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

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

IRELAND v UNITED KINGDOM

REPLY OF IRELAND

18 JULY 2002

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INTRODUCTION

1. In its Counter-Memorial in response to Ireland's Memorial the United Kingdom relies on three legal arguments:

   (1) Article 9 of the 1992 OSPAR Convention does not establish a direct right to receive information.

   (2) In any event, the information requested by Ireland does not fall within the scope of Article 9.

   (3) Article 9 confers an area of discretion on the United Kingdom, into which the Arbitral Tribunal may not inquire. In deciding that the requested information is commercially confidential, the United Kingdom was acting within this permitted area of discretion. In any event, viewed objectively, the information at issue is commercially confidential.

2. Ireland's Reply is limited to identifying and addressing the main issues which divide the parties, in relation to these three points. The Reply comprises this document together with one appendix and three Annexes. The Reply is not intended to be an exhaustive response to the numerous minor points raised by the United Kingdom, which may be addressed as necessary during the oral phase. For the avoidance of doubt, therefore, the silence of this Reply in relation to any assertions of fact or legal claims should not be taken as indicating an acceptance of their veracity or merit.

3. Rather, this Reply concentrates on the main issue which Ireland considers to be at the heart of the dispute, namely the question of whether – on an objective standard - the United Kingdom's claim that the information excised from the PA and ADL Reports can properly be withheld on the basis of "commercial confidentiality". It is apparent from the treatment given by the United Kingdom to this issue in its Counter-Memorial that it accepts this to be the heart of the case before the Tribunal.

4. This Reply also addresses the two other arguments raised by the United Kingdom, namely whether the information in issue is "environmental information", and whether Article 9 of the 1992 OSPAR Convention establishes a direct right to receive information upon which Ireland may rely. Ireland notes, however, that the claim as to "environmental information" was raised for the first time in September 2001, after Ireland had made its application.[1] Throughout the period during which the parties were corresponding and seeking to resolve the matter by other means the issue was never once raised by the United Kingdom: the United Kingdom, in its dealing with Ireland, plainly accepted that the information requested by Ireland fell within the scope of Article 9 of the 1992 OSPAR Convention. As regards the claim concerning Ireland's right to invoke Article 9 at all, it is made for the first time in the Counter-Memorial. The point

[1] United Kingdom, letter of 5th September 2001, Ireland Memorial, Annex 4, p. 171.

has never previously been raised by the United Kingdom. Both claims are without merit.

5. Before addressing the substance of the issues, Ireland wishes to make four preliminary points. The first two relate to the approach taken by the United Kingdom to its pleading.

First, the United Kingdom seeks to put aside "a wide range of matters that are irrelevant to the dispute" (Counter-Memorial, para. 1.21). These matters – risks of marine pollution from the MOX plant, risks of accidents, compliance with safety standards, etc) – all go to the environmental consequences of the MOX plant. The ADL and PA Reports were commissioned by the United Kingdom Government with a view to determining whether these consequences were justified. The ADL and PA reports concluded that they were. The matters which the United Kingdom seeks to put aside are material to this case: they explain the context in which Ireland seeks to obtain the information requested, with a view to determining what the consequences of the MOX plant could be and whether all the environmental costs have been taken into account.

Second, the United Kingdom seeks to put aside all consideration of the THORP plant (Counter-memorial, para. 1.23). It cannot do so. Ireland wishes to know whether – and if so to what extent - the costs of producing at THORP the plutonium feedstock which will be used to manufacture MOX fuel have been taken into account.

The third point arises by reason of the United Kingdom Government's publication on 4 July 2002 of a White Paper entitled "Managing the Nuclear Legacy: A Strategy for Action" (attached at Annex 2). The White Paper sets out the details for the transfer into public ownership – to a Liabilities Management Agency (LMA) - of the MOX plant. By this transfer the LMA will take on full legal and financial responsibility for the MOX plant (White Paper, at para. 5.7). In addition, the White Paper confirms that the conclusion of any new contracts beyond the scope of the economic case referred to in the Decision of 3 October 2001 (i.e. contracts identified in the ADL and/or PA Reports) will require the approval of the UK Secretary of State and that such approval will not be granted if they are shown to be inconsistent with the priority which is to be given to the clean up of the Sellafield site as a whole (White Paper, at paras. 5.15-5.23). The White Paper is highly relevant to this case, for two reasons. First, it confirms that the operation of the MOX plant is not to be treated as normal commercial activity. And second, it indicates the direct relationship between existing MOX contracts, future MOX contracts, and the future activity (and discharges) of both the MOX and THORP plants. The information on what is or is not a new contract will trigger an examination – on environmental grounds - by the Secretary of State as to whether to authorise any new contract.

The fourth preliminary point is this: as set out in paragraph 24 below, there are five categories of information (percentage of plutonium already on site; maximum throughput figures; life span of the MOX facility; number of employees; transport arrangements) which are not included in any of the eight

categories of information upon which the United Kingdom relies to justify its refusal. Ireland submits that on the basis of the approach it has taken in its Counter-Memorial there is no justification for the United Kingdom not to make this information available to Ireland forthwith.

I. ARTICLE 9 CREATES A RIGHT TO RECEIVE INFORMATION

6. The United Kingdom and Ireland have been engaged in communications over Ireland's request for information since 1997. Since then there have been meetings between the governments on this issue on numerous occasions, and Ireland has written to – and received responses from – the United Kingdom on 4 occasions in which Article 9 of the 1992 OSPAR Convention has been invoked.[2] At no time (since the correspondence began on 25 May 2000) has the United Kingdom asserted that Ireland is not entitled to make a request pursuant to Article 9. Now, for the first time (more than two year later), the United Kingdom in its Counter-Memorial asserts that Article 9 of the 1992 OSPAR Convention does not create a direct obligation upon the United Kingdom to provide information to Ireland. This is a novel claim, based on a misconceived distinction between "direct" and "indirect" rights to information under the Convention.

7. A number of points may be made in response. First, Article 9(1) of the 1992 OSPAR Convention requires States to "ensure that their competent authorities are required" to make specified information available to legal and natural persons. Ireland is a legal person and is entitled to ask for, and to receive, information from the competent authorities of the United Kingdom. That, presumably, is not in dispute. The United Kingdom is therefore under an obligation to ensure that its competent authorities make available to Ireland the information set forth in Article 9(2). In this case the competent authority is the United Kingdom Government itself.

