withheld from the public the disclosure of which posed no harm to BNFL's commercial interests. Far from it. BNFL have had to justify their case for protection at every step on the way.

LORD MUSTILL: May I ask a question? It is a quick one this time. I am a little bit worried about how you square your argument with the conjunction of Article 9(1) and Article 9(4). Article 9(4) says the reasons for refusal to provide the information requested must be given. In 9(1) the word "request" is linked with the provision of information to a natural or legal person in response to any reasonable request. Could it not be said that the person to whom you explained the failure to give the requested information should be the person who requested the information. I understand your policy arguments so you need not repeat that. I have got those. It is just back to the dictionary again.

MR PLENDER: On the proper interpretation of Article 9(4), the person to whom reasons are given is the person who has requested the information. What I resist is the interpolation into Article 9(4) of provisions from domestic legislation or, indeed, Guidance Notes which provide for cogent reasons to be given where, in that context, what is required is that the person seeking protection has to give cogent

reasons. It is inapt to interpolate into Article 9(4) the provisions taken from the Environmental Regulations or Guidance Notes.

LORD MUSTILL: If it goes no further than that ...

MR PLENDER: It goes no further.

LORD MUSTILL: Thank you. I go no further on that point.

MR PLENDER: It is no part of the United Kingdom's case that there may be refusal without any reason, although we do say that in determining whether a reason has been given you look at all the circumstances.

Professor Sands also refers, less specifically, to other paragraphs in the Guidance Notes, notably paragraphs 58 and 61, Day 4, page 66, lines 20 to 24. I would simply invite the Tribunal to read through those paragraphs and others when it comes to deliberate on the matter. The United Kingdom has sought progressively to put redacted information into the public domain as it has ceased to be confidential. As I have observed, the 1999 version of the PA report attests to this, as does the very existence of the ADL report.

I now turn briefly to one or two observations in response to other elements of Professor Sands' submissions on margin of appreciation. He suggests that the margin of appreciation operates only at the level of law and not at the level of facts. Day 4, page 56, lines 5 to 6. That is in our submission incorrect. Once again, we are not here saying where precisely the margin should be. But it is quite clear from the cases to which Mr Bethlehem referred on Tuesday that margin of appreciation operates absolutely on the level of facts. Let me recall an example from one such case, the *United States - Wheat Gluten* case. This was the Panel decision that addressed the issue of confidential information. In this case the Panel noted:

"... we do not see our review as a substitute for the investigation conducted by the United Nations International Trade Commission. Our role is limited to a review of the consistency of the United States measure with the Agreement on Safeguards and Article 1 and XIX of the General Agreement on Tariffs and Trade. Within the framework established by the Agreement on Safeguards, it is for the United States International Trade Commission to determine how to collect and evaluate data and how to assess and weigh the relevant factors in making determinations on serious injury and causation. It is not our role to collect new data nor to consider evidence which could have been presented to the United States International Trade Commission by interested parties in the

investigation but was not."

Professor Sands also sought to confine the margin of appreciation or standard of review principles to human rights and trade law. He suggested that no reference was made to these in any case on general international law in which the doctrine had been cited. We point out in this context what was said in one of the cases that Ireland has put into the record, the *Heathrow Airport Users Charges* case. Ireland urged the Tribunal to look at this case as an example of the approach that might be adopted (~Day 4, page 59, lines 26 to 29). Mr Bethlehem has already made submissions on the point, but, in the light of Professor Sands's submissions yesterday, I would nevertheless refer the Tribunal to paragraph 2.2.6 of Chapter 5 of the Award, just over the page from the passage that Ireland took you to on Monday. It reads as follows:

"With regard to the conduct required by the obligation, in the view of the Tribunal a Party is entitled to recognise the normal margin of appreciation enjoyed by charging authorities in relation to the complex economic situation that is relevant to the establishment of the charges. But subject thereto, the Party is obliged to use as much effort as it would if it had an unconditional interest of its own in ensuring that relevant user charges did not exceed what was just and reasonable (eg because the Party itself was going to have to meet the cost of the charges): if a Party used less effort than it would have used, it cannot claim to have used its best efforts."

There is ample support in international law for the standard of review or margin of appreciation doctrine that the United Kingdom advances in this case.

My final point is to deal with the suggestion made yesterday by Professor Sands for the first time that material may have been excised from the public domain versions of the PA and ADL reports not because its disclosure would affect BNFL adversely, but because, if it were revealed, it would, as he put it, "destroy the case economically for the plant". Day 4, page 68, lines 16 to 19. We reject that imputation most vigorously.

