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

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

BETWEEN

IRELAND — Applicant

v

UNITED KINGDOM OF GREAT BRITAIN
AND NORTHERN IRELAND — Respondent

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OCTOBER 21ST TO 25TH, 2002

SMALL HALL
THE PEACE PALACE
THE HAGUE
THE NETHERLANDS

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BEFORE:

THE TRIBUNAL:

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

- - - - - - - -

PERMANENT COURT OF ARBITRATION:

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

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DAY ONE
PROCEEDINGS
(Revised)

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THE CHAIRMAN: Good morning, ladies and gentlemen. This opens the arbitration between Ireland and the United Kingdom under the OSPAR Contention. AS the court reporter has already received a list of counsel for each side, those sitting at the counsel table, I will dispense with asking them to identify themselves and proceed directly to the hearing, because of a preliminary issue that had to be disposed of at 9 o'clock, which took somewhat longer than planned, this session will go until 1.30, depending on the time requirements, we may extend the afternoon session to 6.15, which would complete the time allotted to Ireland on its first day.

May I call on the Irish agent.

MR O'HAGAN: Mr Chairman, members of the Tribunal, my name is David O'Hagan and I am agent for Ireland and I am Chief State Minister in the Ireland Civil Service. Firstly, I would like to thank the members of the Tribunal to agree to act as arbitrators in this case. I would also like to thank the Permanent Court of Arbitration for the administration of the hearing and for the arrangements leading to it. I am pleased to introduce the members of the Irish team who will be presenting oral argument. Firstly, the Attorney-General, Mr Rory Brady, will open Ireland's case. He will address the factual matters in issue and it is expected that Mr Brady's submission will last for between 60 and 75 minutes. The Attorney will be followed by Professor Philippe Sands, who will address legal issues relating to the interpretation and application of Article 9 of the OSPAR Convention. This will take approximately 150 minutes. Mr Eoghan Fitzsimons, senior counsel, will address the issues relating to the application of the Convention to the claim of commercial confidentiality. This will take approximately 45 to 60 minutes. I am pleased to note the presence of Ireland's Minister for the Environment at the opening this morning.

Ireland is conscious of the time constraints and will make all efforts to keep within the allocated time limits. We hope that the Tribunal might take a flexible approach as the hearing develops.

MR BRADY: I am the Attorney-General. In the interests of speed, Mr Chairman, I have prepared a written submission setting out the factual and historical data on which I will be relying. I do not intend to recite verbatim the contents of this submission, as I think that it will only lend to the longevity of the proceedings. As has been pointed out, the legal aspects will be engaged in by Philippe Sands and my other colleague. Mr Fitzsimons will deal with the confidentiality issues. But, with your permission, what I propose to do is to take you through the written submission, not reading it but simply

identifying the key points that we make and you can take the document as being my submission. Obviously, I would not think that it would be the most economic use of time to read it verbatim. Within that spirit of expedition, I will start with the second page, as you have already been given the details from the Chief State Solicitor.

I, of course, observe that this case is about national and international importance. We are grateful, as the Chief said, for the speed with which this Tribunal has constituted itself and the expedition of its procedures.

What is this case about? Why is Ireland looking for this information? There are two bases and I am now looking at paragraph 1.02. The first basis is that we are looking for this information because it is information which affects or is likely to affect the Irish Sea, the marine environment. That is to say that the MOX plant while in operation and the associated operation of Thorp will produce discharges that will impact on the maritime area, ie the Irish Sea, and the Irish Government has a direct and material interest in that matter and in assessing the extent of the impact.

Again, at paragraph 1.03, I adumbrate the second reason why we seek this information and it is of a different quality or type. It is this. It is to enable Ireland to engage in a process of assessing objectively the justification for the MOX plant to determine the extent to which the United Kingdom Government has been complaint with its obligations under OSPAR and, in addition, under UNCLOS. You will, of course, be aware, members of the Tribunal, that there are related proceedings before UNCLOS which I will just mention en passant at this stage. The obligation to justify I will presently address as to its legal genesis.

It is clear that Ireland has a direct and material interest in the operations of Sellafield. By that I mean all of its operations. The extension of its operations by the construction of the MOX plant adds to and intensifies our concerns and our regard for the protection of the environment and our national interests and assets. Ireland's concerns are reinforced by virtue of the fact that the Irish Sea (a semi-enclosed sea) is one of the most radio-actively polluted seas in the world. Because of that, there is an abundant duty on the Irish Government to take all steps necessary under international law to assess and to determine the impact on the Irish Sea and to determine and ensure that the United Kingdom has complied with its obligations. Of course, I accept that this case is not about justification, this case is not about carrying out an assessment of the impact, it is about permitting Ireland access to information on those two bases.

I think that you will already be aware from what has been said in the opening that Ireland

claims a right - and this is manifest in the pleadings - under Article 9 of the OSPAR Convention and, of course, that is the very issue that has to be disposed of before this arbitral hearing.

Professor Sands will address you on the correct legal interpretation of the OSPAR Convention and related matters and will deal with EU law.

I am now moving on to paragraph 1.06 on page 2. I want to deal with the sources of the obligation to justify. Again, I think that it is fair to say that the Tribunal will, no doubt, be fully aware that the genesis of the obligation of justification arises from the recommendations of the International Commission on Radiological Protection and I think that of itself is worthy of reflection. It shows the international community has recognised the special position of the nuclear reprocessing industry that has just promulgated laws and requirements that oblige States engaged in the nuclear industry to justify what they are doing.

You will see on page 3, members of the Tribunal, the genesis of the obligation under your reference. That is to be found in paragraph 112 of the ICRP Publication 60. You will see there the excerpt which I do not propose to read out at this stage.

That was then translated into a similar obligation which we find in the EURATOM Treaty. That is Directive 80/836. In turn, it has been altered and reinforced by amending Directives of EURATOM in 96/269. Again, in the interests of speed, I do not propose to read out those provisions. They are readily apparent from the submission.

I think that at this stage it is apposite that I make some general comments on the spent nuclear fuel reprocessing market, because Thorp is about reprocessing spent fuel from either utilities in the UK or a utility in the UK and utilities outside of the United Kingdom. It is interesting, particularly when one comes to assess the issue with regard to markets and what the future is likely to be in relation to the reprocessing industry, to have regard to what were the original drivers, what were the engines of developing reprocessing. There are two. This you will see in the documentation. At paragraph 1.07 I identify what are the two drivers that resulted in reprocessing becoming an industry decided upon by certain countries, including the United Kingdom. The first driver was the desire to obtain sufficient quantities of plutonium (that is separated plutonium emanating from the reprocessing of the spent nuclear fuel) for use in fast breeder reactor programmes. The second driver or justification was to generate separated plutonium that was to be used in the nuclear weapons industry.

When you look at those two issues in isolation and reflect upon the current position, they as

drivers are now redundant. The fast breeder reactor programmes have been abandoned. The current international position, subject always to rogue States and qualifications that might arise, is against nuclear proliferation. We are entering into a process of looking at the factual background to this dispute, where the two original drivers - or the two original justifications - have become redundant or, in one case, utterly abandoned.

I am moving on to paragraph 1.08. I wish to just emphasise at this point some factors that are of relevance to the special position of this industry. One can ask rhetorically why are there so many regulations, why are there so many conventions relating to the nuclear industry. It is a special industry, where, if things go wrong, the consequences can be cataclysmic. Because of that, responsible authority has decided that it is an industry that must be subject to stringent regulation. WE have a variety of international conventions entered into by States to protect the environment. One of those conventions and part of the matrix of the international communities' approach to this industry is the OSPAR Convention.

In this context, it is important to look at the fact that nuclear States have responsibilities. States adjacent to nuclear States have rights. But for a right to be meaningful in terms of protecting your assets and your people, you have to have access to information. The ideal situation is that the international community of sovereign states should have parity of information to enable equality of response, to enable equality of assessment of risk. That this industry has international ramifications is clearly and most vividly illustrated by the Environment Agency who procured the PA reports, who in their own report to the British Government - and I use that term to encompass the Ministers - said that the MOX plant development was one that was a major development at Sellafield that was of national and international importance. We respectfully agree with that contention.

The United Kingdom Ministers of Environment, Transport and Regions and Agriculture, Fisheries and Food in their third Consultation on the economic case for the MOX plant in June 1999 pursued this theme. There they said:

> " [..] in common with all significant decisions in respect of the nuclear industry, the decisions on the MOX plant are contentious and of wide public interest and concern. It is in the interests of all parties that there should be public confidence in the robustness of BNFL's economic case for the MOX plant and the way the decisions about it are reached".

We respectfully agree, but we will now come to analyse the conduct of the British Government in terms of living up to the standards that they have set for themselves.

Sellafield; I have some general observations by way of background information, and again this is information which can be gleaned from the pleadings. The Tribunal is aware of its location, which is in Cumbria in North West England. It is owned and operated by BNFL and it operates a number of nuclear facilities. We are not solely talking about Thorp and MOX, and I am sure all of this information was well known to members of the Tribunal. Sellafield of course was formerly known as and indeed was christened as Windscale, and Windscale had its own problems in 1957, but through wisdom the name has been changed to Sellafield. The position at present is that you have at Sellafield the Thorp plant, which is the thermal oxide reprocessing plant. It reprocesses spent nuclear fuel. It is divided into three streams. You have uranium, separated plutonium and wastes. It is the separated plutonium that then goes on into the MOX facility for the purposes of being manufactured into MOX fuel assemblies. I should say that while it is possible to use the uranium separated through the reprocessing it is our understanding that fresh supplies of uranium have in fact been used in the past at the MOX demonstration facility.

The BNFL operation is based on contracts or arrangements typically with Energy Utilities, with one exception all located outside of the United Kingdom, and that throws up the following corollary; because if the feedstock of the reprocessing plant is spent nuclear fuel and if the source of this is outside the United Kingdom, it follows in consequence that this can only be transported from these foreign countries, Japan, Germany, wherever, by ship, and that throws up an issue which I will come to presently about transportation risks and Ireland's concerns in that regard. The clients operate what are called light water reactors, and it is the nuclear reactors, these light water reactors, that produce the spent fuel. I am now moving on, members of the Tribunal, to page 5.

I have already explained the reprocessing industry. I should say that Sellafield also has Magnox reactors and a plant called B205 for reprocessing the spent fuel from those rectors, but I do not think it is necessary to dwell any further on that.

Some factual pieces of history and dates are now I think necessary to put before the Tribunal. In 1993 BNFL established a MOX fuel fabrication facility. I think it is important to remember, and forgive me if I am repeating what is already known to you, but initially what was constructed was a MOX demonstration facility to test it out, to manufacture MOX fuel assemblies. Its capacity was then eight tonnes and that is its capacity. But it was very much at the preliminary or the embryonic stage in terms of assessing the development of the manufacture of MOX. It does surface and it surfaces subsequently because it is from this plant that the fuel that was the subject of that data

falsification made its way to Japan and made its way back to Sellafield.

The position is that the manufacturing of MOX and the MOX fuel assemblies that are manufactured are used for the purposes of certain light water reactors called pressure water and boiling water rectors. The position is that all of those reactors that are capable of using MOX fuel as assembled are located outside of the United Kingdom. There is no rector in the United Kingdom that can use MOX fuel for its own purposes.

Going on to paragraph 2.03, I have already adverted to the fact that MOX is a process that arises out of the use of separate plutonium consequent on reprocessing of Thorp. It breaks down the fuels into the three elements which I have just outlined. But reprocessing is only one of the ways in which spent nuclear fuel can be dealt with, and you will hear in extensive detail, which I do not propose to trespass into at this juncture, from Gordon MacKerron that one of the alternatives that is available and perhaps the cheapest alternative is that of storage of spent nuclear fuel, so I think it is important that in giving my overview of the market that I make it clear that the manufacture of MOX fuel assemblies is one of a series of options available to those who operate light water rectors and wish to dispose of their spent fuel.

What happens? What it is proposed in terms of the manufacturing process, and again this is simply outlining facts that are to be seen in the pleadings, but, essentially, the MOX fuel consists of rods. You have a combination of uranium dioxide and plutonium dioxide through a complicated procedure. They are converted into pellets which are then stored in these fuel-assembly rods which are then sent abroad to the proposed customers.

I want to move on to paragraph 2.04 on page 5. I have already referred to the fact that BNFL owns and operates the Sellafield base of operations. It was established in 1971. Before 1971, there was another company, but I do not think that it is necessary to go into that level of historical detail.

Who is BNFL? This becomes of some import at a later stage. BNFL is owned by the British Government and was owned by the British Government. What we are dealing with here - and this may become of significance in the context of the interpretation of Article 9, is an operation, a nuclear reprocessing operation, that is owned and controlled by the British Government.

We know that the current position of BNFL is that its long-term liabilities exceed its assets. This has resulted in the following development by way of historical background. The British Government has established a Liabilities Management Authority. I mention this in passing and as part of my opening simply to refer to the unusual nature of BNFL and the nuclear reprocessing market

in the UK in the context of the points that will arise with regard to confidentiality.

In July 2002, members of the Tribunal, and, if you go to page 6, you will see at paragraph 2.05 the point that I am averting to, the Secretary of State for Trade and Industry presented a white paper entitled "Managing the Waste Legacy: A Strategy for Action". The White Paper set out the implications of this Liabilities Management Agency for BNFL. This will result in a significant change in the manner of operation of BNFL. It is not, and certainly will not be, an ordinarily operating and functioning public limited company.

The key changes will result in transfer of aspects of its business directly into public ownership (ie to the Liabilities Management Authority) and the MOX plant is one element, as indeed is Thorp.

At paragraph 2.06 I go on to point out that the White Paper announced the creation of a new company, "New BNFL", and this essentially will be involved in operating under a contract with LMA and dealing with decisions relating to the operation of the MOX plant.

What is of significance here is that the LMA is not simply an agency to run a business, it is an agency concerned about the running down of a business. At paragraph 2.07 you will see that the focus of the LMA is towards the systematic and progressive reduction of liabilities consistent with safety, security and environmental requirements. What is of primary concern to Her Majesty's Government at this juncture is that of the cost of clean-up. Contracts entered into for MOX are viewed through the prism of what they will cost in terms of the clean-up. This is not a normal method of assessing the operation of a business. It is not looked at in terms of pure inherent profitability. I make these points again at paragraphs 2.07 and 2.08. They explain in detail the matters that I have outlined and, in particular, at 2.08 I emphasise that the priority of the LMA, in terms of new contracts, will be one directive regrading the clean-up of the site in question.

I will move on, sir, with your permission to page 7, paragraph 2.09. New contracts will require the approval of the UK Secretary of State. Again, there is an emphasis on priority to clean up being given. Again, at paragraph 2.10 we go on to re-emphasise the point that we are not dealing with a normal industry in the way in which matters are being assessed.

I now want to move on to the next segment of my opening. With your permission, I propose to follow the procedure of going through the written submission and emphasising the points but not reading every line of it.

The information that is sought by Ireland.

The essence of this case is about access to information consisting of the edited versions of the two PA reports and the edited version of the ADL (Arthur D Little) report.

What is the information that Ireland was looking for that has been excised? We have outlined I think 14 categories and on pages 7 and 8 you will see those 14 categories that have been enumerated. I am not going to read through them because they are a repetition of what is to be found in paragraph 75 of our Memorial, which the Tribunal has, no doubt, considered in great detail.

That is the type of information that has been redacted and withheld from Ireland.

I now address in paragraph 3.02 why it is that we want that. I come back - and I am trying to hold together the two themes of our case - to the fact that we seek information on two bases: one, to assess impact or likely impact on the maritime area and, two, to determine justification and compliance with the Conventions previously mentioned.

AT 3.02 I deal with the first of those bases. Each of the above types of information that we are looking for relates to the impact of the MOX plant on the Irish Sea and the concomitant impact of the related operations of Thorp. I will just pause there for a moment. We are looking for the unedited versions of the reports which deal with MOX and, of course, the issue arises, why do you need that information and how is that relevant to Thorp?

Its relevance to Thorp arises in a causal way and it is this. If the British case is correct in terms of will there be a market, will there be future contracts for MOX, if they are right - and we join issue with them and I do not have to go into that at this stage - if their assertion is correct that MOX is going to make money for the British Government, 200 million odd, the natural consequence of that is that bar the transportation of separated plutonium, which we say is inconceivable, it can only arise in the context of contracts to treat nuclear fuel that is spent at Thorp and then manufacture at MOX from the separated plutonium. Our concern in terms of impact is a concern not just directly in relation to MOX, but the activity that is antecedent or precedes the MOX activity. That discharges a much greater level of matters that we say affect and directly affect the maritime area.

AT paragraph 3.02 we go on to make these observations about the discharges into the Irish Sea. You will see at 3.02 we refer to a document, albeit much criticised by the Irish, which is a document first produced and only produced in 1993 by BNFL, which is the Environmental Impact Statement which they were required to produce under domestic UK law but pursuant to new Directives. That document itself demonstrates that the MOX plant will produce various solid radioactive wastes, principally in the form of plutonium contaminated material. The types and the

quantities of the radioactivity, of the radionuclides, associated with the waste are not set forth in the Environmental Impact Statement.

What they tell us in 1993 is that we will produce sold radioactive waste, but they do not tell us how much and they do not tell us which ones. I just mention that because it has to be said in context with the demands for information that subsequently follow and that really are the first chapter in this saga that has ended up before this international Tribunal. We do not know from that document, and did not know from that document, in 1993 the extent and duration of the operation of MOX and the discharges from MOX. But, as I have already observed, if the British case is correct that there will be substantial contracts that will render it profitable to engage in this process, and justify the net present value of 200 million odd, then that has serious consequences for Ireland.

I will move on to 3.03. What are the risks associated with this? Because, while we are looking for information, we do not want to cast the requests solely in the context of looking for documents and information, but also we want to make it clear why it is that Ireland seeks these documents. We are concerned about risks. And there are risks inherent in the operation of the MOX plant. At paragraph 3.03, we say that, because of these risks and the costs associated with catering for or eliminating these risks, that type of information is germane to Ireland.

At 3.04 I outline the risks that can arise from the operation of the plant. These are essentially technical risks, the failures that can arise. I have outlined those in paragraphs (a) to (d) there. They relate essentially to problems with regard to the software, the advanced power technology that was in use and the failure of BNFL personnel to maintain safety standards. That is not a fanciful risk as we shall come to see shortly in the light of the data falsification incident.

At 3.05 I outline the other risks inherent in the operation of the MOX plant. These are essentially the risks arising from or in consequence of transportation of spent nuclear fuel or the reverse transportation of fuel manufactured into mixed oxide fuel. These are the risks that one associates with, I suppose, the vicissitudes of life, the perils of the sea, the risks of fire and the risks of explosion. These are all matters which are relevant to any country that wishes to assess the extent of those risks and the hazard for its own people.

When we come to look at the information that we are seeking, you must look at it not in terms of, in my respectful submission, a dry request for information which will not be put to valuable use. It will be put to good use by the Irish Government in terms of its assessment of risk and its determination of the precautions taken by the British Goverenment.

On page 10, as you will see, I now move on to why we want the information on the second basis, which is the justification basis. I do not think that I need to elaborate in any great detail in relation to that. You will see that our concern about justification stems from the speculative and unspecified nature of the number of contracts and the categories of contracts for the future manufacture of MOX. Are they firm contracts? Are they letters of intent? Are they letters of indication? What is the position in terms of justification? Is the net present value assessed, predicated on an assumption as to what the future will be in terms of the number of contracts and how valid is that? We say that information of that nature, which I mention simply by way of illustration as to why that is relevant and intensely relevant to the justification process, why we seek that information. It will be elaborated upon in the evidence, but I am mentioning it at this stage in the course of the opening.

One of our concerns in relation to this whole saga is the way in which the whole justification process has proceeded. Of course, that is not a matter for this Tribunal, and I agree with my learned friend, Mr Plender, that this Tribunal is not here to decide whether it was or was not justified. That is not your job and I am not urging that. But I would just emphasise why our concerns are so intense and why two friendly Governments have ended up before this distinguished international Tribunal. What occurred here was that the British Government - BNFL - built the MOX plant, which cost, as we now know on current assessment, £415 million. They treat that cost as a sunken cost. It is dead money. What do they then do? They say, "Whether we will proceed with justification, with manufacturing MOX, depends on whether we will make more money ignoring the 450 million by manufacturing or we will lose more money by simply not proceeding with the MOX manufacturing facility". It is instructive to know in that regard that the Environment Agency itself in its report to Her Majesty's Ministers expressed its dissatisfaction that it was unable to consider the full economic case before construction began. It is seeking a change in the law in that regard. I will refer you, sirs, to the extract at paragraph 3.06 setting out the views of the UK's own Environment Agency on this whole process.

Finally, there is the following factor and, in making this observation, I do not intend to impute any mala fides to the British Government, but I think that a note of caution has to be sounded and it is this. The British Government own BNFL, the British Government invested in BNFL, it is the British Government who are deciding is it justified to proceed with BNFL or abandon its investment to date. That is a factor that I believe is of some relevance to the reason why access to financial data that is

necessary for the purpose of justification is of importance to Ireland.

I will now move on and deal quickly with the next three pages. Demands for information from Ireland of the United Kingdom are not new. You will have seen the correspondence and I will open that correspondence shortly, but the requests for information go back to 1993. BNFL applied to the local authority (page 11) on 19th October for permission to build a MOX plant and advertised its planning application to Copeland Borough Council on 19th October 1993. Ireland obtained a copy of the Environmental Impact Statement. The Environmental Impact Statement is not an extensive document. But Ireland's concerns at the paucity of information impacting on the environment were then made known and you will if you go to paragraph 4.03 a submission was then made by Ireland, the effect of which was to advert to serious omissions and deletions from the Environmental Impact Statement, and you will see Ireland's concerns expressed at a very early stage; (1) no data was provided on the nature and quantities of materials to be used in the production processes; (2) the environmental statement omitted "any assessment of the consequences of transports or of accidents to the proposed MOX plant"; (3) the environmental statement did not evaluate the possible radiological consequence of unplanned releases following a fire or criticality accident and no evaluation has been made of exposures of members of the public either near the site or in the nearest member state of Ireland.

The gravamen of Ireland's contention at that stage about the first regulatory document to be produced by BNFL was it did not provide sufficient and adequate information to enable the effects on the environment of MOX to be assessed, and you will see on page 12 the view of the Minister was then postulated that in the absence of this information which was clearly crucial for a full and proper evaluation of likely environmental consequences, the planning application should be refused. Planning was granted.

When then happened? the next phase I will refer to and I will then take you to the correspondence and I can assure you that I intend only to open a very small number of letters. The next stage in this development that ultimately brings us here today is that having got the permission and having built the plant BNFL applies to the Environment Agency for authorizations in relation to certain discharges, and this was an application under domestic legislation where they applied for, I think, increases in certain authorizations or authorizations for discharges including the MOX plant. The Environment Agency recognised that that then triggered the obligation to engage in the justification process.

I am simply going to refer on page 12 paragraph 4.06 to some general comments because I am aware that all of you have read in detail all of the documentation and I do not propose to start opening it in any great detail, but there will be one or two documents I will refer to. But I want to make some general comments which identify themes that flow through this correspondence between Ireland and the United Kingdom, and which have given rise to an unfortunate contretemps which I will presently deal with. The themes revealed through the correspondence are as follows: (and I am referring to 4.06) the United Kingdom Government accepts that Ireland has a particular interest in relation to the operations of Sellafield. Secondly, in correspondence in 2000 and 2001 there are extensive letters and up till the 5th September 2001 in which Ireland was looking for information and relying on the OSPAR Convention at some points. The United Kingdom did not challenge that this was information within the ambit of Article 9(2) of OSPAR. (3) In correspondence during 2000 and 2001 and up and until these proceedings the United Kingdom Government did not challenge the legal right if Ireland to seek the unredacted PA and ADL reports directly from the UK Government. Just pause there for the moment. There are quite a number of letters looking for this information. There were a number of meetings, meetings in the context of the OSPAR Commission. Unfortunately we did not reach consensus; on the 15th June we initiated the arbitral proceedings. For the first time throughout this entire saga the British Government in these proceedings said you, the Irish Government, have no right to this information from us, the UK Government. That did not surface until very late in the day.