8. Second, in the event that the competent authority of the United Kingdom (in this case the Government itself) does not make the information available to Ireland, Ireland is entitled to take steps to enforce the United Kingdom's obligation to "ensure" that the information is made available to it. The United Kingdom appears to recognise such a right, at least insofar as Ireland's claim relates to the analogous provision on access to environmental information under Directive 90/313/EEC. The United Kingdom says that Ireland could go to the English courts (it states that "ample remedies" are available in domestic law), or it could complain to the European Commission (Counter-Memorial, para. 3.13). The United Kingdom also recognises that Ireland could commence an inter-State claim (under the EC Directive) before the European Court of Justice (Counter-Memorial, para. 3.14).

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[2] See Ireland, letter of 25 May 2000, Ireland Memorial, Annex 4, p. 154; United Kingdom, letter of 27 October 2000, *ibid*., p. 157; Ireland, letter of 9 February 2001, *ibid*., p. 158; United Kingdom, letter 21 May 2001, *ibid*., p. 160; Ireland, letter of 7 August 2001, *ibid*., p. 168; Ireland, letter of 26 September 2001, *ibid*., p. 169; United Kingdom, letter of 5 September 2001, *ibid*., p, 171.

9. This last point illustrates the lack of legal (or policy) logic in the United Kingdom's approach. Given that the language of Directive 90/313/EEC and Article 9 are, in this respect, almost identical, on what basis can it be argued that Ireland could have a right and a cause of action under one instrument (Directive 90/313/EEC) but not the other (Article 9, 1992 OSPAR Convention)? Or that Ireland may bring proceedings under the former (to the ECJ) but not under the latter (to this arbitral tribunal)? The approach becomes all the more curious when one takes into account a material difference between Directive 90/313/EEC and Article 9 of the 1992 OSPAR Convention: Article 4 of the Directive provides that 'A person who considers that his request for information has been unreasonably refused or ignored, or has been inadequately answered by a public authority, may seek a judicial or administrative review of the decision in accordance with the relevant national legal system.' Article 9 of the 1992 OSPAR Convention contains no such (or equivalent) provision. Since the United Kingdom accepts that Ireland would have an actionable right before the European Court of Justice if its request had been made under the Directive, even in the face of its Article 4, it cannot possibly sustain the claim that there is no actionable right under the 1992 OSPAR Convention, which is silent on the availability of any forum for settling claims or disputes.

10. The United Kingdom seeks to argue that Article 9(1) merely requires a Party to establish a system for handling requests for information under the 1992 OSPAR Convention, however inadequate that system in any given case. The United Kingdom states: "the only possible cause of action for breach of Article 9 would be in respect of a failure to provide for a domestic regulatory framework dealing with the disclosure of information" (UK Counter-Memorial, para. 3.41). It is not clear whether this assertion is limited to Ireland (as a legal person) or relates to any legal or natural person entitled to information under the 1992 OSPAR Convention. If it is the latter, this approach would mean that under the 1992 OSPAR Convention no remedy would be available to any person requesting that information, regardless of whether the refusal is reasonable or justified. Ireland submits that this approach would thwart the object and purpose of the 1992 OSPAR Convention. If it is the former, the result would be particularly surprising in light of the clear and precise wording of Article 9, which provides clear rules on time limits, charges and the information to be provided. These detailed requirements are incompatible with an approach which leaves the entire matter up to the discretion of the State party, and with no possibility of a remedy. If, on the other hand, the claim is made only in relation to Ireland, it is unclear (for the reasons set out above) why the language of Article 9, taken together with Article 32, is to be interpreted as restrictively as the United Kingdom proposes, when its plain meaning directs otherwise.

11. The United Kingdom's argument on this point appears as an afterthought, the implications of which may not have been fully considered (see above, para. 9). It is also misconceived. There is nothing in the plain meaning of Article 9 or Article 32 of the 1992 OSPAR Convention which limits the right of Ireland to bring a claim where it has been refused information by the relevant United Kingdom authority, particularly where that authority is the Government itself. The United Kingdom's argument can be summarily rejected by the Tribunal.

II. THE REQUESTED INFORMATION FALLS WITHIN THE SCOPE OF ARTICLE 9(2) OF THE 1992 OSPAR CONVENTION

12. Ireland's submissions on this issue are straightforward. Ireland does not seek to argue that the 1992 OSPAR Convention is 'a freedom of information treaty of general application' (Memorial, para 4.4). Nor is Ireland engaging in a 'fishing expedition' (Memorial, para 4.3). Ireland seeks very clearly identified information contained in the ADL Report and in the PA Report because these reports – and in particular the former – provided the sole basis upon which the United Kingdom decided on 3 October 2001 to proceed to authorise the operation of the MOX plant. Without that decision, which was based on the two reports, the MOX plant would not have been authorised. It is not in dispute that the operation of that plant will have some environmental consequences (however minimal the United Kingdom may claim them to be). It cannot be argued – and the United Kingdom does not argue – that the operation of the MOX plant is an activity which may not have an adverse effect on the environment, or which could have such an adverse effect. That is recognised by the document publishing the United Kingdom's decision to authorise the MOX plant, which devotes a significant effort to addressing the environmental concerns.[3] Ireland would like to see the uncensored versions of the ADL and PA Reports because it believes that the information omitted sheds light on (1) whether all the environmental costs of the MOX plant have been accounted for, and (2) the operating consequences of the MOX plant (for example, time, transports etc) and (3) whether the plant is in fact economically justified (i.e. whether all the economic costs – including environmental costs economically quantified – have been taken into account, and whether the economic benefits have properly been assessed). The Decision to authorise the MOX plant was premised on the ADL and PA reports. Without those reports there would have been no authorisation, and no discharges of radioactive substances into the Irish Sea. It is almost absurd to argue that the ADL Report – on the basis of which a decision having major environmental consequences was adopted – is not information on an activity likely to affect the marine environment.

13. The approach taken by the United Kingdom – as predicted by Ireland – is to take a "salami" approach to the issue, and to slice up the information requested by Ireland. Ireland submits that the approach is wholly misconceived. It is the ADL and PA Reports as a whole which contain the information on the basis of which the MOX plant was authorised. The reports were created as a whole and cannot be sliced into individual pieces of data. Ireland does not need to address the question of whether each individual piece of data constitutes "environmental information": the question is whether the reports as a whole are to be treated as such. Ireland submits that the requested information – the reports as a whole – clearly falls within the scope of Article 9(2). There is no problem of proximity, as the United Kingdom suggests (Counter-Memorial, para 4.4).

