PART 1

INTRODUCTION

A. Overview of this Counter-Memorial

1.1 Pursuant to Article 10(3) of the Rules of Procedure prescribed by the Tribunal on 21 February 2002, the United Kingdom of Great Britain and Northern Ireland ("United Kingdom") submits the present Counter-Memorial in response to Ireland's Memorial dated 7 March 2002.

1.2 By these proceedings, Ireland seeks the disclosure of certain information withheld from publication by the United Kingdom on grounds of commercial confidentiality. It contends that it is entitled to receive this information pursuant to Article 9(1) of the Convention for the Protection of the Marine Environment of the North-East Atlantic ("OSPAR Convention"). It further contends that the United Kingdom has acted improperly in refusing disclosure on the ground of the commercial confidentiality exemption in Article 9(3)(d) of the Convention.

1.3 The United Kingdom challenges these contentions. It does so on three grounds.

1.4 First, Article 9 of the OSPAR Convention does not establish a direct right to receive information. Rather, it requires Contracting Parties to establish a domestic framework for the disclosure of information. This the United Kingdom has done. If Ireland had a cause of action at all under Article 9, it could only be that the United Kingdom had failed to establish an appropriate domestic regime for the disclosure of information. Ireland does not make such a claim.

1.5 Second, in the event that the United Kingdom is wrong in this reading of Article 9, Ireland must show that the information it requests is information within the scope of Article 9(2) of the Convention. It has failed to show that this is the case. In the United Kingdom's contention, the information in question is insufficiently proximate to the state of the maritime area or to measures or activities affecting or likely to affect it. It is not information within the scope of Article 9(2) of the Convention. Even assuming *arguendo* that Article 9(1) does

establish a direct right to request and receive information, it cannot be relied upon in the present case to found a claim for disclosure of the particular information that Ireland now seeks.

1.6 Third, in the event that the United Kingdom is wrong on this point, Article 9(3)(d) of the Convention affirms the right of the Contracting Parties, in accordance with their national legal systems and applicable international regulations, to provide for a request for information to be refused on grounds of commercial confidentiality. The United Kingdom has legislated to this effect. Its refusal to disclose the particular information requested by Ireland is consistent with both national law and applicable international regulations. In the present case, the task of the Tribunal is not to engage in a *de novo* assessment of the issues for purposes 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. In any event, as a matter of objective assessment, the information withheld from publication is properly exempt from disclosure on grounds of commercial confidentiality.

1.7 This Counter-Memorial proceeds as follows. The remainder of this Part addresses the subject of the dispute. In Part 2, the United Kingdom sets out some necessary factual background relevant to the dispute. Part 3 then addresses the first of the United Kingdom's contentions, namely, that Article 9 requires Contracting Parties to establish a domestic framework for the disclosure of information. Part 4 addresses the question of the nature of the information requested by Ireland and the contention that it does not come within the scope of the information contemplated by Article 9(2) of the Convention. Part 5 addresses the interpretation and application of Article 9(3) of the Convention, while Part 6 considers the commercial confidentiality of the excised information. Part 7 contains the United Kingdom's concluding submissions. There are two appendices to the Counter-Memorial: Appendix A is a Survey of International Instruments Concerned with Access to Information; Appendix B is a Survey of National Legislation concerned with Access to Information. Also appended is the text, in English and French, of the OSPAR Convention.

1.8 There are three Volumes of Annexes. Volume I contains of the expert reports of David Wadsworth and Dr Geoff Varley, and the witness statement of Jeremy Rycroft. Volumes II and III contain the remaining Annexes.

B. The Subject of the Dispute

1.9 As Ireland states in its Memorial, the dispute before this Tribunal is a narrow one.[1] The dispute, as formulated by Ireland, "relates to the United Kingdom's failure to provide information to Ireland pursuant to a request for information by Ireland".[2] By that request Ireland asked for *"an unedited and full copy of the PA Report"*. Ireland claims that "as a matter of EU and international law the United Kingdom is under an obligation to make available *all the information set forth in the PA Report which has so far been omitted*".[3]

1.10 Ireland advances the same claim in relation to the ADL Report. It claims that "the United Kingdom is required to make available to it a *complete and unedited* version of the PA Report, including in particular the information requested in the letter of 25 May 2000 and a *complete and unedited* version of the ADL Report".[4]

1.11 "The PA Report" is a report submitted to the United Kingdom's Environment Agency in 1997 by the PA Consulting Group ("PA"), which won a public tendering competition to conduct an independent review of the economic case for the operation of the Sellafield Mixed Oxide ("MOX") fuel plant ("MOX Plant") built by British Nuclear Fuels plc ("BNFL"). This review was being carried out in the context of the justification of a new practice giving rise to ionising radiation under the terms of the then applicable Euratom Directives (Directives 80/836 and 84/467).[5]

1.12 PA submitted their report to the Environment Agency in a full version but certain information was excised on grounds of commercial confidentiality from the version of the report published in December 1997. In June 1999 a fuller public domain version of the PA Report was published as part of a further round of public consultation. Although this version

[1] Ireland's Memorial, paragraph 2.
[2] Amended Statement of Claim, paragraph 2; cf. Ireland's Memorial, paragraph 2: "the dispute is a narrow one. It arises from the refusal of the United Kingdom to provide certain information pursuant to requests for information by Ireland under Article 9 of the OSPAR Convention".
[3] Letter of 25 May 2000, emphasis added, Annex 4 to Ireland's Memorial, page 154.
[4] Amended Statement of Claim, paragraph 30, emphasis added.

[5] The process of justification requires a consideration of whether the benefits of the practice outweigh the detriments.

contained fewer excisions than the version published in 1997, it did not disclose all of the data contained in the full version submitted to the Environment Agency.

1.13 "The ADL Report" is a report by Arthur D. Little Limited ("ADL"), which in April 2001 won a public tendering competition to conduct an independent review of BNFL's revised economic case for the operation of the MOX Plant. This review was carried out within the context of the justification exercise under Euratom Directive 96/29 (replacing Directives 80/836 and 84/467), which provides that:

> "Member States shall ensure that all new *classes or types of practice* resulting in exposure to ionising radiation are justified in advance of being first adopted or first approved by their economic, social or other benefits in relation to the health detriment they may cause".[6]

1.14 ADL submitted a full version of their report to the United Kingdom's Department for Environment, Food and Rural Affairs ("DEFRA") and Department of Health ("DH"). The report was published in a public domain version in July 2001. As in the case of the PA Report, the public domain version of the ADL Report had certain excisions on grounds of commercial confidentiality.

1.15 The PA and ADL Reports therefore cover essentially the same ground: the difference in subject matter is that the ADL Report addresses BNFL's revised economic case. Ireland's Memorial concentrates on the PA Report and includes in an Annex only the executive summary of the ADL Report.[7] Yet it was by reference to the revised economic case as assessed in the ADL Report that Ministers took the decision on 3 October 2001 that the manufacture of MOX fuel is justified in accordance with Euratom Directive 96/29.

1.16 The PA and ADL Reports are substantial and independent reports. This much does not appear to be contested by Ireland.[8] Reading the public domain versions of the PA and

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[6] Council Directive 96/29/Euratom of 13 May 1996 laying down basic safety standards for the protection of the health of workers and the general public against the dangers arising from ionizing radiation, OJ 1996 L159/1 (**Annex 4** to this Counter-Memorial). Cf. Council Directive 80/836/Euratom of 15 July 1980 amended by Council Directive 84/467/Euratom of 3 September 1984. See Ireland's Memorial, paragraphs 37 to 41.

[7] Annex 3A, page 101. A complete copy of the public domain version of the ADL Report is at **Annex 5** to this Counter-Memorial.

[8] See paragraph 143 of Ireland's Memorial.

ADL Reports in their entirety will enable the Tribunal to identify the true nature of the information sought by Ireland. It is unclear whether those responsible for drafting Ireland's Memorial have conducted this essential exercise.[9]

1.17 In response to Ireland's request to be supplied with a full unedited version of the PA Report, the United Kingdom replied on 17 December 1999:

> "After careful consideration, we have come to the conclusion that we are unable to meet the Minister's request. As you are no doubt aware, the full PA report has not been put into the public domain because it contains commercially confidential information. Disclosure of this information could cause BNFL unacceptable commercial harm, which Ministers want to avoid".[10]

1.18 In response to Ireland's request to be supplied with a full unedited version of the ADL Report, the United Kingdom replied on 5 September 2001:

> "At the outset, I should make it clear that my authorities do not accept that the information excised from the public version of the ADL report is information falling within the scope of Article 9(2) of the OSPAR Convention.
>
> Nevertheless, I wish to explain the reasons for which the information was excluded and the manner in which this was done. As is made clear in the public version of the report, it contains all the information on which ADL's conclusions are based, other than that excised for reasons expressly given in the public version of the report. In particular, excisions have been made on the ground that the publication of that information would cause unreasonable damage to the commercial operations of British Nuclear Fuels plc ("BNFL") or to the economic case for the Sellafield MOX plant itself".[11]

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[9] For example, at paragraph 59 of its Memorial Ireland states that "the public domain version of the ADL Report omits, among other things ... all information as to the identity of customers ... transport revenues and costs; transport information and the projected life-span of the MOX facility". Yet, the ADL Report does contain some information as to the identity of customers (e.g. page 10, Figure 7; page 15, Table 15; and page 14, paragraphs 1.3.1 and 1.3.2); in the case of transport costs it makes clear that these were not taken into account in the analysis (page 22, paragraph 1.6); and it sets out its assumptions on projected life-span (page 19, paragraph 1.4.4). Similarly, at paragraph 23 of its Memorial, Ireland states that it wants to know whether appropriate safety standards are being applied and properly budgeted for, adding that it assumes that information on these costs is set out in the PA and ADL Reports, "but the United Kingdom has declined to make information available to Ireland." In fact, 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.

[10] Annex 4 to Ireland's Memorial, page 146.

In that letter, and in other correspondence,[12] the United Kingdom explained its reasons for refusing to supply to Ireland, for reasons of commercial confidentiality, full and unedited versions of the two Reports.

1.19 Article 9 of the OSPAR Convention provides in paragraph 1 that:

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

Paragraph 2 provides:

> "The information referred to in paragraph 1 of this Article is any available information in written, visual, aural or data-base form on the state of the maritime area, on activities or measures adversely affecting or likely to affect it and on activities or measures introduced in accordance with the Convention".

Paragraph 3 adds:

> "The provisions of this Article shall not affect the right of Contracting Parties, in accordance with their national legal systems and applicable international regulations, to provide for a request for such information to be refused where it affects:
> ...
> (d) commercial and industrial confidentiality, including intellectual property; ..."

1.20 Broken down into its component elements, the dispute as formulated by Ireland thus requires an enquiry into three principal issues:

(i) Whether Ireland has a direct right conferred by Article 9(1) of the OSPAR Convention to receive information from the United Kingdom.

(a)

[11] Annex 4 to Ireland's Memorial, page 171.
[12] In particular, the letter of 13 September 2001 **(Annex 6)**.

(ii) If so, whether the information sought by Ireland is information on the state of the maritime area or on activities or measures adversely affecting or likely to affect the maritime area within the meaning of Article 9(2) of the OSPAR Convention.

(iii) If so, whether the United Kingdom has lawfully exercised a right under Article 9(3)(d) of the OSPAR Convention in accordance with its national legal system and applicable international regulations to provide for a request for information to be refused where it affects commercial and industrial confidentiality.

C. Issues in Ireland's Memorial Irrelevant to the Dispute as Formulated by Ireland

1.21 In its Memorial, Ireland canvasses a wide range of matters that are irrelevant to the dispute as Ireland has formulated it. Amongst these are Ireland's claims about the risk of marine pollution alleged to arise from the operation of the MOX Plant;[13] its assertions about the risk of a release of radioactive materials in the event of a maritime accident, notwithstanding the United Kingdom's strict compliance with all relevant international safety standards concerning the transport of nuclear materials;[14] its contentions about the relative merits of storing spent nuclear fuel in storage pools rather than reprocessing it and about converting recovered plutonium into MOX;[15] its arguments about the alleged inadequacy of the Environmental Statement of 1993;[16] the justification of the MOX Plant under Euratom law;[17] alleged failure to comply with the Sintra Statement;[18] and about the risk of a terrorist attack on the MOX Plant.[19]

1.22 These issues are wholly beyond the subject-matter of this dispute. They are also in dispute before a tribunal constituted under Annex VII of the United Nations Convention on

[13] See Ireland's Memorial, paragraphs 8, 9, 13, 22, 31, 41.
[14] Ireland's Memorial, paragraphs 14, 24. The International Code for the Safe Carriage of Packaged Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Waste on Board Ships ("INF Code") was adopted by Resolution 88(71) of the Maritime Safety Committee of the International Maritime Organisation on 27 May 1999. See Annex C of the Report of Dr Geoff Varley **(Annex 2)**.
[15] Ireland's Memorial, paragraphs 16, 25.
[16] Ibid., paragraph 36.
[17] Ibid., paragraphs 37-41 and 61.
[18] Ibid., paragraphs 10, 34, 97.
[19] Ibid., paragraph 96.

the Law of the Sea ("UNCLOS") pursuant to Ireland's application dated 25 October 2001.[20] Hence, the United Kingdom does not respond to them in this Counter-Memorial.

1.23 In particular, the United Kingdom does not respond to Ireland's arguments concerning the possible increased use of the thermal oxide reprocessing plant at Sellafield ("THORP") that Ireland contends will arise as a result of the operation of the MOX Plant.[21] Although Ireland states that it attaches importance to that matter, it is beyond the scope of the present dispute. To the extent that either the PA Report or the ADL Report considered the impact of the MOX Plant on the THORP plant, no information on THORP was excised from the public domain versions of the reports.

1.24 Certain issues in the current dispute were also raised in proceedings in the High Court in London by Friends of the Earth Limited and Greenpeace Limited, who applied for judicial review of the Ministerial decision dated 3 October 2001 that the manufacture of MOX fuel is justified in accordance with the requirements of Directive 96/29 Euratom. Like Ireland in this case,[22] the applicants in the domestic proceedings alleged that the Secretaries of State had erred in deciding to exclude sunk costs from their assessment of the economic case, and that it was the duty of the Secretaries of State to consider whether there was justification for the Sellafield MOX Plant rather than the process of MOX manufacture. The application for judicial review was rejected by Mr Justice Collins on 15 November 2001.[23] His judgment was upheld by a unanimous judgment of the Court of Appeal on 7 December 2001.[24]

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[20] See Annex 4 to Ireland's Memorial, at page 460. Ireland alleges that the United Kingdom has breached its obligations under various Articles of UNCLOS in authorising the MOX Plant. Ireland has raised claims about the risk of marine pollution alleged to arise from the operation of the MOX Plant; about the risk a release of radioactive materials in the event of a marine casualty notwithstanding compliance with the INF Code; about the relative merits of storing radioactive waste in storage pools or of converting such fuel into MOX; about the alleged inadequacy of the Environmental Statement of 1993; and about the prospect of increased use of the THORP Plant in consequence of the authorisation of the MOX Plant.

[21] See Ireland's Memorial, paragraphs 7, 9, 14.

[22] Ireland's Memorial, paragraphs 56 and 58.

[23] *R. (Friends of the Earth Ltd. and Greenpeace Ltd.) v. Secretary of State for the Environment, Food and Rural Affairs and Secretary of State for Health*, Judgment of 15 November 2001, [2001] EWHC Admin 914 (Mr Justice Collins) **(Annex 7)**.

[24] *R. (Friends of the Earth Ltd. and Greenpeace Ltd.) v. Secretary of State for the Environment, Food and Rural Affairs and Secretary of State for Health*, Judgment of 7 December 2001, [2001] EWCA Civ. 1847 (Lords Justices Simon Brown, Waller and Dyson) **(Annex 8)**.

PART 2

BACKGROUND FACTS

A. BNFL and the MOX Plant

2.1 BNFL, a Public Limited Company wholly owned by the United Kingdom Government, is the current owner and operator of the nuclear licensed site at Sellafield in Cumbria (in the north west of England).

2.2 During the operation of a nuclear reactor, a small quantity of the uranium fuel is converted into plutonium and some waste products are produced. Over time (three to five years) the fuel becomes less efficient because of the build-up of waste products. Therefore spent nuclear fuel may be sent for reprocessing, which removes the waste products, allowing uranium and plutonium to be reclaimed.

2.3 BNFL carries out reprocessing of spent nuclear fuel *inter alia* at THORP at Sellafield. THORP was conceived in the early 1970s to reprocess spent fuel from the United Kingdom's second-generation of nuclear reactors: the advanced gas-cooled reactors ("AGRs"). The view was taken that the same plant could usefully be employed in processing fuel from foreign light water reactors ("LWRs"). THORP was funded largely by advance payments from so-called baseload customers (i.e. various utilities in the United Kingdom, Europe and Japan that committed sufficient reprocessing business to occupy the THORP plant fully for a period of operation estimated to last approximately ten years). Plutonium which is separated as a result of reprocessing is either stored at Sellafield or returned to the customer.

2.4 A use has been identified for the plutonium reclaimed from reprocessed spent fuel, i.e. in the manufacture of MOX fuel, which is made from a mix of plutonium dioxide and uranium dioxide. MOX fuel is currently used in LWRs by utilities in Belgium, Germany, France and Switzerland and has been used in the past in countries such as the Netherlands, Japan, Sweden, United States of America and Italy. There are well developed plans to reintroduce the use of MOX fuel on a commercial basis in Japan and Sweden in the next few

years.[25]

2.5 A MOX plant is not a reprocessing plant. It is a fuel manufacturing facility at which separated plutonium oxide and uranium oxide is blended into fuel pellets which are loaded into fuel rods and formed into fuel assemblies ready for use in a reactor. In 1993 BNFL applied to the appropriate local authority for planning permission to build a MOX plant. As part of its obligations under the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988, BNFL was required to submit an Environmental Statement. BNFL did so. The Environmental Statement recorded that the manufacture of MOX is a well-established process and is essentially a dry process so that any discharge of liquid effluent would be minimal. Planning consent to the construction of the MOX Plant was given in 1994. Construction was completed in 1996.

2.6 On 2 August 1996, in accordance with its obligations under Article 37 of the *Euratom Treaty*, the United Kingdom supplied the European Commission with data relating to the disposition of radioactive waste from the MOX Plant. It was then the duty of the Commission to consult experts and deliver an Opinion on the proposed plant. On 25 February 1997 the Commission delivered its Article 37 Opinion, in which it concluded:

> "(a) The distance between the plant and the nearest point on the territory of another Member State, in this case Ireland, is 184 km;
>
> (b) Under normal operating conditions, the discharge of liquid and gaseous effluents will be small fractions of present authorized limits and will produce an exposure of the population in other Member States that is negligible from the health point of view;
>
> (c) Low-level solid radioactive waste is to be disposed to the authorized Drigg site operated by BNF plc. Intermediate level wastes are to be stored at the Sellafield site, pending disposal to an appropriate authorized facility;
>
> (d In the event of unplanned discharges of radioactive waste which may follow an accident on the scale considered in the general data, the doses likely to be received by the population in other Member States would not be significant from the health point of view.