It follows from what has been said that the first occasion upon which our entitlement to the information was challenged was in the letter of the 5th September, and that was only after we had commenced the arbitration. And for a case predicated on Ireland having no rights to this information and no rights to look for this information it is remarkable that officials from the United Kingdom Government dealt with Ireland and its officials at OSPAR Commission meetings.

I now propose to come to the final stage of my closing, and for this purpose I wish to refer to a number of letters and I do not know if you have readily available to you the core booklet which has the annexes. I will then identify what I wish to refer to

THE CHAIRMAN: Could you identify the annexes you are going to refer to?

MR O'HAGAN: It is annex 4, divide 4. It is the correspondence.

THE CHAIRMAN: Could you also give us the page in this tab?

MR O'HAGAN: Certainly. It is page 139. There are only three or four pages. As I intend to finish my part of the opening in about 15 minutes what I propose to do is simply take you to the rest of the written

submission and then refer to these letters. If that is satisfactory to you. If you could go to page 13 of the written submission, and at 5.01 I simply outline how the justification process arises. What happened then was - and there are five phases in this whole process of justification - the first occasion that Ireland engaged in the justification process was by way of a submission from Ireland (and with your permission I will use the term Ireland to include Ministers of the Irish Government for obvious reasons, and I use the UK Government as a similar shorthand). On the 4th April 1997 the Irish Department of Transport, Energy and Communications, wrote in connection with the application by BNFL for justification. What happened was that the Environment Agency requested BNFL to give them information to justify the process. If you look at 5.02 you will see that Ireland, aware of this application for justification, makes its observations on BNFL's submission. Again you will see at paragraph 5.02(a) the quality of the information available for consultation is deficient in many respects. There is not enough information provided to analyse the benefits; (b) there are no real hard facts or details in the documentation about the relationship between plutonium production and MOX consumption, the prospects for future utilisation and so on and so forth. Thus Ireland on page 14 paragraph 5.02 concluded that the information then made available by BNFL in the context of the justification process was deficient.

In fairness to the UK Environment Agency they themselves recognised the necessity for outside advice on the justification process and they retained the services of PA Consulting Services Ltd. They produced a report and that now brings us to the second phase of the justification process.

That was from January to March 1998. What then transpired was that PA Consulting Group prepared a report on the 12th December 1997. A public domain version of that report was produced and there is the edited version which is the subject of these proceedings. The Irish Government got access to the public domain version and the Irish Government made clear its concerns at the lack of information in the public domain version. You will see, Sirs, at page 14 I outline there the concerns of the Irish Government with regard to the paucity of information in the document in question. Ireland there concluded "However, given PA Consulting Group's validation of BNFL's assertion, their final report - public domain version - sheds little light on BNFL's economic case for the commissioning of the SMP. The report does not release information on cost and price data and on plant process and performance. As a consequence many of the assertions made in the report are unverifiable and BNFL's economic case is not open to public review". It then made observations in relation to the failure to include the cost of construction which was then estimated at 300m in the calculation for the

purposes of the determining justification.

During this phase there are a number of milestones that I want to advert to just to paint the picture for the Tribunal, and it is this. In October 1998 the Environment Agency produced a draft decision, and it essentially permitted the variations sought in the levels of discharges and decided however to refer its report having reached a preliminary view on justification of commissioning of the MOX plant to the UK Government, and you will see at paragraph (b) on page 15 that the report was sent forward. It is of significance why that occurred, because the reason why that occurred was as follows. Under the legislative arrangements in the UK, Ministers reserve a jurisdiction to themselves, depending on whether it is an existing operation or an operation which is soon to become operational. But in the case of an existing operation the British Government through its Ministers reserve the right to direct the Environment Agency to reach a different decision. So the authority that decides ultimately here is the British Government, not some quango, or some other statutory body, but the British Government has the right to direct that this is not to proceed, and that has certain corollaries that will be dealt with at a later stage.

The next milestone in this second phase was that in June 1999 the Ministers reached a preliminary decision that the MOX plant was justified. However, the British Ministers were dissatisfied with the amount of information in the public domain version of the first PA report, and required that there be another PA report with more information in it.

So the next phase was engaged in terms of going back to the drawing board by PA Group and drafting a further report that was intended presumably to educate those that read the document as to the information that had been excessively deleted from this document. So we now enter the third phase of this whole process. Ireland is active and engaged in all of these processes looking for information . We are certain vindicated by the very fact the British Government itself decided that the first PA report was deficient. It was subject to too many omission and there was a paucity of important information.

We now enter into the next phase which is the production of the second PA report. That was circulated on 11th June 1999. You will see at paragraph 5.05 the title that it had. Ireland yet again made its submissions known on this. Ireland again was concerned at the gaps, the omissions and the deficiencies in this document. You will see in paragraph 9(a) that Ireland concluded that, because of the level of omissions, it was "impossible for a reader to ascertain whether a MOX plant is economically justified and whether the Minister's provisional assessment is appropriate."

(b) The UK Government was queried as to how much, if indeed any, of the information omitted from the report would affect commercial confidentiality. 9(c) It was observed that sales volumes, price and decommissioning costs have been excluded and that without this information it was simply not possible to ascertain the economic justification for the MOX plant. 9(d) The omission of this information meant that it was meaningless and made meaningless the effort to justify the proposed plan on economic grounds and that, therefore, there was no objective basis for its justification.

(e) The PA report provided insufficient information to ascertain the frequency of international transportation.

(f) Finally, on page 17, there was not a proper assessment of the future demand for nuclear power and there was failure to take into account capital costs, as I have already adumbrated to this Tribunal.

Here we are yet again - we have a second chance to get it right - Ireland is dissatisfied, information is missing justification cannot be assessed. Then we have, perhaps, one of the most significant developments from the perspective of everybody involved in this saga, and that is the data falsification incident. That occurred in either August or September 1999 and it would appear that over a period of time that those charged with safety in Sellafield involved in manufacturing MOX were falsifying records - not just ordinary records, but safety records.

This rightly caused a furore and rightly caused a furore with the British Government as much as it did with the Irish Gov. This saga was investigated by the Nuclear Installations Inspectorate. I set out at paragraph 5.07 some of is conclusions. "It is clear that various individuals were engaged in falsification of important records, but a systematic failure allowed it to happen... (it) could not have occurred had there been a proper safety culture within this plant ... (and) management of the plant allowed this to happen and, since it had been ongoing for three years, must share responsibility."

In mentioning this, I am not getting into an issue of subscribing moral turpitude, I am looking at what is the significance of this having occurred. It validates and justifies Ireland's concern all along to know about matters that affected the safety of the operation of this plant, the cost-related matters and so forth, because, quite fortunately, no human life was lost or no property was damaged, but the risk of things going wrong is not a fanciful risk when one looks at what happened and what was discovered in 1999 in terms of falsification that had been going on for some years. It also had another ramification in that it raised a major question mark over the commitment of the Japanese utilities and,

indeed, the Japanese Government to the future purchase of MOX fuel assemblies from BNFL.

At 5.08 I point out that on 18th November 1999, the Irish Government sought from the United Kingdom a full unedited copy of the PA Consulting Group report (that is to say their final report). That was a report that was produced in June 1999. On 17th December 1999 the DETR wrote back to Ireland and said that, after careful consideration, they had come to the conclusion that they could not meet Ireland's requests and they said that disclosure of that information would cause BNFL unacceptable commercial harm.

On page 18 I refer to correspondence that I will come back to at the end. I think that it will be easier for everybody if I just look at the correspondence at the end rather than as I am going along.

The fourth phase was another public consultation phase on the PA report and also it involved the production by BNFL of two further reports, I think in the first quarter of 2001. We are now into another phase where we have more documentation being produced, this time the second PA report and more documentation coming in from BNFL. Again, Ireland made submissions on that, sirs, as you will see from the submission, and again we set out our concerns in relation to this matter.

AT that particular point in time Ireland's concerns on the information and the omissions are set forth at paragraphs (a), (b), (c) and (d) of paragraph 5.12 and on them down to (j). It sets forth our deep concerns: the consultation papers from BNFL did not provide any data on economic factors; did not provide information on environmental and social impacts; did not provide a basis for concluding that the MOX plant was justified; did not quantify the projected size of the Japanese; German and Swiss markets in terms of sales volumes; there was an omission of critical information relating to primary economic factors, including cost factors such as transportation; Ireland contended that there was no basis for approving the project for only 10 per cent of the projected output was committed; it was noted that the capital sum cost had increased from 300 million to 460 million; data relating to sales volumes; price, production capacity and so on and so forth were all omitted, there was an absence of data on price and the Irish Government observed that it had previously sought a full copy of the that document; the first PA report would have been refused. The document also noted that the British Government were, in fact, again thinking of having this looked at.

Then we come to the final phase, which I will deal with very quickly. It is the fifth phase.

The fifth phase is the next attempt to get this right. The British Government at this stage retained the services of Arthur D Little & Co to produce a report on economic justification. You, sirs, have had the benefit of seeing that report and have read the report. I will not dwell on the contents of

the report. The position is that Ireland, having been apprised of the fact that there was this report and there was a public domain version of it, seeking more information in relation to this matter and it comments upon yet again the deficiencies in the public domain version. At paragraph 5.15 you will see: "From a preliminary analysis of the report, it seems that just as in the earlier PA consulting reports there is still a considerable amount of important information omitted on grounds of confidential commerciality". It goes on then to state Ireland's position.

On 5th September the United Kingdom wrote and it denied that what was excised was information within Article 9.2 and it set forth a reason for its decision and, in particular, it was made on the ground that publication of the information would cause unreasonable damage.

There is then at paragraphs 5.17 and 5.18 further correspondence which I propose to skip at this stage. I will now take you to the bundles just to refer more particularly to the correspondence and I will then conclude this phase of the opening. The letter is letter of 30th July 1999 and the letter starts on page 137, but the portion to which I wish to refer is on page 138. Again, in the interests of expedition I am not proposing to read through the letter. I simply indicate to the Tribunal the relevant portions of the letter and the subject matter of the paragraphs. At page 139 you will see throughout that page Ireland is setting forth its request for information and the type of information that is required for the purposes of determining whether the United Kingdom is entitled to withhold information. It looks for details in relation to transportation and it looks in the second paragraph for various costs, sales volumes, price and decommissioning costs. Then you will see in the third paragraph, the very last sentence, four lines from the end, "For the purposes of ascertaining in accordance with Directive" - and it gives the Directive number - "whether the proposed MOX plant is economically justified and pursuant to 93/13C the Irish Government further asks that the Government of the United Kingdom provide it an unedited and full copy of the PA report".

The next letter to which I wish to refer the Tribunal is on page 154 of that booklet. You will see at the bottom of the letter the paragraph commencing, "Initially and for present purposes relating to the United Kingdom's obligations under Article 9 of the OSPAR Convention, Ireland reiterates its request that it be provided with the following information". I would ask you to go to the top of page 155. You will see that Ireland seeks five categories of information from the United Kingdom. Again, I do not propose to read through the five categories, they speak for themselves, but there on 25th May 2000 Ireland is looking for the information categorised into five separate categories and it is interesting to see when we got that information.

I then move on and you will see a letter on page 157, a letter of 27th October 2000 from the British Government, which acknowledges the letter of 25th May. The only paragraph to which I want to refer there is the second paragraph, which speaks for itself. "Nevertheless, the UK Government does not wish to prejudice the commercial interests of an enterprise by disclosing commercial confidential information. We note the views in your letter, but, nonetheless, believe that disclosure of the information which you have sought would cause harm".

The next letter that I want to refer again briefly is letter of 9th February. It is page 159, the last paragraph, which I think is quoted in the written submission, which makes it clear that as of 9th February 2001 there was then a dispute in existence between Ireland and the UK as to the interpretation of Article 9 of OSPAR and again inviting the British Government to disclose the information as requested in the letter of 25th May.

Page 168 is letter of 7th August 2001, where Ireland is making some observations at this stage on the ADL report and in the last paragraph you will see, "In this context I would be very grateful if your Department could pass on to my Department a copy of the full version of the ADL report. In the event that a copy of the full report is not required, I reserve the right to amend and extend this application in the OSPAR arbitration".

As you are aware, on 15th June 2001, Ireland had initiated this arbitral process. Of course, it was after that date that the ADL report became available and Ireland had to go through the procedure of seeking to amend its claim so as to incorporate and to encompass what in the existing proceedings was a claim in relation to the ADL report. That was the demand that was made for that report.

The next letter that is relevant is on page 170. It is a letter of 26th September. In that letter you see in the middle paragraph "For the sake of clarity it is important to point out that the procedural obligations of the United Kingdom which are .... Information economic justification of ... Part of the overall substantive obligations of the United Kingdom to take appropriate measures to protect the marine environment from radioactive pollution. These obligations are set forth particular in the 1992 OSPAR Convention and the 1982 UN Convention on the Law of the Sea. It is our position that a violation of any of the procedural obligations will bring into question the United Kingdom's compliance with its substantial obligations".

Then I want to bring you to a letter of 5th September 2001, page 171. You will recall at an earlier stage I made the point that it was at this juncture that legal challenges started to arise and, in particular, it was made clear that Article (9)(2) did not apply to this type of information. However, in

fairness to the UK, they go on to explain that the reasons for which the information was excluded and the manner in which it was done, as is made clear in the public version it contains all information on which ADL's conclusions are based other than that excised for reasons expressly given in the public version report. In particular decisions had been made on the grounds that the publication of that information would cause unreasonable damage to the commercial operations of BNFL or to the economic case of Sellafield MOX plant."

I then want to go finally to the letter of 13th September 2001. This one is in divider 6 of the British book. There are three letters and, perhaps, if I just make my point without having to detain you with that. It is on this occasion that we get five specific answers. That is on 13th September 2001, we get five specific answers to the five categories of information that we sought on 25th May 2000. The pace of response was somewhat leisurely.

Perhaps, sir, in the interests of speed I will arrange to hand in separately to you that letter so that it can go into that bundle. It is in your documents but it is in a separate bundle.

I now want to make some concluding remarks on this section of the submission.

I have already said at the outset that this is a case of national and international importance. It is a case of relevance to this generation and to future generations. It is a case about access to information, but it is not about looking for information simply for the purpose of having information. It is about use being made of that information, ultimately for everyone's benefit. That is the background to it.

I will conclude by making one comment on the British case, because I will reserve other comments for the reply. There are extensive exchanges in the course of this arbitration about claims to confidentiality. We all know what is being looked for. We are looking for the unedited PA reports and the unedited ADL reports. We have been treated - and I say this not with disdain or with any disrespect to Her Majesty's Government - with detailed analyses as to why information withheld is confidential. It maybe right or it maybe wrong. But what is absolutely remarkable about this case is that the authors of the reports, the authors of the PA reports, the authors of the ADL reports, have given no evidence. You go back top the origin and genesis of the claim for confidentiality and you will see four to five criteria promulgated by PA, saying this is why it is confidential. Where are they? Where is their evidence? I comment at the beginning of this case on the singular omission on the part of the British side to bring before this international tribunal in a dispute between two friendly nations, the authors of the reports to give us their evidence on why they said it was confidential and

why they excluded it and why they have denied us access.

The legal submissions will now be dealt with by Professor Sands.

THE CHAIRMAN: We will take a brief stretch, but before that if my colleagues have no questions I would like clarification on your very helpful statement. Would you go to paragraph 3.06 of your statement. In your paraphrase you preceded it by saying, referring to an earlier statement by Mr Plender, that the case was not about economic justification. In 3.06 you say "information must be disclosed to establish that in a transparent way that a project such as the MOX plant was objectively justified". That is the claim of Ireland?

MR BRADY: Yes.

THE CHAIRMAN: That you are entitled to it.

MR BRADY: We are entitled to it to engage in the process of justification. What I meant was that it is not for this Tribunal to decide if it was justified or not.

THE CHAIRMAN: It is not our jurisdiction?

MR BRADY: No, this Tribunal does not engage in the process of saying it was justified. I do not now if that has clarified the position>

THE CHAIRMAN: Thank you, that is very helpful. Just before we turn to Professor Sands in place we will take a very brief stretch.

(~~Short adjournment~~)

PROFESSOR SANDS: Mr Chairman, members of the Tribunal,

my task during the course of this morning up until lunch time and then probably shortly after lunch is to make our legal arguments on Article 9 of the OSPAR Convention. I will address three issues. Firstly the extent to which Article 9(1) requires the United Kingdom to ensure that it makes available the unredacted version of the PA and ADL reports and the obligations imposed on the United Kingdom; secondly whether the information contained in the PA and ADL reports is information within the meaning of Article 9(2); and thirdly the extent to which Article 9(3)(d) permits the United Kingdom to refuse disclosure.

It is appropriate to mention that the 1992 Convention on the protection of the marine environment of the North East Atlantic which I shall refer to as either the OSPAR Convention or the Convention or the 1992 Convention, is governed by the general rules of international law concerning the interpretation of treaties as reflected in the 1969 Vienna Convention on the law of treaties, and I do not believe there is any issue between the parties as to the applicability of the rules reflected in the

Vienna Convention. What that means in relation to Article 31(1) is that Article 9 of the OSPAR Convention is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the OSPAR Convention in their context and in the light of the Convention's object and purpose.

If I can say a brief word about context, context includes not only the context within the OSPAR Convention but without the OSPAR Convention. It includes national and international rules on freedom of information which are, it has to be recognised, largely inspired by developments in the United States of America and in particular its Freedom of Information Act 1966 which has to a large extent served as the catalyst for many of subsequent developments at the national and international level. But even predating that statutory enactment in the United States there was I was interested to find an early United National General Assembly resolution on freedom of information. Indeed at the very first session of the United National General Assembly in 1946 Resolution 59(1) reaffirmed that "understanding and cooperation among nations are impossible without an alert and sound world opinion which, in turn, is wholly dependent upon freedom of information". Many of the subsequent international legislative enactments follow that commitment in the United Nations General Assembly which of course was adopted by consensus. I should just say that in the outline I have provided you with I provide details of where in the bundles of authorities you can find each text. I do not propose to take you to each of these texts because it ought to be clear where indeed they are.

Just a word on the bundles. There are effectively authorities located in a number of different places. There are authorities attached to Ireland's memorial and to Ireland's reply; there are authorities attached to the United Kingdom's counter memorial and to United Kingdom's rejoinder, and then there are further authorities referred to in bundles which are numbered I think 1 to 9 up to this point. So the references in this note are references either to the memorial, counter memorial, reply, rejoinder authorities or the bundle of authorities.

After the UN General Assembly had addressed the matter the issue of freedom of information has been taken up subsequently in a large number of international organisations, and I have set out at page 2 of the note some of the leading examples which may be of interest to place in the context of an interpretation of Article 9. I refer you in particular to the 1981 Council of Europe recommendation; the Council Directive of 1990 to which we will come back, Directive 90/313, Freedom of Access to Information; and in particular its preamble, Articles 2, 3, 4 and 9, and I will come back to this during the course of this morning and this afternoon. I think it is common ground between the parties that

for the purpose of these proceedings the substantive provisions of the Community Directive of 1990 are equivalent or the same as the directions required by Article 9 of the OSPAR Convention, subject to one important exception which I will come back to, but I just want to alert you to. Unlike Article 9 of the OSPAR Convention the Community Directive directs member states expressly to take certain measures in national procedure and in national law. There is no equivalent provision in Article 9 of the OSPAR Convention, and as we will say that informs the way in which one must look at the cause of action which is available to Ireland.

After the Council Directive that was taken up in the UN Conference on environment and development at Rio in 1992. 176 states accepted the principle of freedom of information and it is referred to in various instruments. Then of course we have the 1998 Aarhus Convention and most recently the 2002 recommendation of the Committee of Ministers of the Council of Europe. So there is broad acceptance of the place that freedom of information has in the scheme of the international legal order. What we say is that these instruments reflect the commitment of states acting through international organisations to ensure broad access to information, including, and it is common to all of the instruments, a reflection of the presumption in favour of access. In other words the burden is on that side of the room to show why information should not be disclosed.

These instruments also reflect what Justice Holmes in the United States Supreme Court coined in a maxim which has been much repeated, citing John Stuart Mill: "The best test of truth is the power of the thought to get itself accepted in the competition of the market". That is the underlying thrust of all of these instruments and it is the underlying thrust of Article 9 of the OSPAR Convention. Put the ideas into the market place, put the information into the market place, and let the battle begin on the basis of the validity and the effectiveness of the information. I refer you in particular to an interesting article by Lord Justice Sedley of the Court of Appeal in London, an article in the London Review of Books called The Right to Know in which he traces the history of some of these points. You will find that in the material (Tab 19).

Turning to the OSPAR Convention itself, it is obviously necessary in construing, interpreting and applying Article 9 to look at the object and purpose of the OSPAR Convention, and we are here before you today precisely because we believe Article 9 is to be construed in accordance with the overarching and basic obligation of states, parties to the OSPAR Convention, to protect the marine environment of the Irish Sea.

What is the object and purpose of the OSPAR Convention? It includes the prevention and

elimination of pollution, including radioactive pollution. It commits parties to harmonise their policies and strategies - Article 2(1)(b). It notes in the preamble the results of the UN Conference on environment and Development and recall in particular Part XII of the UN Convention on the Law of the Sea, and in particular Article 197 on regional cooperation on protection and preservation of the marine environment. All of these objects inform the way in which we say Article 9 should properly be construed. It expressly commits parties to prevent and eliminate pollution from land based sources - Article 3. It commits parties to apply the precautionary principle and the polluter pays principle - Article 2. And it requires parties to apply best available techniques and best environmental practise, taking account of recommendations of other appropriate international organisations and agencies. I refer you in particular here in the materials to the OSPAR strategy on radioactive substances of 1998 which expressly refers to ICRP recommendations, in other words the recommendations referred to this morning by the Attorney General are incorporated by reference into the OSPAR Convention. One can find a connection between justification and the OSPAR Convention.

The Attorney has already indicated this morning and explained why Ireland wants the information. In simple terms access to the redacted information will enable Ireland to form a better view as to whether the requirements of the OSPAR Convention have been complied with. Whether all the costs have been properly integrated into the design and operation of the plant; whether best environmental practices are being budgeted for; whether best available technology is being used; whether best available technology will continue to be used in the coming years as technology evolves. I think one can turn, not because it is an authority which binds you in a way but because it indicates the process of reasoning which we agree with on this side, reflected in a judgment of the English High Court in a case called *Ex Parte Ibstock*, paragraph 6 of my outline. That is not on Article 9 of the OSPAR Convention but it is on the 1992 environmental information regulations which implement in England and Wales, Directive 90/313 whose provisions are to all intents and purposes identical to those of Article 9. What Mr Justice Harrison said was this:

"The purpose of the 1992 Regulations, it seems to me, is to provide for freedom of access to information on the environment. It would be strange if the legislature had intended that only the bare information it should be disclosed, ~~without it being possible to ascertain whether it was right, wrong or indifferent~~"

That is in a simple sentence what we are seeking to do, to ascertain whether or not the information contained in the redacted reports is right or wrong or indifferent. And on the basis of a

document which has a large amount of information redacted it is simply not possible to form that view. I would make one point to which Mr Fitzsimons will come back in due course. The suggestion has been made throughout the proceedings that what we are concerned with in this redacted information is prices and related matters. But in fact if you read carefully the redacted version it becomes apparent that much of the redacted material has nothing to do with prices or indeed contracts. A lot of it is about opinion, opinion of the drafters of the reports, as to future likely available markets and so on and so forth. That is in the redacted version and that becomes clear from the footnotes in particular in the ADL version that there appears to be a lot of opinion and supposition which has also been removed.

Interpreting Article 9 of the OSPAR Convention it is also appropriate to look at subsequent practice in the application of the 1992 Convention, which came into force for both parties in 1998, for both Ireland and the United Kingdom. I just draw your attention to three bits of subsequent practice which we say are relevant. The first is the OSPAR Sintra Ministerial Declaration of 1998, by which Ministers of OSPAR parties, including the Irish Minister and the British Minister, agreed on the overriding importance of reducing dramatically pollution of the maritime area from ionising radiation through progressive and substantial reductions of discharges, emissions and losses of radiative substances, and then the key words, "with the ultimate aim of concentrations in the environment near background values for naturally occurring radioactive substances and close to zero for artificial radioactive substances". That of course is the subject of another case which is not before you, that is the subject of the UNCLOS proceedings. But for the purposes of these proceedings access to the unredacted material will enable Ireland, we say, to form a better view as to the operational consequences of the MOX plant, how much will be produced, how much will be discharged, how much will come from the Thorp plant, how much additional discharges will arise from the Thorp plant, in order to form a better view as to whether or not the United Kingdom is presently complying with this obligation under international law.