14. The United Kingdom notes that Ireland has only argued that the requested information falls within the second category in Article 9(2), and then proceeds to

[3] See Decision of 3 October 2001, at Annex 5, Ireland Memorial.

elide the three categories into one. The United Kingdom's argument is essentially that "the OSPAR Convention concerns one thing, the prevention and elimination of pollution from the maritime area and its protection against the adverse effects of human activities, whilst Ireland seeks to know quite another, sales prices and volumes, etc." (Counter-Memorial, para 4.8)

15. Of course the 1992 OSPAR Convention *concerns* these matters, in the sense that the protection of the marine environment is its stated aim. However, it is quite wrong to say that, because the 1992 OSPAR Convention aims to protect the maritime area, only information directly relating to the maritime area – pollution levels, etc – is within the scope of the Convention. This argument is unsustainable in light of the wording of Article 9(2), which Ireland considers to be very clear and unambiguous. "Environmental information" covers not only information "on the state of the maritime area", which appears to be the only class of information which the United Kingdom considers to fall within Article 9, but information on "activities affecting or likely to affect it". Data on matters such as transports, operating life of the plant, output of the plant, sales prices and volumes which go to the question of justification, do not constitute information "on the state of the maritime area", and Ireland has never suggested that they do. However, they do constitute information on an "activity" – MOX production – with a very real potential to harm the maritime area, as explained at length in Ireland's Memorial, and as recognised by the United Kingdom itself in the considerable efforts it claims to have taken to protect the marine environment from such consequences.

16. In this regard, Ireland was surprised – and concerned – to read in the United Kingdom's Counter-Memorial that "the PA and ADL Reports do not contain information on the costs of meeting safety standards. This is apparent from the texts of those Reports, which identify the nature of any information excised" (Counter-Memorial, para. 1.16 at footnote 9). In fact, it is not apparent from the Reports that safety costs have been treated in this way. The United Kingdom's statement in the Counter-Memorial is ambiguous, and suggests that safety costs may not have been taken into account <u>at all</u> in the exercise of "justifying" the MOX plant. Ireland would welcome clarification, as those safety standards – and their costs – are material to the protection of the marine environment of the Irish Sea. Their exclusion would therefore be a matter of considerable concern. Ireland feels bound to ask: what other costs – for example insurance to cover the consequences of any accident or unintended discharges, the costs of monitoring the effects of discharges, etc – might also have been excluded? At the very least the statement by the United Kingdom confirms the relevance for the environment of the information that has been included (or not included) in the PA and ADL reports, and the reason why Ireland wishes to see it.

III. ON AN OBJECTIVE APPROACH THE UNITED KINGDOM IS NOT ENTITLED TO INVOKE THE COMMERCIAL CONFIDENTIALITY EXCEPTION IN ARTICLE 9(3)

17. This section sets out Ireland's response to the United Kingdom approach to commercial confidentiality. Ireland argues that, firstly, it is for the arbitral tribunal to consider all the facts and issues in the case with a view to deciding for itself whether the information in question can or cannot be withheld on the basis of commercial confidentiality. This section then goes on to note that the United Kingdom's evidence does not appear to advance *any* arguments of commercial confidentiality in relation to certain pieces of information requested by Ireland. This section then summarises the conclusions of a Second Report by Gordon MacKerron ('the Second MacKerron Report'), which refutes the arguments of the United Kingdom's witnesses on commercial confidentiality. After considering the nature of the MOX 'market', the Second MacKerron Report argues that the United Kingdom arguments are contradictory and unconvincing. MOX fuel does not compete with uranium fuel. Further, competition *within* the limited MOX 'market' is negligible. The Report concludes that release of the information sought will harm neither BNFL's position in relation to 'competitors' or to customers. It falls clearly outside the exception contained in Article 9(3) of the 1992 OSPAR Convention, and Ireland is entitled to disclosure.

(1) The Function of the Arbitral Tribunal

18. The United Kingdom argues that Article 9(3) confers on States a right to withhold information on specified grounds, and that "the task of the Tribunal is not to engage in a *de novo* assessment of the issues for the purpose of substituting its view on commercial confidentiality for that of the United Kingdom. Its task is rather to assess whether the United Kingdom has acted properly, *within the range of its permitted discretion*, in withholding publication on grounds of commercial confidentiality." (Counter-Memorial, para 1.6, emphasis added).

19. Ireland submits that this is an attempt to prevent the Tribunal from making its own determination on the merits, by introducing into the application of the 1992 OSPAR Convention the "margin of appreciation" approach taken by the European Court of Human Rights to the interpretation of the European Convention on Human Rights. But that approach is misconceived and not countenanced by the 1992 OSPAR Convention or international law generally, and it is unsupported by any authorities. Article 32 clearly envisages that any Arbitral Tribunal set up under the 1992 OSPAR Convention will have jurisdiction to deal with the merits of the dispute. While the 1992 OSPAR Convention leaves States to decide which national authorities are to deal with requests for access to information, the provision of relevant information is a mandatory requirement. It is a specifically defined duty, the failure to fulfil which must be subject to a remedy. The duty to provide information is, of course, subject to the exceptions in Article 9(3), which must be interpreted in accordance with national and international law, in the light of international practice. The exceptions include "commercial confidentiality", but those exceptions are to be construed and applied on the basis of objective criteria. The reference to national

law does not deprive or in any way limit the international tribunal of jurisdiction over the merits of the issue, or confine remedies to the national courts, of which there is no mention in the 1992 OSPAR Convention. It is for this Tribunal to decide on the basis of the evidence before it whether or not the MOX plant is subject to any real competition and, if so, whether the release of the information requested (or some of it) could affect competition. This is not a case in which the United Kingdom is entitled to exercise any discretion.

20. Further, as set out above, unlike the EC Regulation, which intends parties to have a remedy on the merits in the national courts, the 1992 OSPAR Convention does not make any reference to the national courts as a means of dispute settlement. The alternatives are, therefore, that under the 1992 OSPAR Convention there is to be no remedy in any forum on the merits of a refusal to provide information, *or* that the Tribunal does in fact have jurisdiction on the merits. Ireland submits that the latter is clearly correct.