[25] MOX fuel is also planned as the route for disposition of large quantities of plutonium declared as surplus to requirements from nuclear weapons programmes of the United States and Russia. Expert report of Dr Geoff Varley, at paragraphs A.1.27, A.2.7, A.3.8 **(Annex 2)**.

> In conclusion, the Commission is of the view that the implementation of the plan for the disposal of radioactive wastes arising from the operation of the BNFL Sellafield mixed oxide fuel plant, both in normal operation and in the event of an accident of the type and magnitude considered in the general data, is not liable to result in radioactive contamination, significant from the point of view of health, of the water, soil or airspace of another Member State."[26]

2.7 Ireland did not challenge that Opinion.

2.8 Ireland did, however, participate in the five rounds of public consultations which formed part of the justification exercise, following which the Secretary of State for Environment, Food and Rural Affairs and the Secretary of State for Health decided on 3 October 2001 that the process of MOX fuel manufacture was justified.[27] (This was not a decision to "authorise the commissioning of the MOX Plant", as stated by Ireland at paragraph 21 of the Memorial and again at paragraph 54 and in the title page of the list of annexes). On 19 December 2001, the United Kingdom's independent nuclear safety regulator, the Nuclear Installations Inspectorate, gave BNFL consent to proceed with plutonium commissioning.

B. Principal Current Competitors and Customers

2.9 A full account of the competitors and customers in respect of the MOX market is given in the expert report of Dr Varley and the witness statement of Mr Rycroft, at **Annexes 2 and 3** to this Counter-Memorial.

2.10 The main international suppliers of MOX fuel are at present BNFL, COGEMA (which is part of the French State-controlled AREVA group) and Belgonucléaire. COGEMA currently operates two MOX manufacturing plants, one of which produces MOX rods which are transported to the FBFC facility at Dessel in Belgium owned by Framatome Advanced Nuclear Plant, which is part of the same group as COGEMA. In addition, Belgonucléaire operates another facility at Dessel producing MOX rods which are transported to the adjacent FBFC fuel assembly plant.[28] There is a MOX plant planned in Japan (at Rokkashomura) and

[26] OJ 1997 No C86/3 **(Annex 9)**.
[27] Annex 5 to Ireland's Memorial.
[28] Witness Statement of Jeremy Rycroft, at paragraph 2.2. **(Annex 3)**

there are plans to construct a MOX fabrication facility in the United States.

2.11 Japan is both a purchaser and a potential supplier of MOX fuel. It has ten nuclear utilities, operating 51 LWRs. All Japanese utilities made firm contracts for reprocessing at THORP and at the COGEMA UP3 plant prior to their commissioning and have shipped substantial amounts of spent fuel from their reactor sites to meet their commitments for reprocessing. In addition, a majority of Japanese utilities have had fuel reprocessed at the Tokai Reprocessing Plant ("TRP"), the domestic pilot plant now operated by the Japan Nuclear Cycle Development Institute.

2.12 Several Western European States currently operate civil nuclear facilities discharging spent fuel suitable for reprocessing, the plutonium from which could then in turn be used in MOX manufacture at the Sellafield MOX Plant. Ireland refers in its Memorial to Belgium, the Netherlands and Switzerland. The state of negotiations between BNFL and potential customers is among the information withheld, on grounds of commercial confidentiality, from the PA and ADL Reports.

C. The Process Followed in Redacting Information from the PA and ADL Reports

2.13 In November 1996 BNFL applied to the United Kingdom's Environment Agency for variations to the gaseous and liquid discharge authorisations for its Sellafield site. The Environment Agency asked BNFL to provide information relating to the MOX Plant and BNFL did so in January 1997. The Environment Agency then undertook a public consultation on the justification for the MOX Plant which lasted for eight weeks and finished in April 1997.

2.14 In response to concerns that there was insufficient information on the economic case for the MOX Plant, the Environment Agency on 23 June 1997 asked BNFL to provide additional information. BNFL submitted a business case for the MOX Plant to the Environment Agency, which then decided that it should have its own independent assessment. PA won the competitive tendering exercise. The Environment Agency entered into a contract with them in September 1997. For the purpose of the assessment BNFL made information on its economic case for MOX Plant available to PA on condition that PA and its staff agreed to be bound by strict terms of confidentiality (which they duly accepted). PA

also undertook a survey of relevant publicly available information.

2.15 At the outset, PA established its own criteria to judge whether information should be regarded as confidential, for the purposes of the Report to be published later. It concluded that information should not be placed in the public domain if it would:

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

In addition, PA considered that information should not be placed in the public domain that would breach security and safeguards requirements with respect to plutonium quantities, locations and movements.[29]

2.16 PA completed its assessment and prepared a "full" version of the Report for submission to the Department of the Environment, Transport and the Regions ("DETR").[30] PA reviewed the full version of the Report against the criteria that it had established at the outset, in order to determine what data should be withheld from a public domain version. In conducting that exercise, PA engaged in discussions with BNFL, but PA was required to take, and did in fact take, an independent view. Where BNFL and PA differed in their assessment of the justification for excluding material from the public domain version of the Report, on grounds of commercial confidentiality, the final decision was taken by the Environment Agency. It was the Environment Agency that published a public domain version of the PA Report on 12 December 1997.[31] A second round of public consultation then took place. This

[29] PA Report, Annex 2A to Ireland's Memorial, paragraph 1.3 (page 40); Annex 2B to Ireland's Memorial, paragraph 1.3 (page 75).
[30] DETR is for present purposes the predecessor of DEFRA.
[31] Annex 2A to Ireland's Memorial, page 32.

concluded on 16 March 1998.

2.17 In October 1998, the Environment Agency forwarded to the relevant Secretaries of State two proposed decisions: one in respect of justification for the uranium commissioning of the plant and the other in respect of the justification for plutonium commissioning and full operation of the plant.

2.18 After receiving representations from Ireland and others, and considering the matter independently, the DETR and the Ministry of Agriculture, Fisheries and Food ("MAFF") undertook a further item-by-item scrutiny of the PA Report so as to ensure that no information contained in the full version should be excised from the public domain version save where this was strictly necessary in the interests of commercial confidentiality. A revised public domain version of the PA Report was published by the Secretaries of State in June 1999.[32] An updated assessment of the market for MOX fuel prepared by BNFL was also published.

2.19 Ireland states that the 1999 public domain version of the PA Report was "essentially the same as the earlier version".[33] That is incorrect. Insofar as information was considered capable of release following the further scrutiny of the PA Report referred to above, it was so released. The following examples serve to illustrate this:

(i) A table disclosing key business drivers was now published.[34]

(ii) A detailed explanatory text dealing with sales volumes, sales prices, production capacity, fixed costs, variable costs and capital costs was now included.[35]

(iii) The economic effect of delay on commissioning was now disclosed.[36]

(iv) A Dupont Chart of Key Business Drivers was now included.[37]

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[32] Annex 2B to Ireland's Memorial, page 71.
[33] Paragraph 48 of Ireland's Memorial.
[34] Page 2-9, paragraph 2.2 of the 1999 version, Annex 2B to Ireland's Memorial, between pages 76 and 77; cf. page 2-9 of the 1997 version, Annex 2A to Ireland's Memorial, page 43.
[35] Page 2-11, paragraphs 2.4 to 2.9 of the 1999 version, Annex 2B to Ireland's Memorial, between pages 77 and 78; cf. page 2-11 of the 1997 version, Annex 2A to Ireland's Memorial, page 45.
[36] Page 3-31 paragraph 3.7 bullet point 5 of the 1999 version, Annex 2B to Ireland's Memorial, page 86; cf. page 3-18 of the 1997 version, Annex 2A to Ireland's Memorial, page 52.
[37] Page A-36 of the 1999 version, Annex 2B to Ireland's Memorial, page 89; cf. page A-23 of the 1997 version, Annex 2A to Ireland's Memorial, page 57.

(v) The period during which the SMP business is expected to generate income was now revealed.[38]

2.20 On 11 June 1999, the Secretary of State for the Environment, Transport and the Regions announced in Parliament that he and the Minister of Agriculture were inviting comments on further information about the economic case for the MOX Plant. There followed a third period of public consultation, which lasted some six weeks in July and August 1999.

2.21 The process was then interrupted by the data falsification incident, discovered by BNFL in September 1999.[39] Subsequently, BNFL submitted a revised case for the MOX Plant. The Department of Trade and Industry reviewed BNFL's revised case and concluded that it could be verified. In March 2001 the Government launched a fourth round of public consultations. Following a public tendering exercise, ADL was commissioned in April 2001 to carry out a review of BNFL's revised economic case. A clause in ADL's contract with DEFRA specified that:

> "The contractor will form its own view on whether any information so identified by BNFL really is commercially sensitive. It will advise [DEFRA] whether any of this can be published. Before advising [DEFRA], it will consult BNFL and take account of its views; but it will then make its representation, and leave any further discussion to [DEFRA] and BNFL. The contractor's Report will then be published, excluding only the commercially sensitive data".

2.22 That clause was supplemented by express instructions from DEFRA encouraging ADL to put as much information into the public domain as possible. ADL produced a "full" version of its Report for Ministers together with a proposed public domain version. BNFL did not share ADL's view on what could be disclosed and made its concerns known regarding the disclosure of commercially confidential information. The appropriate Ministers then

[38] Page B-38 final paragraph of the 1999 version, Annex 2B to Ireland's Memorial, page 90; cf. page B-26, first paragraph of the 1997 version, Annex 2A to Ireland's Memorial, page 60.

[39] In September 1999, BNFL reported to the Nuclear Installations Inspectorate (part of the United Kingdom Health and Safety Executive) that some of the secondary checks on MOX fuel pellet diameter in the MOX Demonstration Facility ("MDF") at Sellafield had been falsified. This led to a full investigation by the Health and Safety Executive, which found that several process workers had not been following quality control procedures agreed with the customer, and had used MOX pellet diameter measurements from previous

decided what data should be withheld on grounds of commercial confidentiality. In making that assessment, Ministers continued to follow the policy that as much information should be put into the public domain as possible. Ireland is therefore incorrect in stating at paragraph 29 of its Memorial that "[t]he United Kingdom, when deciding to omit information from the Reports, is ... acting on the basis of its own financial interests". The decision to include or exclude information from the public domain versions of the reports was taken on the basis of an independent assessment of the information in question.

2.23 ADL concluded that BNFL's revised economic case was sound. There followed a fifth round of public consultations. This ended on 24 August 2001. A decision that the manufacture of MOX fuel was justified was published on 3 October 2001.[40]

D. The Excised Information

2.24 At paragraphs 75 to 77 of its Memorial, Ireland states that the information omitted from the public domain versions of the PA and ADL Reports falls into fourteen categories. Having asserted the existence of these fourteen categories, Ireland alleges that by letter dated 13 September 2001 the United Kingdom did not assert confidentiality for ten of them.[41] From this Ireland deduces that it is only in relation to the four categories of information that there is a dispute as to whether the United Kingdom is entitled to rely on the commercial confidentiality exception in Article 9(3)(d) of the Convention.[42]

2.25 In the letter of 13 September 2001, the United Kingdom gave reasons why five types of information affect commercial confidentiality. The United Kingdom was there responding to a claim advanced by Ireland, who denied that confidentiality attached to information of those five types.[43] In this letter, the United Kingdom was not in any way suggesting that no commercial confidentiality could attach to information that Ireland might later describe by

(a)

spreadsheets instead of making measurements afresh. The MDF is a facility entirely separate from the MOX Plant; the latter employs an automated process such that data falsification could not occur.

[40] Annex 5 to Ireland's Memorial.

[41] Ireland's Memorial, paragraphs 76-77.

[42] Paragraph 77 of Ireland's Memorial. The letter of that date at Annex 4, item 18, page 173 to Ireland's Memorial is the wrong letter. The letter to which Ireland refers at paragraph 77 of the Memorial is at **Annex 6** to this Counter-Memorial.

[43] Annex 4 to Ireland's Memorial, item 9 page 154 at 155.

some other appellation.[44] Ireland is thus incorrect in stating that it is only in relation to information falling within four of Ireland's fourteen categories that a question arises as to the applicability of Article 9(3)(d) of the OSPAR Convention.

2.26 For the purposes of these proceedings the United Kingdom has engaged an independent nuclear industry expert, Dr Geoff Varley, to review the public domain versions of the PA and ADL Reports for purposes of assessing whether information was justifiably excised from them on grounds of commercial confidentiality.[45] Dr Varley's view is that the excised information may properly be grouped into eight generic categories as follows:

(i) MOX sales volumes (including volumes of business secured and forecast);

(ii) MOX sales prices (including prices for particular customers or markets, as well as the variables affecting price and price sensitivities);

(iii) MOX Plant capacity and production capability (including data on ramp-up expectations, expected average operating level and risks to production);

(iv) Production costs at the MOX Plant (including estimates of fixed and variable costs, breakdowns of cost into detailed categories, sensitivity of production cost to various parameters and scenarios);

(v) Contractual details;

(vi) Details of statements given in confidence by utilities and other individuals;

(vii) Outputs from economic models (including sensitivities to various market and operational factors); and

(viii) Information that would reveal insight into BNFL's perception of back end markets and MOX market drivers, BNFL strategy in respect of the MOX fabrication market and, more broadly, BNFL strategy in the spent fuel management mark.

2.27 The Tribunal should also be aware that special considerations apply to Ireland's claim that the United Kingdom is bound to disclose the projected number of marine transports of MOX fuel each year. This is a point to which Ireland appears to attach particular significance.[46] Although it remains the position of the United Kingdom that this information

[44] The letter from Ireland is quoted in paragraph 64 of Ireland's Memorial; the response from the United Kingdom is at **Annex 6**.
[45] A copy of Dr Varley's Report is appended to this Counter-Memorial as **Annex 2**.
[46] Ireland's Memorial, paragraphs 7, 24, 59.

is commercially confidential (and raises obvious considerations of security), the United Kingdom has repeatedly offered to disclose it to Ireland on a confidential basis.[47] At the date of this Counter-Memorial Ireland has not stated whether it will, or will not, respect the confidentiality of the information if it is supplied on that basis.

[47] That offer was made in the United Kingdom's Written Response dated 15 November 2001 to Ireland's Request for Provisional Measures in the *MOX Plant* case before the International Tribunal for the Law of the Sea ("ITLOS"), paragraph 195. It was reiterated at an oral hearing before ITLOS on 20 November 2001 (Oral Hearing Verbatim Record, 20 November 2001, ITLOS Doc. PV.01/09, page 22, lines 4 to 9). Since Ireland made no response, the Agent for the United Kingdom repeated the offer in a letter to the Agent for Ireland dated 19 April 2002. By letter dated 9 May 2002 the latter responded: "We would indeed like to discuss this information with you. However, Ireland does not accept that such information is subject to any commercial confidentiality exception, and as you know our application to the OSPAR Tribunal relates *inter alia* to this information". By further letter dated 16 May 2002 the United Kingdom again reiterated that it remains willing to disclose this item of information if Ireland will guarantee its confidentiality. These letters are at **Annex 10** to this Counter-Memorial.

PART 3

THE NATURE OF THE OBLIGATION UNDER ARTICLE 9 OF THE OSPAR CONVENTION

3.1 The OSPAR Convention is an international treaty, the parties to which include Ireland, the United Kingdom and the European Community. It falls to be interpreted in accordance with the customary rules of interpretation as reflected in Articles 31 to 33 of the *Vienna Convention on the Law of Treaties* of 1969 ("Vienna Convention"). These require, in the first instance, that the Convention be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Convention in their context and in the light of the Convention's object and purpose.

3.2 Article 9(1) of the OSPAR Convention requires Contracting Parties to *"ensure that their competent authorities are required"* to make available the information described in Article 9(2). It does not impose on Contracting Parties an obligation, owed directly to natural and legal persons, to disclose information in response to a request. Nor does it require one Contracting Party to disclose information in response to a request from another Contracting Party. Rather it imposes on Contracting Parties an obligation to ensure that their competent authorities are required to make information available. Each Contracting Party is to discharge this obligation by such means as may be appropriate in its case, e.g. by suitable legislative or administrative measures.

3.3 If the Contracting Parties had intended to create a direct obligation to supply particular information, they could and would have done so in straightforward terms.

3.4 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. Ireland does not allege such a breach. Nor does it allege that the United Kingdom has failed properly to exercise its right under Article 9(3) to provide in its domestic legislation that requests for information may be refused where they affect *inter alia* commercial confidentiality. Ireland's Memorial does not even address the ordinary meaning of the words appearing in Articles 9(1) and 9(3). Ireland's argument simply assumes that Article 9 of the OSPAR Convention creates a direct entitlement to receive information. Such

an interpretation goes against the ordinary meaning of Article 9. There is no basis under Article 9 for the cause of action that Ireland relies on – breach of a direct obligation on the part of a Contracting Party to supply information.

3.5 The French text of Article 9 confirms this interpretation. In the French version, Article 9(1) provides:

> "Les Parties contractantes *font en sorte que leurs autorités compétentes soient tenues* de mettre à la disposition de toute personne physique ou morale les informations décrites au paragraphe 2 du présent article …".

3.6 Similarly, Article 9(3) is not cast in the terms of a bare right to refuse the disclosure of information. Rather it affirms the "right" of Contracting Parties, in accordance with their national legal systems and applicable international regulations, "to provide for" a request to be refused where it affects certain specified categories of information. Article 9(3) in the French text, as in the English version, refers to the Contracting Parties' discharge of their obligations through the exercise of their rights under national law. It refers to:

> "*le droit qu'ont les Parties contractantes, conformément à leur législation nationale et aux réglementations internationales applicables*, d'opposer un refus à une demande d'information lorsque celle-ci a trait …
>
> au secret commercial et industriel, y compris la propriété intellectuelle".

3.7 This language makes it clear that the obligation imposed on each Contracting Party by Article 9(1) is to maintain or establish an appropriate domestic system to ensure that its competent authorities shall be required to make certain information available. Any refusal to make information available, in a particular case, is governed by national law and applicable international regulations. That is why Article 9(3) speaks of the right of Contracting Parties to provide for a request for information to be refused in the circumstances specified thereafter. A refusal to disclose information in a particular case pursuant to the relevant domestic law is not a matter governed by the Convention

3.8 This interpretation of Article 9 is supported by its context and the object and purpose of the OSPAR Convention. The OSPAR Convention is primarily concerned with the adoption by Contracting Parties of programmes and measures to prevent and eliminate pollution and protect the maritime area. This appears clearly from Article 22, as well as from

Article 2(1) "General Obligations" and the following substantive articles and their corresponding Annexes. Article 9 fits into this scheme.