Two other examples of subsequent practice, again by way of background. Two decisions taken by the OSPAR parties, Decision 200/1 and Decision 200/2, and both of those decisions commit parties to urgently review their authorizations in respect of reprocessing of nuclear material and to consider moving to what is called the non-processing option. But of course precisely while these OSPAR decisions are being adopted it is important to note that the United Kingdom abstained in those two votes but did not vote against, abstained but did not vote again, is how the United

Kingdom can comply with such a commitment in the face of a new project to increase discharges from Thorp and to extend those discharges beyond the life that was originally intended. So that is why in simple terms we need that information, and putting all of that together what we see as the case before you, although it seems like a narrow and technical matter between two friendly nations, nevertheless has far broader implications because it is the first inter-state dispute which deals with freedom of information, and your award, whichever way it goes, will provide a benchmark not only at the international level but also at the national level for those countries around the world within the last two or three years - and they have included Mexico and South Africa and the Russian Federation and India, all within the last 18 months have adopted new legislation on freedom of information - your award will provide guidance to those States as to the appropriate way in which to deal with these issues.

In looking at the legal framework, it is appropriate also to consider what is the applicable English law. I think that it might be as well to provide a little bit of guidance here, as we will come back to this in due course. We have focused largely in these proceedings, and certainly in the written proceedings, on the United Kingdom's implementation of Directive 90/313 EEC, which is implemented in English law by the 1992 Environmental Information Regulations. I will be taking you to those in due course. These regulations were amended in a modest but significant manner, which is pertinent to these proceedings, in 1998. Most of our attention has been directed towards those regulations, but I think that it is also appropriate to mention two other points. There is another Act which has figured rather little in the written pleadings, but which on careful review perhaps assumes rather more importance than the parties had ascribed to it. That is the Radioactive Substances Act 1993. I will come back to that in a minute. In particular, it is section 39. The other point to mention (the third point) is that there is no Act of Parliament in England and no statutory instrument which has implemented into English law the OSPAR Convention or, indeed, Article 9 of the OSPAR Convention. In simple terms, Article 9 of the OSPAR Convention is not actionable before the English court.

The UK in its pleadings, in its countermemorial and its rejoinder, has really rather glossed over which English laws were, in fact, invoked to justify redaction of the information from the PA and ADL reports. These submissions are rather in the way of a request for clarification as to precisely what happened in the period of 1997, 1998 and 1999 to which the Attorney directed your attention towards in taking the decision to redact the information. Who took the decision and which principles of law were being applied to justify that decision? The United Kingdom says that the process was "a

detailed and rigorous one". But there is no evidence before this Tribunal as to what the process was. The Attorney has already mentioned that the drafters of the report are not with us this week. They, of course, would be able to inform us what precisely happened. But there is no other evidence before this Tribunal to explain what the process of decision making was in that period 1997, 1998 and 1999 and then again, in fact, in 2001 with the ADL report. It is only by reading between the lines of the UK pleadings and some of the associated documents that you can work out what happened. We are not entirely certain of what happened, but our view is that it is something along these lines.

The first point is that British Nuclear Fuels made a request for justification pursuant to the Radioactive Substances Act 1993. That Act, therefore, governed the application and the manner in which information provided to the regulatory authorities was considered. What the UK pleadings say is that BNFL provided information to the drafters of the report (PA and ADL) on the grounds that "key information forming part of the business case was commercially confidential and must not be disclosed without BNFL's consent". That is from Mr Rycroft. We will hear more from him later on in the week. BNFL apparently relies on the Radioactive Substances Act 1993 and, in particular, its section 39. It might be worth just taking you to section 39 of the Radioactive Substances Act. (Tab 5)

It is in bundle 7, prepared by the UK (a light blue folder). It is page 21, bundle 7. I apologise, if we had more time I would take you through the whole of the Radioactive Substances Act, but we unfortunately do not have time during the hearings, but I invite you to read your way through it. The key provision is section 39 at the bottom of page 21. What that says is that the Chief Inspector shall make copies of those documents - that is to say documents that are made available in the course of seeking authorisation for a new nuclear activity, including the justification process - shall make copies of those documents available to the public except to the extent that that would involve the disclosure of information relating to any relevant process or trade secret, etc, etc. Those are the key words - "cannot make available to the public information which relates to any relevant process or trade secret". It is a very broad definition, much broader than the Environmental Information Regulations 1992 in terms of the exceptions on commercial confidentiality.

The key point to note where I do not think there is any water between the parties is that the 1993 Radioactive Substances Act trumps the 1992 regulations - for a very simple reason. It is an Act of Parliament. The regulations cannot override the Act of Parliament and, indeed, that is expressly provided for in the 1992 UK Regulations Guidance Note published by the United Kingdom. (Tab 7) At paragraph 63. It is expressly stated that the rules in the Environmental Information Regulations on the

commercial confidentiality section do not override the Radioactive Substances Act. It is actually in that reference 1960, but there was a new Act in 1993, so the provision would be the same. The simple point is that the 1993 Act trumps the regulations.

What appears from the material before you is that it was British Nuclear Fuel Limited, not the United Kingdom Government that decided on the application of commercial confidentiality at that time, in 1996 and 1997. This is slightly speculative, because we do not have any information on this before us, but can I take you to the Environment Agency's proposed decision of 1998. It is in tab 5 of the authorities with the Irish memorial, so it is the first bundle of authorities, page 267. This is an extremely important document.

THE CHAIRMAN: Would you give us a moment while we get it?

LORD MUSTILL: Is that headed with a box "Documents Containing" because the page numbers have disappeared?

PROF SANDS: Yes. It is right at the bottom, paragraph A4.30. (Tab 8). The heading is "Commercial in Confidence Issues". This is a document describing responses to one of the consultation processes to which the Attorney referred you earlier. If I take you to the relevant bits of it, I will not read the whole thing. A4.30: "Various responses to the first round of consultations commented that there was a lack of information in the consultation package on the economic prospects for the MOX plant".

Paragraph A4.31: "One respondent queried whether it was appropriate to apply the Environmental Information Regulations 1992, suggesting that relevant statute was the Radioactive Substances Act 1993. This respondent considered that even if the Environmental Information Regulations were to apply, the Environment Agency had in any case misinterpreted them". What that seems to suggest is that the information redaction decisions were taken on the basis of the 1992 regulations.

Then go to the bottom of page 268, A4.34, "The Agency is satisfied that it has now ensured the public release of as much information associated with the economic case for the MOX plant as is necessary".

Then over the page, A4.35 (this is one of the key paragraphs) "The Agency considers that the provisions for release of information to the public under section 39 in RSA 93 are outdated, making the Agency reliant on the company's cooperation to release information. The Agency believes that these provisions should be changed to match those under the Environmental Protection Act 1990". Just pause there. The 1992 regulations are adopted under the 1990 Environmental Protection Act.

Effectively, what the Agency is saying is that we have not been able to apply the 1992 regulations. It goes on, "In particular the Agency considers that it requires a regime for the release of information to the public which would allow the Agency to make the decision as to whether or not information should be excluded from release on the grounds of commercial confidentiality. Information should be treated as commercially confidential if its release would prejudice to an unreasonable degree the commercial interest of an individual or company." What appears to flow from this paragraph is that the Agency did not itself take the decision. It was reliant upon a decision imposed upon it by BNFL.

Then at A4.37, to make the point quite clear, "The Agency welcomed any future legislation on freedom of access to information".

That I think says rather a lot.

That is why we say on the basis of that document that it appears that the decision to exclude information from the PA report was not taken by the Environment Agency, other than in the sense that it merely accepted a decision which was, in effect, imposed upon it by BNFL.

The Minister has then - I turn to page 4 of my note - referred to a June 1999 decision of UK Ministers expressing concern about the amount of in that had been excluded from the pubic domain version of the PA report and noting that more than was strictly necessary had been excluded. I think that it is, therefore, worth taking you to that. That is the bundle 3 of the authorities, tab 21. If you go to a document which is entitled "Department of the Environment Transport and the Regions MOX. Consultation on the economic case for the Sellafield MOX plant."

THE CHAIRMAN: This is not in the annexes to the memorial?

PROF SANDS: I am afraid not, it is tab 21, bundle 3. If you turn to paragraph 12 of that document, which is a document put out by the Secretary of State for the Environment and the Ministry of Agriculture, Fisheries and Food and all of the documents that we are looking at are Environment Agency documents or Department of the Environment documents which, of course, you will wish to have at the forefront of your minds when you are considering whether this is environmental information.

Paragraph 12 says: "the Ministers consider that in common with all significant decisions in respect of the nuclear industry, the decisions of the MOX plant are contentious and of wide public interest and concern." Then I underscore "It is in the interests of all parties that there should be public confidence in the robustness of BNFL's economic case for the MOX plant and in the way that decisions about it are reached".

Then paragraph 13, "The Ministers are, therefore, of the view that it is very much in the

public information that the full PA report should be published" - "That the full PA report should be published" - "excluding only that material, such as contract prices [and nothing else is referred to] whose publication would cause unreasonable damage [not just damage, but unreasonable damage] to BNFL's commercial operations" - then there are the key words -or to the economic case for the MOX plant itself". Those words are crucial, because we say to you that in reading the redacted version (the incomplete version) of the PA and ADL reports, it appears - and this is a formulation that comes up - that some of the excisions may not be based on the damage to competition argument, but on the economic case for the MOX plant itself argument. Indeed, you will find on the very first page of the ADL report public domain version a reference to precisely that formulation. IN other words, there is an express recognition that decisions to excise information are based on two grounds, one of which may be permissible under the relevant provision of OSPAR, the other one of which is plainly not. The UK has never tried to argue that damage to the economic case for the MOX plant itself falls within any of the justifications for accepting information under the OSPAR Convention.

Following that process, a little bit more information was put in the revised public version of the PA report, the 1999 version. IN fact, there are at our count about 12 pieces of material - I almost cannot call it information because some of the assertions include putting a full stop inside two brackets - I commend you, for example, to compare in the Irish memorials annex 2, compare page 61 and compare page 91. Page 61 is the 1997 version, page 91 is the 1999 version. It is probably an exercise worth doing, actually. Let us just go to that. Start at page 61, tab 2. At the bottom there is a chart.

LORD MUSTILL: Are we blue or white?

PROF SANDS: Blue.

THE CHAIRMAN: Prof Sands, it would be useful if you could distinguish between your memorial annexes and this bundle, which some of us have seen for the first time.

PROF SANDS: This is a memorial annex, annex 2. It is not a major point, but it is an entertaining point. At page 61, at the bottom, you will see a chart called "MOX Transport". If you look in that chart at the second column, the middle column, you will see "BNFL Per Cent of Margin". Then in the third column you will see "Voyages Per Year". If you turn to page 91, you will see what the effect of the Minister's efforts was. When it becomes page B40, you will see "BNFL Percentage" and then you will see square brackets, point square brackets, per cent, and then in the third column "Voyages Per Year", the assertion amounts to a square bracket, a point and another square bracket. That is reflective of the

changes between 1997 and 1999. It does not in any way materially enhance a reader's ability to form a view as to the robustness of the argument.

I just conclude this part of my submissions simply by saying that, on the basis of that material, which is mirrored in the ADL report, it does appear to us that, although the UK pleadings and some of the documents might appear to suggest that decisions taken in 1997, 1998 and even 2001 were taken on the basis of the 1992 Regulations, it appears that they may have been taken on the basis of the 1993 Act, which, of course, applies a different test, not a test which we say is compatible with Article 9, and we make the point simply to invite clarification from the United Kingdom on this point.

I turn next to the second subject of the presentation this morning. That addresses this question. What is the function of this Tribunal? What is the function of this Arbitral Tribunal?

We did not think that this was something that needed any great attention, but the United Kingdom has made something of it in its pleadings and in its documentation, including that which we have been provided with over the past week or so. We say that the function of the Tribunal is the function of any arbitral tribunal, which is required to interpret and apply a Convention. Article 32 of the OSPAR Convention directs this Tribunal to authoritatively interpret and apply the Convention, to resolve the dispute relating to interpretation and application. In Ireland's view the function of the Tribunal is a simple one. It is to decide whether the United Kingdom has complied with its obligation to ensure that its competent authorities make available to Ireland the information redacted from the PA and ADL reports. In performing that function, the Tribunal is to decide, as Article 2(6) indicates, according to the rules of international law and, in particular, those of the Convention.

What does that mean in practice? Effectively, you can dissect that into three elements. Firstly, we say that it is your function to authoritatively interpret the provisions of Article 9 of OSPAR. That is your first function. Your second function, we say, is to authoritatively establish the facts, and the third function, which follows from the first two, is to determine whether the United Kingdom has properly applied Article 9 of the Convention.

Has the United Kingdom properly applied Article 9 of the Convention? It is as simple as that.

What I have done in my note is directed you to various international arbitral authorities which apply that approach, not necessarily in those express terms, but which indicate that the function of a tribunal is to make an objective search for the full significance of the obligation as the distinguished tribunal in the Lac Lanoux arbitration put it in 1957. You will find that decision in your authorities. I would also commend to you in this regard the opinion of Judge Jessup in the South

West Africa case - we have not put this in although we can make it available to you, it is a very lengthy decision. He says that the court's function is to apply appropriate objective standards.

What the UK says is that the task of an international tribunal charged with reviewing compliance with Article 9 is to assess whether the United Kingdom's discretion has been exercised within acceptable bounds.

We do not know where the word "discretion" comes from, but the UK assumes that Article 9 permits it a discretion, which is not accepted by Ireland. But the function of this Tribunal cannot be determined by the nature of the substantive obligation which the United Kingdom has assumed. You may, indeed, decide whether or not there is a discretion here. We say that there is not. But your function is not changed in relation to the three tasks we say that you are called upon to apply. In this regard we say that the function that you are called upon to apply is to make an objective assessment of the legal and factual materials that you have and determine whether or not the United Kingdom has given effect properly to its obligation to ensure that information is disclosed. I would draw your attention here to the decision of the English High Court in a case to which I will come back, The Alliance v Birmingham Northern Relief Road. I will not take you to it now. It is at bundle 3, tab 7, in particular at pages 11 and 12. In that case the British Government, Mr Philip Sales on behalf of the Secretary of State and Mr Howell QC on behalf of the application more or less agreed on what the function of an English was in relation to remarkably similar facts to these in terms of determining the nature of the obligation and the meaning of environmental information. What Mr Justice Sullivan says is:

"I accept Mr Howell's submissions in answer to question (1). The language used in the Regulations is clear: whether information relates to the environment is capable of being treated as confidential, and if so, whether it falls in any of the categories [exempting disclosure] are all factual questions to be determined in an objective manner" - "are all factual questions to be determined in an objective manner". We say that that is the correct approach also for this Tribunal as it is also for other international tribunals and, indeed, the European Court of Justice. We cite a couple of other examples applying this approach. One other arbitration which may, I am not sure, have been conducted in this room, in the 1990s, the *Heathrow Airport* arbitration under the auspices of the Permanent Court of Arbitration. There the Arbitral Tribunal were interpreting a treaty obligation between the United Kingdom and the United States, Article 10(1) of which provided that parties had to use best efforts to ensure that user charges were just and reasonable and the Tribunal says this:

"The degree of effort required to constitute 'best efforts' must in the last resort be a question for determination by an arbitration tribunal established under Article 17 of Bermuda 2 and cannot be left for determination by the Party itself or by a national body of that Party, no matter how the Party believed in good faith that no more was required of it."

You find the same approach adopted by the European Court of Justice in a case called *Mecklenburg* to which I will take you later on in my submissions and the same approach taken by the International Court of Justice in looking at what its functions are in many cases, but the one recent example we have given is that of *LaGrand (Germany v USA)*, where the court had to construe, interpret and apply the 1963 Vienna Convention on Consular Relations. The ICJ made it clear that its function was to review the merits of whether the United States had complied with obligations to ensure consular access to an individual in the United States, a German national.

The United Kingdom also claims, having read a discretion into Article 9, that it is entitled to exercise what is called " margin of appreciation" in applying its obligations in relation to Article 9. That language "margin of appreciation".

Mr Chairman, I am happy to pause here if this is an appropriate moment.

THE CHAIRMAN: Perhaps, as you are moving on to a slightly different issue, we will take a five-minute break.

(Short Adjournment)

THE CHAIRMAN: As you will have observed, we have not taken a 20-minute break this morning and the Tribunal proposes proceeding until 1.30 at which point we will take a break. We will also try to calculate the amount of time that Ireland may have lost this morning because of the late commencement.

PROF SANDS: Thank you, Mr Chairman. That is very much appreciated. The Attorney will be back shortly and has invited me to proceed in his absence.

I was turning to the argument made by the United Kingdom that somehow you should be applying what is called a "margin of appreciation" test. Of course, the "margin of appreciation" test is one which will be familiar to human rights lawyers in particular and is applied in certain contexts in the European Convention of Human Rights jurisprudence and in the Inter-American Commission and Court of Human Rights. The United Kingdom says that you should apply a "margin of appreciation" approach, but it does not rely on any authorities for that view. We are not aware of any authority of an international arbitral tribunal which has applied a "margin of appreciation" test. There are, of course, authorities in the European Court of Human Rights and there are authorities, perhaps an

analogous type of standard, in the WTO system, but, of course, those two systems have their own very well-established approach. They do not inscribe themselves into the general inter-state arbitration proceedings. WE would say that the characteristics of the European Convention system dominate the decision to apply a "margin of appreciation". Why is that done? Three reasons, we say, in the European Convention of Human Rights, none of which is pertinent here: firstly, the European Convention sets forth a list of rights and freedoms which is not intended to be exhaustive; secondly, the Convention does not impose uniform rules across the contracting States, which the OSPAR Convention does; and, thirdly, the European Court has taken the view that national authorities are in a better position than international supervisory bodies to strike the right balance between the competing interests of the community and the protection of the fundamental rights of the individual, and that this is, in effect, strengthened by various provisions of the European Convention - I cite Articles 13 and 35. In my note I have set forth various cases which I think confirm all of that and I do not propose to read them now or, indeed, take you to them. You have them in our note. The simple point is that this is an OSPAR Tribunal not the European Court of Human Rights, not a WTO panel, not a WTO appellate body.

I turn to my third heading, and now we being to get to the meat of Article 9. I propose to deal first with what one might be called the jurisdictional or admissibility arguments of the United Kingdom. These arise from its reading of Article 9(1) of the OSPAR Convention. Article 9 (1) of the OSPAR Convention requires the United Kingdom to ensure "that its 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 having to prove an interest, without unreasonable charges as soon as possible and at the latest within two months. I note there in particular, following on from the Attorney this morning, that, although Ireland has a clear and demonstrable interest, it does not actually have to show an interest in order to be able to succeed in this matter. You do not have to establish whether Ireland's interest is proper or appropriate, because that is not required under Article 9(1). We say that Article 9(1) imposes an obligation of result, not an obligation of conduct. I invite you to refer to the materials which I am not going to take you to now on Article 10 of the US-UK agreement arbitration on Heathrow Airport user charges, in particular Article 10, paragraph 1, which is the best efforts to ensure provision that I referred to earlier. That was rightly in our submission characterised by the Tribunal as an obligation of conduct - an obligation of the United Kingdom and the United States to use best efforts. Of course, Article 9(1) does not say

that the obligation on parties is to use best efforts to ensure that they are competent authorities. It goes much further than that. We say, following the line of reasoning - and that was a unanimous decision on that part in this arbitration - that this is an obligation of result and that your task is to assess whether or not that result has been achieved in a manner which is compatible with the OSPAR Convention.

What the United Kingdom says, trying to dissect their argument, is that Ireland has disclosed no proper cause of action and its claims are inadmissible because they have been brought before the wrong forum and because Article 9 of the OSPAR Convention does not create for Ireland a direct right to receive the information that has been requested. It is the nub of their argument. We have three points to make in response.

The first is that this is a very novel argument in the context of the saga which the Attorney General has described. The argument first appears in the United Kingdom Countermemorial dated 6th June 2002. There is no hint of the argument in any of the correspondence between the parties or, indeed, at any of the meetings between the parties. The Attorney directed you to the lengthy history of this dispute. The appropriate point to start here is in Ireland's letter of 30th July 1999 when it first invoked not Article 9 of OSPAR but the equivalent provision of Directive 90/313/ The United Kingdom did not respond and say, "We do not recognise your right to have information under Directive 90/313" nor did they say "We don't recognise that this is information covered by 90/313". IN fact, they did not do anything, they did not respond at all. Four months later Ireland sent a reminder and a month later, on 17th December 1999, a response finally arrived, nearly six months later, "We are refusing to give you the information because of commercial confidentiality" - not because Ireland has no right to the information and not because the information doers not fall within the relevant provisions.

OSPAR and its 1 9 was first invoked in the letter of 25th May 2000. The parties met in June 2000 to discuss the issues raised by the letter. The UK sent a response in October 2000. What did the letter say? The Attorney has taken you to the letters, I do not need to go back to them. The United Kingdom recognised Ireland's very strong interest "and the need to maintain a close and productive dialogue" but it refused disclosure of the PA report on the grounds that disclosure would cause harm to commercial interests. Again, no sense that Ireland has no interest under the OSPAR Convention Article 9, no sense that this is not information covered by Article 9. I think in those circumstances Ireland was entitled to proceed on the basis that its premise, one, that this was information covered by

Article 9 and, two, that it was within the category of legal and natural persons entitled to ask for the information was a correct premise. It was never challenged until well after the proceedings were initiated. Then Ireland wrote again and I set forth in my note, and I do not propose to take you any further to the details of it, that at no point prior to September 2001, three months after the proceedings had been initiated, did we first get any suggestion that the information was not covered by Article 9, but not until June 2002 is it said that Ireland has no cause of action, so to speak.

This first mention of the argument on 6th June 2002 makes it apparent that the argument is an afterthought, that it was not part of the dispute submitted to this Tribunal, for the simple reason that at that time, 15th June, the issue had never been raised and it could never properly be addressed as a dispute, and from at least 25th May 2000 until 6th June 2002 the United Kingdom appeared content to proceed on the basis that Ireland was a person entitled to receive information pursuant to Article 9(1) and, secondly, entitled to initiate proceedings under Article 32 in the event that its request was not acceded to. Again, you will have seen from the correspondence that the reference to Article 32 was raised a year before Ireland finally initiated proceedings and one would have thought that, if the United Kingdom arguments here had some merit, that they would have appeared a little earlier in the process.

The second point we make is in relation to United Kingdom's argument that Ireland has no cause of action. We say that our cause of action is the United Kingdom's failure to ensure the disclosure of information required by Article 9 (1) and that that cause of action is clearly reflected in the relief that is sought from this Tribunal. The relief asks you, the Tribunal, to declare that the United Kingdom has breached its obligations under Article 9 of the OSPAR Convention by refusing to make available information deleted from the PA report and the ADL report as requested by Ireland.

Ireland's case is not premised on the basis that it has a direct right to the information under Article 9(1). Ireland's position is this. By Article 9(1) of the OSPAR Convention, the United Kingdom is under an international legal obligation to ensure that its competent authorities are required to make information available to any natural or legal person. That obligation is a mandatory obligation. It is not a best efforts obligation and the language of Article 9 (1) is "shall" not "should". The United Kingdom has never challenged Ireland's assertion that the entity to which Ireland's request has been made, in particular the Department of Environment, Transport, Regions and now DEFRA, which succeeded the DETR after the last election in the United Kingdom, is a competent authority. They have not made that argument. I think it would be a very difficult argument to run. We say that the

entity from whom we have requested the information is plainly a competent authority within the meaning of Article 9(1).