21. Ireland submits that the standard to be applied by the Tribunal is an objective one. The correct question is whether the information withheld is commercially confidential, not whether the United Kingdom is entitled to think that it is commercially confidential. The Tribunal is perfectly entitled to substitute its view for that of the United Kingdom if it decides that, in fact, the information in question is *not* entitled to protection as confidential information, because it forms the view that release of the information will not competitively disadvantage the operator of the MOX plant. There can be no question – as the United Kingdom appears to suggest – of the Tribunal not being convinced of the confidentiality of the material, but deferring to the United Kingdom's flawed assessment.

(2) The Second MacKerron Report: Release of the Information Will Not Affect BNFL's Position in Relation to Either Customers or 'Competitors'

22. Ireland submits that the economic analysis of the "market" for MOX fuel is at the heart of the dispute with the United Kingdom. This issue, in Ireland's view, is determinative of the dispute. *Even if* the information in question is capable of falling within the definition of "commercial confidentiality", Ireland submits that, since there is no competitive market for MOX, arguments of commercial confidentiality do not apply. The commercial confidentiality exception in Article 9(3) of the 1992 OSPAR Convention cannot, therefore, apply to this case.

23. In support of its argument the United Kingdom relies on three statements, annexed to its Counter-Memorial, by Mr Wadsworth, Dr Varley and Mr Rycroft.[4] These statements take issue with various aspects of the MacKerron Report, annexed to Ireland's Memorial. But it is important to note that, with the exception of Mr Wadsworth, whose evidence contradicts that of Messrs Varley and Rycroft, the general approach taken by Mr MacKerron is not challenged. This part of Ireland's Reply considers the conclusions of the Second MacKerron Report.

[4] As Mr Mackerron notes, neither Mr Varley nor Mr Rycroft can be said to be entirely independent of BNFL, and none of the three witnesses have any real background in economics.

24. First, however, Ireland notes that arguments set out in the United Kingdom's evidence are specifically directed to eight categories of information. The Second MacKerron Report explains (at Section 3, 'Information Issues') that these categories do not accurately reflect Ireland's request. However, Dr Varley's Report is specifically directed at explaining why information in these eight categories *alone* is commercially confidential (see Varley, para. 1.5-1.6). At para 73 of its Memorial, Ireland summarised the types of information which it requested. The following information from that list does not, in Ireland's view, fall within the eight categories listed by Dr Varley:

    (1) Percentage of plutonium already on site (item vii on Ireland's list);

    (2) Maximum throughput figures (item viii on Ireland's list);

    (3) Life span of the MOX facility (item ix on Ireland's list);

    (4) Number of employees (item x on Ireland's list); and

    (5) Arrangements for transport of plutonium to, and MOX from, Sellafield (item xiii on Ireland's list).

    The United Kingdom does not, therefore, advance any arguments as to the commercial confidentiality of these items of information. Accordingly, Ireland submits that it is, without more, entitled to be supplied with this information. Ireland invites the United Kingdom to consider making this information available to Ireland without awaiting the outcome of these proceedings, in the context of the Order by the International Tribunal for the Law of the Sea (3 December 2001, para. 89(1)(a) that "Ireland and the United Kingdom shall cooperate and shall, for this purpose … exchange further information with regard to possible consequences for the Irish Sea arising out of the commissioning of the MOX plant".

(a) Criteria for the Withholding of Information on the Basis of Commercial Confidentiality

25. In summary, the Second MacKerron Report concludes that the three United Kingdom witnesses rely on economic assumptions and arguments which are untenable and mutually contradictory (See Section 4.1 and para. 8.3). Mr Wadsworth argues for an extremely wide application of the commercial confidentiality exception to all business situations where parties negotiate without perfect understanding of each other's key business drivers, and where apparently insignificant data may be used in a "model" or "recipe" which could be illuminating to competitors or customers. (Wadsworth, paras. 9 and 12) This would mean that virtually *all* data relevant to a business would need to be kept confidential. And, as Mr MacKerron notes, the United Kingdom admits in its evidence that, without the information requested, the economic case for the SMP cannot be assessed (see paras. 32 and 33 below).

26. In contradiction to Mr Wadsworth's proposed definition, Dr Varley and Mr Rycroft do not challenge the approach taken by Mr MacKerron. They recognise it was applied to the THORP case, and seek (unpersuasively in Ireland's submission) to distinguish that case (where a large amount of information was put

in the public domain) by the fact that BNFL and Cogema were not in competition, and that contracts had already been signed, preventing any information from being of use to customers. (Varley, para. 4.10ff and Appendix B; Rycroft, para. 5.1ff). Neither of these arguments depend on any assertion that BNFL and Cogema had the "perfect understanding" of each other's business, or that customers could not have used small pieces of data to deduce useful information about BNFL (Mr Wadsworth's criteria). In approving the approach taken by Messrs Varley and Rycroft, the United Kingdom therefore accepts that information does not have to be withheld on the grounds of commercial confidentiality when, *inter alia*:

(1) there is no competition;

(2) customers cannot gain advantage from the release of information. (See Second MacKerron Report, para. 4.18-9).

The difference between the parties is that the United Kingdom considers (and bases its case on) the claim that both criteria apply to the MOX "market", whereas Ireland considers that neither criteria is satisfied.

(b) MOX Fuel Does Not Compete with UOX Fuel

27. Both parties accept that the definition of the 'relevant market' is critical. The MacKerron Report argues that MOX is *not* part of the general market for nuclear fuel, but rather part of the market for the management of spent fuel. Any arguments that it is in direct competition with fresh uranium fuel confuse technical possibility with real world economic behaviour. (Section 5.2, especially para. 5.2.2). Further, the United Kingdom's arguments only go in one direction – uranium substituting for MOX. They do not even attempt to argue that MOX could be substituted for uranium in reactors currently using the latter fuel. In summary, the MacKerron Report concludes (at sections 5.2-5.3) that MOX fuel does not compete with UOX or other fuel because:

(1) There is no reason to consider that price increases in uranium fuel would make customers switch, or threaten to switch, to MOX. No uranium user without ownership of separated plutonium has ever done so. (para. 5.2.2, second bullet)

(2) The technical requirements of MOX production are sufficiently onerous to make the entry of new competitors into the market as a result of rising MOX prices "virtually unimaginable" (para. 5.2.2, final bullet);