3.9 Insofar as the Tribunal considers it necessary to have regard to the *travaux préparatoires* of Articles 9(1) and 9(3) of the OSPAR Convention, these will confirm that the wording of these Articles is derived from Article 3(1) and 3(2) of EC Council Directive 90/313/EEC of 1990. Indeed, the wording was specifically amended in order to secure conformity with that Directive.[48]

3.10 Article 3(1) of Council Directive 90/313/EEC provides, so far as is material, that "Member States shall ensure that public authorities are required to make available" certain information. Article 3(2) begins "Member States may provide for a request for such information to be refused where it affects" certain matters including commercial and industrial confidentiality.

3.11 A directive is defined in Article 249 of the Treaty establishing the European Community ("EC Treaty") as a measure which is "binding as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods". By using a directive, rather than a regulation, to embody the relevant obligation, and by expressing this obligation in the language used in Article 3(1), the EC Member States made it clear that the obligation undertaken by each Member State was to take such legislative or administrative measures as might be appropriate to achieve the stated objective. By adopting that language, the Contracting Parties to the OSPAR Convention evinced their intention to adopt the same approach.

3.12 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/EEC. It has enacted and put into force the *Environmental Information Regulations 1992* (*"1992 Regulations"*) 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

[48] See extracts of OSPAR Convention *travaux preparatoires*, at **Annex 11** to this Counter-Memorial.

Convention[49].

3.13 A natural or legal person who is refused information, pursuant to the *1992 Regulations*, has ample remedies in domestic law. In addition, it is open to any such person, and of course to an EC Member State, to complain to the European Commission of an alleged failure of an EC Member State properly to discharge a duty to implement a directive. Indeed, it is the duty of the European Commission, under Article 211 of the EC Treaty, "to ensure that the provisions of this Treaty and the measures adopted by the institutions pursuant thereto are applied". If the European Commission took the view that the United Kingdom had failed properly to implement the Directive, it could raise the matter at the administrative level and, if this failed to resolve the issue, could institute proceedings against the United Kingdom in the Court of Justice, whose duty it is "to ensure that in the interpretation and application of this Treaty the law is observed" (EC Treaty, Article 220).

3.14 As an EC Member State, Ireland has in addition the remedy for which provision is made in Article 227 of the EC Treaty. This provides that:

> " A Member State which considers that another Member State has failed to fulfil an obligation under the Treaty may bring the matter before the Court of Justice.
>
> Before a Member State brings an action against another Member State for an alleged infringement of an obligation under this Treaty, it shall bring the matter before the Commission."

3.15 Indeed, EC Member States have invested the European Community with exclusive jurisdiction. Article 292 of the EC Treaty provides:

> "Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein".[50]

This also applies in respect of any alleged failure to comply with the obligations incumbent

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[49] *Environmental Information Regulations 1992* (S.I. 1992/3240), as amended by the *Environmental Information (Amendment) Regulations 1998* (S.I. 1998/1447) **(Annex 12)**; the latter made in response to a previous Commission administrative approach to the United Kingdom.

[50] The same point may be made in respect of alleged breaches of Euratom law. See *Euratom Treaty*, Article 193.

on EC Member States by reason of Directives made pursuant to the Treaty.

3.16 Ireland has not availed itself of any of these remedies.

3.17 In the light of the above, it is submitted (i) that Ireland has no cause of action, and (ii) that Ireland's claims are inadmissible as they are claims that must be brought before a different forum.

PART 4

THE INFORMATION SOUGHT BY IRELAND IS NOT INFORMATION WITHIN ARTICLE 9(2) OF THE OSPAR CONVENTION

A. The Interpretation of Article 9(2)

4.1 For Ireland to make its case it must show that the information it seeks is information that comes within the scope of Article 9(2) of the OSPAR Convention. This provides:

> "The information referred to in paragraph 1 of this Article is any available information in written, visual, aural or data-base form on the state of the maritime area, on activities or measures adversely affecting or likely to affect it and on activities or measures introduced in accordance with the Convention."[51]

4.2 Ireland does not contend that the redacted information in the PA and ADL Reports constitutes information in either the first or third of these categories; it contends solely that this constitutes information on activities adversely affecting or likely to affect the maritime area, claiming that "MOX production is an activity which will inevitably and certainly affect the maritime area, including Ireland's waters".[52] It follows, says Ireland, that all information relating to the production of MOX will be information that comes within the scope of Article 9(2). The entirety of the PA and ADL Reports, Ireland asserts, is directed exclusively at assessing the prospects of the MOX Plant; the correct approach, it says, is to look at the information requested as a whole.[53]

4.3 The relevant question, however, is not whether MOX production will affect the maritime area. It is whether the *information requested* is information on activities or measures adversely affecting or likely to affect the maritime area. Article 9(2) is quite specific. It does not licence "fishing expeditions" for any and all information concerning undertakings merely because aspects of their operations may have a bearing on the maritime area. Any other interpretation would both be at odds with the object and purpose of the

[51] The term "maritime area" is defined in Article 1(a) of the Convention.
[52] Ireland's Memorial, at paragraph 96.
[53] Ireland's Memorial, at paragraphs 98-99.

Convention and would open the door to potentially widespread abuse.

4.4 The OSPAR Convention is not a freedom of information treaty of general application. It is concerned with the protection of the marine environment of the North-East Atlantic. To come within the scope of Article 9(2), information must be "on" the state of the maritime area or activities or measures affecting or likely to affect it, which at the very least requires a real degree of proximity. Article 9 of the OSPAR Convention cannot be used to secure disclosure of any and all information concerning undertakings some aspects of the operations of which may touch upon the state of the maritime area.

4.5 The context in which Article 9(2) is found and the object and purpose of the Convention lend added support to this interpretation. The OSPAR Convention is focused on the prevention or elimination of pollution in the North-East Atlantic and the protection of the maritime area against the adverse effects of human activities. Article 9(2) draws its meaning from this focus. An assessment of whether information requested comes within the scope of Article 9(2) must also be undertaken by reference to the particular information requested rather than by reference to some generalised view of the information as a whole, the operations of the undertaking in question or the document in which the information is found.

B. The Requested Information does not fall within Article 9(2)

4.6 The material with which this case is concerned comprises figures secured and projected business for the MOX Plant; sales prices; the production capacity of the MOX Plant; production costs; contractual details; the identity of certain customers; outputs from economic models; and information that would reveal insight into BNFL's back end markets. Ireland's contention is that this amounts to information on activities affecting or likely to affect the maritime area (i) because the PA and ADL Reports assess the "prospects" of the MOX Plant, (ii) because there will be some discharge of radioactivity from the MOX Plant (no matter how small), (iii) because the MOX Plant is related to the THORP Plant from which there will be some discharges of radioactivity, and (iv) because there may be accidental discharges of radioactivity from the MOX Plant or from shipping destined to or from it.[54]

[54] Ireland's Memorial, at paragraphs 96 and 99. The underlying assertions are not supported by evidence.

4.7 This is not a case where a natural or legal person requests information on the potential environmental impact of a given activity. All such information has been in the public domain for many years. Ireland has known for many years what the liquid and gaseous discharges from the MOX Plant are likely to be; it has known for many years what the radiological impact of the MOX Plant is likely to be (and moreover it does not challenge the United Kingdom's estimates on radiation doses from the MOX Plant).[55] The information with which this case is concerned is information of a purely commercial character.[56]

4.8 As appears from the interpretation of Article 9(2) in paragraphs 4.1 to 4.5 above, the material words of that provision cover only information which is directly and proximately related to the state of the maritime area or to activities or measures adversely affecting or likely to affect the maritime area. On first impression, the information sought by Ireland fails to meet this test. Disclosure of the information sought by Ireland appears inconsistent with the overall object and purpose of the OSPAR Convention and the rights and obligations created by its substantive provisions. Put at its simplest, 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.

4.9 Turning to the individual categories of information that the United Kingdom has identified, none of information on (i) sales volumes, (ii) sales prices, (iii) capacity and production capability, (iv) production costs, (v) contractual details, (vi) information given in confidence, (vii) outputs from economic models, or (viii) information revealing BNFL's market perceptions/strategies could constitute information which is directly and proximately related to the state of the maritime area or to activities or measures adversely affecting or

[55] See Ireland's oral submissions before ITLOS, 20 November 2001 (p.m.), page 9, lines 49-50. Insofar as Ireland now relies on the alleged risk of accidental discharge from shipping, the fact remains that Ireland has known for many years that vessels serving the Sellafield site must comply with international regulations (which are widely available). Nothing that was excised from the PA and ADL Reports is relevant to the alleged risk of accidental discharge from marine transports. Ireland seeks information as to the number of marine transports of MOX fuel. The United Kingdom has offered to disclose this on a confidential basis.

[56] Ireland seeks to give a quite different impression. It claims that the information sought "relates to the functioning of the MOX plant" and/or that it concerns "the MOX process" (paragraph 99 of the Irish Memorial). Neither is correct. Further, although the process of justification requires a consideration of whether the benefits of a given practice outweigh the detriments, neither the PA nor the ADL Report was in any way concerned with evaluating the "detriments" i.e. the potential adverse impacts of the MOX Plant.

likely to affect the maritime area.[57]

4.10 Ireland's case that Article 9(2) is to be interpreted so as to cover purely economic information is largely based on the decision of the European Court of Justice in *Mecklenburg v Kreis Pinneberg – Der Landrat* concerning Directive 90/313 on freedom of access to information on the environment,[58] and on the definition of "environmental information" contained in Article 2(3) of the 1998 Aarhus *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (the "Aarhus Convention").[59]

4.11 The *Mecklenburg* case is not on point but, if anything, supports the United Kingdom's interpretation of Article 9(2). In that case, the European Court of Justice found – unsurprisingly – that a statement of views provided by the competent countryside protection agency in connection with planning approval for a new road constituted information relating to the environment. As explained by the Advocate General, the defining issue was: "the relationship linking the information to the protection of the environment. For the definition … to be satisfied, the data or other information in point must be produced or collected or processed with the principal aim of protecting the environment or must at least be related to the environment".[60] On that basis the Advocate General concluded that the expression embraced a statement of views given in development consent proceedings by a countryside protection agency. The European Court of Justice agreed. The link between the information and the effect of the environment was sufficiently proximate because it was itself "an act capable of adversely affecting or protecting the state of one of the sectors of the environment covered by the Directive".[61]

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[57] Ireland contends that "Throughout the period when Ireland was making its requests the United Kingdom never claimed, or even suggested, that the PA or ADL Reports were not 'environmental information' and that "Those Reports themselves make no such claim" (paragraph 96 of Ireland's Memorial). This simply reflects the fact that Ireland did not until recently seek the redacted information under the OSPAR Convention, and also the fact that the two reports were commissioned in the context of a quite different legal regime.

[58] Case C-321/96: [1999] 2 CMLR 418, 435. See paragraph 102 and Annex 15 to Ireland's Memorial, page 514.

[59] The Aarhus Convention is reproduced at Annex 10 to the Irish Memorial.

[60] Paragraph 13 of the Advocate General's Opinion. The Advocate General relied on Krämer, *"La directive 90/313 sur l'accès à l'information en matière d'environment: genèse et perspectives d'application*, [1991] R.M.C. 782.

[61] Paragraph 21 of the Judgment; see also paragraph 19. In any event, in the *Mecklenburg* case the European Court of Justice was concerned with the interpretation of the phrase "and on activities or measures designed to protect these [water, air, soil, etc], including administrative measures and environmental programmes". Those words do not appear in Article 9(2) of the OSPAR Convention.

4.12 It should, however, be borne in mind that Directive 90/313 refers to a wider category of information than that identified in Article 9(2) of the OSPAR Convention. Article 2(a) of Directive 90/313 is concerned with "information relating to the environment".[62] Article 9(2) of the Convention is concerned with "information … on the state of the maritime area, on activities or measures adversely affecting or likely to affect it". Information about the economic prospects of an undertaking is not *ipso facto* information on activities or measures adversely affecting or likely to affect the maritime area. There must be a connection – a sufficiently proximate link – between the information requested and the activities or measures adversely affecting or likely to affect the maritime area.

4.13 As to the Aarhus Convention relied upon by Ireland, although its definition of "environmental information" includes an express reference to cost benefit and other economic analyses in Article 2(3), this does not assist Ireland.[63] The language of the two Conventions is fundamentally different, and the benchmark by which Ireland's case is to be assessed is the language of Article 9 of the OSPAR Convention. The Aarhus Convention is not in force. It is not, and cannot at this point be, a source of "relevant rules of international law applicable in the relations between the parties".[64] On the contrary, it reflects an exercise of progressive development of the law relating to the disclosure of "environmental information" in terms which go a considerable way beyond the language of the OSPAR Convention and to which neither the United Kingdom nor Ireland is yet party. Furthermore, there remains debate at an EC institutional and intergovernmental level about certain aspects of the definitions of

[62] Article 2(a) of Directive 90/313 defines 'information relating to the environment' as "any available information in written, visual, aural or data-base form on the state of water, air, soil, fauna, flora, land and natural sites, and on activities ... or measures adversely affecting or likely to affect these and on activities or measures designed to protect these, including administrative measures and environmental management programmes". The Commission has presented a proposal regarding the replacement of Directive 90/313: Proposal for a Directive on Public Access to Environmental Information. One of the effects of this Proposal would be to introduce a definition of "environmental information" similar to that contained in the Aarhus Convention. The perceived need to replace Directive 90/313 and its definition of the environment merely demonstrates the limits of the existing law.

[63] As is evident from paragraph 100 of Ireland's Memorial, the use of the term "environmental information" is simply an attempt to import the Aarhus Convention definition into Article 9(2) of the OSPAR Convention.

[64] Cf. paragraph 101 of Ireland's Memorial, where Ireland, implicitly invoking the Aarhus Convention, states that its "interpretation of the OSPAR Convention is consistent with the clear trend in international law and practice towards extensive disclosure of environmental information in all its forms." It goes on to refer explicitly to Article 31(3)(c) of the Vienna Convention, which requires an interpreter to take account of "any relevant rules of international law applicable in the relations between the parties".

"environmental information" and the commercial confidential exemption.[65] In these circumstances, ratification by the United Kingdom and others is dependent on the emergence of an EC consensus on the meaning and application of the Aarhus Convention terms. This case must be addressed on the law as it is and as it applies between the Parties.[66]

C. Consequences of the Requested Information Falling outside Article 9(2)

4.14 As the information excised from the public domain versions of the PA and ADL Reports is not information within the scope of Article 9(2), Ireland's case must fail on the merits.

4.15 In addition, because the information sought by Ireland is not information within Article 9(2), the violations alleged by Ireland do not fall within the OSPAR Convention. As a result, it is the United Kingdom's respectful submission that this Tribunal has no jurisdiction.

4.16 By Article 32(1) of the OSPAR Convention, the Contracting Parties agree that:

> "Any disputes between Contracting Parties relating to the interpretation or application of the Convention, which cannot be settled otherwise by the Contracting Parties concerned, for instance by means of inquiry or conciliation within the Commission, shall at the request of any of those Contracting Parties, be submitted to arbitration under the conditions laid down in this Article."

4.17 In order that the Tribunal should have jurisdiction the dispute must be one "relating to the interpretation or application of the Convention". As the International Court of Justice has recently confirmed, a difference between two States does not amount to a dispute relating to the interpretation or application of a given treaty merely because one State asserts that it falls within the scope of the treaty and the other denies that this is so. Nor is a showing that

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[65] See, for example, the DEFRA *Proposals for a Revised Public Access to Environmental Information Regime – Consultation Paper* of 18 October 2000 (http://www.defra.gov.uk/environment/consult/pubaccess/01.htm).

[66] The United Kingdom observes that the Aarhus Convention, in Article 4(4)(d), permits a request for "environmental information" to be refused "if the disclosure would adversely affect ... the confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest." The United Kingdom considers that, were the Aarhus Convention to be applicable to the present dispute, the information redacted from the PA and ADL Reports that Ireland now seeks would be exempt from disclosure pursuant to this provision.

the applicant's interpretation is a plausible one sufficient to establish jurisdiction. Rather, to establish jurisdiction under the compromissory clause the applicant must show that the alleged breach does indeed fall within the relevant treaty.

4.18 In *Oil Platforms (Islamic Republic of Iran v. United States of America)* the International Court of Justice was faced with a jurisdictional challenge in a case involving a compromissory clause expressed in terms similar to Article 32(1) of the OSPAR Convention. The United States maintained that none of the acts alleged by Iran fell within the Treaty of Amity of 1955, and hence that the dispute did not fall within the compromissory clause. The Court rejected Iran's argument that there was inevitably a dispute within the compromissory clause because the parties advanced opposite contentions as to the meaning or scope of the treaty and/or that its provisions had certain meanings, whilst the United States contended the opposite. The Court found:

> "... the Parties differ on the question whether the dispute between the two States with respect to the lawfulness of the actions carried out by the United States against the Iranian oil platforms is a dispute "as to the interpretation or application" of the Treaty of 1955. In order to answer that question, the Court cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the violations of the Treaty of 1955 pleaded by Iran *do or do not fall within the provisions of the Treaty* and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain, pursuant to Article XXI, paragraph 2".[67]

4.19 Thus, according to the Court, the only way of determining whether the compromissory clause containing the parties' consent to jurisdiction could apply (subject to its terms), was to interpret the substantive provisions of the treaty that the claimant relied on and see if the facts it alleged could lead to a treaty breach. The Court carried out a detailed examination of Articles I, IV and X of the Treaty of 1955, and found that it did not have jurisdiction where the Articles did not cover the alleged actions of the United States.

4.20 This approach has been confirmed in the subsequent case-law of the Court. In the *Legality of Use of Force* cases, the Court referred to the *Oil Platforms* case and distinguished

[67] *ICJ Reports 1996 (II)*, p. 810, paragraph 16, emphasis added. See the Separate Opinion of Judge Higgins for a useful insight into the Court's approach; p.847, in particular at paragraphs 27-36. See also the Separate Opinion of Judge Shahabuddeen, p. 822.

the correct approach at the provisional measures phase, where a claimant need only establish *prima facie* jurisdiction. For those limited purposes, the Court found, it was sufficient to show that the breaches of a given treaty "are capable of falling within the provisions of that instrument".[68] It follows that, in order that the Tribunal should have jurisdiction, it is not enough for Ireland to assert that the information that it has requested is information falling within Article 9(2) of the OSPAR Convention. The Tribunal lacks jurisdiction in circumstances where that information does not constitute information within the scope of Article 9(2).

[68] See e.g. *Legality of Use of Force (Yugoslavia v. Belgium)*, *ICJ Reports 1999*, page 124, paragraph 38.

PART 5

THE INTERPRETATION AND APPLICATION OF ARTICLE 9(3) OF THE OSPAR CONVENTON

5.1 If the United Kingdom is wrong as to the nature of the obligation created by Article 9(1) of the OSPAR Convention, and if the information sought by Ireland is in fact information within Article 9(2), it falls to be considered whether the United Kingdom has properly exercised its rights under Article 9(3) with the result that it is under no obligation to disclose commercially confidential information to Ireland.