Nor has the United Kingdom challenged at any point Ireland's claim that it is within the categories of persons who are defined as legal or natural persons within the meaning of Article 9(1). We made this point very clear in our reply, we raised it expressly at paragraph 7 of our Reply, and the United Kingdom Rejoinder does not say "Ah yes, but legal and natural persons means some other category of persons". They have never run that argument and indeed that argument also would be a difficult argument to run, particularly since the United Kingdom has recognised and ha relied upon in the other proceedings before UNCLOS, it is Ireland's participation in the consultation procedures.

It follows that the UK's refusal entitles Ireland to claim that the United Kingdom is not complying with its obligations under Article 9(1). In many ways it is as simple as that. A UK competent authority has failed to ensure that a legal or natural person gets access to the information.

What the UK says is that 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. That is at page 19 of their counter memorial and it is maintained in the rejoinder. So they say all Article 9(1) requires them to do is establish a domestic regulatory framework. That is not what Article 9 says. Article 9 requires them to ensure that the information is made available, and indeed there is nothing in Article 9 which makes any mention of domestic regulatory framework, domestic procedures, administrative measures, judicial proceedings, and I draw your attention here to the Directive 90/313, and it maybe worth going to that. It is in the United Kingdom counter memorial authorities, volume 2, tab 4. On the second page, just to draw your attention to two provisions. Article 4 of the Directive. This Directive is relevant in a number of ways and I am about to explain why it is relevant here. But for broader purposes it is relevant because both parties agree that this directive is one of the instruments which falls within the category of applicable international regulations for the purposes of Article 9(3) of the Convention. But if you look at Article 4 of the Directive it says "A person who considers that his request for information has been unreasonably refused or ignored or has been inadequately answered by a public authority may seek a judicial or administrative review of the decision in accordance with the relevant national legal system".

Then Article 9 says "Member states shall bring into force the laws, regulations and administrative provisions necessary to comply with this directive by 31 December 1992 at the latest". In other words this directive does have provisions requiring you to do something at the domestic

regulatory level. Article 9 has no equivalent provisions.

It may be that a failure to establish a domestic regulatory framework would be a violation of Article 9, but that is not our case in these proceedings. We say that Article 9 establishes an obligation of result and that result has not been achieved by the United Kingdom. The reasons why it has not been achieved, whether it is a failure of domestic regulatory framework or anything else, is not a matter which precludes you from determining that they have not complied with their substantive obligation of result.

I have at paragraph 38 drawn your attention to what I think is an analogous argument. In the Heathrow arbitration, which I am not going to take you to, but in which the United Kingdom as I understand it essentially argued that it was complying by a best efforts obligations to ensure that user charges were reasonable and just, solely by the existence of a statutory power to take steps to regulate charges and to establish machinery to prompt the taking of such steps. What the arbitral tribunal says, and again this is a unanimous decision, "Such an approach, with its overtones of passivity, would not be consistent with the continuous duty to take active steps which the Tribunal sees as flowing from the words 'use' and 'ensure'". Now recall this is a lesser standard. This is not an obligation to ensure that charges are reasonable, this is merely an obligation to use best efforts to ensure. The arbitral tribunal says No, that is not acceptable. We say that the mere existence of a domestic regulatory framework cannot itself satisfy the obligation to ensure disclosure of information in Article 9(1). That is the nub of the point. You cannot comply with your obligation under Article 9(1) simply by adopting a domestic regulatory framework. That is not good enough because the domestic regulatory framework may not achieve the result which is intended.

The UK then looks to derive support for its very narrow and limited reading of Article 9(1) by relying on Article 9(3) of the OSPAR Convention. You will recall that Article 9(3) of the OSPAR Convention provides for limited exceptions - and we will come onto this in due course - but it includes the words "in accordance with national legal systems and applicable international regulations". The simply point that we would make is that those words inform Article 9(3); they do not inform Article 9(1). Article 9(10) is a freestanding obligation of result which has nothing to do with national legal systems and applicable international regulations.

We say the United Kingdom has misunderstood the scheme of Article 9, and they have taken their misunderstanding we say very far. I quote counter memorial paragraph 3.7. "A refusal to disclose information in a particular case pursuant to the relevant domestic law is not a matter

governed by the Convention". That we say is a startling proposition, because it would mean that every one of the contracting parties was entirely free to provide for whatever national rules on disclosure it wanted and that would trump the Convention. So we say that argument on cause of action is not one which indicates a path this tribunal can follow.

The other part of the United Kingdom's argument is that if we do not have a cause of action we also do not have a remedy in front of this tribunal. And what they do is meld into their cause of action argument a further argument which effectively says we have come to the wrong place. The UK says that Ireland could go to the English courts - it makes that concession, which of course assumes that we are a legal or natural person, and it assume that DEFRA/DETR are a competent authority, or they say we can complain to the European Commission, the Commission of the European Communities in respect of Directive 90/313; or they say we can bring an inter-state complaint against the United Kingdom under Article 227 of the EC Treaty alleging a violation of the EC directive by the United Kingdom. But what they say we cannot do is come to this tribunal. I will deal with each of those arguments in turn.

The UK says that a person who is refused information pursuant to the 1992 regulations has ample remedies in domestic law. That passage in the counter memorial is very carefully worded, and it is carefully worded precisely because of this issue as to whether or not the decision to excise information was based on the regulation or the 1993 Act, and we think the better view is that it appears to have been based on the 1993 Act. So they do not accept the regulations govern this situation, but they do say we should have gone to the national courts. But that is a misplaced argument. Why? there are two reasons.

First, the 1992 regulations implement the EC Directive. the statutory instrument says "These regulations implement council directive 90/313 EEC". They do not implement Article 9 of the OSPAR Convention. Article 9 of the OSPAR Convention is an unincorporated Convention, it is not part of English law and it cannot be invoked before the English courts. If I was appearing in front of the English courts with Article 9 the English courts would not have much to say about Article 9 because it is axiomatic that treaties which have not been incorporated into English law by Parliament cannot create rights or duties under English law and are not enforceable by the English courts. I have cited some authorities at paragraph 45. I do not believe this is in dispute.

The second point here is that although the documentation made available as part of the consultation process suggests reliance on the 1992 regulations, and in particular I will take you to the

PA reports in due course, it does appear now that the decision to refuse disclosure was made on the basis of the 1993 Act. If that is correct there would be no remedy available in the English courts under the 1992 regulations since that does not appear to have been the basis for the decision.

What about their second argument, that we could go to the European Commission. Ireland has chosen, as it is entitled to do, to proceed on the basis of Article 9 of the OSPAR Convention precisely because that is a convention which is focused on the maritime area of the Irish Sea, and I have indicated to you earlier the objects and the purposes of the Convention. Ireland is well aware of the possibility of complaining to the European Commission under Article 2(11) of the EC Treaty and the suggestion from the United Kingdom is noted. It is simply not relevant to these proceedings. The United Kingdom we note has not argued forums non conveniens. It is not part of their argument.

What about an inter-state complaint to the European Court of Justice? Again, the same considerations apply. Ireland has chosen to go under Article 9 of the OSPAR Convention. It is, of course, well aware of the possibility of proceedings in relation to the Directive, but the logic of the United Kingdom argument, which says that Ireland could bring an inter-state case against the United Kingdom, appears flawed and, in our view, bizarre. We have seen the language of Directive 90/313 and Article 9 are on the substantive parts virtually identical. So we ask on what basis can it be argued that Ireland could have a right and a cause of action under the Directive, but no right or cause of action under Article 9 or that Ireland can bring an application to the ECJ but not to this Tribunal. I think that that approach becomes all the more curious having regard to the material differences between the Directive and Article 9 which I have drawn your attention to, Articles 4 and 9, which create a national procedure.

Since the United Kingdom accepts that Ireland would have an actionable right before the ECJ if its request had been made under Directive 90/313, even in the face of Article 4, we do not see how it can sustain a claim that there is no actionable right under Article 9, where the cause of action underlying is identical to the Directive and which is silent on the question of the availability of the forum at the national court.

The concluding part on this part of the submissions is this. It really takes us back to Article 32 of the OSPAR Convention, which we say determines the extent of your jurisdiction. That extent is to cover any dispute between the contracting parties relating to the interpretation or application of the Convention. That dispute, we say, turns on the interpretation and application of Article 9(1), 9(2) and 9(3). We see no basis for the argument that the Tribunal has competence for challenging the

argument, but the Tribunal has competence to declare that the United Kingdom has failed to ensure the information which Ireland has requested, now for many years, under Article 9 of the OSPAR Convention be provided in the form of declaratory relief which we seek. The UK, as I said, is not claiming that we have failed to exhaust local remedies - there is no argument on that - they are not saying forum non conveniens, having recognised that Ireland is a person with an article, 9(1), the fact that Ireland is a State cannot preclude it from invoking a remedy which is available pursuant to Article 32 of the OSPAR Convention. There is nothing in the Convention which can be read as limiting the basis upon which Ireland can have recourse to Article 32. In this regard we think that there is a direct analogy with the approach taken by the International Court of Justice in the case of *Germany v United States*, the *LaGrand* judgment, which you will find. There there is an error, I am afraid. Paragraph 54 of my note should read "Ireland authorities bundle 1" not "Ireland authorities bundle 3. Of course, as many of you know in the Tribunal, what that case concerned was whether the United States had failed to provide consular access to Mr LaGrand, to the LaGrand brothers, and the International Court of Justice at paragraph 42 had no hesitation in finding that that raised a dispute concerning the interpretation and application of the Vienna Convention on Consular Relations. The failure to provide consular access at the national level gave rise to a dispute over which the International Court of Justice had jurisdiction. It is essentially the same argument that has been run here was run in the LaGrand case and was rejected by a very large majority by the International Court of Justice.

I turn now to the argument in relation to Article 9(2) of the Convention. Article 9(2) of the Convention provides that environmental information or information is any available information in written, visual, oral or database 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. I have underlined the relevant parts that are pertinent for these proceedings. We say that the question for the Tribunal is this. Do the PA and ADL reports constitute information in written form on activities or measures adversely affecting or likely to affect the maritime area? Do the PA and ADL reports constitute such information? We say that the question is not whether each and every piece of information constitutes environmental information. Here we adopt the approach taken by Mr Justice Sullivan in Ex Parte Alliance v Birmingham Northern Relief Road and that should be modified slightly. It is in Ireland's authorities bundle 3, tab 7 at page 40. What his issue was about was whether a concession agreement for the construction of a road was or was not information within the meaning of Directive 90/313 and the language on defining information in Directive 90/313 is identical to that in

the Convention. You can substitute the Directive for the Convention in that judgment. Mr Justice Sullivan was faced with the argument that since only little bits of the concession agreement could be relevant to the environment, it was not environmental information as a whole. He rejected that argument and took the view, correctly we say, that, if a document contains information on the environment, then that whole document is to be treated as information within the meaning of the Directive and, we say, the OSPAR Convention. What he says is that, having treated the whole of the concession agreement as information within the meaning of the Directive, what is then available is to determine whether or not some of the information could be excised on grounds of commercial confidentiality. He is not saying that you have got to give the whole document over. He is saying that the starting presumption is that the document as a whole is environmental information and it then falls to be determined whether the principles governing excision have been satisfied. That is precisely the approach, we say, that you should be taking.

The first major point that we would make here is that until 5th September 2001 the United Kingdom certainly did a pretty good job of giving the impression that it was proceeding on the basis that the PA and ADL reports were, indeed, information subject to the 1992 Regulations and Article 9 of the OSPAR Convention. The Attorney mentioned this morning that throughout its dealings with Ireland until September 2001, the UK appeared to treat the redacted information as information within the meaning of Article 9(2) of the OSPAR Convention and regulation 2(2)(b) of the 1992 Regulations. Indeed, the definition of "environmental information" in the domestic implementing legislation for the EC Directive is information that relates to the environment if and only if it relates to any of the following; that is to say any activities or measures which adversely affect the state of any water, etc.

But in its countermemorial for the first time, in detailed terms, the United Kingdom says that the information excised from the PA and ADL reports is not information of the kind governed by the 1982 Regulations. We say that they have misdirected themselves on the proper approach; that what they should be doing is asking themselves whether the PA and the ADL reports are information and then decide whether or not to excise that which affects commercial confidentiality. They have misdirected themselves by asking themselves whether each and every piece of information is such information and we say that that is the wrong approach. But, in any event, if you look to the documents that they themselves have prepared, they give every impression as having treated the PA report and the ADL report as covered by the EC Directive and the 1992 Regulations. Just to take one example, if we go to annex 2 to Ireland's memorial - page 40 of annex 2 - it says "1.3 Commercial

confidentiality issues. PA was asked to provide the Agency with an independent view on the validity of BNFL' assertion that elements of the economic case for the SNP are commercial sensitive and, therefore, that certain information therein should be withheld from the public domain". Then it says, "The Environmental Information Regulations 1992 section 4(2) provide that for the purpose of those Regulations information relating to matters to which any commercial or industrial confidentiality attached may be treated as confidential".

It begs the question why are they relying on the exception in Article 4(2) of the Regulations if the information concerned is not considered to be information generally subject to the Regulations. The 1999 report, the revised public domain version, does the same thing. I have referred in paragraph 60 to the note to various other matters which appear to confirm the point. I have referred you once again to the document we looked at earlier this morning, the United Kingdom's Environment Agency proposed decision on the MOX justification. That was the one, if you recall, which appeared on close reading to suggest that they took the decision under the 1993 Act, but it is difficult to form a final view and one reading of that material or at least part of that material is that the decision was, in fact, premised on an application of the Regulations and the Directive. You will recall the respondent who writes in and complains that they took the decision on the basis of the 1992 Regulations and that was wrong. Presumably, that respondent was premising his or her complaint on the basis of the PA report, which certainly suggests that this is environmental information. The first time that the United Kingdom claims that this is not information within Article 9(2) of the OSPAR Convention is in the letters of 5th and 13th September 2001, three months after the proceedings had been initiated. In respect of none of the correspondence referred to by the Attorney this morning was there even the slightest hint that Ireland was barking up the wrong tree, because this is not information within the meaning of Article 9(2). In our memorial we of course address the basis for our belief that the PA and ADL reports constituted information within the meaning of Article 9. In summary form, the basis for the argument is as follows.

The MOX plant plainly is an activity which is likely to affect the maritime area of the Irish Sea and the PA and ADL reports constitute or contain written information on an activity which will affect the marine environment. To take just one example, transports. The number of transports. A point of real contention between the parties. Ireland is determined to know whether or not or how many international transports from MOX to Japan or Germany there will be. "No", says the United Kingdom, "that is commercially confidential information. No", says the United Kingdom, "that is not

environmental information", which seems a rather remarkable proposition. The MOX plant was subject to an Environmental Impact Assessment, however inadequate that was, which is premised on the view, under European Community law, that the plant may adversely affect the environment.

The October 2001 decision of the United Kingdom Government authorising as justified the MOX plant has whole sections dealing with the environmental impact of the MOX plant and the very purpose of the PA and ADL reports is to examine the justification of the MOX plant taking into account all economic costs and those economic costs include the cost of environmental consequences, include the costs of ensuring against environmental damage, include the costs of ensuring against transport accidents, include the costs of ensuring that the plant is safe and complies with all domestic and international environmental standards. And, of course, there is the point that the PA and ADL reports were commissioned by the United Kingdom Environment Agency in the case of PA report and the relevant United Kingdom Government department with responsibilities for the environment. It seems almost preposterous to suggest that information which has been commissioned by the Environment Agency, by the Department of Environment, Transport and Regions is not environmental information in some way.

There is another way of looking at it. Could the plant operate without the PA and ADL reports having been commissioned? Would the discharges which will definitely be made into the Irish Sea have occurred but for the PA and ADL reports? It is absolutely simple. Without the PA and ADL reports there would be no discharges into the Irish Sea from the MOX plant and there would be fewer discharges into the Irish Sea from the Thorp plant. We also say that our interpretation is consistent with international and domestic law and practice. We have referred in particular - and I will come back to this momentarily - to the relevant ECJ case law and the Aahrus Convention.

What does the United Kingdom say? It makes three arguments. Firstly, the information is of a purely commercial character; secondly, the information is not directly and proximately related to activities or measures adversely affecting or likely to affect the maritime area and, thirdly, Ireland's approach is based on the *Mecklenburg* case of the European Court of Justice, which is not on point, and the Aahrus Convention which is not applicable in the exercise of the progressive development which is not in force.

Mr Chairman, I have noted the time and I wonder whether rather than begin but not complete this section, it might not be sensible to take a pause here so that I can then have a clean run through to the end of these arguments, with your permission.

THE CHAIRMAN: We will rise now and we will resume at 2.30.

(Luncheon Adjournment)

PROFESSOR SANDS: Mr Chairman, members of the Tribunal;

I was dealing with the nature of the information which has been redacted, and of course we say when dealing with this Article 9(2) point you can get to the point of determining whether or not individual bits of information are or are not caught or covered by Article 9(2), the proper approach is to consider the documents as a whole.

The first argument that the United Kingdom makes in this regard is that the information is what it calls of a purely commercial character. Just before getting on to the points I have set out in my note on submissions I would make this point. Of course having not seen the full reports we are not in a position to comment on whether or not it is or is not purely commercial in character, we have not seen that information or at least most in this room have not seen this information. What we would say is this. We have asked one of our colleagues who has not seen the full reports to assess and analyse what the nature of the information is and it appears that the origins and the nature if the redacted information break down something like this. We have looked at the executive summary and chapter 1 of the redacted ADL report, so it is only on the basis of a description of what has been redacted. But on the basis of that information it is possible to classify the types of information into three groups.

Firstly information consisting the opinion of the consultants who prepared the report.

Secondly information derived from third parties.

Thirdly information derived from British Nuclear Fuels. In the Executive summary in chapter 1 by our count there are 80 examples of redacted information. We will hand up a note of this later. Of the 80 pieces of redacted information it appears that only 28 of them emanate from BNFL. An equivalent number, 27, are merely the opinions of the consultants. Of the remainder seven appear to come from third parties; four appear to be the opinion of third parties; and two appear to be the opinion of BNFL; and the remaining 12 appear to be either from the third party or BNFL, we are not entirely sure. But the simple point is this; the vast majority of information that has been redacted just from those sections does not come from BNFL and if that information it appears that much of it does not concern prices. I mention this point because you have the obvious difficulty in addressing these issues, not at least in this room now, addressing what has and has not been redacted, and it raises an interesting question of how it is you are to determine on the United Kingdom's own test that information which cannot be made publicly available is or is not purely commercial in character. That

is a difficulty which will obviously be for the tribunal to work out.

Ireland does not dispute of course that the information relates to a commercial activity, the operation of the MOX plant, but of course as the Attorney made clear that is commercial activity in which the sole share in the company is owned by the British Government and in which the activity concerned is about to be transferred into the ownership of the liabilities management authority, and in which its future activities are going to be circumscribed by the need to assess primarily whether any future activity at the MOX plant and at Thorp is going to contribute to clean up. So we use the word commercial in a special context. This is not ordinary commercial activity. We would also note since it has not been said that this is commercial activity which takes place in the context of a situation in which it is now recognised that BNFL's liabilities significantly exceed its assets. So in any ordinary situation this is not a going concern.

The information, even though it relates to commercial activities, will we say directly affect the environment. There will be transport, there will be discharges, there will be operation over years we do not know how long because that is redacted. There will be implications for the Thorp plant. We do not know either what they will be because that too is redacted. But the question of whether the information has a commercial character is not dispositive of whether it falls within Article 9(2), and I just quote here from the judgment in Birmingham Northern Relief Road, bundle 3, tab 7. There they were concerned with a concession agreement. "The fact that the agreement can be described as a commercial document does not mean that it does not contain information which relates to the environment. It simply means that if such information is contained in the agreement it may fall within one of the exceptions in regulation 4". That is the equivalent to Article 9(3)(d), commercial confidentiality exception, and we think that is the right way to do it. It is self evident, we say, that the PA and ADL reports are information on activities or measures adversely affecting or likely to affect the maritime area of the Irish Sea. The information has been requested and assembled by or on behalf of the United Kingdom Government or its agencies pursuant to its obligation to justify the MOX plant, and as the United Kingdom Government put it in its decision of 3rd October 2001 "in applying the justification test to the present case it is relevant to have regard to the detailed information available to the Secretaries of State about the specific instance of a MOX fuel fabrication plant in respect of which they have access to extensive data, namely SMP. This information has been used to inform and test the decision made by the Secretaries of State in respect of whether the manufacture of MOX fuel is justified. The application of the justification test requires the consideration of

environmental, safety, economic, social and other benefits and disbenefits." So absolutely clear that the process of justification includes environmental benefits and disbenefits. Each of these considerations we say contributes to the determination of whether or not the plant will be able to operate, for how many years it will operate, its output, its discharges in the marine environment. It is abundantly clear that the PA and ADL reports are a central part of those considerations, and we refer you in particular to paragraph 89 of the October 2001 decision justifying the plant taken amongst others by the Secretary of State for the Environment. We note that in that paragraph in the 2001 decision the only document which is expressly referred to by name and identity in the three paragraphs entitled "The decision of the Secretary of State" is the ADL report. It was plainly the central document in the decision.

It is also apparent that the ADL report and before it the PA report contained and constituted information on activities affecting the marine environment. Of course information can impact both economic and environmental considerations. The idea that somehow information trundles along a road and then bifurcates where it becomes either environmental or economics is now recognised not to be an appropriate way of dealing with these types of issues, and we have cited for you the approach of the International Court of Justice in this building under the Presidency of Judge Schwebel as they put it in the Gabcikovo-Nagymaros Project, referring to the concept of sustainable development, "This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development". Environmental considerations in form in economic considerations and economic considerations have environmental consequences. So the idea that one can somehow separate things out we think is misconceived. It is plain and we accept that the ADL report contains and is information which is both economic and environmental in character.

The second argument that is made by the United Kingdom is a related argument, it is that the information is not what they call directly and proximately related to activities or measures adversely affecting or likely to affect the maritime area.

The United Kingdom says that on first impression the information sought by Ireland fails to meet this test of direct or proximate application. I will come to direct and proximate in a moment, but I am bound to point out that the United Kingdom's first impression, its own first impression, on whether or not this information was environmental information lasted from 12th December 1997 when the PA report was published in its redacted form until 5th September 2001. In other words its first impression

lasted four years. It was only when Ireland filed its application and when the United Kingdom began to address the issues seriously, and that is apparently the first time they addressed the issue seriously, that first impressions became second impressions.

The source of the words "direct and proximate" is not clear to us. The 1992 Convention does not use those words. They are not in Article 9(2). But even applying that standard, it is hard to see how the PA and ADL reports cannot be considered to be direct and proximate. After all, without the ADL report there would be no discharges from the MOX plant into the Irish Sea. It is hard to think how that report cannot even according to that test be direct and proximate.

The third set of arguments raised by the United Kingdom concern the *Mecklenburg* case and the Aarhus Convention. The United Kingdom says that the *Mecklenburg* case is not on point. I think that it is worth taking a moment to look at the *Mecklenburg* case and just take you through it, because the reasoning of both the Advocate General and the Court is, we say, highly pertinent. It is annex 15 of the Irish memorial. That should be the first blue book. It is at page 521 to which I would like to take you first. This report is the report of the Advocate General of the European Court of Justice. He is dealing in this part of the judgment with whether or not the information concerned constitutes environmental information for the purposes of the EC Directive. The information in question here is a preparatory statement by a planning authority.

Paragraph 13: "In view of the considerations thus put forward by the parties and in particular by the Commission, it is my opinion that the statement of views in question must be linked to the measures and activities contemplated by the Directive in question. There can be no doubt that the Community legislature intended to include within the concept of information related to the environment all conduct on the part of public authorities as defined in the Directive subject only to the exceptions specially provided for in that regard. The concept of information relating to the environment is by the express intention of the Community legislature all embracing. For the rest it is possible to identify it on the basis of the two criteria that the provision in point of the Directive implicitly lays down". The first is the substantive element, the more existence of information, and it is not disputed that the PA and ADL reports constitute information. The second is concerned with the relationship linking the information to the protection of the environment. Of course, for our case it is linking the information to the maritime area of the Irish Sea.

He says, "For the definition in the Directive 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" - "or at least must be related to the environment".