(3) Dr Varley states that "MOX fabrication prices have been high due to demand exceeding supply". If this is correct, MOX and uranium fuel are not competitors, since the putative excess demand for MOX would have been met by an expanded supply of uranium fuel. (para. 5.2.3)

(4) If uranium and MOX did genuinely compete, it would be expected that similar amounts of information would be available about both. This is not the case, since the information requested by Ireland in relation to MOX is generally available in relation to the UOX market. (para. 5.2.4)

(5) MOX prices remain higher than uranium fuel in any given market situation. MOX use also carries additional costs compared to uranium use. (para. 5.2.8)

(6) In theory, MOX could in the long term become sufficiently cheaper than uranium to allow it to compete. However, since uranium is a competitive market and MOX is not, prices are much more likely to be checked in the competitive market, making a price reversal extremely unlikely. (para. 5.2.9)

(7) In the longer term, if MOX has difficulty competing with uranium when the plutonium input to MOX is costed as free – because of past reprocessing commitments – it will be virtually impossible for MOX to compete when the substantial costs of separating the plutonium have also to be added to the equation. (para. 5.3.2)

28. For these reasons, MOX cannot be considered to be in competition with uranium fuel. It is part of the market for management of spent nuclear fuel, rather than any market for fresh fuel, and the competition issues therefore fall to be assessed in the context of the former 'market'. (para. 6.1.1)

(c) Competition within the MOX 'Market' is Negligible

29. The Second Mackerron Report then addresses (in Section 6) the arguments relating to competition *within* the 'market' for MOX. It considers that the only potential competitor is Cogema, and that the United Kingdom has advanced no contrary evidence on this issue. (para. 6.2.2)

30. Dr Varley argues for two types of competition – direct or "head to head" competition for MOX business itself, and indirect competition in which customers place pressure on the two companies by means of substitution, swaps, loans and assignments. (para. 6.2.3) The Report makes the following key points:

(1) In order for direct competition to take place, the parties accept that it must be possible to transport customers' separated plutonium between Sellafield and France. However, a licence to do this would take at least five years to obtain, if it were possible to obtain it at all (and even more doubtful after the events of 11 September 2001). The costs of such transports would also have to be low enough to make movement financially worthwhile; they are not. (para. 6.2.4-6)

(2) The options for 'indirect' competition are as yet hypothetical, and if they occur at all, will be on a small scale, will need the agreement of both BNFL and Cogema, and do not significantly undermine the market power that BNFL can exercise because of its physical possession of separated plutonium. (para. 6.2.7-9)

(3) The long-term market for joint reprocessing/MOX contracts is in serious doubt on the demand side, as a result of competition from storage, the other (and favoured) option for managing separated plutonium. Discounting planned MOX plants in the USA and Russia, which will dispose exclusively of military plutonium on a non-commercial basis,

the only feasible markets are Japan and France. Dr Varley himself considers that the prospects of winning business in France are negligible. This leaves Japan, but that country is currently building MOX plants to handle all its domestic separated plutonium. (para. 6.3.1-3)

(4) There are further factors making BNFL and Cogema very unlikely to act in a competitive manner: they have a history of close collaboration, entry barriers for new firms are exceptionally high, and they are likely to maximise joint profitability by collaborating to some degree. Therefore "competitive behaviour is only one possible outcome." (para. 6.3.5)

31. Therefore, because MOX does not compete with uranium fuel, and because there is no short-term, and very limited prospects of long-term, competition within the limited MOX "market", the information sought cannot harm BNFL's position in relation to its competitors. In simple terms, there is no evidence that the redacted information would be of sufficient commercial value to any competitors, if they existed, to damage BNFL's competitive position. (para. 1.5.1.; 7.1.1)

(d) Release of the Information Will Not Harm BNFL's Position in Relation to Its Customers

32. The Mackerron Report considers that the release of average price data will not harm BNFL's position in relation to its customers, since a wide range of prices is charged to different customers. (para. 7.2.1-3) The argument that a known average price would harm BNFL by putting a cap on its income is untenable, because:

(1) Dr Varley has stated that his company regularly sells information on "costs, prices and other commercial information related to the MOX plant." Interested customers can therefore obtain such information if they are prepared to pay for it. (para. 7.2.2, first bullet)

(2) If MOX were a competitive market, BNFL would be able to charge different prices to different customers if there were real cost differences. No amount of public data on average prices could change this possibility. (para. 7.2.2, second bullet)

(3) For longer-term joint reprocessing/MOX contracts, any customers who continue in the market are almost certain to be those who have already signed reprocessing and MOX contracts with BNFL and/or Cogema, including the Japanese utilities, who financed large parts of the BNFL and Cogema reprocessing plants. They will, therefore, already have detailed knowledge of MOX prices and costs, and would gain nothing from knowing average prices. (para. 7.3.1)

(e) Other Matters Considered in the Second MacKerron Report

33. At para 7 of his Report, Mr Wadsworth states that:

"In the case of BNFL the information classed as commercially confidential principally relates to the inputs into the financial model

> supporting the economic case for the MOX plant together with the related outputs."

34. In relation to this statement, the Second MacKerron Report points out that:

> "This is an admission that without the information sought, the economic case for the SMP cannot be assessed. This goes contrary to Article 6 of the Directive 80/836/EURATOM and Article 6 of Directive 96/269. Ireland, who has a material interest in the environmental consequences of the SMP, is unable to assess without the information sought, whether there ever was an economic justification to the SMP. The statement by David Wadsworth confirms this." (Appendix B, para. B.1.1)

35. Ireland considers that this admission is highly significant, in that it makes clear the importance of the information omitted for an objective, transparent justification procedure, and the impossibility of carrying out such a procedure without the omitted information.

36. The Second MacKerron Report also notes that the United Kingdom evidence nowhere addresses Appendix A of the First MacKerron Report. (Appendix C, paras. C.1.1-2). That Appendix examined in detail the reasoning contained in the letter of 13 September 2001 from Michael Wood. This letter is the only source of reasons of any level of detail supplied by the United Kingdom before the filing of their Counter-Memorial. Given that, in Appendix A, the MacKerron Report gives detailed arguments why those reasons are wholly unconvincing, it might be expected that the United Kingdom's evidence would address this Appendix in some detail. However, while Dr Varley comments on each aspect of the MacKerron Report in turn (at section 4, p36ff), he entirely fails to comment on the arguments set out at Appendix A. These remain wholly unaddressed by the United Kingdom.