5.2 As the Tribunal will recall, Article 9(3) of the OSPAR Convention preserves the right of Contracting Parties, "in accordance with their national legal systems and applicable international regulations", to provide for a request for information to be refused where it affects (*inter alia*) commercial and industrial confidentiality, including intellectual property. It follows from the express language of this provision that the role and function of the Tribunal in the present case cannot be to address the question of commercial confidentiality *de novo*. It is to assess whether the United Kingdom has acted properly, within the framework laid down by the OSPAR Convention, in providing for the request for information to be refused on grounds of commercial confidentiality. The function of the Tribunal is to assess whether the United Kingdom acted properly in exercise of its right, not whether it (the Tribunal) would have exercised a discretion differently.

5.3 In this Part, the United Kingdom addresses three issues:

A. Whether the United Kingdom has acted in accordance with its own domestic legislation and any applicable international regulations in providing that Ireland's request for information be refused. This involves an enquiry into the nature of the relevant domestic legislation, English law, and how English law would be applied in this case.

B. Whether any guidance as to the meaning of the term "commercial confidentiality" can be derived from international instruments and State practice.

C. Whether, as Ireland contends, commercial confidentiality can be accepted as a reason for refusing a request for information under Article 9(3) of the OSPAR Convention only if it outweighs a public interest in access to information.

A. English Law

5.4 In its Memorial, Ireland proceeds on the basis that the disclosure of the information contained in the complete and unedited versions of the PA and ADL Reports is governed by the *Environmental Information Regulations 1992* (*"1992 Regulations"*) made under the European Communities Act 1972, which give effect in Great Britain to EC Directive 90/313.[69]. This follows from Ireland's case that the information redacted from the two reports is environmental information falling within the EC Directive.

5.5 The United Kingdom does not accept that the information excised from the PA and ADL Reports is information within the scope of Article 9(2) of the OSPAR Convention. Nor is it information of the kind governed by the *1992 Regulations*, which *inter alia* cater for the obligations arising under that provision. However, assuming against the United Kingdom that the information requested does fall within Article 9(2) and by extension the *1992 Regulations*, these Regulations support the redactions effected in the PA and ADL Reports, as do the applicable English common law principles.

1. The Commercial Confidentiality Exemption under the 1992 Regulations

5.6 Pursuant to regulation 3(1) of the *1992 Regulations*, a relevant person holding information relating to the environment is required to make it available on request, subject to following provisions of the Regulations. By regulation 4, as amended:

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

[69] *Environmental Information Regulations 1992* (S.I. 1992/3240), as amended by the *Environmental Information (Amendment) Regulations 1998* (S.I. 1998/1447). **(Annex 12)**

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

...

(e) would affect the confidentiality of matters to which any commercial and industrial confidentiality attaches, including intellectual property.

(3) For the purposes of these Regulations information must be treated as confidential if, and only if, in the case of any request made to a relevant person under regulation 3 above –

(a) it is capable of being so treated and its disclosure in response to that request … would involve a breach of any agreement;

…

(c) the information is held by the relevant person in consequence of having been supplied by a person who –

(i) was not under, and could not have been put under, any legal obligation to supply it to the relevant person;

(ii) did not supply it in circumstances such that the relevant person is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure; ..."

5.7 DEFRA has published guidance on public access to environmental information under the *1992 Regulations*.[70] In its Memorial,[71] Ireland highlights paragraph 40 of this Guidance, which affirms that the "presumption is that environmental information should be released unless there are compelling and substantive reasons to withhold it." However, paragraph 40 continues: "The Regulations list the conditions under which a body can refuse access." Addressing commercial confidentiality, as one of the "compelling and substantive reasons" for withholding information, the Guidance goes on to provide as follows:

"Information affecting matters to which any commercial or industrial confidentiality attaches or any intellectual property must not be released if it is the subject of existing statutory restrictions disclosure (see paragraph 63). When not subject to other statutory restrictions it may be withheld. There will be circumstances where the disclosure of information would prejudice the commercial interests of an individual or business."[72]

[70] DEFRA, *Public Access to Environmental Information: Guidance on the Implementation of the Environmental Information Regulations 1992* ("DEFRA Guidance") **(Annex 13)**. This is not authoritative law. See, *R v Secretary of State for the Environment, Transport and the Regions, ex parte Alliance against the Birmingham Northern Relief Road* [1999] JPL 231, 254 (**Annex 14**).

[71] Ireland's Memorial, at paragraph 128.

[72] DEFRA Guidance, at paragraph 55.

> "This could include 'contract details', 'intellectual property' (e.g. data embedded in proprietary GIS, copyright maps), 'trade secret' (e.g. under regulation *6(2) of SI 1989/318*), 'secret manufacturing process' (e.g. under *section 4(1) of the Environment and Safety Act 1988*), and 'relevant process' (e.g. under section *13(3) of the Radioactive Substances Act 1960*)."[73]

5.8 Ireland refers to two English cases in its consideration of the *1992 Regulations*. The first of these, *R v British Coal Corporation, ex parte Ibstock Building Products Limited*,[74] does not concern commercial confidentiality. It is not relevant to Ireland's case. Of far greater relevance is the second case on which Ireland relies: *R v Secretary of State for the Environment, Transport and the Regions, ex parte Alliance against the Birmingham Northern Relief Road*.[75] This case considers the application of both regulations 4(2)(e) and 4(3). The case concerned the disclosure of a commercial agreement between the Secretary of State and the concessionaire who was to design, build, finance and operate a 44 km stretch of motorway around part of Birmingham. This agreement contained environmental information in particular in that it required the concessionaire to provide and maintain works to mitigate the environmental effects of the construction and use of the motorway.[76]

5.9 Mr Justice Sullivan approached the case on the premise that he had to decide as a matter of fact whether information was environmental and/or confidential. On the other hand, the issue of whether or not information should then be disclosed was a matter in the discretion of the Secretary of State.[77] With specific regard to the issue of disclosure, the court found that the "blanket" approach being adopted by both parties was inappropriate. The commercial agreement was not to be considered commercially confidential as a whole merely by virtue of its nature; but it could not be disclosed in its entirety as parts of it clearly were commercially confidential:

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[73] DEFRA Guidance, at paragraph 57, note 3. See also the definition of commercial confidentiality at sections 22(11) and 64(11) of the *Environmental Protection Act 1990*: "Information is, for the purposes of any determination under this section, commercially confidential, in relation to any individual or person, if its being contained in the register would prejudice to an unreasonable degree the commercial interests of that individual or person."

[74] [1995] Env. LR 277. See Annex 15, page 534, and paragraph 130 of Ireland's Memorial. In that case, the court held that the source of information relating to the state of the land (a mine where it was reported that munitions had been dumped in 1947) was itself to be construed as information as it went to the credibility and weight of the information. This is unsurprising.

[75] [1999] JPL 231 **(Annex 14)**. See paragraphs 131-138 of Ireland's Memorial. Ireland has annexed a different case at its Annex 15, page 539.

[76] [1999] JPL 231, at 249.

[77] [1999] JPL 231, at 247.

> "As a matter of common sense, one would expect a commercial document, and in particular a contract, to contain information which was commercially confidential. In striking the balance seen in Article 3 of the Directive, it is easy to see why particular information, e.g. relating to prices, in a commercial agreement should be exempted from disclosure. It is much less easy to see how a blanket exclusion in respect of a commercial agreement as a whole could be justified as being proportionate to the objective of ensuring freedom of access to environmental information whilst protecting commercial and industrial confidentiality.
>
> Taking the present agreement as an example, it is as difficult to see why clause 29, which deals with "Fossils and Antiquities" should be treated as confidential, as it is easy to understand without the need for detailed evidence why clause 28 which deals with "payment" should be excluded from disclosure. Although the agreement was made in 1992 I do not accept that financial information relating to "Payment", or to "Compensation Events" is now only of historical interest. It would be a relatively simple matter for competitors to update prices by reference to the appropriate indices.
> … whilst the agreement as a whole does not fall within regulation 4(2)(e), it is plain from the Index and the Index of Schedules that much of the information within it does relate to matters to which commercial confidentiality attaches."[78]

5.10 Ireland does not address these important passages, which do not support a "blanket" request for information. It would be difficult to find a clearer case of a "blanket" demand for disclosure than the present one, in which Ireland demands to be supplied with the complete and unedited versions of the PA and ADL Reports.

5.11 The *Birmingham Northern Relief Road* case suggests that the correct approach to commercial confidentiality under the *1992 Regulations* is to look at the nature of the information sought in some detail, and to ensure that protection is afforded to all that is commercially confidential, such as prices, costs, etc. This is precisely the approach adopted by the United Kingdom in the instant case, in which edited versions of the PA and ADL Reports were published, the only excisions being information considered to be commercially confidential.

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[78] [1999] JPL 231, at 255. The court found that the agreement itself was not the subject of a confidentiality undertaking and rejected this and related arguments under Regulation 4(3).

5.12 Ireland also relies on the *Birmingham Northern Relief Road* case as authority that a balancing act is to be carried out between the public interest that confidences should be preserved and the public interest in disclosure.[79] Whilst it is correct that the court found that the Secretary of State had a discretion insofar as Regulation 4(2)(e) was concerned, it also found that there was no such discretion in respect of Regulation 4(3)).

5.13 The Tribunal should also be aware of the *Code of Practice on Access to Government Information*, Second Edition (1997).[80] The purpose of the Code is to provide a framework for access to government information "based on the assumption that information should be released except where disclosure would not be in the public interest, as specified in Part II of this Code".[81] Part II of the Code indicates 15 categories of information that are exempt. Exemption 13 exempts from disclosure "[i]nformation including commercial confidences, trade secrets or intellectual property whose unwarranted disclosure would harm the competitive position of a third party." Exemption 14 exempts from disclosure "[i]nformation held in consequence of having been supplied in confidence by a person who: ... was not under any legal obligation, whether actual or implied, to supply it, and has not consented to its disclosure".[82] Commercial confidentiality under Exemption 13 of the Code was relied upon to withhold disclosure of information on the operating and maintenance costs of the Dounreay nuclear reprocessing plants in 1995. The decision of the Department of Trade and Industry refusing disclosure was challenged before the Parliamentary Commissioner for Administration, who is responsible for overseeing the operation of the Code, but was upheld in Case No.A.1/95.[83] The refusal of a request for information concerning the economic viability of THORP on similar grounds was also upheld by the Parliamentary Commissioner in Case No.A.29/95.[84]

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[79] Ireland's Memorial, at paragraph 138.

[80] **Annex 15**. Note also that the Freedom of Information Act 2000 contains important exemptions relating to commercial confidentiality. See in particular sections 1, 2, 41 and 43.

[81] Code of Practice, at paragraph 1 **(Annex 15)**.

[82] In respect of these categories, the Code provides that "the presumption remains that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available." It goes on to state: "References to harm or prejudice include both actual harm or prejudice and risk or reasonable expectation of harm or prejudice. In such cases it should be considered whether any harm or prejudice arising from disclosure is outweighed by the public interest in making information available."

[83] *Case No. A.1/95 – Refusal to provide full responses to information requests about the reprocessing of nuclear fuel at Dounreay* **(Annex 16)**.

[84] *Case No. A.29/95 – Refusal to provide information about the economic viability of the Thermal Oxide Reprocessing Plant (THORP) at Sellafield*, at paragraph 5.40 **(Annex 17)**.

2. The Commercial Confidentiality Exemption under Common Law

5.14 The rejection of an "all or nothing" approach is also evident from authorities outside the *1992 Regulations*, including *London Regional Transport and London Underground Ltd v. The Mayor of London and Transport for London*,[85] which is considered in paragraphs 141 and 142 of Ireland's Memorial. In that case, the defendants had commissioned a report by Deloitte & Touche concerning the economic viability of the London Underground Public-Private Partnership. The defendants wished to make the report public but were enjoined from doing so. This injunction was discharged on the defendants' undertaking to make public a version of the report excising only the commercially confidential information.[86] The key issue for the Court was whether disclosure of the redacted version of the report was to be prevented in circumstances where the parties had entered into various confidentiality agreements.

5.15 In assessing the weight to be attached to such agreements, it was of great importance to the court that the defendants were only seeking disclosure of the analysis contained in the Deloitte report, and not the detail. As Mr Justice Sullivan said at first instance (in a passage quoted by the Court of Appeal with approval at paragraph 40 of its judgment):

> "I take into account the nature of the document that is proposed to be produced. This is not some item of distasteful trivia. It is not the equivalent of paparazzi photographs. It is a serious report about a matter of very considerable public interest, prepared by a highly reputable organisation, Deloittes. I would also add that it is quite different from those cases where "moles" try to publish leaked documents. In the present case, what Deloittes have done is to peruse LUL's confidential documents, but the report is their own analysis. They are not seeking to leak LUL's documents. LUL would say that they are seeking to leak information which is contained in those documents. But in my judgment the redactions to the Deloittes report meet

[85] [2001] EWCA Civ. 1491. Annex 15 to Ireland's Memorial, page 554.

[86] In his witness statement in support of the defendants' case, Mr Kiley said in relation to the details of the bids that had been excised (paragraph 26 of the Court of Appeal's judgment): "Necessarily, such detailed bidding information … is highly confidential. As is obvious were, say, one competitor in the tendering process to learn of some details of a rival bid, it could `trim' its bid accordingly. Any such unfairnesses could taint any selection process and lead to legal action against LUL or other parties. I have at all times been acutely aware of such sensitivities and have never proposed or considered disclosing information of this kind. I have never proposed to disclose any part of the Report that did not pay heed to and preserve such genuine commercial confidences." See also at paragraph 51 of the judgment.

that objection. What remains, and what would be made public, is Deloittes analysis.

…

I am not concerned with the publication of the Deloittes report in its original form, with all of the figures and identities included. I am concerned with the redacted version, which I have read, where figures and identities are blanked out."

5.16 Hence the Court of Appeal concluded:

> "The guiding principle is to preserve legitimate commercial confidentiality while enabling the general public (and especially the long-suffering travelling public of London) to be informed of serious criticism, from a responsible source, of the value for money evaluation which is a crucial part of the PPP for the London Underground." (paragraph 50, per Walker LJ)[87]

5.17 Ireland is wrong to suggest that the Court of Appeal's view was that the existence of a confidentiality agreement made no difference in the balancing exercise.[88] The Court merely rejected the argument that more weight was to be accorded in respect of information given in confidence pursuant specifically to a confidentiality agreement, as opposed to being given in confidence by some other means.

5.18 The Court of Appeal in the *London Regional Transport* case considered that the redacted information was plainly commercially confidential. The case offers only limited assistance on the types of information (other than information given in confidence) considered as commercially confidential, save that it confirmed that the specific information on figures and identities was to be kept confidential. English case law is nonetheless well-developed in terms of identifying different types of commercially confidential information. Such types of information include:

(a) price information;

(b) new product development;

(c) new market details;

[87] See also at paragraph 53, per Sedley LJ: "I am in full agreement with the reasoning and conclusions of Robert Walker LJ. The discharge of the injunction by Sullivan J is justified on the straightforward ground that *there is nothing of genuine commercial sensitivity in the redacted version of the Deloittes report* and nothing therefore to justify the stifling of public information and debate by the enforcement of a bare contractual obligation of silence." (emphasis added)

[88] Paragraph 142 of Ireland's Memorial, examining paragraphs 45-46 of the judgment.

(d) customer details;

(e) information on employees;

(f) technical secrets,

(g) industrial devices and formulae;

(h) secret industrial processes.[89]

3. Conclusions on English Law

5.19 The following principles relevant to the application of Article 9(3) of the OSPAR Convention may be distilled from the foregoing account:

(i) There is a public interest in the preservation of commercially confidential information to be balanced against a public interest in disclosure. That balance is a matter for appraisal by the competent executive authorities. The courts will seek to preserve legitimate commercial confidentiality.

(ii) In cases involving the *1992 Environmental Information Regulations*, English law permits, and in some cases requires, requests for information to be refused where disclosure: (a) would be in breach of an undertaking of confidentiality or where the information was otherwise provided by a third party on the basis that it would remain confidential; (b) would, or would be likely to, prejudice the commercial interests of any person; (c) would harm the competitive position of a third party.

(iii) A particularly high premium is given to the protection of information provided under a confidentiality undertaking or on the basis that it would remain confidential. Non-disclosure in such cases is required: regulation 4(3)(a). The same applies where information is given voluntarily: regulation 4(3)(c).

(iv) Information gathered by government in the course of regulation is also invariably considered to be commercially confidential.

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[89] See Hull, *Commercial Secrecy: Law and Practice* (1998), at paragraphs 3.68 – 3.88 **(Annex 18)**.

(v) One accepted means of protecting commercial confidentiality is by redaction of commercially confidential information in a given document and disclosure of the remainder.

4. Applicable International Regulations

5.20 The term "applicable international regulations" is not defined in the OSPAR Convention. Ireland contends that "applicable international regulations" should be construed simply as a reference to "international law and practice".[90] This is a forced interpretation. In the United Kingdom's submission, the term "applicable international regulations" means what it says. In this respect, Article 9(3) contemplates 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. In the case of Article 9(3)(d), there are no such regulations. It is accepted however that the Tribunal should have regard to EC Directive 90/313, which is implemented by the *1992 Regulations* and contains an exemption in respect of commercial confidentiality.

5.21 Directive 90/313 of 7 June 1990 has the object of ensuring freedom of access to information relating to the environment generally: it is not confined to information on the marine environment.[91] Article 3(2) of that Directive sets out grounds on which a Member State may provide for a request for information relating to the environment to be refused as follows:

> "Member States may provide for a request for such information to be refused where it affects:
> …
> commercial and industrial confidentiality, including intellectual property."

5.22 This ground is expressed in the same terms as Article 9(3)(d) of the OSPAR Convention (as are all the other grounds). In particular, it contemplates that the national provisions may entail refusal of a request which "affects" commercial and industrial

[90] Ireland's Memorial, at paragraph 117.
[91] OJ No 1990 L 158/56 **(Annex 4)**. The definition of "information relating to the environment" in Article 2(a) of the Directive is considerably broader than the information on the state of the maritime area, etc that is indicated in Article 9(2) of the OSPAR Convention.

confidentiality. It is not cast in terms of "adverse affects". This is confirmed by the European Commission's Explanatory Memorandum concerning its proposal for a new Directive on access to environmental information (to implement the Aarhus Convention).[92] Article 4(2) of the proposed directive refers to the right of a Member State to provide for a request for environmental information to be refused if disclosure of the information would "adversely affect" *inter alia* commercially confidential information.[93] According to the Explanatory Memorandum:

> "Under the terms of Directive 90/313/EEC, public authorities are entitled to refuse access to information relating to the environment if disclosure simply *affects* one of the legitimate interests listed in Article 3. With a view to improving the provisions on exceptions, the proposal states the environmental information shall only be withheld if disclosure would *adversely* affect one of the legitimate interests for which provision is made."

5.23 The language of "adverse affects" is new language, drawn from a Convention to which the United Kingdom, Ireland and the European Community are not yet party and contained in a *draft* proposal for an EC Directive.[94]

5.24 Regulation 4 of the *1992 Regulations* is entirely consistent with current EC law and practice. EC Directive 90/313 does not contain a "scale and effects", or threshold of harm, test for purposes of assessing whether commercial confidentiality applies.