Then over the page, he goes on, "Where the data in question satisfy both criteria we are in my opinion dealing with information related to the environment. The Directive itself swiftly goes on to give, purely by way of illustration, some examples of data or activities that can fall within the concept in question. Significantly the word which introduces that definition, which the Directive itself uses to identify the information, which is the subject of the body of the report, laid down by it is the adjective 'any'" - and, of course, we have the same adjective here. "Such a formulation which in fact employs terms as accepted meaning as very broad and exclusive cannot therefore be construed in a restrictive manner. Thus administrative acts of the type at issue also fall within the activities or measures designed to protect the environment in so far as they constitute information gathered by public administrative bodies with responsibilities for the protection of the environment".

This, of course, does not bind this Tribunal, but we say that the process of reasoning there is the right process of reasoning and is one which we think this Tribunal is encouraged to apply.

I turn then to the actual judgment of the court. You will find that on the top right-hand corner at page 435. The judgment, in fact, endorses the Advocate General's view. It is 434 to 435, paragraph 19: "It must be noted in the first place that Article 2(a) of the Directive includes under information relating to the environment any information on the state of the various aspects of the environment mentioned therein as well as on activities or measures which may adversely affect or protect those aspects, including administrative measures and environmental management programmes. The wording of the provision makes it clear that the Community legislature intended to make that concept a broad one embracing both information and activities. Secondly, the use in Article 2(a) of the Directive of the term 'including' indicates that administrative measures is merely an example of the activities or measures covered by the Directive. AS the Advocate General pointed out in paragraph 15 of his opinion, the Community legislature purposely avoided giving any definition which could lead to the exclusion of any of the activities engaged in by the public authorities. The term 'measures' merely serves to make it clear that the acts governed by the Directive include all forms of administrative activity". There they reach the conclusion applying the facts of that particular case. We say not that you are bound by it, but that it directs you, I think, to a sensible way to approach this issue. The language of the Directive is identical to the language of the Convention and, of course, the Community itself is, along with some of the Member States individually, a party to the OSPAR Convention.

With regard to the Aarhus Convention, that, of course, is the Convention of 1998 on public participation and access to information. I will just take you to that. It is in the same bundle. It is annex 10. I will just direct you to the definition there. I say that is a Convention, but, of course, it is in force but it is not yet in force for Ireland and the United Kingdom. Both States have signed the Aarhus Convention. It includes a definition which we say confirms the validity of the approach taken by Ireland in its broad definition. We say that Article 2(3)(b) - page 395 at the bottom - merely makes clear that which is already implicit in the OSPAR Convention. The information includes, you will see there, at Article 2(3)(b) factors such as substance, energy, noise and radiation and activities or measures including (going down the page) cost, benefit and other economic analyses and assumptions used in environmental decision making.

The United Kingdom will say that that is all very interesting, but it is a progressive development of the law. We say that it is not a progressive development. We say that it simply makes clear that which was implicit. To support that view, can I just take you to Ireland authorities bundle 1, tab 15. It is a document that should be entitled "Department of the Environment Food and Rural Affairs. Proposal for Revised Public Access to Environmental Information Raised in the Consultation Paper". I think that that is late 2000. That concerns both the Aarhus Convention and the new European Community legislation giving effect.

At paragraph 13 of that document, are the views of the British Government, DEFRA, on the implications of the Aarhus Convention. At paragraph 13 it says "Definitions." It says "Article 2 of the Aarhus Convention introduces a definition of public authority" and then a little bit below it says at paragraph 14, "The definition of environmental information is clarified" - "clarified" is the formulation that is used - it is also defined to include cost, benefit, economic analysis and others".

Then "Preliminary Government view", paragraph 15, "These are minor changes. They are not expected to broaden the practical application of the regime".

THE CHAIRMAN: I am sorry, could you again tell me the location of the material.

PROF SANDS: Authorities bundle 1, tab 15, paragraph 13, page 3. At paragraph 15 is a comment of the British Government on the revised definition in the Aarhus Convention. They are minor changes, they are not expected to broaden the practical application of the regime.

Going on a bit to paragraph 30, page 5 on the top right-hand corner, "no additional cost to business to revisions in this area". At paragraph 37, "the preliminary Government view not on the definition in the Aarhus Convention but the new definition in European Community law, which gives

even beyond Aarhus, the extensions which strictly are beyond Aarhus, the extensions which are strictly beyond the Convention, are arguably already environmental information within the meaning of the 1990 Directive ."

THE CHAIRMAN: Can you give me the paragraph again, please?

PROF SANDS: Paragraph 37. "The extensions" - that is in the definition of environmental information in the new Directive, which goes even further than the Aarhus Directive - "are arguably already environmental information within the meaning ..." The argument somehow on this progressive development is at least, one can say, inconsistent with the publicly-stated position of the British Government in another context. We would also simply note the view of Minister Meacher on 6th October 2000 - and I am not going to take you to this - "The United Kingdom strongly supports the objectives of the Aarhus Convention. The UK intends to ratify the Convention as quickly as possible". All of that points, we say, to a clear view that the type of information which is constituted by the PA and ADL reports plainly constitutes information within the meaning of Article 9 (2).

I turn to my final area for submission and that is on Article 9(3) of the Convention. Article 9(3) of the Convention provides for the exceptions to the obligation to ensure disclosure of information. Article 9(3) says that the obligations in Article 9(12) "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 commercial confidentiality".

Mr Fitzsimons will deal with the application of those words where it affects commercial confidentiality, but I am going to deal with the first part of Article 9(3). In our memorial we set out what we say is the proper approach to dealing with Article 9(3). In paragraph 83 of my note there is a misnumbered paragraph, it should be four points and not three points.

The first point is that it is plain that the burden is on the United Kingdom to justify its entitlement to invoke the exception. Secondly, the United Kingdom must give reasons for refusing to provide the information requested. Thirdly, the United Kingdom must demonstrate that the refusal is "in accordance with its national legal system and applicable international regulations". Fourthly, the United Kingdom must demonstrate the disclosure of the information will "affect commercial and industrial confidentiality".

These points are not made in any sort of order. We say that the fourth point, disclosure of information will affect commercial and industrial confidentiality, is the decisive point and it is

freestanding and irrespective of what national and international law provides."

I will just deal with two preliminary matters. We say that the standard applied by Article 9(3) is an objective standard, one capable of objective appreciation, which is capable of objective review by this Tribunal. The UK says, as we have already noted, that "a refusal to disclose information in a particular case is not a matter governed by the Convention". We say that that is wrong and it is a wrong proposal based on a wrong reading and interpretation of Article 9(3). Article 9(3) does not constitute a rehvoi to national law to determine the conditions under which disclosure may be refused. First, it is plain that Article 9(3) indicates that the matter is governed by the Convention - "will affects commercial confidentiality as a freestanding obligation in the Convention". Secondly, the consequence of the UK's approach being applied is, of course, that every party to the Convention would then be free to cast its exceptions exactly as it wished and that cannot have been the intention of the drafters of the Convention.

The second point that we make is that the UK claims in its pleadings that the information has been provided in consequence by BNFL to the UK Government. We have already made the point that some of it may have been provided in confidence. We do not know, we have not seen the conditions, but there is a lot of information that has not been provided by BNFL and which does not fall within any such confidentiality agreement. There is no evidence before this Tribunal, beyond Mr Rycroft's witness statement, that it has been provided in confidence or how it has been provided in confidence or which information was provided in confidence or for how long or under which conditions. Mr Rycroft simply states that 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 and we assumed that, at least in relation to some of the material, that that consent has been declined. No further evidence is provided. The Tribunal has no contract before it in support of what is nothing more than a view expressed by one person associated with BNFL. More to the point, as was said this morning, we note that the drafters of the report are not here today. We note also the serious reservations expressed by the United Kingdom's Environment Agency on the ability of BNFL effectively to veto the information.

The first simple point that I can make, turning to the substance here, is that the burden is on the United Kingdom to invoke the exceptions. The United Kingdom has not challenged that assertion. We assume, therefore, that they recognise the burden is on them to demonstrate that commercial confidentiality will be affected.

The second point turns to the applicable standard. What we say - and we have elaborated on this at length in our pleadings - is that Article 9(3) means that under the Convention disclosure is required unless it can be shown that such disclosure will certainly affect commercial confidentiality. It is not might, it is not should, it is not could (Mr Fitzsimons will come back to this) it is will. In our submissions, the exceptional right to exempt is a substantive norm in Article 9(3) which is capable of objective application and determination which flows directly from the language and the Convention itself. It is a self-standing obligation which is independent of other national and international rules, which must additionally be complied with.

National and other applicable international rules are, of course, to be taken into account by the Tribunal. IN any event (this is the key point) in this case because of the convergence of the substantive standards in the Convention and the Directive, the rule in the OSPAR Convention and the rule in the EC Directive are the same. There is no difference in them. I do not extend that point to the Regulations, because, as will become apparent, the Regulations have a slightly different formulation of language.

From Article 9(3) and the national and international rules, certain common elements emerge and I shall come back to that shortly. Just on applicable international Regulations, the parties are in agreement that Directive 90/313 is an applicable international regulation within the meaning 9(3)(d). Those Regulations, therefore, inform the conditions under which the exception can be invoked. That agreement provides the basis, of course, for expressly referring to decisions such as the *Mecklenburg* decision. If the Community legislation is directly applicable in international regulation then an authoritative interpretation of that by the European Court of Justice must be equally applicable.

That means that it is appropriate to look at the relevant ECJ case law. At paragraph 90 I have indicated the one case which is right on point, Mecklenburg, which I have already referred you to and I do not propose to take you back to it, but it makes it very clear, because they are derogations the exceptions in Directive 90/313 "may not be interpreted in such a way as to extend its effects beyond what is necessary to safeguard the interest which it seeks to secure". In other words it is a restrictive interpretation and application of the exceptions. Two authorities are cited in general European Community law, Mrozek and Jager and South Eastern Traffic Area, both of which we have put in, which confirm restrictions are to be treated as derogations and to be narrowly construed.

As to other international instruments we have already made reference to a long line of international instruments supporting freedom of access to information from the UN General Assembly

resolution 59/1 right up to the Aarhus Convention. They may provide you with assistance in your construction, interpretation and application of 9(3)(d).

Turning to national legal systems again it is worth spending a moment on this because the United Kingdom sets great store on its compliance with national legal systems, the parties being in agreement that Directive 90/313 is here relevant, must also therefore be in agreement that the 1992 regulations are also material.

I think the document that it is worth drawing your attention to here is the guidance note on the 1992 regulations, which is at tab 13 of the United Kingdom counter memorial. I am not going to read you the whole text, the blue volume here. It is entitled "Public access to environmental information, guidance on the implementation". This is the guidance which should have been applied by the United Kingdom when it received the request from BNFL, but there is no evidence before the tribunal that it did in fact apply it. Paragraph 40 of the guidance note, the presumption is that environmental information should be released unless there are compelling and substantive reasons to withhold it. I would underline "compelling and substantive". But it points to a presumption of release. It is drawn very much from the approach in other national legal systems and we will come back in due course to Canada, the United States, Australia. It is exactly the same approach.

Paragraph 55 is the first of the paragraphs dealing with restrictions on grounds of commercial confidentiality. "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 on disclosure. See paragraph 62". Then if you go to paragraph 63 you will see right at the bottom, the last line of paragraph 63, an example would be the Radioactive Substances Act 1990 which makes it a criminal offence to disclose commercial information". By the time this issue came up in our case, the Radioactive Substances Act 1993 which is the same principle, that trumps everything that follows in the regulation. It is a clear hierarchy which is established.

The last line of paragraph 55, "Public authorities should be careful not to restrict the release of information unreasonably". Paragraph 57, "The supplier of environmental information should be informed that it is subject to public release. If the supplier believes that its release would prejudice his commercial interests he should be asked to write identifying the information to be protected and giving if deemed necessary by the body cogent evidence of the need for the protection of such information on grounds of confidentiality". We assume that if BNFL had provided the UK environmental agency or DEFRA with cogent evidence that would be before this tribunal. It is not,

there is no evidence that in 1996 or 1997 or 1998 or 1999 or at any time have BNFL provided cogent evidence.

Paragraph 58, "Neither will it be reasonable to withhold information which could be obtained or inferred from other publicly accessible sources". We will come on in due course, but there is certain information which the United Kingdom still claims commercial confidentiality which is now in the public domain. There is the question of transports. For example, two weeks ago the United Kingdom's Department of Trade and Industry released information on the number of transports and BNFL's chief executive provided public information. We would say it is not inconceivable in the context of that information having been made publicly available by that side and by the chief executive of BNFL that they can now claim commercial confidentiality in relation to the number of transports in this document. That is simply inconsistent we say with that paragraph.

Finally again at paragraphs 58 and 61 it is made clear that restrictions should be limited in time. We then have no evidence before us that any restrictions on time had been provided for.

How are these put in place in practice? If I could take you to annex 13 of our memorial, just to give a couple of examples which are in the public domain. Two letters, tab 13 of the Ireland memorial, the number one bundle of authorities from Ireland. Tab 13 contains two letters, and we put in examples of one from a body which is equivalent to the Environment Agency and one from a body which was a decision maker in the justification, the Ministry of Agriculture Fisheries and Food. If I can take you to the second letter, page 458, this is a letter from the Ministry of Agriculture Fisheries and Food to the legal adviser of the Friends of the Earth. The issue here was a request by Friends of the Earth for access to information on pesticides, and the approach by the Ministry of Agriculture Fisheries and Food is set out here. "We shall treat as being commercially confidential specific information that an enterprise needs to keep confidential in order to protect its competitive position rather than general knowledge of business organisations or methods. We shall form a view about whether any specific confidential information ought not to be made available unless regulation 4(3)(a) of the EIR applies. However, and in any event as a matter of good administration and due process we must first ask the suppliers of the requested items for information whether they consider that any of it is commercially confidential on the basis of the strict test under the EIR and if so their reasons. We are actively pursuing this and shall revert to you as soon as possible." We ask this question: Is there any equivalent letter of request from DEFRA or MAFF to BNFL? If so what is it not before this tribunal?

The second letter followed two months later and it is a letter from the Pesticides Safety Directorate, a UK Government agency, to the Director of Regulatory Affairs at Aventis, which is a private company. It follows a concern from Aventis that MAFF was about to release a large volume of information which Aventis considered to be subject to commercial confidentiality. Half way down, "We have taken into consideration the arguments put forward in your letter of 4th May. As far as the information supporting your experimental approval is concerned we believe that only certain limited types of data can be treated as commercially confidential." I should have read the previous paragraph. "In light of recent legal advice as the information has been specifically requested under the regulations we must take an objective approach in determining whether some or all of the particular documents can truly be regarded as attracting commercial confidentiality. We set out in our earlier letter the test we would use to asses this, namely specific information that an enterprise needs to keep confidential to protect its competitive position".

Then they say that information on formulations, methods of manufacture or the purity of the active substance is information which is commercially confidential because if released would enable a competitor to reproduce or replicate the product developed by your at your own expense". That is not something that is likely to happen in this case. "We do not consider that there is a public interest in disclosure that outweighs the public interest in respecting the confidence of this commercially confidential information and so for the purpose of regulation 4(1)(a) we do not intend to release this confidential information. Against this background we propose to release to Friends of the Earth all the data listed in annex 2 of your letter which do not fall within these categories and do not contain personal details about an individual."

Then going on half way over the next page "We note that you agree to the disclosure of information supporting your commercial approvals that were obtained for glufosinate, ammonium based products during the period 1991 to 1999. However, you wish to restrict the conditions under which such information could be made available " - and this is the key paragraph. "In the absence of any cogent evidence for the need for protection of such information on the grounds of commercial confidentiality we do not consider that the information is commercially confidential for the purposes of the environmental information regulations."

We put that in not because it binds you but it indicates what happens in British Government practice when the regulations which implement the directive which is the same as the Convention is properly followed and there does not appear to be any evidence in front of this tribunal - there is no

evidence in front of this tribunal - which indicates that BNFL at the relevant times provided any cogent evidence as to why information should be restricted on ground of commercial confidentiality. Everything that is before you in terms of the evidence of the two United Kingdom experts has been produced in 2002, several years after, five years after, the PA report and well over a year after the ADL report, so it is ex post facto justification, no apparent contemporaneous consideration of the matter.

We have also cited to you in the final page of our materials various other English cases. I have already taken you to Birmingham Northern Relief Road and I do not propose to take you back, save that I would say that there are two elements which are important which emerge from Birmingham Norther Relief Roads. Maybe I will take you to that, it is Ireland authorities bundle 3, tab 7.

LORD MUSTILL: As a weaker brother in this hearing it would help me if it were possible to maintain some consistency of citation as we have two series called Ireland bundles of authorities, and it is made more complicated by the fact that the bundles which are called on the back "Book of Authorities" are called on the inside "Bundles of Additional Materials"! Whereas the authorities on which I have written Irish Memorial Authorities in accordance with your description are called Annexes to Ireland's Memorial. Would it be possible to make life a bit easier by calling them bundles A, B, C and D or something like that.

PROFESSOR SANDS: We confirm that we will be happy to put arrangements in hand.

LORD MUSTILL: It would be a bit quicker as the slower member of the Tribunal wastes everybody's time trying to find the right bundle.

PROFESSOR SANDS: That will be done immediately after the close of the hearings today, Lord Mustill. Page 18, we are somewhere north of Birmingham, and on the left hand column, two-thirds of the way down: "Although an agreement between the parties to a document that they will treat it as confidential is relevant for the purpose of deciding whether any commercial or industrial confidentiality attaches for the purpose of regulation 4(3)(e) it is not determinative of that question. Regulation 4(3)(e) does not require information to be treated as confidential merely because the parties have agreed that it should not be disclosed. The information must be both capable of being treated as confidential within regulation 4(2)(e) and the parties must have agreed that it should be so treated so that its disclosure would involve a breach of agreement." So the mere fact that BNFL have an agreement from the Environment Agency or from DEFRA is not dispositive. I would just remind the Tribunal that we are here dealing with the regulations, but these

regulations of course are an implementation of the Directive and they are to be construed in accordance with the EU directive. So there is a direct line of connection here with this case.

Simple agreement is not enough. Then it goes on at the bottom: "I do not accept the Respondent's submission that the agreement as a whole falls within regulation 4(2)(e) because it is a commercial document which contains a bundle of rights and obligations which individually and collectively have financial implications. The Respondent's formulation would apply to any commercial agreement as a whole. If it has been intended to exempt any agreement or any commercial agreement from disclosure it would have been easy to say so in regulation 4(2), and that has not been said".

Then to go on to the right hand column to make it clear "as a maker of common sense one would expect a commercial document and in particular a contract to contain information which was commercially confidential. In striking a balance seen in Article 3 of the Directive it is easy to see why particular information, eg relating to prices," that once again being the example - "in a commercial agreement should be exempted from disclosure. It is much less easy to see how a blanket exclusion in respect of commercial agreements as a whole could be justified". What we have here is a blanket exclusion in relation to all of the information requested by BNFL to be confidential and the judgment then goes on to indicate that what needs to be required is each piece of information must be individually assessed to determine whether its disclosure would affect commercial confidentiality. Mr Fitzsimons will come back to that point.

We have referred also to the case of London Underground and that is not on the environmental information regulations but the general common law approach in the United Kingdom. We commend that to you as very sensible approach in dealing with these issues, and in particular the judgment of Lord Justice Sedley who recognises clearly the interests of disclosure notwithstanding undertakings to the contrary, if the public interest and the free flow of information and idea will be served by it.

The final document to which I would like to take you - and it is the very last document - is in the same bundle at tab 20. It is the guidelines prepared by the Lord Chancellor's Department on the application of the Freedom of Information Act 2000 in the United Kingdom. I would like to take you to paragraph 100 of that document.

I should just say that the Freedom of Information Act 2000 has received Parliamentary approval, but it will not be brought into force until 2005. It is not yet in force in the United Kingdom, but guidelines have been prepared and at paragraph 100 we have a pertinent reference. "The Freedom

of Information Act similarly allows exclusions where commercial confidentiality will be affected". I am just here directing you to what was called the "harm test" at section 100, "Information would be exempt from disclosure where to do so would cause substantial harm". It then goes on to say, "The need to define the nature of the harm that would qualify as substantially against the specified interest will, in effect, create exemptions but on a contents basis not class basis. Each record or piece of information would be examined to see whether any of its contents would if disclosed cause substantial harm to the relevant specified interest".

We say that the right approach in this case is to take every single piece of information that has been redacted and subject it to that test. That is a hugely time consuming exercise and we do not expect to address each point now, but we will be making suggestions in due course as to how the Tribunal might address that issue and we will, in particular, within the realms of the confidentiality requirements imposed on independent counsel on this side prepare a confidential note which will address each and every piece of information that has been redacted. It will obviously be done confidentially so I am not in a position to say any more than that.

I am right up now to my conclusions. What we draw from all of this text from Article 9 (3)(d) itself, from the EU Directive of 1990, from the UK implementing regulations, from the case law in the European Court of Justice and in the English courts and from the guidelines prepared both in relation to the 1992 Regulations and the 2002 Freedom of Information Act will identify a remarkable consistency of approach. It is a consistency of approach, it must be said, that is reflected equally in Irish law, in Canadian law, in Australian law and, in particular, in United States law on which material has been provided. The common elements are these and there are four common elements. Firstly, in principle information is to be made available rather than withheld, that is the operating presumption; secondly, restrictions on access to information justified on grounds of commercial confidentiality are to be narrowly construed; thirdly, the burden is on the person wishing to restrict access to information to satisfy the court that release of each and every piece of information (I should add in there "each and every price of information") would cause substantial harm; and, finally, that this Tribunal is to assess the evidence and to form its own view as to the merits of the claim, that competition would be substantially harmed, if information was to be released. That is what we say emerges from the material which we have made available to you.

Mr Chairman, that concludes my submissions. I apologise for having taken you through so much material at such speed and I thank you for bearing with me. That concludes my submissions

sunless I can help the Tribunal further.

THE CHAIRMAN: Could you wait a moment, there are a number of questions that the Tribunal would like to pose?

MR GRIFFITH: Prof Sands, you say in your submission that Ireland is a natural or legal person, therefore, it is entitled to make a reasonable request under Article 9(1) and, as I understand your submission, to enforce any dis pute as to that under the Article 32 procedures as it is a contracting party. What remedy would a natural or legal person who is not a contracting party have?

PROF SANDS: It is something that we have given some thought to. If we were here before you not on behalf of the Irish State or the Irish Government but on behalf of, let us say, an Irish national or an Irish company which had sought to obtain the information requested, we assume that that person would have had to bring proceedings before the national courts in English to try to obtain the information presumably under the Environmental Information Regulations or, alternatively, under Article 9, and, if such an application would have been unsuccessful, under ordinary principles of international law, the failure of the United Kingdom to ensure that an Irish national had been granted access to the information would give rise to an entitlement to Ireland to bring an international claim by way of diplomatic protection on behalf of the Irish national. The Irish national, of course, would not have a remedy before this Tribunal, only the State would have such a remedy, but Ireland would be entitled to bring a claim in reflation to an individual case where information was not being provided and the analogy for that is, in fact, what happened in the *LaGrand* case, where an international Convention effectively created a right of access to a consular official. The individual sought to give effect to that right in the US Federal Court and State Court and was unsuccessful and ultimately prevailed upon the Government of Germany to bring an international claim. That is what would happen here. The Irish national would not itself be able to bring a claim, but it could invite the Irish Government to bring a diplomatic claim on its behalf.

MR GRIFFITH: If I could ask a follow-up question, would that claim be a claim for the information itself or would it be a claim that the other contracting party should by its legal system provide that information?

PROF SANDS: It would have to be a claim to the information itself. The obligation of the United Kingdom is to Ireland to ensure that information is provided and Ireland would, in those circumstances, be entitled to request a declaration. The remedy would be a declaration from the Tribunal that the United Kingdom had failed to ensure that the information was made available to an Irish national. There would also be

questions as to the exhaustion of local remedies, presumably, in that context, but the remedy sought would be a declaration to that effect and, presumably, a declaration also for an order that the information be made available.

MR GRIFFITH: May I just ask you to clarify one point in your answer, the penultimate answer that you just gave. You said that a natural or a legal person, say an Irish citizen, may be able to bring a claim under the United Kingdom domestic law under Article 9 itself. What do you mean by that?