37. The Second MacKerron Report further notes (at Appendix C, para. C.1.37-8)) that the United Kingdom's evidence submitted with the Counter-Memorial raises for the first time the argument that revealing *any cost information at all about SMP* would have strategic advantages for customers and competitors (Rycroft, para 4.6; Varley, para 3.21ff). The United Kingdom had ample opportunity to raise this argument in the extensive correspondence entered into by the parties. However, the Second MacKerron Report comments that:

> It should be noted that no reference to production cost was made in the UK government's previous reasoning regarding the confidential nature of information requested by Ireland. In a competitive market it would be unreasonable to ask SMP to reveal its precise cost structure in detail, especially if the underlying technology in the market is heterogeneous. Nevertheless Appendix D shows that Cogema and companies in related markets (nuclear fuel, electricity generation) publish information which is related to their costs and other variables for which the UK counter-memorial claims commercial confidentiality.

> However the MOX fabrication market is not competitive (see Appendix F) and on admission of the UK there is a history of also technological information exchange between BNFL and Cogema: *The group* /United Reprocessors/ *also felt that technical co-operation would avoid expensive duplication of effort.*[5] In a duopoly with a history of technological information exchange it is hence not unreasonable to ask BNFL to provide the rather limited cost related information that it is necessary to obtain a factual assessment of the economic case for SMP (investment costs, fixed costs, variable costs, including the costs associated with meeting safety standards[6]).

Not only is this argument raised late in the day: it is also wholly unpersuasive.

(f) Conclusion

38. Having considered the United Kingdom's evidence on competition issues relating to MOX, Ireland's submissions remain unchanged. The United Kingdom's evidence contains internal contradictions, damaging admissions, notable omissions and weak arguments raised for the first time. (Second MacKerron Report, para. 8.3, and paras. 33-37 above). The Second MacKerron Report comes to the following conclusions:

    (1) The case for commercial confidentiality of data does not apply when there is no competition, and when customers and potential customers can gain no advantage from release of such data. The conditions of absence of competition and inability of customers to gain advantage apply in the MOX market.

    (2) MOX does not compete in the general market for nuclear fuel because it is more expensive than UOX fuel and more costly to use, and there is no realistic prospect that this will change.

    (3) Within the separate market for MOX, there is no competition between the only two significant producers (BNFL and Cogema) in the short term – that is, where customers have already committed to reprocessing. Customers' plutonium arising from such reprocessing is captive to the reprocessor.

    (4) In the longer term, where there might be joint reprocessing/MOX contracts, the prospects for new BNFL business are very poor. In the unlikely event that such contracts were available, competition is only one possible market outcome, and the reprocessing element of the contract would be dominant, so neither BNFL's sole competitor nor customers could gain advantage from data release. The recent announcement by the UK Government that any future such contracts would need to pass the additional test of not conflicting with the clean-

[5] *Witness statement of Jeremy J. R. Rycroft*, page 14, paragraph 5.2 (footnote in original).

[6] The United Kingdom Counter-Memorial freely admits that, although likely to be substantial, the *PA and ADL Reports do not contain information on the costs of meeting safety standards* (page 5, footnote 9)- this suggests at least one important cost factor which was omitted from the UK's economic benefits assessment for SMP (footnote in original).

up strategy at the Sellafield site makes the chances of such contracts even more remote.

(3) National and International Law

39. Turning to the United Kingdom's substantive arguments on commercial confidentiality, Ireland notes firstly that the United Kingdom does not comment at all on the material which Ireland has made available to the Tribunal in relation to the *Aventis* case, in which the United Kingdom Government argued for a narrow definition of commercial confidentiality. The argument that "the United Kingdom has acted in accordance with its own domestic legislation in providing that Ireland's request for information be refused" (UK Counter-Memorial, para 5.25) does not sit easily with the Government's submissions in that case, which suggest that the domestic legislation should be interpreted to give only very narrow protection to allegedly commercial confidential information.

40. Ireland considers that the domestic case-law cited by the parties confirms broad recognition of the applicable principles invoked by Ireland (see para. 44 below). It also indicates that each case is to be decided on its own merits, and in particular the question of fact as to whether substantial harm would arise if the information was released. The case-law does not indicate that the material requested by Ireland would not be made available in any of the jurisdictions. In this regard, Ireland considers that that *London Regional Transport* case is significant because it sets out the *principles* which should be applied whenever a public body attempts to suppress information relating to an issue of legitimate public concern. The Court confirmed that there is great public interest in the free flow of information, in a democratic society, relating to politically controversial issues. They also considered that the existence of a confidentiality agreement did not determine the issue, since the court was still entitled – as is the Tribunal – to look at the nature of the information, the public interest, and to make its own assessment on the merits.

41. The United Kingdom takes issue with Ireland's decision to refer the Tribunal to "international law and practice" for assistance in interpreting and applying Article 9(3). The United Kingdom takes the reference in Article 9(3) to "applicable international regulations" to refer to "international regulations that have been or may be adopted in respect of the matters set out in sub-paragraphs (a)-(g) and are binding on the Contracting Party concerned."(UK Counter-Memorial, para 5.20). However, the United Kingdom goes on to accept that "[t]he term "commercial and industrial confidentiality" is not defined in the 1992 OSPAR Convention. In construing this term, the Tribunal may derive assistance from cognate provisions in other international instruments and in the national law of other jurisdictions." (UK Counter-Memorial, para 5.29).

42. Ireland submits that "regulations" include all the instruments relating to the environment and access to information referred to in detail in Ireland's Memorial. However, the meaning of terms used in these instruments is not self-explanatory. It is well established that the meaning of legal provisions takes its content from the context, which in this case means the evolving international law and practice

on access to environmental information. Documents such as the draft proposals for a new EC Directive and the Aarhus Convention (which Ireland and the United Kingdom have signed and are in the process of ratifying) highlight the international community's understanding of the shortcomings of previous attempts to define and regulate the issue. They reflect a collective understanding of what information may be withheld from the public. The Tribunal is entitled to – and should - draw on current international law and practice in considering whether a 'commercial confidentiality' exception to a request for information can be invoked. As the International Court of Justice put it in the *Case concerning the Gabcikovo-Nagymaros Project*:

> "new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past."[7]

This approach is equally applicable to procedural standards. Without repeating what has been said in its Memorial, Ireland stresses that the Aarhus Convention has been signed and is applicable (in the sense that neither party should do anything to frustrate the object and purpose of the Convention)[8] and informs the content of the conditions under which "commercial confidentiality" is to be applied as an exception.