5. Conclusions

5.25 In the instant case, the United Kingdom has acted in accordance with its own domestic legislation in providing that Ireland's request for information be refused.

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[92] Proposal for a Directive of the European Parliament and of the Council on public access to environmental information (COM/2000/402 final, OJ 2000 L337E/156).

[93] Article 4(2)(d) defines this reflecting the Aarhus Convention as follows: "the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest. Member States may not, by virtue of this sub-paragraph, provide for a request to be refused where the request relates to information on emissions, discharges or other releases into the environment which are subject to provisions of Community legislation. ..."

[94] It is apparently on the basis of this wording that Ireland now contends that in the OSPAR Convention the expression 'adversely affects' means that the effects of disclosure must be *significantly detrimental*". See, Irish Memorial, at paragraph 122. There are two points. The first is that Ireland replaces a neutral word used in the Convention - "affects" - by wording of its own which would signify a quite different test - "significantly detrimental". The second is that Ireland's argument is based in the law as Ireland would like it to be, rather than the law as is now applicable between the Parties.

5.26 A detailed review has been carried out in which the public interest in maintaining the commercial confidentiality of information held by BNFL has been balanced against the public interest in disclosure. A balance has been achieved by disclosing the substance of the information (PA's report on BNFL's economic case) in which there is an interest in disclosure, but excising data concerning matters such as sales prices, volumes, production costs, etc. That this is the correct approach is confirmed by cases such as the *Birmingham Northern Relief Road* case and the *London Regional Transport* case. The detailed review has then been repeated at two junctures: in 1999 (leading to the further public domain version of the PA Report), and in 2001 (leading to the public domain version of the ADL Report).

5.27 The United Kingdom submits for present purposes that the redacted information was:

(i) Information that is capable of being treated as confidential and its disclosure would involve a breach of an agreement and/or information supplied by BNFL (a) which was not under any legal obligation to supply the information, (b) did not supply it in circumstances where there was an entitlement to disclose it, (c) has not consented to its disclosure. In these circumstances, the information is correctly treated as confidential and, for the purposes of regulation 4(3) of the *1992 Regulations*, must be treated as confidential;

(ii) Information to which commercial and industrial confidentiality attaches (either for the purposes of regulation 4(2) of the *1992 Regulations* – and as a matter of Directive 90/313 – or as a matter of the English common law). A discretion has been exercised not to disclose the information. It is submitted that this discretion was correctly exercised.

5.28 It follows that the United Kingdom has correctly exercised its right pursuant to Article 9(3) of the OSPAR Convention, "in accordance with their national legal systems and applicable international regulations", to provide for Ireland's request for information to be refused.

B. Commercial Confidentiality under International Instruments and Other National Laws

5.29 The term "commercial and industrial confidentiality" is not defined in the 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.

1. International Instruments

5.30 The only references in the Irish Memorial to other international instruments are to the Aarhus Convention and the Rio Declaration of 1992. The Aarhus Convention is not in force for either the United Kingdom or Ireland and, as Ireland observes, it embodies "emerging international standards".[95] The Rio Declaration is not a binding instrument and the absence of any reference to a commercial confidentiality exemption in its Article 10 is explained by its hortatory character.

5.31 There is however a much more substantial body of international instruments, shedding light on the meaning of "commercial and industrial confidentiality". For present purposes, such instruments can be divided into two categories.[96] The first comprises instruments concerned principally with trade and commercial matters. These include:

- General Agreement on Tariffs and Trade 1947/1994;
- North American Free Trade Agreement (NAFTA) and the NAFTA Agreement on Environmental Cooperation, 1992;
- Energy Charter Treaty, 1994;
- WTO Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994 (TRIPS Agreement);
- WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement);
- WTO Agreement on Preshipment Inspection; and
- WTO Agreement on Subsidies and Countervailing Measures.

[95] Ireland's Memorial at paragraph 118.
[96] References to all of the instruments cited are provided in Appendix A to this Counter-Memorial.

5.32 The second category consists of instruments concerned principally with the environment. These include:

- Convention on Environmental Impact Assessment in a Transboundary Context, 1991;
- Convention on the Transboundary Effects of Industrial Accidents, 1992;
- Convention on the Protection of the Marine Environment of the Baltic Sea Area, 1992;
- Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 1992;
- Convention on Civil Liability for Damage Resulting From Activities Dangerous to the Environment, 1993;
- Convention on Nuclear Safety, 1994;
- Convention for the Protection of the Marine Environment and Coastal Region of the Mediterranean, 1995;
- Aarhus Convention, 1998; and
- Recommendation of the OECD Council on Environmental Information, 1998.

5.33 A review of these international instruments is contained in Appendix A to this Counter-Memorial. The following conclusions can be drawn:

(i) Commercial confidentiality avails both public and private enterprises.

(ii) Non-disclosure on grounds of commercial confidentiality is characterised as a "right" to be exercised in accordance with national law. This is particularly evident in the field of the environment. The reference to national law, for these purposes, must be taken to imply a margin of appreciation to States to determine the precise parameters of the exemption. This, in turn, suggests that the function of a tribunal established to resolve disputes concerning the interpretation and application of such provisions is to assess the propriety and reasonableness of the actions in question, not to consider *de novo* whether information can be characterised as commercially confidential.

(iii) The constant reference to a commercial confidentiality exemption from disclosure as

an integral part of access to information provisions, together with its characterisation as a right, attests to the central importance of the exemption within the scheme of access to information measures. Obligations to disclose information subject to an exemption on grounds of commercial confidentiality amount therefore, quite explicitly, to a careful balance of competing, equally legitimate, rights and interests. The public responsibility to protect legitimate commercial interests is a corollary of the public interest in securing the disclosure of information more generally.

(iv) The term "commercial confidentiality" is nowhere comprehensively defined. There are nevertheless a number of common and useful indicators that go some way towards the scope of commercial confidentiality. Thus, as variously articulated, commercial confidentiality exempts the disclosure of information that:

(a) would prejudice the legitimate commercial interests of an enterprise; or
(b) could prejudice the competitive position of the persons providing the information; or
(c) would be of significant competitive advantage to a competitor; or
(d) would have a significantly adverse effect upon the person supplying the information or upon a person from whom the supplier acquired the information; or
(e) is secret, has commercial value because it is secret, and has been subject to reasonable steps to maintain its secrecy; or
(f) could prejudice the legitimate commercial interests of an enterprise and which is not already published, generally available to third parties or otherwise in the public domain.

(v) Within these general definitions, some forms of information are considered to be intrinsically commercially confidential. These include *inter alia*:

(a) manufacturing data relating to patented, licensed or undisclosed processes;
(b) unpublished technical data;
(c) internal pricing and manufacturing costs;
(d) profit levels;
(e) the terms of contracts between undertakings;

(f) information provided on a confidential basis by third parties.

2. Other National Laws

5.34 The United Kingdom has also conducted a review of the domestic legislation of certain other jurisdictions in order to identify and illustrate the manner in which States legislate to provide for the protection of commercially confidential information, both generally and in respect of information relevant to the environment. The review encompasses the laws of France (the wording of French legislation was adopted into Directive 90/313), Ireland, Australia and the United States.

5.35 The review is contained in Appendix B to this Counter-Memorial. The following conclusions can be drawn from that review:

(i) While the national measures reviewed contain a threshold of harm test, this varies from State to State. In Ireland, the threshold is the *possibility* of prejudice; in Australia it is that disclosure *would* or *could reasonably be expected to* cause prejudice; in the United States it is whether disclosure is *likely* to cause *substantial* harm. Given this variation, there is no foundation for Ireland's proposed test of "significantly detrimental effects" on commercial interests. Although commercial confidentiality is a term of art, States have a margin of discretion in establishing the precise parameters of the term. Reference to national law suggests a broadly common understanding of the term commercial confidentiality as including:

(a) trade secrets;
(b) information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed;
(c) information the disclosure of which would, or could reasonably be expected to, result in a material financial loss or gain to the undertaking to whom the information relates or otherwise unreasonably affect that undertaking in respect of its lawful business;
(d) information the disclosure of which could cause substantial harm to or otherwise prejudice the competitive position of the person to whom the information relates;

(e) information the disclosure of which could prejudice the conduct or outcome of contractual or other negotiations of the person to whom the information relates;

(f) information the disclosure of which could reasonably be expected to prejudice the future supply of information.

(ii) Irish law apart, there is no explicit public interest balancing requirement in the national legislation reviewed. While a public interest element has been read into some national provisions (as in the case of some of the Australian heads of commercial confidentiality), it appears to have been expressly disavowed in other cases (such as in the United States).

(iii) National decisions at both an administrative and judicial level have adopted a broad approach in determining categories of information and harm that is properly cognisable under the commercial confidentiality exemption. Such categories include:

(a) detailed financial information;

(b) commercial and other information regarding an undertaking gathered by government agencies when controlling or investigating an undertaking;

(c) information on a company's pricing structure;

(d) information gathered to establish the safety and effectiveness of a product;

(e) operating information and information of future strategies, expected export market movements, selling prices and overseas customer lists;

(f) a company's actual costs and break-even calculations;

(g) workforce details which would reveal labour costs, profit margins and competitive vulnerability;

(h) details of consultants and subcontractors, names of shippers and importers;

(i) freight routing systems, costs of raw materials, unannounced and future products;

(j) proprietary technical information;

(k) pricing strategy.

3. Conclusions

5.36 The preceding review of international instruments and national law affirms the central importance of a commercial confidentiality exemption to access to information provisions. It is evident from these instruments and measures that the protection of commercially confidential information is as much a matter of public interest as is access to information. These instruments and national measures also identify common categories of information that are generally treated as commercially confidential. The United Kingdom acted entirely consistently with its own national legal regime which, in turn, is entirely consistent with the approach adopted by other States and in international instruments.

C. Ireland's Contentions on Public Interest

5.37 Ireland interprets Article 9 of the OSPAR Convention so as to require a further hurdle to a State's right to refuse a request for information. It says that commercial confidentiality is merely one factor in a balancing exercise – the other factor in the balance being a public interest in disclosure. The argument is that commercial confidentiality can only be accepted as a reason for refusing a request for information if it outweighs that public interest.[97] This is contrary to the language of Article 9(3) of the OSPAR Convention. The right under Article 9(3)(d) to provide that a request for commercially confidential information may be refused is not subject to the qualification for which Ireland contends. It is not open to Ireland to add something that is not there.

5.38 If Ireland's point is simply that the right of a Contracting Party to provide for a request for information to be refused is one to be exercised in accordance with that Party's national legal system, and that English law requires a consideration of the public interest, that is unobjectionable. There are however two competing public interests at issue here: a public interest that confidences should be preserved and a public interest in disclosure. There is not simply one single public interest in favour of disclosure. It is not for this Tribunal to substitute its own assessment for that of the United Kingdom in terms of which public interest is to prevail.

[97] Paragraphs 158-159 of Ireland's Memorial.

PART 6

THE COMMERCIAL CONFIDENTIALITY OF THE REDACTED INFORMATION

6.1 It is recalled that the function of the Tribunal in the present case is to assess whether the United Kingdom has acted, within the framework laid down in Article 9(3) of the OSPAR Convention, in accordance with its national law and applicable international regulations. The task of the Tribunal is not to undertake a *de novo* assessment of whether the specific information redacted from the PA and ADL Reports is in *its* view commercially confidential for purposes of substituting its assessment for that of the United Kingdom.

6.2 However, the United Kingdom in any event contends that as a matter of objective assessment the information redacted from the PA and ADL Reports is properly exempt from disclosure on grounds of commercial confidentiality. In this Part, the United Kingdom develops this proposition (Section A) and also responds to Ireland's contention that the United Kingdom failed to give reasons for the refusal to provide the information requested (Section B).

A. The Confidentiality of the Information Redacted from the PA and ADL Reports

1. The PA and ADL redaction exercises

6.3 The process that was followed in the redaction of the public domain versions of the PA and ADL Reports was detailed and rigorous. In the case of both the PA and ADL Reports, the exercise went through a number of stages at which careful consideration was given to assessing what information could properly be considered to be commercially confidential. In making recommendations to the relevant United Kingdom Government Departments on what information should be considered commercially confidential, PA and ADL acted independently of both BNFL and the Government, forming their own conclusions on the matter. The instructions to PA and ADL made clear the Government's wish to put as much information into the public domain as possible.

6.4 The PA and ADL recommendations, and ultimately the decisions of the relevant Government Departments, on what should be considered commercially confidential and thus redacted from the public domain version of the reports, were considerably narrower than the proposals advanced by BNFL. BNFL's position was that it was being asked to disclose information that was indeed commercially confidential. The Departmental decisions on what information warranted redaction on grounds of commercial confidentiality were carefully considered, in full knowledge of the United Kingdom's obligations under both its own internal law and relevant European Community and international instruments. The United Kingdom's objective in the exercise was to put as much information as possible into the public domain consistent with the protection of the legitimate commercial interests of BNFL and of the confidentiality understandings under which the information in question had been provided.

2. Information provided in confidence

6.5 The starting point for the assessment of the confidentiality of the information redacted from the PA and ADL Reports is that all of the redacted information had been supplied to either PA or ADL, and through them to the relevant United Kingdom Government Departments and agencies, on a strictly commercial confidential basis. The point is made in the witness statement of Jeremy Rycroft, the Commercial Director for the Spent Fuel and Engineering Group at BNFL.[98] Mr Rycroft summarises BNFL's position as follows:

> "Thus, from the very start of what turned out to be a five year SMP justification process, BNFL's position was (and remains) that key information forming part of the business case was commercially confidential and must not be disclosed without BNFL's consent."[99]

6.6 Mr Rycroft further notes that all the relevant information was made available to PA and ADL on condition that they and their staff agreed to be bound by strict terms of confidentiality.[100] He notes further that "[t]he relevant information was made available to PA in a secure room (on BNFL's premises) and was subject to a further requirement that it would

[98] Witness Statement of Jeremy Rycroft, at, for example, paragraphs 3.4, 3.6, 3.12, 3.16. **(Annex 3)**
[99] Ibid., at paragraph 3.4.
[100] Ibid., at paragraphs 3.6 and 3.16.

not be copied or removed without BNFL's consent."[101] Similar arrangements applied in respect of ADL.

6.7 In addition to the information that was (and remains) confidential to BNFL, the criteria for determining confidentiality employed by PA expressly recognised that some of the information had been provided by third parties on condition of confidence.[102] This issue is addressed further in the expert report prepared by Dr Geoff Varley, of NAC International, attached as Annex 2 hereto, in the following terms:

> "In the ADL report (see for example Appendix A10: Interviews Conducted by ADL, page 28 [appendix] and Appendix B1: Customer by Customer Pricing Assumptions, page 30 [appendix] the names of specific customer and industry representatives interviewed by ADL, their perceptions of the MOX market, intentions in respect of MOX contracting with BNFL and so on, were excised. Assumptions used to determine appropriate inputs to analytical models, based on the information given by the interviewees, also were excised. The non-disclosure of statements given in confidence, as well as the identity of interviewees, is entirely consistent with normal practice. The issue of principle apart, disclosure in breach of confidence could lead to a deterioration in the commercial relationship that BNFL has with the party having given the information, potentially affecting business prospects in other fuel cycle sectors as well as in the MOX sector. In addition, given the circumstances of its original disclosure, the information might well be commercially confidential for a discrete reason."[103]

6.8 Information provided in confidence is subject to a special obligation of protection. In the present context, information provided – whether by BNFL or by third parties – pursuant to an understanding of confidentiality, that could not otherwise be released with the consent of the party concerned, was redacted from the published versions of the PA and ADL Reports.

3. Commercial Confidentiality

6.9 Separately from the above, the United Kingdom contends that the information redacted from the published versions of the PA and ADL Reports was properly redacted on

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[101] Ibid., at paragraphs 3.6.

[102] PA Report, Commercial in Confidence Version, Released June 1999, at page 1-6, section 1.3.

[103] Report of Dr Geoff Varley, at paragraph 3.31 **(Annex 2)**.

grounds of commercial confidentiality.

6.10 Ireland's case against commercial confidentiality rests on three propositions:

- commercial confidentiality cannot be "affected" where there is no competition;[104]
- there is no competition in the market for the production of MOX fuel so "commercial confidentiality" cannot be affected;[105]
- even if there were competition in the market for the production of MOX fuel, disclosure of the information requested would not affect competition.[106]

6.11 These propositions are heavily dependent on the expert report prepared for purposes of Ireland's case by Gordon MacKerron of the economic consultancy *National Economic Research Associates*.[107] This report postulates that "there is no real competition in the relevant markets for MOX, and no prospect of harm to BNFL's interest with respect to customers, provided some data are averaged ..."[108] The Irish case against commercial confidentiality thus rests essentially on the view that there is no competition in the MOX market or, if there is competition, that disclosure of the information requested would not affect that competition.

6.12 Ireland's case is fundamentally flawed on a number of grounds. First, as Dr Varley demonstrates in his expert report,[109] and as the evidence of Mr Rycroft attests,[110] there is competition in the MOX market. Second, as Mr MacKerron himself acknowledges, commercial confidentiality must be considered not only in relation to information that might be of value to a competitor but also in relation to information that might be of value to actual or potential customers. Third, even in circumstances in which the competitive position of an undertaking would not be prejudiced, commercial confidentiality may operate to restrict disclosure if the wider commercial interests of the undertaking would be affected.

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[104] Ireland's Memorial, at paragraph 147.
[105] Ibid., at paragraphs 148 – 150.
[106] Ibid., at paragraphs 151 – 153.
[107] Ibid., at Annex 18.
[108] MacKerron Report, Annex 18 to the Irish Memorial, at page (i), second paragraph.
[109] Report of Dr Geoff Varley, at section 2 **(Annex 2)**.
[110] Witness Statement of Jeremy Rycroft, at paragraphs 2.1 – 2.12 **(Annex 3)**.

6.13 These matters are addressed in the expert reports of David Wadsworth and Dr Geoff Varley, and in the witness statement of Jeremy Rycroft, attached hereto as **Annexes 1, 2 and 3** respectively. While it is not necessary to repeat in detail the substance of these reports and the statement, a number of the observations made therein may be highlighted.