PROF SANDS: The same analysis that we provided in relation to the Irish State would apply to an Irish national. Plainly, an application under Article 9 would fail, because Article 9 is not part of English law, and there would then be a question as to whether in those circumstances the exhaustion of local remedies would require the Irish national to even bother to bring a claim before the English courts. An application under the Directive would fall within the same analysis that we have provided, but there would not be, on my understanding, a remedy available in the English courts for a violation of the Convention as such.

MR GRIFFITH: You are saying that, if you could demonstrate that there was not a remedy under the English law, Ireland could just bring directly its claim on behalf of an Irish citizen under the Article 32 procedures.

PROF SANDS: Assuming that one could persuade you that the position in international law was that futile remedies did not have to be exhausted, then the answer to that would be yes, if indeed the Irish State was mindful to bring such a claim.

LORD MUSTILL: I would like to raise a question concerning the point which is somewhere down the road and may never be reached, we shall see, but I would like to raise it just the same. Kindly take up your written submissions, page 5, where you deal with paragraph 12, the section dealing with the function of the Tribunal. I would just like to ask you something about paragraph 15 which forms only a part of that analysis. During your arguments you have addressed submissions on why the United Kingdom is mistaken in submitting that, as OSPAR contemplates, a margin of appreciation in the Member State. I do not want to open that up. We have not heard it argued on the other side yet. I would just like you to help me with paragraph 15. "The UK assumes that Article 9 permits a discretion (which is not accepted by Ireland)." That is another way of describing the margin of appreciation point, I think. Then you go on, "however, the function of the Tribunal cannot be determined by the nature of the substantive obligation which the UK has assumed." Pausing there for a moment, on the hypothesis which you reject but which your paragraph 5.15 is addressing, the obligation is one which involves a

margin of appreciation. Then you go on to say, "The function of the Tribunal is to determine objectively whether the UK has correctly interpreted and applied Article 9". I have a little difficulty with this and I would like you to help me. Your argument amounts to this. If OSPAR permits the State a margin of appreciation, that is to say, if OSPAR premise a State to decide in a way which falls within a range of possible modes of decision, taking into account all the things that you take into account in establishing the breadth of the margin of appreciation, if that is the position, the supervising body - in human rights law the European Court of Human Rights - will not intervene, precisely because the State has not acted inappropriately in acting within the margin.

What slightly puzzles me is that, if that is a correct statement of what is happening, I do not see how the supervising court or in the present instance this Tribunal can reach through the margin of appreciation down into the underlying merits and make an objective determination upon them, because that seems to me to get rid of the margin of appreciation altogether. In this rather long question, which I will quite soon stop, in trying to explain to you what is bothering me, you have called up Voigt - or somebody has called up Voigt in the materials - as an instance of the fact that the supervising body (in this case ours) always retains an ultimate right of decision, objectively. I think that I am right in assuming that that is what you quote Voigt for.

Now I have reached the end, can you explain to me how, if there is a margin of appreciation, the supervising body can ignore the margin of appreciation and go straight to the merits? I know that you say that there is not a margin of appreciation; obviously we have not got that far yet.

PROF SANDS: The starting point, I suppose, for our analysis would be that the Tribunal has a function which is determined by the OSPAR Convention and it cannot exceed that function. That function is effectively governed by two elements. The first element is what it was entitled to do under Article 32 of the Convention, that is clear; the second element is informed by the nature of the substantive right in issue. The reason that we have put paragraph 15 in those terms is that we say that in this case it never gets to the point that there is a discretion, but I am going to take you on your hypothetical. Let us assume that there is a discretion. We have seen that the English courts proceed on the basis that a number of questions are not within what is called Wednesbury unreasonableness discretion, whether or not it is environmental information is not a matter in which the State has any discretion. Whether it is information which will affect commercial confidentiality is not a matter which is within the discretion in any way of the State. But it is when you get to the next point, assuming that it is environmental information, assuming that it will affect commercial confidentiality, nevertheless, the State at that point

has a discretion to decide what to do, and your question, I take it, goes to that issue of what is this Tribunal to do in those circumstances? I would say that that is a hypothetical, because we say that you do not get to that point. But, if you get to that point, then we would say that the approach that is to be taken is guided by the principle set forth in the Heathrow Airport arbitration, where the Tribunal in its interpretation and application of Article 10(1) had to construe the meaning of the words "best efforts" and it recognised implicitly, although not explicitly, that perhaps there was some middle room in what was and what was not "best efforts". But what the Tribunal made clear that it said was that "best efforts" ultimately was to be determined by the Tribunal, not by the State - what did or did not constitute "best efforts". To the extent that there is a discretion, and we say that you do not need to get to that point, then your function would not come to an end. It does not reach the end of the road. You would then need to determine whether the discretion was exercised in a manner which was consistent with requirements of the OSPAR Convention. We might say in those circumstances that in forming a view as to whether the discretion had been properly exercised or not, it would be appropriate to have regard, for example, to the 1992 guidelines. It would be appropriate, for example, to have regard to the question of whether indeed the Environment Agency or the DTR had before them cogent reasons as to why each and every piece of information could not be disclosed. It would not be enough for the United Kingdom to say,"We have a discretion, that is the end of the matter". If they had exercised the discretion in a manner which, for example, is not based on any cogent reasons, then we would say that that is something which you have the competence to review. If they have, in fact, directed themselves to cogent reasons, then I would be bound to accept that you would be circumspect on that particular narrow point in substituting your view for their view as to whether or not the reasons given at that time were or were not cogent. That would impose a degree of limitation on an international tribunal.

LORD MUSTILL: Thank you. If I may just follow this up a little, some of the arguments which you address in your helpful answer are really arguments for saying that there is no margin of appreciation and those I have completely in mind. I am just picking up again the last sentence, really, of paragraph 15, may I make it plain that I, for the time being at least, accept that the Tribunal in accordance with ordinary principles would have the task, even in a margin of appreciation case, of deciding whether the decision maker had gone outside the margin, that is pretty straightforward doctrine of no novelty and, in so far as your side relies on Voigt - and I do not know where I got the idea from that you did, but I must have got it from somewhere - Voigt is a very good example. With regard to the blasphemous

obscene video, there were very strong considerations required to censor material so that it does not enter the public domain, but, nevertheless, the court looks at the question whether the UK Government or the regulatory authority had acted within the margin and concluded that it did, so that, in a sense, it looks like a decision by the European Court that the Government was right to censor this. In fact, that is not what was held. What the court actually did was to say that the national authorities were entitled to consider that the impugned measure was justified. I read from tab 12 of the third volume of the White Book at paragraph 65.

That is all perfectly orthodox law. The reason why I ask the question is to pick you up a little bit on the last sentence of paragraph 15 of your submissions, which we have just looked at. "The function of the Tribunal is to determine objectively whether the UK has correctly interpreted and applied Article 9". That to me read as if we were going to retake the decision, which ex hypothesi is, in fact, within the margin of appreciation. Perhaps, you did not really mean that by that sentence. If you did not, perhaps you could make it clear to me.

PROF SANDS: We will certainly provide a formulation which makes it crystal clear that the point that we make is in drafting paragraph 15 it is premised on the view that we never in this case reached the stage ....

LORD MUSTILL: I am sorry, forgive me for interrupting. I hope that I made that plain more than once. I accept, of course, that your main argument is that there is no margin of appreciation. So please do not be worried about that. That I have noted and we shall look forward to hearing it argued when the UK gets its turn. If you were able to help me at least as one member of the Tribunal in refining your submission, I would much appreciate it.

THE CHAIRMAN: Thank you very much, Prof Sands. I think that we will take our five-minute stretch.

(Short Adjournment)

THE CHAIRMAN: Before we continue we will continue for another hour and then take a 20 minute break, and then continue until 6.30. The Secretary of the Tribunal is keeping a record of the amount of time consumed by questions from the Bench, so that a proper allocation as between the parties will be maintained. I think it would be prudent tomorrow morning to start at 9 o'clock again. Hopefully we will finish before 1 o'clock, but if not we have that extra margin of time. If you have concluded, Professor Sands, we have no more questions.

MR FITZSIMONS: Mr Chairman, members of the Tribunal, it is a great pleasure and an honour to appear before you.

As Professor Sands has indicated I am to deal now with the issue of commercial

confidentiality and the question of construction of the latter part of Article 9(3) of OSPAR.

Just to put my submissions in context as we know the omissions from the two reports that are at issue are listed in full in annex 3 and 3B to Ireland's memorial. I will not take you through those, you will have read them and they are available.

The omissions fall into 14 categories and we have listed those categories at paragraph 75 of our memorial. It is possible also to categorise them in a different way, and I do this very briefly by reference to the source of the omissions. This has been adverted to by Professor Sands. Effectively one can say that there are three sources for the omissions. Firstly there are the opinions of PA and ADL. Secondly there are facts and information from third parties recorded as such in the reports. Then there are certainly facts and information that have come from BNFL itself.

So it is in respect of all of these categories that the claim of commercial confidentiality is made, and as has been stated Article 9(3) has very specific provisions that give rise to a very specific test for any body, tribunal or court deciding the issue. A contracting party under 9(3) may refuse a request "where it affects" and then "commercial and industrial confidentiality including intellectual property". So obviously issues of interpretation arise here and as Professor Sands has said these issues of interpretation arise to be determined by reference to principles of international law.

We say that the phrase "where it affects" in Article 9(3) should be construed as "where it adversely affects", and we make this case in paragraphs 120 to 122 of our memorial. The UK takes issue with this assertion (paragraph 25.22 of its counter memorial) but it does not offer an alternative construction. So this question of interpretation is probably a simple one. What alternative constructions could there be? The phrase could not possibly be construed as indicating beneficial effects on commercial confidentiality and similarly it seems illogically that it could ever be construed in terms of mutual effects. That would render the exception to void of reason. So our case simply put is that the only logical construction to attribute to the simple phrase "where it affects" is one that involves the notion of adverse affect.

As I mentioned the UK has not offered an alternative construction so this question of construction may not be a serious issue in the case, even from their point of view.

What was the second phrase to be construed? "Commercial and industrial confidentiality, including intellectual property". Both sides have abstracted from that simply the phrase commercial confidentiality and we are quite happy to proceed on that basis; in other words we are both attributing a particular significance to the other phrases used in the sense that we do not see them as

necessarily assisting the construction, though of course the Tribunal may well feel otherwise.

We say that the definition of the term commercial confidentiality cannot be left to national systems alone. Quite obviously if this was permitted scope would exist for contracting parties to widen the intended meaning of the phrase commercial confidentiality and potentially seriously damage the Treaty objective. It may be that this partially explains the reference to applicable international regulations in the earlier part to 9(3). If an applicable international regulation is to be referred to this at least has the benefit of exercising a measure of control upon members states who attempted in some way to apply a more restrictive test.

How does the Uk deal with this issue of interpretation? They do it by drawing the Tribunal's attention to other international instruments and national laws. That is 5.29 to 5.33 under appendix A and B of their counter memorial. At 5.33 it is noted that the term commercial confidentiality is "nowhere comprehensively defined in the international instruments examined". But this material is offered to assist the Tribunal and to provide a broad context for consideration of the issue.

We submit that it is clear from the UK examination of the international instruments that the primary object of commercial confidentiality is the protection of the competitive position of the parties claiming it. Examples are given by the UK from GATT and NAFTA are provided. That is at pages 68, 69 of the UK counter memorial.

Having analysed a number of international instruments and having noted this fact, namely that the term is nowhere comprehensively defined in a manner that could assist the Tribunal, the UK offers a number of indicators of what the term might mean. These are suggestions from the UK, they say drawn from their review of authorities. These are found at paragraph 5.33(iv) of the counter memorial, but I am not going to put the Tribunal to the trouble of going to them. I just propose to comment on the having given the reference, because they are simply suggestions drawn from international instruments, presumably the intention being to provide some form of general guidance. But at the end of the day the task of construction is down to you, the members of the Tribunal, and the task is one to construe relatively straightforward language in accordance with the principles of international law which are generally accepted as being those contained in Article 31 of the Vienna Convention.

The principles suggested by the UK in our submission all appear to contemplate the existence of competition and a competitive business environment for the rationale. However, one of the proposed categories if literally construed - this is one effectively comprising secrecy - would give

carte blanche to any party seeking to rely upon it to simply bar information seekers from any type of information with any conceivable commercial connotation. We say that manifestly is not within the contemplation of the section.

The UK also go on to give domestic law examples, again presumably with the intention of assisting the Tribunal, and to this end they refer the Tribunal to freedom of information statutes from Ireland, from Australia and the United States. In Ireland's case they also refer to our equivalent of the UK 1992 regulations. Ireland of course is a member of the EU and is subject to EU directives and has to implement them. It had to implement EU directive 90/313 and did so by a regulation with the features similar to the UK 1992 regulations. Examples of French law are given also.

The examples under US law may be of particular interest because on a reading of them they appear to be consistent with the proposition that the sole object of commercial confidentiality is to protect the competitive position of the party seeking to advance such a claim. I will just mention that two cases are in our books of authorities at book 2 divider 5, National Parks and Conservation Association -v- Morton and book 2 divider 6, Public Citizen Health Research Group -v- Food and Drugs Administration. I would sound a note of caution, but this is part of the UK case, the UK no doubt offer these examples to assist and I have no doubt that that is the case, but all of these cases are determined in national courts on the basis of particular national statutes and on the basis possibly in some instances of particular national jurisprudence. So come caution has to be exercised in considering them, though they do assist in a general way in throwing light upon the subject.

Canadian case law is also referred to or relied upon us by us, but I will come back to that later because there is one little point I wish to make on the basis of a Canadian case. It is our submission, even on the basis of the authorities submitted by the UK, international and national, that an essential prerequisite to a claim of commercial confidentiality is the need to protect a competitive position, and of course that prerequisite presupposes in every case the existence of real competition in the relevant market, not hypothetical competition, not abstract competition, not future competition - and if I may unfairly (or perhaps not unfairly as he is a witness for the other side) make a reference to Dr Varley's often used phrase in his statement "not feasible competition" which is at a level below possible competition. That phrase is found throughout Dr Varley's report.

Moving back and returning to the first phrase I referred to, where it affects, under Article 9(3) the UK is entitled to refuse to provide information where it affects commercial confidentiality. We argue for the notion of adverse affect. How serious must the adverse affect be, because that is

another issue you have to consider. Clearly a trivial or a minor effect would be difficult if not impossible to prove. So we submit that the adverse affect must be substantial or significant, we do not see a great difference between those two terms. In other words the adverse affects must constitute real or demonstrable harm, and Professor Sands has made legal submissions to you on this issue.

In this context of course the fact that Article 9(3) is an exempting provision is of relevance. We submit, as Professor Sands has already, that it should be strictly construed. A high threshold should be applied. In engaging in that task we submit that Article 9(4) should be taken into account, the language of Article 9(4).

Article 9(4) is framed in imperative terms. It states very simply the reasons for a refusal to provide the information requested must be given. Not should be given or may be given or can be provided within a particular space of time. It must be given, it is imperative and mandatory. In our submission that is entirely consistent with the notion that the provisions in relation to the exceptions should be strictly construed.

A very brief digression to deal with comments in the UK submission in relation to Irish law, just a digression, but just in case it distracts you when you are reading the counter memorial. At paragraph 5.35 of the UK counter memorial it is asserted that the threshold of harm where commercial confidentiality in Ireland is concerned is the possibility of prejudice, a very low threshold indeed. This bald assertion is made at paragraph 5.35 of the Uk counter memorial. This is an incorrect statement and misleads as far as Irish law is concerned. The law relied upon for the statement is discussed at appendix B of the UK counter memorial. irish regulations dealing with environmental information are based upon, as I have already stated, EU directive 90/313 as are the UK 1992 regulations, and confined permission to resist disclosure of environmental information on commercial confidentiality grounds to situations where it can be demonstrated that the disclosure will in fact affect commercial confidentiality. So there is no question of the threshold being that of the possibility as alleged.

The statement made in the text of the Uk counter memorial ignores these, the relevant, regulations and it appears to be based upon a provision of the Irish Freedom of Information Act 1997, which is an altogether different statute dealing with documentary records within the possession of the public service and public bodies with the State. I am not going to bring you into it in detail but they rely clearly on the use of the word "could" in the particular section, 27(1)(b), an issue of construction

arises there. We do not accept that the Irish Courts would construe the particular provision that they rely upon in the manner suggested in the counter memorial.

I have digressed in this way to make this point because the bald statement at paragraph 5.35 of the UK counter memorial unfortunately, and to be as gentle as I can, unfairly gives the impression that Ireland in its domestic law has a very low threshold of harm where commercial confidentiality is concerned, whilst at the same time in these proceedings it is seeking to impose upon the UK a higher threshold. That simply is not the case.

I move on to the burden of proof. I should say that these notes you have I will be adding and subtracting to, and you will probably have noticed that already. The burden of proof. We say that having regard to Articles 9(3) and (4) of OSPAR the UK clearly have the burden of proof where the refusal of information is concerned, and we rely upon the language of both the mandatory provisions in both. How is the burden to be discharged? We would have to accept on our argument and indeed on the evidence that we rely that if the UK can satisfy the Tribunal that the competitive position of BNFL will be significantly damages if the information at issue or party of the information that then they will have discharged the burden of proof. If the Tribunal accepts the UK case on commercial confidentiality it does of course have the option of directing the release of part of the information withheld, categories of information that it considers will not result in damage to the competitive position of the UK. That of course is apart from the categories that simply do not fall within the scope of the commercial confidentiality claim advanced, in other words for example opinions of ADL and PA.

We also say that in this context, that is the context of the burden of proof, the UK must satisfy the Tribunal that it is entitled to rely upon the commercial confidentiality exemption where each - and I emphasise each - item of information is concerned, and here of course 9(4) is relevant because it places this strong obligation upon a party claiming commercial confidentiality to justify the refusal in respect of the information that it is sought to retain.

I have already made mention of the line taken by the UK in its countermemorial. It refers to international cases, it gives examples, it refers to international treaties, it gives examples, it refers to national laws of different countries and gives examples. Of course, all of this is leading up a broad submission that is put to you, namely that the UK to be able to rely upon 9(3) simply has to show that the information at issue would possibly and would only be likely to cause harm to BNFL. We say that that is simply not a correct statement of the law and we would submit that that is an erroneous

interpretation of Article 9(3).

We say that Article 9(3) is quite clear in its terms. In the commercial confidentiality context we say that it speaks in absolute terms. If the UK wishes to rely upon it, it must be established to the satisfaction of the Tribunal that disclosure of the information at issue will cause substantial or significant harm to the competitive position and, thus, the commercial interests of BNFL.

Just to rephrase that and bring it to the actual wording of the section, 9(3) itself, the UK has to establish that the disclosure of the information will immediately adversely affect in a significant way the UK's commercial confidentiality. In other words, BNFL will suffer immediate, significant or substantial harm if this information is released.

Here, if I could just refer you briefly by way of comment to the one document that I am going to refer you to. It is the case at divider 1, bundle 2 of our authorities, it is the *Canada Packers Inc* v *Canada Minister of Agriculture*.

THE CHAIRMAN: Mr Fitzsimons, what is page 20 here?

MR FITZSIMONS: It is a computer-generated, I am afraid, law report and you will see that the pages are vertically numbered in the middle of the pages. It is not easy to follow, I am afraid, as a report.

LORD MUSTILL: Are those the double asterisked pages?

MR FITZSIMONS: Yes.

LORD MUSTILL: the single asterisks being footnotes, is that right?

MR FITZSIMONS: It is double asterisk 20 which I have taken to be page 20. It is about the tenth page, in fact, in on the actual report itself. As I said, it is not taken from the law report. It is in the middle of the page.

LORD MUSTILL: Is that the paragraph that begins, "The American test ..."

MR FITZSIMONS: Yes, that is the actual paragraph to which wish to refer. I apologise for the confusion.

This case was a case involving consideration of the Canadian Access to Information Act and the particular provision being construed was one that permitted the retention of information "which could reasonably be expected to result in prejudice" - which could reasonably be expected to interfere with contractual negotiations with the third party. It is not a phrase similar to where it affects, it is, if you like, framed in more conditional terms. This little passage I wish to read because it puts the point that I wish to make in context and it also has the benefit of referring to a broad test in the American cases to which I have referred.

The American test then depends upon "evidence revealing actual competition and the

likelihood of substantial competitive injury. Actual competitive harm from the disclosure of documents not yet released is of course impossible to show and is not required. Conclusory and generalised allegations of harm are however unacceptable. While the actual terms of the exemption in the US statute may differ, this standard of proof seems to coincide with the tests set out in the Canadian cases referred to above. The evidence must not require pure speculation but most at least establish a likelihood of substantial injury. This also seems to be the test incorporate in paragraphs 21(c) and (d) of the Canadian Act where the wording used is 'could reasonably be expected to' result in harm. The expectation must be reasonable but it need not be a certainty."

There are two points just arising from this text, firstly a point that will become relevant later. You will note the statements about conclusory and generalised allegations of harm or speculation as to harm are deemed simply not acceptable even in the Canadian context. IN due course, of course, we will be submitting that Dr Varley's statement in particular is precisely that. But that is an aside. The point that I really do wish to emphasise on is the very final word "it need not be a certainty".

The Canadian court here is recognising that the wording is different. One could be talking about a certainty as a matter of construction of an appropriately worded statute.

I emphasise that because in this case we say that the phrase "where it affects" means precisely that, that a party seeking to rely upon 9(3) must demonstrate that an inability to rely upon it will result in an immediate effect, the immediate effect of substantial harm, and that it is not sufficient to try to, as we submit the UK has sought to do, read into the phrase "where it affects" or "where it might be likely to affect" or "probably affect" or "could be reasonably expected to affect". Where it affects, in our submission, is framed in simple absolute terms and should be, in our submission, construed in the fashion that I have suggested.

Of course, if the UK have to cope with such a burden of proof, that is a very heavy burden indeed. Now, nobody, certainly lawyers do not like to use the word "certainty". It is inconvenient in the law when one speaks of certainty. From a legal perspective, lawyers are possibly uncomfortable with that term. That is perfectly understandable and one could spend a long time discussing such a concept. But what we have to remember here is that the OSPAR Convention is a policy-driven Convention. It is not a lawyers' Convention. It is a Convention the contents of which were driven by environmentalists and by, presumably or obviously, those in the various ministries of the different States who were promoters of freedom of information. The object of the treaty is to open up the coffers of the various States, the various public authorities and the various industries where

environmental information is concerned. Of course, that object that is the object and purpose of the treaty would be defeated if these entities could defeat it by relying upon it liberally-construed exceptions. We submit that this explains the wording of 9(3) and 9(4) because 9(4) is the check on 9(3). States do not just have a right to exempt, they must provide reasons whenever they seek to do so.

In construing the nature of the burden of the proof that the UK have to meet, we invite you to view the object and purpose of this treaty from an environmental information open information perspective and view the attempt to cut back on the object and purpose of the treaty in that light.

On that basis we submit that the UK, if it cannot satisfy you on the evidence, and at the end of the day this issue will be decided on the evidence in respect of certainly some of the categories of information, if you cannot be satisfied as a matter of certainty that the release of information will cause substantial damage to BNFL's competitive position, then they have failed to discharge the burden of proof. Even if they adduce evidence that is dealing with the future, that is speculative, that speaks in general terms, makes allegations, that is simply not enough. They must establish as a matter of fact the position that they contend for.

Have the UK recognised the fact that they have such a heavy burden? Well, they may well have. You have before you evidence from two expert witnesses, on behalf of the UK, as well as an additional witness as to fact a senior member of the NFL.

THE CHAIRMAN: Mr Fitzsimons, before you proceed to a detailed analysis of the evidence ...

MR FITZSIMONS: If it is of any assistance, I am not going to proceed to a detailed analysis of the evidence, just to mention that ...

THE CHAIRMAN: The reason that I ask is that the Tribunal has a number of general questions that it would like to pose and this may be an appropriate moment, if you will entertain the questions.

MR FITZSIMONS: I would be pleased to do that.