The only basis for the suggestion is Professor Sands's reading of a phrase used by the authors of the ADL report, who are not lawyers, quoted verbatim by Mr Richard Wood in correspondence ("The case for the MOX plant"). Professor Sands places emphasis in the word "case". If the Tribunal consults the wording used in the Decision on Justification for the Manufacture of MOX Fuel, it will find that Ministers used expressions which made it very clear that information was not withheld so as to put at a disadvantage those objecting to the proposal. They used, for example,

the following expression, "the only information withheld was that judged to be commercially sensitive for BNFL, the publication of which would prejudice BNFL's commercial opportunities with respect to the manufacture of MOX fuel."

One last point on margin of appreciation requires comment lest it go by default. On Wednesday, Mr Griffith asked Mr Bethlehem where the Tribunal could find a reasoned explanation of the decisions taken in this case (Day 3, page 37, line 7). Mr Bethlehem responded by referring the Tribunal to paragraph 35 of his speaking note which, in turn, referred both to the reasons set out on the face of the PA and ADL reports themselves and to two letters from the United Kingdom to Ireland. I would simply add two points to his answer.

The first is that there is a cogent principle to the effect that, when required, reasons given must be intelligible and adequate in the circumstances of the particular case. One of the seminal tests on *Judicial Review of Administrative Action* in English law by De Smith, Woolf and Jowell addresses the question of the standard of reasons required in the following terms:

"It is clear that the reasons given must be intelligible and must adequately meet the substance of the arguments advanced. However, it is still difficult to state precisely the standard of reasoning the court will demand Much depends upon the particular circumstances and statutory context in which the duty to give reasons aris es ...

Some general guidance may be derived from a consideration of the purposes served by the duty to give reasons. Thus, reasons should be sufficiently detailed as to make it quite clear to the partes - and especially the losing party - why the tribunal decided as it did, and to avoid the impression that the decision was based upon extraneous considerations, rather than the matters arising at the hearing. Reasons must also enable the court to which an appeal lies to discharge its appellate function, and when this is limited to questions of law, it will only be necessary to explain the exercise of discretion and to set out the evidence for the findings of fact in enough detail to disclose that the tribunal has not acted unreasonably, ... courts should not scrutinise reasons with the analytical rigour employed on statutes or trusts instruments, and ought to forgive obvious mistakes that were unlikely to have misled anyone. Brevity is an administrative virtue, and elliptical reasons may be perfectly comprehensible when considered against the background of the arguments at the hearing."

The passage does not of course address precisely the situation with which we are faced

today. There are, however, some general statements in that passage which may be extracted with benefit for the Tribunal. As it has done in its Counter Memorial, the United Kingdom contends that, in the circumstances here in issue, the reasons provided for the redactions on the face of the PA and ADL reports and in the two letters referred to in Mr Bethlehem's answer were both intelligible and adequate for the purposes for which they were required.

The second point that I can make even more briefly is that, even where there is a failure to give reasons, it is well established, certainly in English administrative law, that this itself would not require the decision to be set aside. I simply note for the record that there is some discussion of this point in the text to which I referred a moment ago, De Smith, Woolf and Jowell on *Judicial Review of Administrative Action* at paragraph 9-054.

The United Kingdom's conclusions remain as in paragraphs 33 and 34 of our rejoinder. For the reasons advanced in our written and oral pleadings, the United Kingdom respectfully requests the Tribunal to adjudge and declare that it lacks jurisdiction over the claims brought against the United Kingdom by Ireland and/or that those are inadmissible; or, in the alternative, to dismiss the claims brought against the United Kingdom by Ireland.

The United Kingdom further invites the Tribunal to reject Ireland's request that the United Kingdom pay Ireland's costs and instead order Ireland to pay the United Kingdom's costs.

MR GRIFFITH: Mr Plender, are the extracts from De Smith, Woolf and Jowell that you refer to us in your last paragraphs included in our bundles?

MR PLENDER: They are not and I have not thought it right to burden you with more paper because I rely upon them only as statements of some very general principles. If it would be helpful to the Tribunal for us to supply it, of course, we shall.

MR GRIFFITH: For myself I never know whether I have got the last edition. It is a bit like turning left two streets before you get to the intersection. If I could perhaps have the relevant pages and the frontis piece.

MR PLENDER: As is apparent from my note, that can be done today.

MR GRIFFITH: The second question may be premature but you aroused my curiosity. Firstly, I would like to say that how very much we appreciate counsel working themselves to exhaustion to assist us during this week. I see that the claim for costs is maintained by each party. Is the costs provision in Article 32(8) a usual costs provision? Perhaps the parties will think about it, because it is probably premature.

On one reading it might be suggested that it has a default provision that each party pays their own costs unless there are particular reasons rather than costs survive the event of the default position. I do not think that we need submissions about this now, but it just crosses my mind that it may not be a normal cost provision, particularly dealing with the issue of costs in an arbitration under an international treaty of this sort.