6.14 The central thesis of the MacKerron Report, and thus of Ireland's case (that commercial confidentiality cannot be affected where there is no competition), is addressed by David Wadsworth, a senior partner with the accountancy firm Deloitte & Touche, *inter alia* as follows:

> "The MacKerron Report relies heavily on 'The economics of EU competition law' published by Sweet and Maxwell and in particular chapter 3. which discusses the identification of the relevant market for the purposes of the application of European Community competition law. ...
>
> I regard the report as conceptually flawed in its approach and as dismissive of certain relevant and important facts.
>
> The approach relies on competition as defined in paragraphs 1.3.2 and 1.3.3 of the report, but competition is only one factor affecting commercial confidentiality. The existence of competition is not a precondition for commercial confidentiality. The requirement of commercial confidentiality arises whenever there are two or more parties who seek to negotiate contractual terms without a perfect understanding of each other's key business variables. …
>
> I am informed that BNFL have identified a number of actual and potential customers. ...
>
> Prices may vary significantly between customers. ...
>
> It is clear that there are buyers, and potential buyers, of MOX product who are not in possession of all the key variables around their prospective supplier economics. It is also clear that BNFL is not a monopoly supplier able to impose price and other conditions. This is evidenced by the fact that the parties enter into arms length commercial negotiations. Any additional information which improves the knowledge of one of the parties and hence their negotiating position may be expected to prejudice BNFL's commercial position and I would therefore expect such information to be considered commercially confidential."[111]

[111] Report of David Wadsworth, at paragraphs 11-16 **(Annex 1)**.

6.15 These observations by David Wadsworth are echoed in the expert report of Dr Geoff Varley, which addresses in detail the flawed methodology adopted in the MacKerron Report,[112] the structure of the MOX market and the existence of competition therein,[113] and the likely prejudice to the commercial interests of BNFL from the disclosure of the redacted information.[114] Having broken down the redacted information into eight categories, Dr Varley summarises his conclusions as follows:

> "In my opinion, in a competitive market all of the information in the eight categories above has commercial value and the commercial interests of a supplier accordingly would be harmed by the release of this information. It is my view that the MOX market is competitive.
>
> With respect to competition in terms of the fabrication of MOX fuel from existing reprocessing business, the option to transport separated plutonium from Sellafield to Belgium or France, for fabrication into MOX fuel, or indeed from La Hague in France to Sellafield, is feasible. This possibility alone, or even the threat of this possibility, creates head-to-head competition for MOX fabrication business. ...
>
> In addition, the MOX market is competitive because the utility customers have a number of ways in which they can apply commercial pressure to the MOX suppliers. ...
>
> Finally, there is a degree of competition between MOX and UOX (uranium oxide) fuels ...
>
> On the basis of my review of the public domain versions of the ADL and PA reports, it therefore is my view that information justifiably has been excised, on the grounds that it has commercial value for competitors and/or clients of BNFL and that such disclosure would cause significant harm to the commercial interests of BNFL.
>
> ... Even if the relevant market were not competitive, customers and other suppliers could benefit financially and/or strategically through access to such information, with corresponding harm to the commercial interests of BNFL."[115]

6.16 As explained in Part 2, in considering what information should be excised from the PA Report on grounds of commercial confidentiality, PA identified six categories of

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[112] Report of Dr Geoff Varley, at Section 4 and Annex B **(Annex 2)**.
[113] Ibid., at Section 2 and Annex A.
[114] Ibid., at Section 3.
[115] Ibid., at paragraphs 1.6 – 1.12.

information that should not be placed in the public domain.[116] By reference to these categories, they undertook an assessment of what information in their Report might be said to be commercially confidential. A similar exercise was undertaken by ADL, which had before them the PA information categories but nevertheless proceeded to assess the matter in respect of their Report independently. Summary reasons for the excision of material in the ADL Report is given in respect of each excision in a footnote in the Report itself.

6.17 As the Tribunal will recall, on the basis of the public domain versions of the Reports, Dr Varley placed the excised information into eight generic categories and concluded that commercial confidentiality attached to all eight.[117]

6.18 In the United Kingdom's view, the categories and type of information identified in the PA and ADL Reports as commercially confidential come squarely within the scope of commercial confidentiality under English law as well as principles of law more widely. By reference, in the first instance, to the PA and ADL assessments on commercial confidentiality, the United Kingdom undertook a detailed review to determine finally what information should be excised from the public domain versions of the PA and ADL Reports. In doing so, it proceeded on the basis of its stated commitment to place as much information as possible in the public domain, subject only to overriding interests of commercial confidentiality (including confidences under which information had originally been provided). In the United Kingdom's assessment, in respect of the information eventually excised from the public domain versions of the two reports, there was, and remains, a likelihood of prejudice to BNFL's legitimate commercial interests from the disclosure of the information in question. Additionally, the information in question is covered by clear confidentiality understandings with both BNFL and third parties which preclude its publication without the consent of the party concerned.

6.19 Dr Varley's analysis in respect of each of the eight categories supports the assessment that the information in question was properly excised on grounds of commercial confidentiality. The witness statement of Mr Rycroft, commenting on Dr Varley's categories, identifies the potential prejudice to BNFL from the disclosure of each type of information.

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[116] PA Report. Commercial in Confidence Version, June 1999, at page 1-6, section 1.3.
[117] See paragraphs 2.26 and 4.9 above and the Report of Dr Varley, at paragraphs 1.5 and 3.6. **(Annex 2)**

The expert report of David Wadsworth makes the point that, even if individual pieces of information appear on their face innocuous, the interaction between pieces of otherwise innocuous information would allow competitors, customers and others to build up a comprehensive picture of an undertaking's operating assumptions and commercial position.[118] Quite apart from the intrinsic quality of any given item of information, it is this interaction between items of financial information that will often dictate non-disclosure.

6.20 The salient features of Dr Varley's and Mr Rycroft's observations in respect of each of the categories identified by Dr Varley are as follows.

Category 1: MOX sales volumes (including volumes of business secured and forecast)

6.21 In respect of this category, Dr Varley observes that it is correctly regarded as commercially confidential because *inter alia*:

- potential MOX customers would be able to improve their negotiating positions;
- MOX competitors would be able to estimate BNFL production costs more accurately which in turn would help them to judge their optimum competitive strategy;
- MOX competitors would have improved knowledge about which customers would represent the main targets for uncommitted MOX fabrication business;
- MOX customers would be placed in an improved negotiating position.[119]

6.22 In respect of this category, Mr Rycroft states *inter alia*:

> "A knowledge of secured and projected sales volumes will allow customers and more particularly competitors (actual and potential), to understand how far BNFL has progressed in the market. Information relating to sales volumes could also be helpful to customers in assessing whether BNFL is under pressure to fill capacity at SMP, which would help their negotiating position. It would allow COGEMA, for example, to compare the position on sales volumes at SMP with its own sales volumes and use this information to build its own market share through, for example, targeting of remaining unsecured business, or undercutting prices if capacity was limited."[120]

[118] Report of David Wadsworth, at paragraph 9 and Appendix **(Annex 1)**.
[119] Report of Dr Geoff Varley, at paragraphs 3.7 – 3.10.
[120] Witness Statement of Jeremy Rycroft, at paragraph 4.3 **(Annex 3)**.

Category 2: MOX sales prices (including prices for particular customers or markets, as well as the variables affecting price and price sensitivities)

6.23 In respect of this category, Dr Varley observes *inter alia*:

> "Because the MOX market is competitive, with defined prices negotiated at arms length, disclosure of SMP MOX sales prices (concluded, expected or offered) would be harmful to the commercial interests of BNFL in the same way that pricing/pricing strategy would be of value to an existing competitor or a potential new entrant in any competitive market.
>
> ...
>
> For a MOX competitor, how BNFL perceives prices will change and the market sensitivities that could influence pricing, would constitute commercially valuable information on the grounds that it would provide insight into BNFL's view of relevant markets and, in particular, would provide insight into BNFL's MOX strategy."[121]

6.24 In respect of this category, Mr Rycroft states *inter alia*:

> "A competitor such as COGEMA would be able to target BNFL markets and opportunities and use the information to undercut BNFL, erode market price and thus reduce BNFL's income from SMP. Alternatively, disclosure of average sales prices for SMP products would present competitors with the opportunity to present the market with alternative solutions, potentially taking business away from BNFL. Further, the risk of predatory pricing would be increased. The disclosure of prices would provide potential new competitors with invaluable market information, thus facilitating new market entry. From a customer perspective, the disclosure of assumed sales prices where pricing is still under negotiation could allow customers to use such information to their own advantage in commercial negotiations thus creating a serious risk of eroding income from SMP."[122]

Category 3: SMP capacity and production capability (including data on ramp-up expectations, expected average operating level and risk to production)

6.25 In respect of this category, Dr Varley observes that it is correctly regarded as

[121] Report of Dr Geoff Varley, at paragraphs 3.11 – 3.14.
[122] Witness Statement of Jeremy Rycroft, at paragraph 4.4.

commercially confidential because *inter alia*:

- projected average SMP operating levels will correspond to target MOX sales volumes (addressed in *category 1*);
- information on the ramp-up capability of SMP and the achievable plant output are pertinent to the timing of manufacturing capability and could therefore influence the timing when utilities would aim to contract with BNFL;
- such information would be of strategic value for an existing MOX competitor as it would reflect BNFL strategy.[123]

6.26 In respect of this category, Mr Rycroft states *inter alia*:

> "Disclosure would enable customers and competitors to validate their own private estimates of SMP's performance capabilities. This would provide insights into other areas of key information and significantly threaten income from SMP. This would present the same disadvantage as knowledge of BNFL sales volumes. It would also allow competitors the chance to try to exploit any gaps in BNFL's product range."[124]

Category 4: SMP MOX production costs (including estimates of fixed and variable costs, breakdowns of cost into detailed categories, sensitivity of production cost to various parameters and scenarios)

6.27 In respect of this category, Dr Varley observes that disclosure would be harmful to BNFL because *inter alia*:

- it would allow potential customers to improve their negotiating positions;
- MOX competitors would be able to estimate BNFL's production costs more accurately, which in turn would help them to judge their optimum competitive strategy.[125]

6.28 In respect of this category, Mr Rycroft states:

[123] Report of Dr Geoff Varley, at paragraphs 3.17 – 3.19.
[124] Witness Statement of Jeremy Rycroft, at paragraph 4.5.
[125] Report of Dr Geoff Varley, at paragraph 3.21.

> "Specific references to costs by type, including likely trends, would be valuable to both customers and competitors in helping to validate their understanding of SMP economics. Such references would also assist competitors in assessing BNFL's likely pricing levels and hence provide an advantage to them in negotiation of sales volumes. Such knowledge would allow competitors to undercut BNFL, and hence threaten BNFL's market position and income from SMP. Contracts for SMP are on a 'fixed price' basis. Knowledge of BNFL's costs will assist customers' understanding of BNFL profit margins and provide them with an advantage in negotiation of contract prices."[126]

Category 5: Contractual details

6.29 In respect of this category, Dr Varley observes that, "[s]ince existence of the contract often is considered confidential, the detailed provisions of the contract would be equally or even more confidential." He goes on to observe *inter alia* that knowledge of contractual details:

- would improve the negotiating position of potential future customers;
- would give a strategic advantage to BNFL competitors;
- could result in a loss of business of grounds that confidential information had been disclosed.[127]

6.30 In respect of this category, Mr Rycroft states *inter alia*:

> "Disclosure of detailed information in contracts would breach commercial confidentiality provisions. In addition, where information has been given by customers to independent consultants with the understanding that it is on a commercially confidential basis, this understanding must be respected."[128]

Category 6: Details of statements given in confidence by utilities and other individuals

6.31 This category of information has already been addressed in paragraphs 6.5-6.8 above as, in addition to questions of commercial confidentiality, it raises a question of exemption

[126] Witness Statement of Jeremy Rycroft, at paragraph 4.6.
[127] Report of Dr Geoff Varley, at paragraphs 3.25.
[128] Witness Statement of Jeremy Rycroft, at paragraph 4.7.

from disclosure on grounds that disclosure would be in breach of confidentiality understandings on the basis of which the information was disclosed. In respect of this category, Dr Varley observes *inter alia*:

> "The non-disclosure of statements given in confidence, as well as the identity of interviewees, is entirely consistent with normal practice. The issue of principle apart, disclosure in breach of confidence could lead to a deterioration in the commercial relationship that BNFL has with the party having given the information, potentially affecting business prospects in other fuel cycle sectors as well as in the MOX sector."[129]

6.32 In respect of this category, Mr Rycroft states *inter alia*:

> "Information on existing and potential customers, if disclosed, could be used against BNFL by its competitors to target the business of those specific customers. As noted above, disclosure of detailed information in contracts would breach commercial confidentiality provisions. In addition, where information has been given by customers to BNFL or independent consultants on a commercially confidential basis this confidentiality must be respected. As well as reasons of principle, from a purely practical perspective, breaches of confidence would be likely to impact adversely on BNFL's relationships with its customers, again to the detriment of BNFL's business."[130]

Category 7: Outputs from economic models (including sensitivities to various markets and operational factors)

6.33 In respect of this category, Dr Varley observes that the excised data would be of commercial value to BNFL competitors and/or customers. It "could be analysed in a manner that would provide improved understanding of BNFL's MOX business".[131]

6.34 In respect of this category, Mr Rycroft states *inter alia*:

> "The key business drivers are items such as sales volumes, sales prices, production capacity, fixed/variable production costs, and so on. Many of these business drivers, which constitute input values for the economic models, are commercially confidential in their own right, as noted above. In

[129] Report of Dr Geoff Varley, at paragraphs 3.31.
[130] Witness Statement of Jeremy Rycroft, at paragraph 4.8.
[131] Report of Dr Geoff Varley, at paragraph 3.35.

the same way, the output values of the models, such as the specific NPVs or ranges of NPVs, also constitute valuable commercial information. The disclosure of any individual piece of information in relation to the business model would reduce the number of unknown variables and thereby enable competitors and customers to refine their own models of the business, reducing the uncertainty ranges around input and output data from the model."[132]

Category 8: Information that would reveal insight into BNFL's perception of back end markets and MOX market drivers, BNFL strategy in respect of the MOX fabrication market and, more broadly, BNFL strategy in the spent fuel management market

6.35 In respect of this category, Dr Varley observes *inter alia*:

"BNFL competes with COGEMA for new reprocessing/MOX business, whereby the MOX component of cost in any such package or portfolio of related services is in appreciable proportion of the overall cost. BNFL and COGEMA both effectively compete for spent fuel management business against the strategic alternative of the so-called open cycle (storage followed by direct disposal of fuel assemblies). Given this situation, competitive intelligence about BNFL strategies and market perceptions related to MOX and more broadly spent fuel management solutions, in the normal way of things for a competitive market, would be of value to BNFL's competitors.[133]

6.36 In respect of this category, Mr Rycroft states *inter alia*:

"Knowledge of BNFL's estimates of market potential, market risks and marketing strategy would be useful to competitors. BNFL's view of the market might be different to that of its competitors and therefore stimulate a strategic reassessment by both actual and potential competitors. The disclosure of targeted, emerging markets would allow new competitors to consider targeted entry. Knowledge of potential market share, BNFL's specific treatment of market risks and the stated NPV of SMP would enable both customers and competitors to develop a better view of SMP economics. Both customers and competitors could use this information to BNFL's detriment, eroding income from SMP."[134]

[132] Witness Statement of Jeremy Rycroft, at paragraph 4.9. See also the Report of David Wadsworth at paragraph 9 and Appendix **(Annex 1)**.
[133] Report of Dr Geoff Varley, at paragraph 3.36.
[134] Witness Statement of Jeremy Rycroft, at paragraph 4.10.

4. Conclusions

6.37 The observations set out above highlight the issues and concerns that were addressed by PA, ADL and the relevant UK Government Departments when considering what information could and should be considered commercially confidential. The process was thorough and considered, and the presumption was in favour of disclosure as opposed to withholding information on grounds of commercial confidence. The United Kingdom considers that the outcome of the process was consonant with its own national law, as the principal yardstick against which its actions are to be measured. It is also consistent with European law, and consonant with the practice of other States and other international instruments.

6.38 One final observation on this question is required. Ireland, in its Memorial and in the Report of Mr MacKerron, argues that, since detailed information was made public by BNFL in respect of THORP, similar information cannot be considered to be commercially confidential in the case of MOX. The answer is straightforward and is addressed fully both in the expert report of Dr Varley and the witness statement of Mr Rycroft.[135] The position may be summarised as follows:

> "The commercial situation pertaining at the time of the THORP consultation was very different to the situation surrounding SMP. Therefore commercial confidentiality considerations relating to SMP now are very different to those relating to THORP in 1992/3. Thus the type and quantity of information released during the THORP consultation has no bearing on the SMP consultation; and
>
> Mr MacKerron's description of the information disclosed during the THORP consultation is misleading and incorrect."[136]

B. The Alleged Failure to Give Reasons

6.39 Referring to Article 9(4) of the OSPAR Convention, which provides that "[t]he reasons for a refusal to provide the information requested must be given", Ireland submits in its Memorial that the United Kingdom has given reasons for excising only certain types of

[135] Report of Dr Geoff Varley, at Annex B. Witness Statement of Jeremy Rycroft, at paragraphs 5.1 – 5.8.
[136] Report of Dr Geoff Varley, at Annex B, paragraph B.1.1.

information; but those reasons "are manifestly inadequate and cannot be said to amount to 'reasons' within the meaning of Article 9(4) of the OSPAR Convention". As for the remainder, Ireland "notes that no reasons have been given for the non-disclosure of all other information".[137]

6.40 The allegation of insufficiency of reasons is made for the first time in Ireland's Memorial. It is not mentioned in Ireland's Statement of Claim, nor its Amended Statement of Claim. It is an afterthought. Had Ireland sought further elaboration of the reasons for refusing to disclose at an earlier stage, the United Kingdom would have had an opportunity to respond. It is inappropriate for Ireland now to seek a remedy for an alleged breach, which it did not afford the United Kingdom of addressing before the dispute crystallised.

6.41 In any event, for the purposes of the application of Article 9(4), the United Kingdom contends that Ireland has from the outset been fully aware of the reasons for the excisions of the information in question. The reasons for the excisions from the public domain version of the PA Report are set out in that Report itself.[138] The text identified each and every excision, and the nature of the omissions can readily be deduced from the context. In the case of the ADL Report, the footnotes identify the information where this is not obvious from the text (e.g., "text deleted: price information"; "customer names, except where publicly known, and volumes"); and where it is possible to give limited information but not the whole of the excised information, this is done (e.g., "text deleted: price information. Actual figures commercially sensitive but in the region of +/- 20%"; "commercially sensitive figure but less than 100tHM/y").

6.42 Within the specific context of the current dispute, the United Kingdom has amplified the reasons for the excisions in its letter of 13 September 2001[139]. Ireland interprets Article 9(4) to require "full, clear reasons" which in turn requires "the United Kingdom, *inter alia*, to identify accurately each type of information, the specific commercial interests which would be threatened by the disclosure of the information, how this threat arises from the disclosure of the particular pieces of information, and the reasons why partial disclosure is

[137] Paragraphs 111 to 116 of Ireland's Memorial.
[138] PA Report (1999), at paragraph 1.3 (Annex 2B to Ireland's Memorial, page 75).
[139] **Annex 6** to this Counter-Memorial.

impossible".[140] To satisfy Ireland's current contentions, the United Kingdom would have had to explain in this letter:

(a) "whether the commercial threat came from customers, competitors or both";

(b) "which companies the United Kingdom considered to be credible competitors";

(c) "what the United Kingdom considered to be the relevant market"; and

(d) "how each item of omitted information would cause serious harm to BNFL if disclosed".