LORD MUSTILL: I have really only got one question, Mr Fitzsimons. Could we go back to the Canadian case for a moment and the very paragraph that we have been looking at? It is the second sentence of it, just by the double asterisk and the figure 20. The court says "Actual competitive harm from the disclosure of documents not yet released is, of course, impossible to show". You are saying, as I understand your submission, that actually the United Kingdom does have to show.

MR FITZSIMONS: Absolutely. I am drawing the court's attention to this statement in this Canadian case to make a number of points. It does, of course, contain this sentence, but we do not accept, of course,

that that sentence represents a correct statement of the law and, certainly, do not rely on it. I drew the court's attention to the passage for the reasons that I have already given. This statement is here, but I take issue with it and I am quite happy to debate it with you if needs be. It is possible, we say, to demonstrate that actual harm will occur if that is the case. If BNFL can demonstrate, for example, that the release of information will definitely result in the loss of contracts or customers, that is a threshold that I have to meet and it should be possible for them to demonstrate that. I will be coming on to the reality, of course, of their evidence in this area at a later stage.

The United Kingdom appears to have recognised the weight of the burden that it carries. Three witnesses, two experts, detailed statements and supplementary statements. Ireland relies upon the evidence of Dr MacKerron, an expert witness, who has submitted lengthy statements himself. He is an economist. None of the respondent's witnesses are, of course, qualified in that area.

One of the unusual features of the evidence of the UK experts is the fact that they have not shown the full reports. One would have thought that, if they were to be fully qualified to give their evidence as experts, and they are presented as such, that they would have shown the full unredacted text of the reports, so that they could say why the omissions made such a difference. We have not had any explanation for that, but we do know that Dr MacKerron is not being allowed to see the reports also.

Why not? We would ask you to draw the inference ... Well, we would ask you to draw obvious inferences. I am not going to say any more than that.

The evidence itself - this huge body of scientific and economic evidence that has been placed before you and gives you a difficult task when you come to deal with it - is advanced by witnesses and, whilst I could spend a lot of time talking about the contents of it, it does not seem to me that that would be time valuably spent. You have the reports. The witnesses are going to be presented and cross-examined in some degree of depth and you then will have an opportunity to consider the evidence and take a view on it. Of course, we will be closing this case and we will have an opportunity to make points that appear then to be particularly important after the witnesses have been cross-examined. But, quite obviously, we are inviting you on the basis of the evidence submitted to date and the evidence that will be given to prefer the evidence of Dr MacKerron. Dr MacKerron, of course, addresses the two main issues - or perhaps three main issues - the relevant market, is there competition in the relevant market and then, secondly, a slightly disassociated point, the position of customers. Those are the main areas of dispute between the parties. But that, of

course, is leaving aside all of the information that appears to be represented by opinions of ADL and PA and information obtained from third parties, which is in a different category altogether and does not appear to have been totally addressed or covered by indeed any of the witnesses. Perhaps we will be able to pursue that in cross-examination.

Obviously, at the end of the day there is still going to be dispute between the experts, particularly, and you are going to have to the unenviable task of trying to resole that dispute.

Could I at this stage refer to a number of factors which I would submit may assist you in resolving that dispute or at least taking a view as to which evidence you should prefer?

The first item is a straightforward one and this will be addressed during cross-examination. It can be established and will be established that some of the items of information contained in the PA and ADL reports have been disclosed elsewhere. This is not consistent, we say, with the existence of competition or that information posting a threat to BNFL's commercial interests.

Secondly, the failure to give reasons - and the Attorney-General and Prof Sands have gone over that - and the non-compliance with this very strong mandatory obligation at 9(4). That, we say, is not consistent with the existence of competition or a perceived threat to BNFL'S commercial interests. Reasons could have been given immediately, if there were reasons at that time, for the refusal to give the information. We have alleged in our written submissions that the UK has only given reasons for five areas of refusal and that is in the letter of 13th september 2001, which is - I am not going to trouble you with it, it has been referred to - unfortunately in Appendix 6 to the UK countermemorial which should have been in appendix 4 to ours. In that letter the UK on 13th September 2001 writes to Ireland and gives reasons for five categories of information. What that letter does not say, of course, is that it was dealing with a letter sent to it some almost 18 months before on 25th May 2001. It is page 2 of that letter. Why it did not refer back to that letter, we will probably never know, but the important question is why were these reasons being given 19 months later without a reference to the letter asking for them? But, more importantly, why were reasons not given for all of the other items of information excised from the reports? Because Article 9(4) places an obligation upon States playing commercial confidentiality to give reasons. They do not have to be asked for reasons. They must give them in any event.

The additional reasons have never been furnished, unless, of course, Dr Varley's report is to be viewed as such.

A third factor for what it is worth that I invite the court simply to have regard to is this. As I

mentioned at the outset, we at paragraph 75 of our memorial listed the 14 categories of information that we said ere missing. Our memorial of 7th March 2002. What did the United Kingdom do? It prepared its own categories. It did not address our case. It did not deal with 14 items of information. Dr Varley, who had read Ireland's memorial, as is recorded in his report, produces his own eight categories of information. Now, I invite the Tribunal at a later stage - and I suppose the fact that I have raised this will mean that an explanation will be forthcoming - but, if it is not forthcoming, I invite the Tribunal to seek one, because the question arises as to why the United Kingdom was not prepared to meet the Irish case of 14 identified categories in the context of a scenario where no reasons had been given for most of them, By formulating its own eight categories as against 14, what is the result? The waters are muddied, there is chaos, confusion and the task of the Tribunal is made immensely more difficult.

The United Kingdom has declined to join issue with the case made by Ireland as to the 14 missing categories. What the Tribunal has to ask itself is was this a strategy? The Tribunal in this morass of technical and economic information has an extremely difficult task and, to make that task more difficult, obviously, creates much greater uncertainty.

The next item is that averted to by Prof Sands. Again, this is something that we will have to at least explore in cross-examination, though, as prof Sands has demonstrated, there is strong documentary evidence supporting the proposition that the Radioactive Substances Act 1993, with its much greater commercial confidentiality umbrella, was in fact used by the United Kingdom rather than the 1982 Regulations. But, as I say, that is something that will have to be explored later.

The next item that I draw to your attention is the fact, again, as averted to by the Attorney-General, that during the various consultations and exchanges the BNFL wished to withhold considerably more information than was ultimately released. WE would submit that this is consistent with reliance upon the Radioactive Substances Act 1993.

A sixth factor to which I ask you to have regard is the contradiction between the United Kingdom witnesses, more particularly between Mr Wadsworth, on the one hand, and Mr Rycroft and Dr Varley, on the other, because the latter two appear to accept that competition is a test, whereas Mr Wadsworth appears to rule it out. But that is an issue that we can explore in more detail in cross-examination.

Seventhly, and this is a broader factor, the acceptance by the United Kingdom witnesses, Mr Rycroft and Dr Varley, in particular, of the fact that the European world energy markets are in the process of being rapidly liberalised. Nuclear powered energy is now too expensive for many utilities

and many look elsewhere for their needs. As will be demonstrated, and is averted to in evidence, the United Kingdom's own largest utility, British Energy, has made it perfectly clear that it does not wish to avail of reprocessing at BNFL's premises at Sellafield, because it is too expensive and that has already been averted to and can be explored later.

BNFL, as the largest customer, caught up in this rush towards liberalisation has taken this stand. What is the position now or indeed is likely to be in the future where others are concerned.

Eighthly, again it has been averted to, the proposed creation of new UKF, the Liabilities Management Agency, to take over BNFL and to effectively remove it from the commercial arena, but for very good reason, because, of course, the storage problem at Sellafield is an immense one. There are 70 tonnes of plutonium at Sellafield at the present time stored there.

Almost finally, ninthly, the silent witnesses, if I can describe them as such, and the Attorney-General has already referred to some of these, why have we not heard from a witness from PA? Why have we not heard from a witness from ADL? A witness from ADL would have been particularly helpful, because, as has already been mentioned, on the index page to the ADL report, that is Ireland memorial annex 2B, page 75 of that book, ADL identified two alternative types of information that they excluded. This rider, if I can describe it as such, is framed in the alternative. Commercial confidentiality information or information that would be likely to adversely affects the economic case for MOX. Why do we not have somebody from ADL to at the very least tell you, members of the Tribunal, which of the items excluded fell into the latter category. It may be that that is a reference to - well, we do not know what it is a reference to, but why are they not here? We submit that, if the UK was determined to discharge their heavy onus of proof, that they would have considered producing them.

I make that submission with particular reference to the ADL confidentiality rider.

But there is a second category of witnesses who also might have been expected to appear. Customers. There is not one customer who can say that, yes, there is competition between COGEMA and BNFL. A customer, somebody who might potentially deal with both. Not a single customer is here.

Finally, and tenthly, I return to the very first matter, the three source categories. The very fact that the categories of information excluded have three sources, the ones I have mentioned, the opinions of PA and ADL, the fact information from third parties, the fact information from BNFL, is a further pointer to you that should, we submit, influence you into preferring the evidence of Dr

MacKerron, because the evidence of the UK experts seeks to exclude all of these categories, even though manifestly the opinions ADL and PA are not property of BNFL.

That is essentially my submission. In the very final section of the notes I have provided I have run through basically items contained in the opening section of Mr MacKerron's evidence that are not disputed, just to make that point. There is no need, I do not think, for me to take you through them unless my friends want me to. You will see the heading "MacKerron evidence". There I list assertions of Dr MacKerron at section 1 of his report. These are assertions of fact, background fact, if you like, to give a background to his later opinions, none of these assertions of fact are disputed by either Dr Varley, Mr Rycroft or Mr Wadsworth in their statements of evidence. In the interests of saying time, I will not go through each of them.

Those are my submissions. I will be pleased to answer any questions that you may have.

THE CHAIRMAN: Thank you, Mr Fitzsimons, we do not have any questions. May I suggest that you give this section to the court reporter, the section that has not been read, and it can be put into the record. It is the last pages of the MacKerron evidence.

MR FITZSIMONS: We will do that, indeed.

MacKerron Evidence

Whilst Dr Varley seeks to attack aspects of the MacKerron statement and opinion, he does not seek to contradict the critical background factual material identified by Dr MacKerron at section 1 of this report. There Dr MacKerron asserts as follows:

1. All commercial MOX sales in the world have been directly linked to the signing of prior reprocessing contracts on the part of MOX customers.
2. The overwhelming bulk of the world's nuclear fuel contains only UOX fuel (uranium oxide). Current MOX consumption represents only 2 per cent of world nuclear fuel use.
3. MOX can be used for about 30 per cent of the core of current LWRs: the remaining 70 per cent of the core is UOX fuel.
4. Only COGEMA in France (commercially incorporating the small plant operated by Belgiumcleraire) and BNFL are commercial scale suppliers of MX.
5. The countries whose utilities use MOX are currently Germany, France, Belgium and Switzerland though in all cases except France, future MOX use is in doubt or has been banned.
6. The trade in MOX is limited and intimately connected with spent fuel reprocessing. Both of the underlying rationales for reprocessing (the positive value of recovered fissile

material and waste management savings) have disappeared.

7. Some 75 per cent to 80 per cent of the world's spent nuclear fuel is now routinely stored (including all US fuel) and the world trend, for example in Europe as noted by the ADL report, is towards storage and away from reprocessings.

8. All reprocessing and MOX plants are majority government owned and controlled. Utilities at contract time are State owned or are privately regulated monopolies subject to government interference. All international transactions in reprocessing have involved inter-government agreements.

It is against this agreed factual background that the UK seek to persuade the Tribunal that there is a relevant market for MOX fuel and that ordinary commercial competition exists in that market.

Dr MacKerron's analysis demonstrates clearly that the evidence upon which the UK case is based is unreliable and flawed.

THE CHAIRMAN: We will now take a ten-minute break and then we will resume for another hour and a half.

(Short Adjournment)

MR FITZSIMONS: Mr Chairman, Mr MacKerron is Ireland's witness and I am proposing to call him. With your leave I would hope to proceed in the following way. He has submitted his statements in evidence and we would offer the statements as his evidence. I simply wish to introduce him and ask him just two or three general questions, and then hand him over to Mr Plender for cross-examination, if that is in order.

THE CHAIRMAN: Yes. Please proceed.

MR GORDON MacKERRON: Called

THE CHAIRMAN: Dr MacKerron, before you testify, I presume you have testified before in international arbitrations. This is not a national court, we do not administer an oath, but we expect a witness to tell the whole truth, and to be scrupulous and honourable.

A. I understand, sir.

EXAMINED BY MR FITZSIMONS

A. Mr MacKerron, I think just at the outset I was referring to Dr MacKerron but you do not hold a doctorate. If you could outline briefly to the members of the Tribunal your background and qualifications and experience.

A. Thank you, Mr Fitzsimons. Good afternoon. I hold a Bachelors and a Masters Degree in Economics,

the former from Cambridge and the latter from the University of Sussex. I have worked for about 25 years in economic and policy issues concerned with energy, and I have specialised for most of that time in issues of Nuclear Power. I have been an academic for much of that time and then more recently a consultant. I have done a number of consulting jobs and advisory jobs that relate to nuclear power for about the last 12 to 15 years. It may be worth my mentioning just a few of those by way of illustration.

I was an adviser to the European Court of Auditors on questions of nuclear fusion in the early 1990s. I have been an adviser to the British Radioactive Waste Management Advisory Committee which advises the Minister on such matters on issues of decommissioning. I have on several occasions acted as a special adviser to the House of Commons in the UK Trade and Industry Select Committee when it has been involved in energy and nuclear inquiries. I have also been an invited witness before that and other committees on related matters. For six months in the latter part of last year, from June to December, I became a temporary civil servant. I joined as a senior member of a team that was working for the Cabinet Office in the UK that produced a report called the Energy Review, a report to Government on future energy prospects, and one of the issues in which I specialised while working for the UK Government was in fact nuclear power. More recently I have just completed a contract with colleagues at my company NERA for the British Department of Trade and Industry scoping out in relation to the future of a White Paper on energy in the UK some of the issues which the Government might wish to consider in relation to security of energy supply. So I have had substantial experience in and around the public sector, especially in relation to nuclear power as well as having studied the issue for some time.

Q. You mentioned working with your colleagues in NERA. Could you explain to the Tribunal what work you do now in terms of earning a livelihood and what NERA is?

A. NERA is a firm of private economic consultants which gives economic advice and economic analysis to clients from both the private and the public sector. I have been working for NERA as an employee of NERA for nearly two years, but of that two years I have for six months been seconded to the UK Government to work on its energy review, and NERA is a firm of private economic consultants.

Q. You have prepared two reports that have been submitted under your name to this Tribunal.

A. I confirm that.

Q. Those reports are in evidence. Just to deal briefly with the two main themes in them, firstly the question of the relevant market, can you inform the Tribunal briefly - you have already set it out in

your reports - what your view is as to the relevant market for MOX?

A. My view is that the relevant market, if it can be called market, in which MOX fuel exists in practical terms is the market for managing separated plutonium. It is the contention of the UK witnesses that MOX is part of the market for general nuclear fuel. While of course it is true that MOX is a form of nuclear fuel and can be used in place of standard uranium fuel the practicalities of the market place are that they do not compete with each other, they are in separate markets. So the relevant market for MOX is for managing separated plutonium, not for nuclear fuel in general.

Q. Is there competition in that market?

A. In the market for MOX there is not competition, largely because in the first place there are only two significant companies in the "market", and secondly because of the particular characteristics of the commodity and in order to get MOX one must have separated plutonium, and separated plutonium is extremely difficult substance to move across the international borders that it would be required to move for this purpose. It is in practical terms extremely difficult to envisage a situation in which the customers who currently hold separated plutonium either in France or the UK could feasibly move that plutonium in order to create some competition between the two predominant suppliers of MOX and therefore in my view there is no serious competition between the relevant firms that produce MOX in the western world.

Q. Just in case we are not clear on what separated plutonium is or rather the form that it is in, could you please indicate what its form makes it a dangerous substance to move?

A. The form in which plutonium is stored after reprocessing is the form of plutonium oxide powder. It is not technically a difficult substance to move but it represents an extremely high proliferation risk in the form of oxide powder and as such there are substantial international obstacles to creating a new set of transport movements in such powder, largely because of the proliferation risk and the very severe political difficulties to which that gives rise were it attempted in any serious way to transport such separate plutonium in this case between the UK and France.

Q. You have read the redacted versions of the PA and ADL reports.

A. I have.

Q. On the basis of your reading of them and noting the omissions contained in the text, is it your opinion in so far as you can form an opinion that there is any prejudice to BNFL or there would be any prejudice to BNFL via the release of that information?

A. My view is that there would be no significant prejudice to BNFL from the release of most of the

information. I have to say that there is detailed contract information, especially in the ADL report, which it seems to me is not necessary to perform an assessment of the justification of the plant which it would be not necessary to have revealed, but there are many other pieces of data that have been removed from both PAS and ADL which it would be necessary to have in order to create a proper scrutiny of justification and without which such cannot be done.

Q. The information you have just referred to, is that customer related information?

A. It is principally customer related information. It is to do with the contracts that exist between customers and BNFL.

Q. Just three unrelated questions. I think you have analysed the executive summary and chapter 1 of the ADL reports?

A. That is correct.

Q. And you have noted the examples of data removed from those texts?

A. Yes, I have.

Q. Did you perform an exercise classifying in so far as you could the probably sources of those items of information?

A. Yes, I have done so. I should of course say that in some instances it is not possible to be certain from where the information originates, but in other cases it seems fairly clear.

Q. I think we have a document that we will make copies of itemising the results of this inquiry and I will bring Mr MacKerron through it now. What were the results of your inquiry?

A. We tried to classify the information that has been removed in three main categories, I think these have already been referred to briefly. The first that seemed to be the opinion of the consultants, in this case ADL. The second was information that clearly derived from third parties, and thirdly information that derived clearly from BNFL. We found approximately 80 cases of information removed from the executive summary in chapter 1 of the ADL report, roughly, I cannot swear that it might not be 81 or 79, but it is broadly speaking about 80. As far as we can judge about 27 of those pieces of information constitute the opinion of the consultant. I describe them as the opinion of the consultant because they are usually described in language such as 'we believe' or 'our estimate is'. Seven pieces of information appear to have come from third parties, usually as a result of interviews conducted by ADL, and some 28 pieces of information appear to come directly from BNFL. That then leaves about 18 pieces of information where it is not really clear as to the original source. It could be an opinion or a third party, it could be a third party or BNFL; or thirdly it could be an opinion or BNFL. But if we

exclude all the categories where we thought BNFL was or might have been the source of information out of the 80 there are 38 pieces of information removed where it seems to be the case that the source of the information, opinion, fact or whatever was not BNFL. But we cannot be authoritative about that, but we think it is probably not far wrong.

Q. We will make Mr MacKerron's memo available to the Tribunal and to Mr Plender. Just two final disassociated questions. In the United States is there any commercial reprocessing carried out?

A. No, there is not.

Q. In appendix J of your second report you refer to the Charpin report in France. What is the Charpin report and what is its opinion?

A. The Charpin report was commissioned by the Prime Minister in France and reported to him in I believe round about May 2000. In particular it was charged with looking at the economic consequences of the long term decision in France to go down the route of reprocessing spent fuel and subsequently using the separated plutonium from it in MOX. The assessment was broadly speaking that it had been a significant net cost to the French electricity industry and consumer to have gone down that route rather than to have done the alternative which was simply to store the spent fuel pending a solution to the long term waste problem which is essentially the same problem whether you reprocess or not.

MT FITZSIMONS: That finishes my examination of the witness.

CROSS-EXAMINED BY MR PLENDER

Q. Mr MacKerron, you stated at the beginning of your first report "I understand that my duty in providing this report is to the Tribunal and I confirm that I and all those involved in the production of this report have complied with that duty". Is that correct?

A. That is correct.

Q. Is there anything that you now wish to add to or detract from your report?

A. No, there is not, sir.

Q. You acknowledge the assistance of others. May we take it that despite that the whole of the report is yours and anything said in it is at l;east checked by yourself?

A. Yes, that is fair.

Q. And you are not aware of any significant omissions from it?

A. I am not quite sure I understand the sense of your question?

Q. Then I shall lead to it in another way. In your second report you state the UK team of specialists is lacking in independent expertise and in particular do you give it as your opinion that Dr Varley is not

independent because in a period ending in 1988 he worked for BNFL, did you not?

A. I did.

Q. Do you hold yourself out by comparison as independent?

A. I do.

Q. Is it the case that you have been involved for a number of years in campaigns against the MOX plant?

A. No, it is not the case that I have been involved in campaigns against the MOX plant.

Q. You wrote, did you not, tracts or material for the following organisations: The Consortium of Opposing Local Authorities; Friends of the Earth; Greenpeace; The National Steering Committee of Nuclear Free Local Authorities; and the Irish and UK Annual Meeting of Nuclear Hazards?

A. I have written reports or given conference papers to audiences that you correctly represent. In all cases they represent my independent opinion and in no cases was the material that I produced, sometimes under contract to those organisations, in any way influenced by their own agenda, and I repeat I have not been involved in campaigns against the MOX plant, I have been involved in providing analyses which has cast doubt on whether the MOX plant was an economically justified investment. I should perhaps also say that in the course of my career I have received substantially more funding from BNFL and from British Energy or its predecessors than I have from all the organisations which you have mentioned.

Q. I don't expect you get paid very much from Friends of the Earth or Greenpeace. We shall hand to you in a moment copies of your publications for these organisations. My question to you is in these reports did you not express your opposition to the MOX plant to reprocessing and to deep storage at the Nirex site on economic or other grounds?

A. I have certainly expressed the view that there are strong economic arguments against reprocessing as practised in the UK, against MOX, and against particular proposals that Nirex made.

Q. And you did so in support of the organisations which I have mentioned and which I have for brevity characterised as campaigning organisations?

A. I did not do so in support of those organisations. I provided texts which those organisations commissioned me to do but which I repeat my texts were not influenced by the particular campaigns that those organisations were undertaking.

Q. Not only that but you were actively involved in the public consultation which is the subject of these proceedings and submitted a series of reports to the public consultations on behalf of Friends of the Earth?

A. I believe only one was used by Friends of the Earth, but yes, you are generally speaking correct.

Q. You submitted three in fact?

A. I am sure I did not submit three on behalf of Friends of the Earth but I am not sure that is a material point.

Q. You were involved in this very campaign or in this very public consultation?

A. I was involved in the public consultation, absolutely, which is not it seems to me the same thing as a campaign.

Q. Did you not think when you held yourself out as an independent expert in relation to these proceedings that you should at least mention to the Tribunal that you had actually been involved in the very consultation in question?

A. With hindsight if it is seen by the Tribunal as an omission I would apologise and say that I would have been perfectly willing to do so. It is clear to the Tribunal now that I was. There was no intention in not so doing to mislead in the same sense that I did not equally say that a greater part of funding in my career has been received from BNFL and British Energy.

Q. Do you have before you copies of your own report?

A. The reports to this Tribunal?

Q. That you wrote, yes?

A. The reports to the tribunal, I do, yes.

Q. Would you like to look at the first one, footnote 91 on page 58.

A. Yes.

Q. You refer to a publication there by Mr Sadnicki and others. It is identified as "Sadnicki et al". Who was the al, please?

A. The al included myself and Fred Barker.

Q. It is not characteristic of you when you are referring to your works , and indeed when referring to this particular work, to omit mention of your own name, is it?

A. I have no clear recollection of whether I habitually omit my own name, but there is an academic tradition that if there are more than two names as authors of a report it is very common to refer only to the first name. You may see in the same page footnote 90 refers to two authors and footnote 92 which has several authors also says N Bunn et al.

Q. We will show you your own publications now, we will send copies to the Tribunal and one copy to Ireland and I shall refer you to a number of places where you refer to the work by "Sadnicki and

MacKerron", mentioning your own name. On this one occasion you have missed out your own name. See for example tab 2 page 73 note 145.