MR PLENDER: We believe that it is similar to the Rules of Procedure of the ICJ. The provision in Article 32 is for expenses not costs, but in this case the parties have themselves expressly agreed that the Tribunal shall have jurisdiction to award costs.

MR GRIFFITH: So we do not rely on sub-article 8 at all.

MR PLENDER: No, you do not need to rely upon it. It is the express agreement of the parties.

MR GRIFFITH: Perhaps this will be dealt with later and it is quite premature, but is it your understanding that that is a default position that, basically, costs should follow the event?

MR PLENDER: That is a position from which we would start. We of course wait and see the Tribunal's award, but the position from which we would start would be that costs would follow the event.

THE CHAIRMAN: I am not asking for submissions. It is just that my curiosity is aroused because of the nature of this enquiry as compared with a normal international commercial arbitration.

MR PLENDER: We are well aware, of course, that provision for an international Tribunal to award costs has been uncommon until quite recently and still may perhaps be considered uncommon, but this is a case in which the parties have so agreed.

LORD MUSTILL: Again just to be noted, and no more, since we are on noting questions of costs, there may be two events, of course, because it may be that Ireland win on the first phase and would open the door to a second phase and you would win on that.

MR PLENDER: Yes.

LORD MUSTILL: It is early days, I would have thought.

MR PLENDER: It is and it may be that, if there were to be a second phase, one party or the other may wish to submit that it would be premature to make any application in reflation to costs at that stage while waiting the outcome. These events are so far in the future that it is not possible at the moment to make any submissions definitively as to costs. Article 22 of the Rules of Procedure embodies the rules on which I say we have agreed. It is simply that the Tribunal makes such award as appears to it appropriate in respect of the costs incurred by the parties in presenting their respective cases. A

broad term, but a term that is expressly agreed by the two parties.

LORD MUSTILL: I have no questions. I would just like to associate myself with the observations of Dr Griffith of the very hard and excellent work put in on both sides.

MR PLENDER: I am very grateful to all members of the Tribunal. I would like to say publicly how much indebted I am to Mr Bethlehem and Mr Wordsworth. May I also on behalf of the United Kingdom thank members of the Tribunal, much more of whose time has been occupied than he would have dared to contemplate in advance. We are most grateful for the huge efforts which have been applied by the Tribunal.

THE CHAIRMAN: Of course I associate myself with the expressions of gratitude of my two colleagues to Dr Plender and the counsel for the United Kingdom and, of course, to Mr Fitzsimons, Professor Sands, the Attorney General and counsel for the Republic of Ireland. This is a case that both parties have described at various times in the past week and in their submissions as raising a narrow question, whether that is, in fact, correct remains to be seen. But it is quite clear that it raises a very subtle problem and one that is in many ways a first impression in public international law. The Tribunal has been enormously helped by the briefing and the oral argument of the parties on these issues. Speaking for my colleagues and myself, we felt that all this was accomplished with a very high degree of professionalism and courtesy and honour and it will greatly facilitate the task that we appreciate is challenging and difficult.

There are a number of technical matters that I would like to review before we conclude the hearing. On some of these points I simply note them for the record. The Secretary of the Tribunal has indicated to you the status of costs. This is a matter that she will take up with you in due course. The unredacted versions, which were made available and accord with the order issued by the Tribunal, will be at the end of the hearing returned to the Tribunal and the Tribunal will, pending a decision as to whether there will be a second phase, return the unredacted versions to the United Kingdom. Should there be a second phase, the procedure of making those documents available for scrutiny by the Republic of Ireland's independent counsel will be taken up.

With respect to the notes that independent counsel for Ireland were authorised to take, those notes will be at the end of this hearing given to the secretary of the Tribunal who will keep them in a sealed envelope pending the determination as to whether there will be another phase. Should there be another phase, the notes will be returned to the independent counsel for the Republic of Ireland until

the end of that phase, at which point, in accordance with the agreement, they will be returned to the secretary and will be destroyed. Of course, in the eventuality that the Tribunal should decide that all or parts of the unredacted versions be made public, then an entirely different disposition will be called for.

With respect to the question of whether the award will be delivered in public session will be simply transmitted to the parties and publicised in some appropriate electronic form. This is a matter that the secretary to the Tribunal will take up with the parties and the Tribunal will take account of the parties' wishes on this matter.

I thought that I had said that all the unredacted copies of the reports are returned to the United Kingdom. The secretary to the Tribunal indicates that I may not have expressed that. I thought that I had, but that is certainly the intention.

Once again I would like to thank counsel for very splendid work in these very intense circumstances and acknowledge again our gratitude for the extent to which this will facilitate our task.

With those words, I conclude these hearings.

We are adjourned.

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