6.43 Such issues have been addressed in this Counter-Memorial. However, it is evidently unrealistic to expect any response of such detail before the issues in dispute had crystallised. In fact, all that Ireland has done is to take stock of its allegations of breach as formulated in its Memorial, and to demand explanations for such alleged failings by way of a wholly new allegation of breach of Article 9(4) of the OSPAR Convention.

6.44 The purpose of Article 9(4) is to enable a natural or legal person making a request to understand in the given circumstances why a request has been refused. The requirement for reasons in the case of excisions from the PA and ADL Reports must obviously take account of the disclosure of the detailed analyses that they contain, and the fact that the excisions affected only specific figures and other such items of information. Insofar as it is asserted that this requirement was not satisfied on the face of the PA and ADL Reports, it was amply met by the United Kingdom's letter of 13 September 2001, which set out the reasons why the five types of information described in Ireland's letter of 25 May 2000 could not be disclosed.

[140] Ireland's Memorial, paragraphs 106 and 108.

Reasons given can be perfectly adequate even if concisely expressed.[141]

6.45 The final complaint made of the letter of 13 September 2001 is that it leaves unresolved central issues, chief of which is whether commercial confidentiality is being claimed for all or just some of the omitted information. That complaint cannot be reconciled with the express terms of the letter dated 13 September 2001. It states that "the information requested by Ireland cannot be disclosed for the reasons given in article 9, paragraph 3(d) of the Convention". Nor can it be reconciled with the fact that Ireland has consistently reiterated its own clear understanding of the United Kingdom's case that the data excised from the public domain versions of the two reports constituted information affecting commercial and industrial confidentiality.

6.46 Also, at two points in its Memorial,[142] Ireland suggests that it would be content with a different version of the PA and ADL Reports in which the information excised on grounds of confidentiality should be aggregated. This suggestion is not only novel but is inconsistent with Ireland's repeated demands to be supplied with a complete and unedited version of the PA and ADL Reports. There is no suggestion in any of the antecedent correspondence, or in the Amended Statement of Claim, that Ireland would be satisfied with anything other than the complete and unedited Reports.

6.47 The belated suggestion that Ireland would be satisfied with aggregated information raises an issue as to whether there is any dispute before the Tribunal at all. If it is now Ireland's case that it does not assert the right to be supplied with complete and unedited versions of the PA Report and the ADL Report, the "dispute" forming the subject of the arbitration will no longer exist.

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[141] Letter of 13 September 2001 **(Annex 6)**. See also in the European context, Case T-105/95, *World Wildlife Fund v Commission* [1997] ECR II-313, paragraph 64: "The Commission cannot confine itself to invoking the possible opening of an infringement procedure as a justification, under the heading protection of the public interest, for refusing access to *the entirety of the documents* identified in a request made by a citizen. The Court considers, in effect, that the Commission is required to *indicate, at the very least by reference to categories of documents, the reasons* for which it considers that the documents detailed in the request which it received are related to the possible opening of an infringement procedure. It should *indicate to which subject-matter the documents relate* and particularly whether they involve inspections or investigations relating to a possible procedure for infringement of Community law".

[142] Ireland's Memorial, page 31, footnote 11, and paragraphs 160-161.

PART 7

CONCLUDING SUBMISSIONS

7.1 For the reasons advanced above, the United Kingdom respectfully requests the Tribunal:

(i) 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,

(ii) to dismiss the claims brought against the United Kingdom by Ireland.

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

M. C. Wood

Agent of the United Kingdom
of Great Britain and
Northern Ireland

6 June 2002

APPENDIX A

SURVEY OF INTERNATIONAL INSTRUMENTS CONCERNED WITH ACCESS TO INFORMATION

A-1 There are a considerable number of international instruments that provide for the disclosure of information subject to an exemption on grounds of commercial confidentiality. This Appendix examines, first, international instruments concerned with trade and commercial matters and, second, instruments concerned with the environment.[143] Not all of these instruments are in force or apply as between the United Kingdom and Ireland. They may nevertheless shed light on the meaning of the term at issue.

A. Instruments Concerned with Trade and Commercial Matters

A-2 The starting point of instruments concerned with trade and commercial matters is GATT 1947. Article X.1 provides *inter alia* that the provisions of that paragraph requiring the publication of trade and other measures "shall not require any contracting party to disclose confidential information which would ... prejudice the legitimate commercial interests of particular enterprises, public or private." This provision is repeated in almost identical terms in Article XVII.4(d) of the GATT in respect of state trading enterprises. Both provisions remain operative as part of the GATT 1994 regime of the WTO.[144]

A-3 Exemptions from disclosure on grounds, simply stated, of commercial and industrial confidentiality or business secrecy are found in numerous other trade and commercial instruments including, for example, the *International Convention on the Harmonised*

[143] There is a third residual category of other instruments such as the *Additional Protocol to the European Social Charter* of 1988 and the *Chemical Weapons Convention* of 1992. These have no direct bearing on the issues in contention in these proceedings, save that they nevertheless illustrate the importance and wide currency of confidentiality exemptions to disclosure obligations. See the *Additional Protocol to the European Social Charter, 1988*; ETS No.128; at Articles 2 and 21; and the *Chemical Weapons Convention, 1992*; 1974 UNTS 64; at the "Annex on the Protection of Confidential Information". This category of instruments is not addressed further in this Appendix.

[144] *General Agreement on Tariffs and Trade 1994*;33 ILM 1125, 1154 (1994).

Commodity Description and Coding System, 1983,[145] the *Convention on Mutual Administrative Assistance in Tax Matters, 1988*,[146] and the *Energy Charter Treaty, 1994*.[147] Similar provisions are found in both the NAFTA and the NAFTA *Agreement on Environmental Cooperation*,[148] although with the gloss, in Article 507.1 of the NAFTA, that "[e]ach Party shall maintain, *in accordance with its law*, the confidentiality of business information collected pursuant to this Chapter [concerned with customs procedures] and shall protect that information from disclosure *that could prejudice the competitive position of the persons providing the information*".[149] As will be apparent from the following account, the international instruments that address such matters commonly make references to national law, as the law (with attendant margin of discretion) pursuant to which commercial confidentiality is to be maintained. The principle that disclosure may be refused if it "could prejudice the competitive position of the persons providing the information" is a variation on the language in Article X.1 of the GATT.

A-4 Article 1711.1 of the NAFTA,[150] concerned with intellectual property rights, goes further towards elaborating a definition of commercial confidentiality. This requires that each party provide the legal means to prevent trade secrets from being disclosed in a manner "contrary to honest commercial practices" insofar as (i) the information is secret, in the sense that it is not generally known or readily accessible, (ii) has actual or potential value because it is secret, and (iii) the person in control of the information has taken reasonable steps under the circumstances to keep it secret. This language is reflected in the WTO *Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994* ("TRIPS Agreement"). Addressing the "protection of undisclosed information", Article 39.2 of the TRIPS Agreement provides:

> "2. Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices so long as such information:

[145] *International Convention on the Harmonised Commodity Description and Coding System, 1983*; 1503 UNTS 168; at Article 3(1)(b).
[146] *Convention on Mutual Administrative Assistance in Tax Matters, 1988*; 1966 UNTS 215; at Article 21(2).
[147] *Energy Charter Treaty, 1994*; 34 ILM 381 (1995); at Articles 6(6) and 20(2).
[148] NAFTA *Agreement on Environmental Cooperation*; 32 ILM 1480 (1993); at Article 39(1)(b).
[149] NAFTA Article 507.1 (emphasis added); 32 ILM 289 (1993), at p.360.
[150] NAFTA Article 1711.1; 32 ILM 670 (1993).

(a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;

(b) has commercial value because it is secret; and

(c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret."

A-5 Article 64.2 of the TRIPS Agreement, dealing with transparency, follows the language of GATT Article X.1 exempting from disclosure information that "would prejudice the legitimate commercial interests of particular enterprises, public or private". Several other WTO Agreements contain provisions adopting similar language. Among the measures making provision for such exemptions are:[151]

- Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement"), at Annex B, paragraph 11(b);
- Agreement on Technical Barriers to Trade, at Article 5.2.4;
- Agreement on Trade-Related Investment Measures, at Articles 5.1 and 6.3;
- Agreement on Import Licensing Procedures, at Article 1.11;
- Agreement on Safeguards, at Article 12.11;
- General Agreement on Trade in Services, at Article III *bis*;
- Agreement on Government Procurement, at Article XIX.4;
- International Dairy Agreement, at Article III.3; and
- International Bovine Meat Agreement, at Article III.3.

A-6 Of these, the *SPS Agreement* is particularly noteworthy as the focus of this Agreement is the elaboration of rules relevant to the interpretation of the general exception in the GATT permitting measures "necessary to protect human, animal or plant life or health". The exemption from disclosure, on grounds of the confidentiality of legitimate commercial interests, of information required in this context attests to the importance of the exemption.

A-7 The *Agreement on Preshipment Inspection* addresses the "protection of confidential

business information" in some detail in Article 2.9 – 2.12 in the following terms:[152]

> "[2.9] User Members shall ensure that preshipment inspection entities treat all information received in the course of the preshipment inspection as business confidential to the extent that such information is not already published, generally available to third parties, or otherwise in the public domain. User Members shall ensure that preshipment inspection entities maintain procedures to this end.
>
> [2.10] User Members shall provide information to Members on request on the measures they are taking to give effect to paragraph 9. The provisions of this paragraph shall not require any Member to disclose confidential information the disclosure of which would jeopardise the effectiveness of the preshipment inspection programmes or would prejudice the legitimate commercial interest of particular enterprises, public or private.
>
> [2.11] ...
>
> [2.12] User Members shall ensure that preshipment inspection entities do not request exporters to provide information regarding:
>
> (a) manufacturing data related to patented, licensed or undisclosed processes, or to processes for which a patent is pending;
>
> (b) unpublished technical data other than data necessary to demonstrate compliance with technical regulations or standards;
>
> (c) internal pricing, including manufacturing costs;
>
> (d) profit levels;
>
> (e) the terms of contracts between exporters and their suppliers unless it is not otherwise possible for the entity to conduct the inspection in question. In such cases, the entity shall only request the information necessary for this purpose."

A-8 Two definitional elements emerge from these provisions. First, confidential business information is information the disclosure of which could prejudice the legitimate commercial interests of an enterprise, whether public or private, and which is not already published, generally available to third parties or otherwise in the public domain. Second, within this

(a)

[151] See generally *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*, 33 I.L.M. 1125 (1999) and http://www.wto.org/english/docs_e/legal_e/final_e.htm for the full texts of all agreements.
[152] Ibid.

definition, some forms of information are evidently considered to be intrinsically commercially confidential. This includes manufacturing data related to patented, licensed or undisclosed processes, unpublished technical data, internal pricing and manufacturing costs, profit levels and the terms of contracts between the undertakings in question and third parties.

A-9 The *Agreement on Subsidies and Countervailing Measures* provides, in Article 12.4, as follows:[153]

> "Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom the supplier acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without the specific permission of the party submitting it."

A-10 By reference to this provision, three further categories of information appear to be regarded as intrinsically confidential, namely:

(a) information the disclosure of which would be of significant competitive advantage to a competitor;

(b) information the disclosure of which would have a significantly adverse effect upon the person supplying the information or upon a person from whom the supplier acquired the information; and

(c) information provided on a confidential basis by third parties.

B. Instruments Concerned with the Environment

A-11 As with trade and commercial matters, there are a substantial number of instruments that address access to information, subject to an exemption on grounds of commercial confidentiality, in the field of the environment. These include:

[153] Ibid.

(i) *Convention on Environmental Impact Assessment in a Transboundary Context, 1991*;[154]

(ii) *Convention on the Transboundary Effects of Industrial Accidents, 1992*;[155]

(iii) *Convention on the Protection of the Marine Environment of the Baltic Sea Area, 1992*;[156]

(iv) *Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 1992*;[157]

(v) *Convention on Civil Liability for Damage Resulting From Activities Dangerous to the Environment, 1993*;[158]

(vi) *Convention on Nuclear Safety, 1994*;[159]

(vii) *Convention for the Protection of the Marine Environment and Coastal Region of the Mediterranean, 1995*;[160]

(viii) *Aarhus Convention, 1998*;[161] and

(ix) Recommendation of the OECD Council on Environmental Information, 1998.[162]

A-12 The commercial confidentiality exemption in each of these instruments is framed in broadly similar terms. By way of example, Article 22(1) of the *Convention on the Transboundary Effects of Industrial Accidents, 1992* provides:

> "The provisions of this Convention shall not affect the rights or the obligations of Parties in accordance with their national laws, regulations, administrative provisions or accepted legal practices and applicable international regulations to protect information related to personal data, industrial and commercial secrecy, including intellectual property, or national security."

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[154] *Convention on Environmental Impact Assessment in a Transboundary Context*; 1989 UNTS 309; see Article 2(8).
[155] *Convention on the Transboundary Effects of Industrial Accidents, 1992*; 31 ILM 1330; see Article 22(1).
[156] *Convention on the Protection of the Marine Environment of the Baltic Sea Area, 1992*; 32 ILM 1069; see Article 18(1).
[157] *Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 1992*; 31 ILM 1312; see Article 8.
[158] *Convention on Civil Liability for Damage Resulting From Activities Dangerous to the Environment, 1993*; 32 ILM 1228; see Article 14(2).
[159] *Convention on Nuclear Safety, 1994*; 1963 UNTS 293; see Article 27(1).
[160] *Convention for the Protection of the Marine Environment and Coastal Region of the Mediterranean Sea, 1995*; http://www.unepmap.org/legal.zip. See Article 15(3).
[161] *Aarhus Convention*, supra. See Article 4(4)(d).
[162] OECD *Recommendation of the Council on Environmental Information, 1998*; OECD Doc. No. C(98) 67/Final, adopted by the Council at its 922nd Session, 3 April 1990.

A-13 By way of further example, Article 27(1) of the *Convention on Nuclear Safety, 1994* provides:

> "The provisions of this Convention shall not affect the rights and obligations of the Contracting Parties under their law to protect information from disclosure. For the purposes of this Article, 'information' includes, inter alia, (i) personal data, (ii) information protected by intellectual property rights or by industrial or commercial confidentiality; and (iii) information relating to national security or to the physical protection of nuclear materials or nuclear installations."

A-14 With one exception, each of the treaty provisions highlighted is cast in terms of (a) the "right" of Contracting Parties to refuse a request for information, (b) pursuant to their national law (this being, on occasion, supplemented by reference also to applicable international instruments). The exception is found in Article 4(4)(d) of the *Aarhus Convention*, on which Ireland relies.[163] But as Ireland itself points out, the *Aarhus Convention* is an exercise of progressive development of the law relating to the disclosure of "environmental information".

C. Conclusions

A-15 The conclusions that may be drawn from the preceding survey of international instruments are set out in paragraph 5.33 of the main body of this Counter-Memorial.

[163] Article 4(4)(d) of the *Aarhus Convention* provides: "A request for environmental information may be refused if the disclosure would adversely affect: ... (d) The confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant to the protection of the environment shall be disclosed."

APPENDIX B

SURVEY OF NATIONAL LEGISLATION CONCERNED WITH ACCESS TO INFORMATION

A. France

B-1 It is apparent that the list of types of information exempt from disclosure contained in Article 3(2) of EC Directive 90/313 was drawn from a French Law of 1978.[164] The wording of Article 9(3) of the OSPAR Convention was in turn taken from Article 3(2) of the EC Directive.[165] The French Law from which the original language was drawn was Law No. 78-753 of 17 July 1978 concerning freedom of access to administrative documents. In its original version, operative at the time that Directive 90/313 and the OSPAR Convention were being considered, Article 6 provided *inter alia*:

> "Les administrations mentionnées à l'article 2 peuvent refuser de laisser consulter ou de communiquer un document administratif dont la consultation ou la communiction porterait atteinte:
>
> ...
>
> – au secret en matière commerciale et industrielle; ..."

B-2 The term "secret en matière commerciale et industrielle" was not defined in the 1978 legislation.[166] It was, however, the subject of a number of authoritative interpretative decisions. By way of example, one such *arrêté*, of 23 February 1983, indicated the type of information, that could not be disclosed on grounds of commercial and industrial confidentiality, in the energy sector. This included *inter alia*:

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[164] COM Doc. 2000-400 Final, page 34.

[165] See extracts of OSPAR Convention *travaux preparatoires*, at **Annex 11** to this Counter-Memorial.

[166] The 1978 was amended by Act No.2000-321 of 12 April 2000. The operative text now reads: "Ne sont communicables qu'à l'intéressé les documents administratifs: ... – dont la communication porterait atteinte au secret de la vie privée et des dossiers personnels, au secret médical et au secret en matière commerciale et industrielle ..." (See further http://www.cada.fr) EC Directive 90/313 was implemented in France by Ordinance No.2001-321 of 11 April 2001. Article L.124-1 of the Ordinance cross refers to the 1978 Law as amended,

- files regarding authorisations and operations of importation and exportation of energy products and raw materials;

- elements of plans for the development of industrial sectors which can enable someone to determine the financial situation of the company;

- documents with statistics which could enable someone to gather information regarding an identifiable company or individual.[167]

B-3 A further *arrêté*, of 20 September 1983, indicated the type of information in the economic sector that was covered by commercial and industrial confidentiality. This included:

- all technical, economic, commercial, financial or accounting information regarding a company that the Administration had gathered when controlling or investigating it.[168]

B-4 These decisions illustrate the types of confidential information protected by the French statute the wording of which was adopted into EC Directive 90/313 and the OSPAR Convention.

B. Ireland

B-5 For present purposes, access to information legislation in Ireland can be divided into two categories: access to information relating to the environment and access to information more generally. The former category includes Regulations made under section 6 of the *Environmental Protection Agency Act, 1992* implementing EC Directive 90/313.[169] The latter category is addressed by the *Freedom of Information Act, 1997* ("Irish FOI Act").[170]

(a)

incorporating by reference the "protected interests" set out in Article 6 of the Law. The Ordinance does not define "commercial and industrial confidentiality".

[167] *Arrêté du 23 fevrier 1983*, at Article 1(4). Journal Officiel, 17 avril 1983, p.3833. **(Annex 19)**

[168] *Arrêté du 20 septembre 1983*, at Article 1(4). Bulletin Officiel, No.58, 17 avril 1984. **(Annex 20)**

[169] *Environmental Protection Agency Act, 1992* (Act No.7 of 1992; http://193.120.124.98/ZZA7Y1992.html).

[170] *Freedom of Information Act, 1997* (Act No.13 of 1997; http://www.gov.ie/oic/2132_3c2.htm).