MR FITZSIMONS: Mr Chairman, I wonder if I could intervene and make the point that this huge file with which we have just been furnished clearly was not prepared overnight, and clearly required considerable research. We have operated on the basis that all documentary evidence to be produced to this Tribunal had to be exchanged in advance. Now having said that these documents are in now and I cannot object to them being dealt with, but I would like the Tribunal to note the way that this has been done. Any additional pieces of paper that we intended to rely upon were sent to the United Kingdom in advance in accordance with the clear understanding between the parties. It appears that the United kingdom is not playing the game in the same way and has plotted this little production for quite some time having regard to its volume, and I think it is most unfortunate and I would like to add that as a further factor for the Tribunal to take into account when considering the quality of the evidence in this case at the end of the day.

THE CHAIRMAN: The Tribunal will take note of your remark.

MR FITZSIMONS; Thank you, Mr Chairman.

MR PLENDER: Mr Chairman, can I simply respond to Mr Fitzsimons' comment? It is wholly misplaced. Mr MacKerron is the author of these reports. There is no reason why he should be taken by surprise. However, it is part of the United Kingdom's case, which I shall now put to Mr MacKerron, that here are materials that he ought to have disclosed and has failed to disclose in breach of his duty. To put them to him in advance would clearly rob me of the possibility of making that point.

Mr MacKerron, there are many occasions in your publications when you do refer to yourself by name, I have given you one, if you would like to check others, I will simply give further references. At page 1, note 3 you even give your name as a joint author of a letter of *The Guardian*. Page 12, note 14, tab 2, page 55, note 115, tab 2, page 54, note 113, tab 2, page 53, note 119, tab 2, page 22, note 29. On this occasion alone, where you were actually involved in the consultation, you made no mention of the consultation and I suggest to you you took the care to ensure that you did not mention your own name when referring to one of your previous publications.

A. I am afraid that I disagree with that rather strongly. The implication that I have somehow acted with conscious deceit or in deliberate breach of trust of my duty to this Tribunal I regard as unfounded. If the Tribunal should find that that is the case, I would , of course, respect their findings. I have not sought deliberately to hide my publications. The Irish Government in choosing to retain me for this

purpose was well aware of these previous publications or, perhaps, my expertise would not have been visible or worth having. I have in no way attempted to mislead, conceal or disguise my previous work that I have conducted in this field. It is not part of my intention to in any way to conceal or mislead. It is clear to me that in a proceeding of this kind the UK side would probably have been aware of these publications and I would have been quite unable to conceal them from you or, indeed, the Tribunal should the Tribunal wish to see them.

Q. Now we come to the general tenor of these materials. Look at the new bundle, tab 2, this is the report on behalf of Friends of the Earth and others. It expresses, if I may quote your language, "growing concern about BNFL's operations at the Sellafield site, the levels of radioactive emissions from Thorp, the rationale for continued reprocessing of spent fuel, the future of plutonium stock piles and the planned opening of the new facility to manufacture mixed oxide fuels". Those are your views, are they not?

A. I am sorry, I am not clear that each of those statements represents a view. Some of them represent a concern on economic grounds that certain decisions that had either been taken or might be taken would not be economically justified. They did not represent a campaign, as you have on several occasions expressed the view, in relation to these particular decisions.

Q. But the language of yours which I quoted "with growing concern at [among other things] the planned operation of the new facility to manufacture mixed oxide fuels". Did you have concern at the planned opening of the new facility to manufacture mixed oxide fuels?

A. I had concern on economic grounds. I am not sure exactly what was in my mind, but I am sure that the phrase "growing concern" was meant to reflect concern that I was reporting among others, as well as myself. Perhaps, if I may, I would add one thing to this general exchange. Despite these publications, whatever interpretation that you or others may wish to put upon them, one of the other pieces of consultancy that I have done in the recent past, subsequent, I think, all the publications you have in this folder, was to be invited by the British Government to be a member of a steering group of the Quinquennial Review of the United Kingdom Atomic Energy Authority, a steering group which had previously been confined to civil servants, but which for the first time, I think in early 2000, was opened to outsiders, and I was invited to become an active member and participated fully in that particular steering group.

Q. I am coming to what you say about your work with the British Government in due course. Now, let us look at tab 4 of the present bundle: "What are the prospects for nuclear power in the UK?" This is a paper

presented to the Nuclear Free Local Authorities, Irish and UK, Annual Meeting of Nuclear Hazards in Manchester. You express the opinion, do you not, on page 3, under the second heading under "Waste Management" that it would be desirable to defer a decision on whether or not to allow the MOX plant to open until a more thorough review of separated plutonium management policy takes place.

A. Yes, I do not doubt that I have said that. I have not found the point, but I would not deny that.

Q. I was reading from the second paragraph under the heading "Waste Management", the last three lines.

A. Yes, that is an opinion that I expressed.

Q. You were aware, no doubt, that delay would itself affect the economic prospects of the MOX plant. Indeed, that is the point that you yourself made to the Public Consultation in 1999, was it not?

A. It is probably the case that a delay might have affected the economic prospects, but I never imagined that the decision whether or not to open the MOX plant was entirely to be taken on relatively narrow economic considerations. In any case, it is not necessarily the case that just because a particular course of action might have an economic impact, it is by that same fact in itself undesirable if there are other reasons why it would be undesirable, as I held then and still hold now, to have a full public discussion of the merits of the plant in advance of the decision being taken.

Q. If you would, please, go to tab 8 of the new bundle, this was a paper that you wrote for Greenpeace in March 2000. By this date the justification process for the MOX plant had reached the stage at which the central issue was the economic justification for the manufacture of MOX fuel. There was in force at that date, was there not, a draft report from the Nuclear Energy Agency of the OECD relevant to reprocessing?

A. I believe that to be true.

Q. And you summarise the report, which is a long one, very concisely and accurately in paragraph 7. You say that the NEA argues - perhaps I would have preferred the word conclude - that the radiological impact to the general public from mining and milling and reprocessing tend to compensate each other.

A. Yes.

Q. This was a view which in your paper published by Greenpeace you challenged, paragraph 31. You contended that the NEA report was flawed.

A. I did.

Q. What I have put to you about these publications is not, of course, to suggest that there is anything remotely to be criticised in engaging yourself with campaigning organisations on one side or other of

the debate. But that your engagement consistently with such organisations on one side of the debate is not consistent with the degree of independence that you claim in your report.

A. I would maintain, by contrast, that I have had a consistent view of the economics of nuclear power in general and, in particular, some issues at the back end of the fuel cycle, which I have consistently expressed wherever it seemed appropriate to do so. I would repeat, and I am sorry to labour the point, that I have not been involved in campaigning in relation to any particular issue either before this court or in relation to nuclear power in general.

Q. Can we agree on a form of words which expresses what I take to be the obvious? I suggest this, that you have on a number of occasions written or published written material, published for organisations, which are campaigning organisations, opposed to reprocessing and you, indeed, are yourself opposed to reprocessing, as you say, on economic grounds.

A. I am not opposed to reprocessing on economic grounds as a matter of principle. As a matter of analysis of reprocessing, I have never found a convincing economic case in its favour and it is possible that I could find an economic case in its favour in the future. So far I have never done so.

Q. Let me come to your work for the British Government, in particular the Performance and Innovation Unit of which we have heard a great deal. The Attorney General said this morning that you acted as adviser to the British Government on nuclear matters. Is that the way in which you would express it?

A. I have acted as adviser to the British Government on nuclear matters on a number of occasions, some of which I am not at liberty to reveal at present, but on two occasions, both of which have now been mentioned, I was a member of a team that dealt with the Energy Review and specialised among other things in nuclear power. As I just said, I was a member of a steering group of the Quinquennial Review of the United Kingdom Atomic Energy Authority. I think those do constitute advice, sometimes on nuclear matters, yes.

Q. As a member of the group that worked on the Performance and Innovation Unit report, you were, were you not, one of 23, assisted by 20 others, who were engaged in compiling a report on the basis of some 400 representations from interested organisations?

A. These are matters of great detail. There were certainly of the order of 400 representations. The team that prepared the Energy Review roughly speaking consisted of eight full-time people, I am not sure where 23 comes from, but I am not sure whether it is material.

Q. It comes from annex 3 to the report which the Tribunal has in bundle 7 at page 108 and it lists 23 people including your name.

A. It may well be that it lists 23 people. I would like you to take it on my immediate authority that approximately eight people were mainly involved in the full-time production of the report.

Q. Out of the 400 organisations that made representations, many were commercial, including BNFL, and many were, to use the term that you dislike, campaigning organisations or organisations with an interest in environmental matters comprising private subscribers, including Gnreepeace, Cumbrians Opposed to Radioactive Environment, Nuclear Free Local Authorities, Bringing Planet Criminals to Justice - who may well be in favour of reprocessing - the Welsh Anti-Nuclear Alliance, Friends of the Earth and many others.

A. Yes, that is true.

Q. The report itself made clear that the purpose was to be inclusive and consultative, did it not?

A. Yes, it did, I am sure.

Q. What I suggest is that your participation in the PIU report tells us no more about your independence on these matters than does the participation of Friends of the Earth. Both have, no doubt, convictions thought out and concluded, but they do not show us a degree of independence.

A. I would like to correct actually at least the implication of your last question. In working for the British Government as a civil servant for six months as part of the Energy Review team, I was required, and I believe discharged my duty, to do exactly what it was that the Review Team was mandated to do. The fact that there were other organisations, such as Friends of the Earth and others, Criminals, Climate Change, I am not sure, who chose to make submissions to that Review seems to be an entirely separate question that has nothing obvious to do with my employment by the British Government as part of the Energy Review Team.

Q. Did it not occur to you, perhaps, that the British Government might want in this particular report to be assisted by a group of people who were representative of a spectrum of opinion?

A. I cannot speculate exactly on why the particular team was assembled as it was, no, I am sorry, it is not possible for me to speculate on that.

Q. You stated, if I took your words correctly, when giving your evidence in chief, that without the excised information (I took the words down) "a scrutiny cannot be done". You may, if you wish, like to check your words with your own report. In paragraph 1.1.1 of your second report, you state, "Ireland is unable to assess whether there was an economic justification to the SNP unless it has access to the materials sought".

A. Yes, that is correct.

Q. And you make the point repeatedly, see, for example, paragraph 3.1.1, "The UK countermemorial", you say, "contains an admission that without the information sought the economic case for the SNP cannot be assessed". Then at appendix B 1.1.1, you say "the United Kingdom has admitted that without the information sought, the economic case for the SNP cannot be assessed". That is your view?

A. It cannot be assessed independently of those parties who have been allowed to see the relevant data, yes.

MR GRIFFITH: Dr MacKerron, could you just give us another ten seconds between answering the question or ...

THE CHAIRMAN: Yes, so we can find the documents.

MR PLENDER: I shall certainly do that.

THE CHAIRMAN: The problem is that the Tribunal would like to follow the documents, so if you could pause.

MR PLENDER: Certainly, Mr Chairman, I was not intending that necessarily you would have to keep looking backwards and forwards, but I shall go slower so that you can do so.

(To the witness) Your case is not that Ireland could have put up a better case, if it had had access to the excised material, you say that Ireland is unable to assess whether there is an economic justification.

A. That is true, yes.

Q. Would you now like to look at what you said to the PA consultation? Look at tab 6, page 1. Here you expressed your view at B. You stated "The provisional view of Ministers that the balance of argument was in favour of economic justification appears to be incorrect. The confidence which Ministers have in the evidence so far assembled should be very limited. We are able to state these conclusions with complete confidence".

A. I am sorry, I said "confidence" not "complete confidence".

Q. I am sorry, "with confidence". "We are able to state these conclusions with confidence despite the fact that this most recent extension of the consultation process had not removed the overall criticism that insufficient information is being placed in the public domain to render the consultation meaningful".

A. Yes, that is obviously true.

Q. How do you reconcile your statement that Ireland is unable to assess whether there is economic justification with your conclusions stated in 1999, "We are able to state these conclusions with confidence"?

A. There has been a change in 1999. In 1999 we had the PA report, which, in my opinion, was a not very adequate report and we subsequently had further reports. It is clearly the case that Ireland will have

great difficulty in assessing the argument without the full requisite data. You should be aware that the conclusion actually says that the provisional view of Ministers is that the balance of the argument is in favour of economic justification appears to be incorrect. There is no statement that it is definitely incorrect. On the basis of the information then available, this seemed to me to be a reasonable conclusion.

Q. Is not the position that in 1999 you reported to the PA Consultation not only that you could reach your conclusion with confidence, but also that you could, on the basis of the published data available, construct your own economic case?

A. Yes, I think that it is fair to say in this respect that it matters a great deal whether we are going to consider all the costs or not. If one considers all the costs as sunk that have been incurred so far, some £470 million or so, and allows them into the analysis, then it is absolutely plain that the plant is not justified because the net present value of the future streams of income minus costs are on the various consultants' reports less than that. A great deals depends - and I have to confess that I cannot remember at the moment, but I think that it probably is the case that part of the argument in this report to which you now refer took the argument that it was appropriate to consider those sunk costs for the purpose of justification, though possibly not for economic analysis. But I am sorry you have the advantage over me in that I cannot recollect everything that I said at the time, but I cannot at the moment guarantee that I think it likely that it was on the basis of the assumption that one should have concluded the sunk costs at that moment as well.

Q. Again, you will be aware that the argument that sunk costs ought to have been taken into account was advanced by Friends of the Earth and that argument failed in the High Court?

A. I am certainly aware of that, yes.

Q. So we can leave at the moment sunk costs aside, but look, I think, at your paragraph (i) on page 2. You say, "We have constructed a business model of SNP following the PA methodology. Our analysis shows that the price that BNFL must charge to achieve the breakeven case is in the range of £2,052 per kilogramme of MOX to £689 per kilogramme of MOX". Then you say "Such prices are very high, significantly higher than the prices, around £1,850 per kilogramme of MOX, that COGEMA have been charging the German utilities. The utilities have been unhappy at such prices and it, therefore, seems implausible that BNFL will be able to secure sufficient contracts to breakeven even at the price range estimated in this report. If BNFL is then forced to drop prices, it will need to secure a large percentage of the reference case just to break even".

A. I did follow the text, but, unfortunately, page 2 of my particular volume here is blank, but I do think that I can follow it.

Q. You can have my copy and check what you wrote.

A. Thank you. Yes, I have now read it.

Q. You were on the basis of published information to construct your own business case. Were you aware that Ireland had made a submission to the Consultation?

A. I was not aware at that time that Ireland had made such a submission, no.

Q. You are now aware that Ireland did make a submission?

A. I am aware that a submission was made by Ireland, yes.

Q. And we find that, Mr Chairman, in the annexes to Ireland's memorial at page 140. Ireland refers to the fact that there were in place firm contracts for only 6.7 per cent of the reference case, with letters of intent or reservations for 11 per cent. It doubts in those circumstances that further sufficient orders will be forthcoming. You, indeed, make the same point at paragraph 11, page 553 of the bundle that I have put before you.

MR GRIFFITH: Excuse me, did you say page 140?

MR PLENDER: I said page 140 of the annexes to Ireland's memorial. I should check on that.

MR BRADY: It is in divider 4 of the booklet that I referred to this morning.

MR PLENDER: It is page 140 at the top of the page: "To cover future costs BNFL says that the MOX plant must operate continuously at 40 per cent of the reference case output which had been used in analysis by PA Consultancy Group. However, it would appear that firm contracts are in place for only 6.7 per cent of such output with letters of intent or reservations for a further 11 per cent".

Ireland makes that point and Mr MacKerron makes the same point, referring to the same statistics at page 553 of the bundle that we have seen today. Paragraph 11, "In addition to the 6.7 per cent contracted, DETR also states that 11 per cent is covered by less than intended reserved capacity and 25.7 per cent - there is a total of 43.4 per cent as under offer or better, the remaining 56.6 per cent of the reference case is defined as forecast.

Mr MacKerron, is it fair to say that you were both making the point, you and Ireland, as you say independently, were making the point that by reference to published data an insufficient proportion of contracts were secured in your view to warrant confidence in the economic justification for the plant?

A. That would be broadly true, yes.

Q. And the data, that is to say the proportion of the reference case covered by firm contracts by letters of intent and those not covered was in the public domain.

A. Indeed, it was, yes.

Q. That is so because the materials that were published in connection with various consultations included, but were not confined to the PA and ADL reports?

A. I am sorry, at that time the ADL report had not been commissioned or published.

Q. Well, at the period in question the material published was a PA report, together with other materials.

A. Yes, that is right.

Q. And later the ADL report, together with other materials.

A. Yes.

Q. There was published, in particular, a consultative document by the United Kingdom which gave the very data on which you relied?

A. Yes, indeed.

Q. We have this and Ireland has this, Mr Chairman, but I think that you do not yet have it, but should have it. May I simply give you for the moment a page reference?

A. If I can assist. The document, Mr Chair, is in Book 3 of Ireland's bundle of authorities at tab 21, a consultation on the economic case for the Sellafield MOX plant and at the final page of that document are the very figures which are referred to. Tab 21, bundle 3 of Ireland's authorities.

MR PLENDER: Mr Chairman, I am reluctant to have you put out these documents. I have really made my point and Mr MacKerron has agreed that these data were published. They were put in the public domain. The materials upon which interested partes could and did rely included, but were not confined, to the PA Report; and particular statistics upon which both he and Ireland relied are those at tab 21 of Ireland's new bundle, published by the Department for the Environment, Transport and the Regions.

May I take you to another point. Your evidence to this Tribunal is, is it not, that BNFL's customers are captive. You say that as a practical matter they cannot return the plutonium to their customers or make use of other MOX fabrication facilities.

A. That seems to me to be practically the case at present, yes.

Q. I was quoting - Mr Chairman, I do not ask you to look it up unless you wish to - Mr MacKerron's words from his first report, paragraph 1.3.19. I shall give some references simply for your note, gentlemen. Paragraph 1.3.24 and in the second report 1.6.1.

It may be helpful, particularly to Mr MacKerron, if I now read his words to him. "Customers,

therefore, have only the current choice between buying MOX and having BNFL continue to store their separated plutonium. In such circumstances, there is no competition at all in the market for managing separate plutonium. Reprocessing contracts bind their customers to have their fuel reprocessed and are watertight. This means that the customer's plutonium is essentially held captive to the reprocessor; physically once the reprocessing has taken place and financially before it takes place. In other words, BNFL has a complete monopoly in the market for managing separated plutonium among existing reprocessors".

Those were your words. Do you adhere to that view?

A. Yes, I adhere to the view because of the difficulty, indeed current impossibility, of transporting the separated plutonium from the Sellafield site to any other location outside the UK and very probably within the UK itself and, for those reasons, essentially, those people who hold the separated plutonium at Sellafield are captive to BNFL.

Q. Would you now look at your publication at tab 9 of the bundle that I have given you today? I would like you to read particularly - I shall read to you - parts of paragraphs 22 and 24. The context is - as is your heading - "Customer alternatives to MOX manufacture in the SNP". You begin by saying that the obvious alternative is storage and you point out or contend that BNFL has a certain market power in respect of storage. Then you continue at the end of paragraph 22, that "it is worth pointing out, however, that the degree to which BNFL uses these factors to seek to persuade customers to sign SNP contracts is likely to be tempered by its current concern not to cause a further deterioration in customer relations". Unless you ask me to do so, I shall not read paragraph 23, but go on to paragraph 24. "It is clear that a range of alternatives are in principle open to customers either separately or in combination. These are as follows: (1) plutonium immobilisation. Several approaches to managing plutonium as a waste are not emerging as serious options. Two of the present authors have recently proposed that the SNP could be used to condition separated plutonium into a ceramic waste form known as low spec MOX. This has the attraction of presenting an alternative use for the SNP, so that, even if the MOX fuel route is not pursued, the sunk capital invested in the SNP is not wasted. A similar approach to immobilisation but involving a purpose-built plant is being actively developed in the US." The second possibility. "The return of plutonium to customers in separated form. This alternative was practised prior to the furore surrounding a sea shipment of separated plutonium from France to Japan in 1992-3." The third option. "Use of other MOX fabrication facilities. These include the plant at Dessel in Belgium and at Katerash and Marcule in France. The Marcule

plant has the largest capacity and there are plans to extend this within the next few years. With respect to plutonium not yet separated, there is, of course, a fourth possibility, renegotiate reprocessing contracts. This would enable the scale of the plutonium management problem to be reduced significantly. In fact, it is estimated that only around 30 per cent of the spent fuel subject to contract between BNFL and overseas customers has been reprocessed to date". You continue, "Given recent events, it is anticipated that overseas customers will be actively reviewing these alternatives".

I thought it fair to read the whole of that to you. My question is this. When it suited the case that you are arguing to contend that there were a number of alternatives, including the use of other MOX fabrication facilities, that is what you said. Now that it suits your case to argue that there are no alternatives, but customers are essentially held captive, that is what you say.

A. No, I do not agree with that interpretation. I think that it is important to note immediately two things. Paragraph 24 says that it is clear that a range of alternatives are in principle open to customers and I subsequently in paragraph 25 over the page say that it is anticipated that overseas customers will be actively reviewing these alternatives. In relation to the immobilisation alternative, which was put first, because it seemed at the time the most attractive, the US Administration, since it has changed Presidency under Mr Bush, has now abandoned its earlier research programme on immobilisation technology and that route is now less likely to be taken. It is true that I raised the question of the return of plutonium as separated from all the use of other fabrication facilities, but it was not part of my analysis there to look at the realism of these alternatives, only to suggest that utilities would wish to consider them. There was no statement that I can detect at the moment in those particular paragraphs that says that these are realistic and genuine practical alternatives.

Q. If it were not a realistic or practical alternative, the statement that you make at paragraph 22 would be wrong, would it not? Your conclusion is that BNFL is limited in persuading these customers to sign SNP contracts, because there is a range of alternatives open to the customers. If there were no true alternatives, then your conclusion would have no basis?

A. No, I am afraid that I will not accept that. At that point in the text, the argument is about whether or not it is likely that the customers of BNFL will be able to continue the existing practice of storing the separated plutonium on the site and, clearly, that is in practice an attractive alternative for those customers in the short term. I then say, I think realistically, that, although BNFL has considerable market power in this area, it will not wish to exploit it too far, because it wishes to obtain business from the same customers in this or other areas in the future. That is one point. Separately I go on to analyse with colleagues at

the time other alternatives that might occur to utilities should this alternative - and the preferred, as I would see it - of continued storage prove to be difficult in the slightly longer term.

THE CHAIRMAN: It is 6.30. We have been going since 9 o'clock. I am afraid that the Tribunal does not have the endurance of this very impressive range of counsel on both sides. Could you conclude this particular line of enquiry and then we will stop?

MR PLENDER: Mr Chairman, I had only one last question on this chapter.

Is it then a fair reading of your paragraph 24 that you say that there is a range of alternatives in principle open, one of the alternatives in principle open is the use of other MOX fabrication facilities but, although that is in principle open, it is illusory because there is no realistic prospect of it happening?

A. That is fair and it is the same view which I hold now, and it is this: utilities would be very interested, if it were feasible, to use other fabrication facilities for the plutonium that has been separated at Sellafield, but it is not realistic for them to suppose that they can. I note that what I say here in paragraph 25, three lines from the bottom, is that it is plausible that utilities could decide to seek to implement any one or a combination of these alternatives, but I give no indication at that point as to their feasibility. Had I been asked at the time, I would have said that the feasibility of using these alternative fabrication facilities was slight, but I was merely setting out what the possible remotely feasible alternatives might be. I do not see any inconsistency between the statement made then and the view that I take now.

MR PLENDER: Gentlemen, I shall leave it to the Tribunal to determine whether there is any consistency or inconsistency between those statements and continue on a different topic tomorrow.

THE CHAIRMAN: Thank you, Mr Plender. May I ask for the purposes of planning our schedule tomorrow, could you estimate how long your cross-examination will take?

MR PLENDER: I am now one-third of the way through, and have got one third of the questions through in about 45 minutes. I am proceeding fast, but I am conscious of proceeding fast at the expense of members of the Tribunal. If I go a little slower I will do it in an hour and a half or so tomorrow morning,

THE CHAIRMAN: Thank you. Tomorrow morning we will commence with the continuation of the cross-examination and then proceed to redirect and at that point Ireland will conclude the presentation of its case, and then we will continue with the United Kingdom's case. But in view of the problems of balancing the time I propose that we begin at 9 o'clock tomorrow morning and I look forward to seeing you all then.

(Adjourned till tomorrow morning at 9 o'clock)

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