43. At para 5.33(iv), the United Kingdom sets out the categories of information which it considers to be commercially confidential, as seen by a review of international law. Ireland accepts that "commercial confidentiality" is a recognised exception to freedom of information. That is not in dispute. Ireland does not accept that the "conclusions" which the United Kingdom draws from its review of these international instruments is accurate or relevant or provides any assistance. The real issue is whether or not publication of the information will cause any harm to BNFL's commercial interests. Ireland submits that it would not (see above at paras. 22-31).

44. With regard to its review of national law, Ireland considers that the examples referred to by both parties reflect a broad recognition of three simple principles:

    (1) that in principle information is to be made available rather than withheld;

    (2) that restrictions on access to information justified on commercial confidentiality are to be narrowly construed;

    (3) that the burden is on the person wishing to restrict access to information to satisfy the court or tribunal that a release of information would cause substantial harm;

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[7] Hungary/Slovakia, 1997 ICJ Reports, para. 140.

[8] See Vienna Convention on the Law of Treaties, 1969, at Article 18.

(4) that the court or tribunal is to assess the evidence and form its own view as to the merits of a claim that competition would be substantially harmed if information as to be released.

These points are amplified in Appendix 1 to this Reply.

(4) Summary and Conclusion

45. In summary, Ireland submits that international and domestic law and practice recognise the importance of access to information on the environment. Article 9(3) of OSPAR must be interpreted in light of these developments. Further, it is well settled that exceptions to that right must be narrowly interpreted. Commercial confidentiality, to justify non-disclosure, requires a pressing, serious threat to well-defined commercial interests from identified competitors on a specified market. In any event, full reasons must be given for non-disclosure. In relation to four categories of information (see para. 24 above) no attempt has been made by the United Kingdom to show why release of the information could cause commercial harm.

46. At the heart of the case is the United Kingdom's failure – in respect of the remaining categories - to demonstrate that disclosure of the information sought by Ireland will cause *any* harm to BNFL's commercial interests, either in relation to its customers or to its competitors, if any. The United Kingdom's arguments about the alleged harm done to BNFL's position on the MOX 'market' by disclosure are demonstrably unsustainable. The evidence before the Tribunal shows that there exists in relation to the activity in question no competition such as to permit the United Kingdom to invoke the commercial confidentiality exception in Article 9(3) of the OSPAR Convention. The claim should be rejected by the Arbitral Tribunal, and disclosure ordered.

(5) Relief Sought

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

(1) That the United Kingdom has breached its obligations under Article 9 of the 1992 OSPAR Convention by refusing to make available information deleted from the PA Report and the ADL Report as requested by Ireland.

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

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

APPENDIX 1:
COMPARISON OF NATIONAL APPROACHES TO ACCESS TO INFORMATION

(1) Ireland

A1. The regulations entitled Access to Information on the Environment Regulations 1996 S.I. No 185/1996 and referred to in the Counter Memorial of the United Kingdom at paragraph B-6 have been revoked and replaced with the European Communities Act 1972 (Access to Information on the Environment) Regulations 1998 S.I. 125 of 1998 (at Annex 3). There are no material differences from the former regulations.

A2. Ireland notes that the United Kingdom accepts, as indicated by the concluding sentence to paragraph B-12 of the Counter Memorial of the United Kingdom, that under Irish law the documents at issue would be disclosed.

(2) Australia, New Zealand, Canada

A3. In Australia, New Zealand and Canada, environmental information held by a government department or a public authority is governed by freedom of information legislation, with very strictly defined commercial confidentiality exceptions.

A4. The object of the Australian Freedom of Information Act 1982 is expressed in sec. 3(1). It aims:

> "to extend as far as possible the right of the Australian community to access to information in the possession of the Government of the Commonwealth by: (a) […] (b) creating a general right of access to information in documentary form in the possession of Ministers, departments and public authorities, limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by departments and public authorities…"

A5. Section 3(2) states that:

> "It is the intention of the Parliament that the provisions of this Act shall be interpreted so as to further the object set out in subsection (1) and that any discretions conferred by this Act shall be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information."

A6. Under sec. 11 of the 1982 Act, a person has a legally enforceable right to obtain access to a document of an agency or an official document of a Minister, other than an exempt document. Part IV of the 1982 Act deals with exempt documents. Section 43(1) provides that

> "A document is an exempt document if its disclosure under this Act would disclose … (b) any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed; or (c) information … concerning the business, commercial or financial affairs of an organization or undertaking, being information: (i) the disclosure of which would, or could reasonably be expected to, unreasonably affect that … organization or undertaking in respect of its lawful business, commercial or financial affairs …".

A7. In *Secretary, Department of Employment, Workplace Relations & Small Business v The Staff Development & Training Centre Pty Ltd*[1] while rejecting an appeal by the government department against the granting of access, it was accepted that the requirement in s 43(1)(c) that disclosure "unreasonably affect" the lawful business, commercial or financial affairs of the organisation or undertaking meant that the court be satisfied that disclosure would not be in the public interest. Further, the court accepted that the information "must have value to the Department in respect of those of its activities which can be said to bear a commercial, as opposed to an administrative or governmental character." Ireland notes that the MOX plant is soon to be run by a non-commercial Government agency (the LMA).

A8. Under section 12 of the Official Information Act 1982 of New Zealand, official information requests may be made to a Department or Minister of the Crown or organisation to make available to him or it, any specified official information. The guiding principle of the Act states that: "information shall be made available unless there is good reason for withholding it."[2] The New Zealand Court of Appeal has recognised that the Official Information Act reflects the general contemporary movement towards open government in New Zealand.[3]

A9. The New Zealand legislation imposes a requirement not found in the Australian regime, namely that the obligation of confidence only be protected when the disclosure would be likely to damage the public interest.

A10. The Canadian regime is governed by the Access to Information Act 1985. In *Dagg v Canada (Minister of Finance)*[4] the Supreme Court stated that:

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[1] [2001] FCA 382 This concerned an application for documents relating to criteria used in the tendering process for assessing the financial viability of tenderers for the award of employment service contracts.

[2] Sec. 5, Official Information Act 1982.

[3] *Fletcher Timber v Attorney-General* [1984] 1 NZLR 290, 296, 302; *Brightwell v ACC* [1985] 1 NZLR 132, 139, 146.