Oversight of decisions of public bodies in relation to freedom of information requests is vested in the Office of the Information Commissioner.[171]

B-6 EC Directive 90/313, concerning access to information relating to the environment, was implemented in Ireland by the *Access to Information on the Environment Regulations, 1993*.[172] This was repealed and replaced by the *Access to Information on the Environment Regulations, 1996*.[173] Article 5 of the 1996 Regulations provides that, subject to the conditions and exceptions provided for in the Regulations, a public authority shall make available any information relating to the environment to which the Regulations apply. Articles 6 and 7 of the 1996 Regulations go on to indicate both mandatory and discretionary grounds for refusing a request for information. Insofar as is relevant for present purposes, Articles 6(b) and 7(1)(c) provide:

> "6. A public authority shall not make available information in accordance with article 5 where the information requested relates to –
>
> ...
>
> (b) material supplied to the public authority by a third party where that third party was not, or is not capable of being put, under a legal obligation to supply the material,
>
> ...
>
> 7.(1) A public authority may refuse to make available information in accordance with article 5 where the information requested affects –
>
> ...
>
> (c) commercial or industrial confidentiality, or intellectual property, or where the information requested relates to internal communications of the public authority orb to material which is still in the course of completion."

B-7 In accordance with the latitude provided to EC Member States in Article 3(2) of EC Directive 90/313, commercial confidentiality is established as a discretionary ground for refusing to provide requested information. The term "commercial and industrial confidentiality" is not, however, defined in the Regulations.

B-8 Some guidance as to the intended meaning of commercial confidentiality in Ireland is, however, provided in the Irish FOI Act 1997 which applies also to information relating to

[171] See further http://www.gov.ie/oic/
[172] S.I. No.133/1993.

the environment. Pursuant to section 6(1) of this Act, subject to the provisions of the Act, every person "has a right to and shall, on request therefor, be offered access to any record held by a public body". Section 7(1) of the Act provides that a person wishing access to information must make a request in a prescribed form to the head of the public body concerned. "Exempt Records" are addressed in sections 19 – 32 of the Act.

B-9 Sections 26 provides that, subject to a public interest requirement in favour of disclosure and other specified considerations, a request shall be refused where the record in question contains information given to the public body in confidence and on the understanding that it would be treated as confidential or where disclosure would constitute a breach of confidence.[174] Section 27, addressing "commercially sensitive information", goes on to provide:

> "(1) Subject to *subsection (2)*, a head shall refuse to grant a request under *section 7* if the record concerned contains—
>
> (*a*) trade secrets of a person other than the requester concerned,
> (*b*) financial, commercial, scientific or technical or other information whose disclosure could reasonably be expected to result in a material financial loss or gain to the person to whom the information relates, or could prejudice the competitive position of that person in the conduct of his or her profession or business or otherwise in his or her occupation, or
> (*c*) information whose disclosure could prejudice the conduct or outcome of contractual or other negotiations of the person to whom the information relates.
>
> (2) A head shall grant a request under *section 7* to which *subsection (1)* relates if—
> (*a*) the person to whom the record concerned relates consents, in writing or in such other form as may be determined, to access to the record being granted to the requester concerned,

(a)

[173] S.I. No.185/1996 **(Annex 21)**.

[174] Section 26 provides: "(1) Subject to the provisions of this section, a head shall refuse to grant a request under *section 7* if –

(a) the record concerned contains information given to the public body concerned in confidence and on the understanding that it would be treated by it as confidential (including such information as aforesaid that a person was required by law, or could have been required by the body pursuant to law, to give to the body) and, in the opinion of the head, its disclosure would be likely to prejudice the giving to the body of further similar information from the same person or other persons and it is of importance to the body that such further similar information as aforesaid should continue to be given to the body, or

(b) disclosure of the information concerned would constitute a breach of a duty of confidence provided for by a provision of an agreement or enactment (other than a provision specified in *column (3)* of the *Third Schedule* of an enactment specified in that Schedule) or otherwise by law."

(*b*) information of the same kind as that contained in the record in respect of persons generally or a class of persons that is, having regard to all the circumstances, of significant size, is available to the general public,
(*c*) the record relates only to the requester,
(*d*) information contained in the record was given to the public body concerned by the person to whom it relates and the person was informed on behalf of the body, before its being so given, that the information belongs to a class of information that would or might be made available to the general public, or
(*e*) disclosure of the information concerned is necessary in order to avoid a serious and imminent danger to the life or health of an individual or to the environment.

(3) Subject to *section 29*, *subsection (1)* does not apply in relation to a case in which, in the opinion of the head concerned, the public interest would, on balance, be better served by granting than by refusing to grant the request under *section 7* concerned."

B-10 Two observations on this provision are warranted. First, paragraphs 1(b) and (c) of section 27 provide some guidance on the kind of information that is to be considered commercially confidential. Notably, this includes a wide range of information, not simply information that may be characterised as "commercial" in a narrow sense. Three distinct heads of prejudice are then indicated:

(i) information the disclosure of which *could reasonably be expected to* result in a material financial loss or gain to the person to whom the information relates, or

(ii) information the disclosure of which *could* prejudice the competitive position of the person to whom the information relates in the conduct of its business, or

(iii) information the disclosure of which *could* prejudice the conduct or outcome of contractual or other negotiations of the person to whom the information relates.

B-11 In each case, the threshold of risk is that of the *possibility* of prejudice ("could" or "could reasonably be expected to") rather than the likelihood or probability or certainty of prejudice.

B-12 Second, section 27 establishes a number of important caveats to non-disclosure. Of particular note are those indicated in paragraph 2(e) and (3) of the section which, respectively, require disclosure if this is necessary to avoid a serious and imminent danger to the life ore health of an individual or to the environment, and if, on balance, the public

interest would be better served by disclosure rather than refusal. These are significant. What is material for present purposes is that these provisions reflect the exercise of a discretion by Ireland to entrench in legislative form certain overriding public interest requirements. This is permitted by Article 9(3) of the OSPAR Convention but is not required. Irish law, in this regard, goes further than either the OSPAR Convention requires or is provided in other applicable international instruments. Different OSPAR Contracting Parties have drafted their national laws differently. It is apparent is that Ireland has formulated its case against the United Kingdom on the basis of what is required by Irish law, not on the basis of what is required by the OSPAR Convention, English law, European Community law or any applicable international instrument.

C. Australia

B-13 Access to information in Australia is addressed at both the Federal and State levels. The principal legislation at Federal level addressing such matters is the *Freedom of Information Act, 1982* ("Australian FOI Act").[175] Similar legislation has been enacted at State level.[176] Obligations upon persons to disclose specific kinds of information are found in a range of other legislation, including in respect of environmental matters. There is, however, no legislation which requires the disclosure of information relating to the environment in general terms.

B-14 Section 11(1) of the 1982 Act establishes a legally enforceable right to obtain documents other than "exempt documents". Pursuant to section 4(1) of the Act, exempt documents are *inter alia* documents which are exempt by virtue of the provisions of sections 32 – 47A of the Act. Of relevance for present purposes are sections 43 and 45, the former addressing "documents relating to business affairs, etc", the latter addressing "documents containing material obtained in confidence". Pursuant to section 45(1), a document is an exempt document if its disclosure would found an action for breach of confidence.

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[175] *Freedom of Information Act, 1982* (http://www.ag.gov.au/foi/). A series of detailed guides to the operation of the Act are published by the Australian Attorney-General's Department. The issue of exemptions under the Act, including commercial confidentiality, is addressed in a memorandum of 20 June 2000 entitled *Freedom of Information (FOI) Memorandum No.98: Exemption Sections in the FOI Act*, Attorney-General's Department, 30 June 2000 (http://www.ag.gov.au/foi/memos/memo98.htm) ("A-G Memorandum No.98") **(Annex 22)**.

[176] A-G Memorandum No.98, supra, at paragraph 1.1.2.

B-15 Section 43(1) of the Act provides:

> "(1) A document is an exempt document if its disclosure under this Act would disclose:
> (a) trade secrets;
> (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 (other than trade secrets or information to which paragraph (b) applies) concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, being information:
> (i) the disclosure of which would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs; or
> (ii) the disclosure of which under this Act could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency for the purposes of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency."

B-16 A number of observations on this provision are warranted. First, the section provides useful guidance as to the kind of information that is to be considered commercially confidential. For present purposes, this includes four broad categories as follows:

(i) trade secrets, or

(ii) information having a commercial value that *would* be, or *could reasonably be expected to* be, destroyed or diminished if the information were disclosed, or

(iii) information concerning the business, commercial or financial affairs of an undertaking, being information the disclosure of which *would*, or *could reasonably be expected to*, unreasonably affect that undertaking in respect of its lawful business, commercial or financial affairs, or

(iv) information concerning the business, commercial or financial affairs of an undertaking, being information the disclosure of which *could reasonably be expected to* prejudice the future supply of information.

B-17 In respect of information other than trade secrets, the threshold of risk is that disclosure of the information "would" or "could reasonably be expected to" cause prejudice

of some defined sort. This contrasts with other provisions of the Act which require that, for documents to be exempt, the decision-maker must determine that disclosure would have a "substantial adverse effect" on the interests in question.[177]

B-18 Second, in contrast to other exemptions indicated in the Act (which invariably address the protection of government interests),[178] section 43 does not contain an express public interest proviso. The relevant test is whether the disclosure of the information in question would, or could reasonably be expected to, prejudice the interests of the commercial undertaking concerned. While public interest considerations may be relevant, under section 43(1)(c), to an assessment of whether disclosure could reasonably be expected to unreasonably affect an undertaking's commercial interests, these may not be either relevant or dispositive.[179]

B-19 Third, section 43 has been the subject of both judicial interpretation and governmental comment. The relevant principles are summarised in detail in *Memorandum No.98* of 30 June 2000 prepared by the Attorney-General's Department.[180] Addressing the exemption in section 43(1)(b) – information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed – the A-G Memorandum summarises the position as follows:

> "Information has commercial value to an agency or to another person if its is valuable for the purposes of carrying on the commercial activity to which that agency or other person is engaged ... That information may be valuable because it is important or essential to the profitability of the viability of a continuing business operation. Also information has a commercial value to an agency or another person if a genuine, arms length buyer is prepared to pay to obtain that information from that agency or person ..."[181]

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[177] See, for example, sections 39(1) of the Act which, addressing "documents affecting financial or property interests of the Commonwealth", provides *inter alia*: "... a document is an exempt document if its disclosure under this Act would have a substantial adverse effect on the financial or property interests of the Commonwealth or of an agency".

[178] See, for example, section 39(2) of the Act which withdraws the exemption provided pursuant to section 39(1) – in the case of documents the disclosure of which would have a substantial adverse effect on the financial or property interests of the Commonwealth or of an agency – if disclosure would "on balance, be in the public interest".

[179] *A-G Memorandum No.98*, supra, at paragraphs 14.4.2.1 – 14.4.2.3. **(Annex 22)**

[180] Ibid., at Chapter 14.

[181] Ibid., at paragraph 14.3.1.2.

B-20 Addressing the exemption in section 43(1)(c)(i) – information concerning the business, commercial or financial affairs of an undertaking, being information the disclosure of which would, or could reasonably be expected to, unreasonably affect that undertaking in respect of its lawful business, commercial or financial affairs – the A-G Memorandum highlights a number categories of information that have been held to come within the meaning of this section, including:

- statements of financial information and information on costs of production;
- information as to a company's pricing structure;
- information gathered to prove the efficacy or otherwise of a product;
- information in the nature of operating and financial information, future strategies, expected export market movements, selling prices and overseas customer lists.[182]

D. United States of America

B-21 Access to information in the United States is addressed, in the first instance, in the *Freedom of Information Act, 1966* ("US FOI Act").[183] This provides *inter alia*, in subsection (a)(3), that Federal government agencies, "upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person." Subsection (b) of the Act goes on to indicate nine categories of exemption. Pursuant to "Exemption 4", the Act does not apply to matters that are "trade secrets and commercial or financial information obtained from a person and privileged and confidential".[184]

B-22 There is no US legislation that specifically requires disclosure of environmental information separately from the FOI Act. The US Environmental Protection Agency ("EPA") has, however, adopted detailed regulations regarding the disclosure of information. The EPA's stated policy on disclosure is to

[182] Ibid., at paragraph 14.4.3.3.
[183] The Act, as amended, is codified in 5 U.S.C. § 552 **(Annex 23)**.
[184] § 552(b)(4).

> "make the fullest possible disclosure of records to the public, consistent with the rights of individuals to privacy, the rights of persons in business information entitled to confidential treatment, and the need for EPA to promote frank internal policy deliberations and to pursue its official activities without undue disruption."[185]

B-23 Consistent with this policy, EPA regulations requiring disclosure specifically adopt the exemptions laid down in the FOI Act.[186] The exemption for commercial confidentiality is then, additionally, the subject of detailed elaboration by the EPA. Defining what is meant by "reasons of business confidentiality", the EPA states that this includes:

> "the concept of trade secrecy and other related legal concepts which give (or may give) a business the right to preserve the confidentiality of business information and to limit its use or disclosure by others in order that the business may obtain or retain business advantages it derives from its rights in the information. The definition is meant to encompass any concept which authorises a Federal agency to withhold business information under 5 U.S.C. 552(b)(4), as well as any concept which requires EPA to withhold information from the public for the benefit of a business under 18 U.S.C. 1905 or any of the various statutes cited in Sec. 2.301 through Sec. 2.309."[187]

B-24 The substantive criteria used by the EPA in making confidentiality determinations are:

(a) the business has made a confidentiality claim;

(b) the business has satisfactorily shown that it has taken reasonable measures to protect the confidentiality of the information and that it intends to continue to take such measures;

(c) the information is not, and has not been reasonably obtainable without the business's consent by other persons by use of legitimate means;

(d) no statute specifically requires disclosure of the information; and

(e) either:

  (1) the business has satisfactorily shown that disclosure of the information is likely to cause substantial harm to the business's competitive position; or

  (2) the information in voluntarily submitted information and its disclosure would

[185] Title 40, Code of Federal Regulations (40 CFR), Part 2, § 2.101(a) (extracted at **Annex 24**).
[186] 40 CFR § 2.118 **(Annex 24)**.

be likely to impair the Government's ability to obtain necessary information in the future.[188]

B-25 The commercial confidentiality exemption of the FOI Act (incorporated in EPA Regulations) has been the subject of extensive judicial analysis. The two seminal decisions setting out the applicable tests for confidentiality are *National Parks & Conservation Association v. Morton* and *Critical Mass Energy Project v. NRC*.[189] The central principles that emerge from these decisions are summarised in a May 2000 US Department of Justice Guide to the FOI Act as follows:[190]

> "... *National Parks & Conservation Ass'n v. Morton*, long considered to be the leading case of the issue, ... significantly altered the test for confidentiality under Exemption 4. In *National Parks*, the Court of Appeals for the District of Columbia Circuit held that the test for confidentiality was an objective one. ...
>
> > 'To summarise, commercial or financial matter is 'confidential' for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.'
>
> ...
>
> In August of 1992, the D.C. Circuit issued its en banc decision in *Critical Mass*. After examining the 'arguments in favour of overturning *National Parks*, [the court] conclude[d] that none justifies the abandonment of so well established a precedent.' ...
>
> Although the *National Parks* test for confidentiality under Exemption 4 was thus reaffirmed, the full D.C. Circuit went on to 'correct some misunderstandings as to its scope and application.' Specifically, the court 'confined' the reach of *National Parks* and established an entirely new standard to be used for determining whether information 'voluntarily' submitted to an agency is 'confidential'. The United States Supreme Court

(a)

[187] 40 CFR § 2.201(e) **(Annex 24)**.
[188] See 40 CFR § 2.208 **(Annex 24)**.
[189] *National Parks & Conservation Association v. Morton* 498 F.2d 765 (D.C. Cir. 1974); *Critical Mass Energy Project v. NRC* 975 F.2d 871 (D.C. Cir. 1992) **(Annexes 25** and **26** respectively**)**.
[190] A detailed guide to the interpretation and application of the FOI Act and its exemptions is published by the US Department of Justice; see *Freedom of Information Act Guide, May 2000* ("DoJ FOI Act Guide") (http://www.usdoj.gov/oip/foi-act.htm).

> declined to review the D.C. Circuit's en banc decision and it now stands as the leading Exemption 4 case on this issue.
>
> Through its en banc decision in *Critical Mass Energy Project v. NRC*, a seven-to-four majority of the Court of Appeals for the District of Columbia Circuit established two distinct standards to be used in determining whether commercial or financial information submitted to an agency is 'confidential' under Exemption 4. Specifically, the test for confidentiality set forth in *National Parks & Conservation Ass'n v. Morton*, were confined 'to the category of cases to which [they were] first applied; namely, those in which a FOIA request is made for financial or commercial information a person was obliged to furnish the Government.' The D.C. Circuit announced an entirely new test for the protection of information that is 'voluntarily' submitted: Such information is now categorically protected provided it is not 'customarily' disclosed to the public by the submitter."[191]

B-26 In the light of these decisions, the position under the US FOI Act and EPA regulations regarding the interpretation of the commercial confidentiality exemption can be broadly summarised as follows:

(2) commercial or financial information submitted to the government pursuant to an obligation to do so is confidential, and therefore exempt from disclosure, if disclosure is likely either:

(a) to impair the government's ability to obtain necessary information in the future; or

(b) to cause substantial harm to the competitive position of the person from whom the information was obtained;

(3) commercial or financial information submitted to the government voluntarily is categorically protected if it is of a kind that would customarily not be released to the public by the person from whom it was obtained.

B-27 Significantly, for present purposes, the *Critical Mass* case concerned a request for the disclosure of information bearing on the safety of nuclear power plants. At first instance, the District Court, applying a balancing of interests tests between a public interest for

[191] DoJ FOI Act Guide, text at footnotes 28 – 50 (footnotes omitted).

disclosure and the respondent's interest in maintaining confidentiality, ruled in favour of the respondent against disclosure. The decision was upheld on appeal, although without applying a balancing test. More recently, in *Public Citizen Health Research Group v. FDA*, the D.C. Circuit rejected any type of balancing test under either the impairment or competitive harm elements of *National Parks*.[192]

B-28 An assessment of whether the disclosure of information would cause substantial harm to the competitive position of the person from whom the information was obtained has been addressed by US courts on a case-by-case basis.[193] Competitive harm properly cognisable under Exemption 4 has, however, been recognised in cases concerning the disclosure *inter alia* of:

- detailed financial information;
- a company's actual costs and break-even calculations;
- workforce details which would reveal labour costs, profit margins and competitive vulnerability;
- selling prices;
- purchase records;
- technical and commercial data;
- details of consultants and subcontractors;
- names of shippers and importers;
- freight routing systems;
- costs of raw materials;
- unannounced and future products;
- proprietary technical information;
- pricing strategy;
- raw research data concerning safety and effectiveness test.[194]

E. Conclusions

[192] *Public Citizen Health Research Group v. FDA*, 185 F. 3d 898 (D.C. Cir. 1999). **(Annex 27)**
[193] DoJ FOI Act Guide, text at footnotes 205 – 206.
[194] DoJ FOI Act Guide, text at footnotes 265 – 274.

B-29 The conclusions that may be drawn from the preceding review of national laws and practice are set out in paragraph 5.35 of the main body of this Counter-Memorial.