[4] [1997] 2 S.C.R. 403.

> "The overarching purpose of access to information legislation … is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry … it is important to have regard to the overarching purposes of the Act in determining whether an exemption to that general right should be granted."

A11. Similarly, in *Rubin v Canada (Minister for Transport)*[5], the following comment was made:

> "… all exemptions to access must be limited and specific. This means that where there are two interpretations open to the Court, it must, given Parliament's stated intention, choose the one that infringes on the public's right to access the least. It is only in this way that the purpose of the Act can be achieved. It follows that an interpretation of an exemption that allows the government to withhold information from public scrutiny weakens the stated purpose of the Act."

A12. Section 20(1)(c) provides that the head of a government institution shall refuse to disclose any record requested that contains:

> "information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party..."

A13. In *Canada Packers Inc. v Canada (Minister of Agriculture)*[6] the Court of Appeal considered that in order to withhold information pursuant to paragraph 20(1)(c), there must be reasonable expectation of probable harm to a third party. The Court ruled that there need not be a direct causal connection between disclosing the information and the probable harm. This case was cited in *Occam Marine Technologies v The National Research Council of Canada*[7] where it was held that:

> "… the general financial success or lack of it, of any third party has no significance in relation to the decision to refuse to disclose requested information. Whether third parties would have agreed to release the information requested if they had been asked at an earlier time is a matter of sheer speculation, and so is a forecast that by failing to agree third parties risked disclosure of the information through this review process."

A14. Note also that under s 20(6),

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[5] [1989] 1 F.C. 265.

[6] [1989] 1 F.C. 47.

[7] 19 October 1998, FC T-146-98.

> "the head of a government institution may disclose … if that disclosure would be in the public interest as it relates to … protection of the environment and, if the public interest in disclosure clearly outweighs in importance any financial loss or gain to, prejudice to the competitive position of or interference with contractual or other negotiations of a third party."

A15. Further, s 21 provides that

> "… the head of a government institution may refuse to disclose any record requested under this Act that contains (a) advice or recommendations developed by or for a government institution or a minister of the Crown …", but this does not apply in relation to "a report prepared by a consultant or an adviser who was not, at the time the report was prepared, an officer or employee of a government institution or a member of the staff of a minister of the Crown."

A16. In light of these principles, it appears that the general tenor of freedom of information legislation in the Commonwealth is that exemptions to the right of access should be construed narrowly. Further, in relation to confidential information, both the Canadian and New Zealand regimes require that non-disclosure be in the public interest.

(3) The United States

A17. The United Kingdom correctly states the applicable test under the U.S. Freedom of Information Act (FOIA) relating to exemptions concerning commercial confidentiality. However, in its submission the U.K. reaches no conclusion as to whether the information at issue in this case would be withheld under U.S. law. Ireland submits that it is strongly arguable that this information *would* be released under FOIA.

Principle of Open Government

A18. In any discussion of FOIA, it is necessary to recall that its purpose is *open government*. As such, under the statute, all federal government agency records must be accessible to the public unless they are specifically exempted and all exemptions must be *narrowly* construed. Though discussion of the FOIA necessarily focuses on what may be withheld, as the U.S. Supreme Court said decades ago, "[d]isclosure, not secrecy, is the dominant objective of the Act." *Department of the Air Force v. Rose*, 425 U.S. 352 (1976).

FOIA's Requirements

A19. As the United Kingdom notes, under FOIA, documents are less likely to be disclosed where they were submitted to the government *voluntarily*.[8] On the other hand, where documents are submitted *involuntarily*, their disclosure is only withheld subject to certain requirements (discussed below). *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992).

A20. Information given to government agencies is considered to be given *involuntarily* if any legal mandate compels submission of the information, including, for example, information submitted in the context of regulatory licensing.[9] It is Ireland's contention that the documents at issue here were submitted involuntarily because they were submitted pursuant to the requirements of government regulation.

A21. Where information is submitted involuntarily, it is only exempt from disclosure where its release is likely to either (a) impair the government's ability to obtain the necessary information in the future or (b) to cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

A22. Under FOIA, the relevant question in the instant case would be whether the disclosure of the information would cause substantial competitive harm to the party opposing disclosure. It is Ireland's contention that substantial harm cannot be shown.

A23. U.S. Courts have held that a party seeking to protect information from disclosure need not show "actual competitive harm", but they must show "actual competition and the likelihood of substantial competitive injury" (*Gulf and Western Industries Inc v United States*, 199 U.S. App. D.C. 1, 615 F.2d 527, 530 (D.C. Cir 1976). It is often held that, "conclusory and generalized allegations are…unacceptable as a means of sustaining the burden of non-disclosure under FOIA, since such allegations necessarily elude the beneficial scrutiny of adversary proceedings, prevent adequate appellate review and generally frustrate the fair assertion of rights under the act." *National Parks II v. Kleppe*, 547 F. 2d 673, 680 (1976).

A24. In order to assess the potential harm, "the court need not conduct a sophisticated economic analysis of the likely effects of disclosure." It need only exercise its judgement in view of the nature of the material sought and the competitive circumstances in which the defendants do business, relying at least in part on relevant and credible opinion. (*National Parks II* at 680). The harm

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[8] As the UK correctly states, under FOIA commercial or financial information submitted to the government voluntarily is protected if it is the kind that is not customarily not be released to the public by the person from whom it was obtained.

[9] See U.S. Department of Justice Guidelines, FOIA Update, Vol. XIV, Spring 1993, http://www.usdoj.gov/oip/foia_updates/Vol_XIV_2/page3.htm and U.S. Department of Justice Freedom of Information Act Guide, May 2002, http://usdoj.gov.oip/foi-act.htm at 8 *et seq*.

must be proved by the introduction of specific evidence such as, for example, "lengthy expert report[s] and … depositions documenting the competitive injury that disclosure would cause." *Public Citizen v. FDA,* 704 F. 2d 1280, 1291 (1983).

A25. Simply put, in order to prevent disclosure under the competitive harm exemption, parties must be able to show competition and harm. It is Ireland's contention that the U.K. has not met FOIA's burden because it has merely presented generalized allegations of potential competitive harm. The U.K. has failed to particularise such allegations with credible and specific evidence of potential *substantial* harm and has failed to show the existence of *actual* competition. As such, it is Ireland's submission that under U.S. law, the documents at issue would be disclosed.

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