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

and

UNITED KINGDOM OF GREAT BRITAIN
AND NORTHERN IRELANDRespondent

- - - - - - - -

OCTOBER 21ST TO 25TH, 2002

SMALL HALL
THE PEACE PALACE
THE HAGUE
THE NETHERLANDS

- - - - - - - -

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)

- - - - - - - -
DAY TWO
PROCEEDINGS
(REVISED)
- - - - - - - -
Transcribed by Harry Counsell & Co.
(Incorporating Cliffords Inn Arbitration Centre)
Cliffords Inn, Fetter Lane
London EC4A 1LD
Tel: 44 (0) 207 269 0370
Fax: 44 (o) 297 831 2526
- - - - - - - -

A P P E A R A N C E S

FOR IRELAND

Mr David J O'Hagan (Agent for Ireland)
Mr Rory Brady (Attorney General)
Mr Eoghan Fitzsimons (Senior Counsel)
Prof Philippe Sands (Counsel)
Ms Alison MacDonald (Counsel)

Office of the Attorney General & Office of the Chief State Solicitor

Ms Caitlin Ni Fhlaitheartaigh (Advisory Counsel)
Mr Edmund Carroll (Advisory Counsel)
Ms Anjolie Singh (Advisory Counsel)
Ms Christina Loughlin (Deputy Agent)
Ms Anne O'Connell (Solicitor)
Mr Loughlin Deegan (Special Assistant)

Department of the Environment and Local Government

Minister Martin Cullen
Ms Renee Dempsey
Mr Peter Brazel
Ms Emer Connolly
Mr Frank Maughan
Ms Geraldine Tallon
Mr Conor Falvey
Mr Owen Ryan
Mr Dan Pender

FOR UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

Mr Michael Wood (Agent for Unitet Kingdom)
Mr Douglas Wilson (Deputy Agent)
Dr Richard Plender QC (Counsel)
Mr Daniel Bethlehem (Counsel)
Mr Samuel Wordsworth (Counsel)

Advisors

Mr Jonathan Cook (Department Of Trade and Industry)
Mr Brian Oliver (Department for Environment, Food and Rural Affairs)
Mr Jolyon Thomson (Department for Environment, Food and Rural Affairs)
Ms Olivia Richmond (Foreign and Commonwealth Office)

THE CHAIRMAN: Good morning, ladies and gentlemen.

MR PLENDER: Chairman, gentlemen, there is a minor organisational matter to deal with at the outset. We have prepared a bundle of public documents, that is to say all the documents that were issued in connection with the various consultation exercises. We have put them in a separate bundle. We supplied them to the Irish team on Sunday night. We believe that they have seen them all and that, indeed, many of them are already in the court's bundle elsewhere. If there is any objection to my referring to these documents as they are, I do not need them. I can with the assistance of the Irish team refer to those documents that are already in the bundles before the Tribunal and I can simply refer, as a matter of public record, to the existence of documents which have certainly been considered on the Irish side long ago. It appears to us, however, that it would be convenient to the Tribunal to have in one single bundle a compendium of published materials in relation to each consultation. I am entirely in the Tribunal's hands and, if there is objection, I certainly shall not press the point.

MR BRADY: Mr Plender mentioned this matter just before the Tribunal sat and solved a mystery on our side, that at 6 o'clock on Sunday evening this bundle of documents was left in our consultation room in our hotel by Mr Plender, with the message that this bundle was for counsel. It is a bundle of documents prepared by Freshfields solicitors of 65 Fleet Street. We did not know what it was or what it was for. It is a series of public documents. The mystery has now been solved and we have no objection if Mr Plender wishes to use them.

THE CHAIRMAN: If there is no objection, we may proceed with this. May I say, as a matter of good order, that the record in this case has been becoming larger and larger. Much of it is repetitive. It would be very useful if counsel from here on in would arrange to have the judge's folder available for each member of the Tribunal, following the usual practice in this building, which would include only those documents to which reference is going to be made. I think that that would save us from wrestling, as you saw yesterday, with these very enormous binders, many of which are difficult to open, and would facilitate our consultation of the documents.

Please proceed.

MR PLENDER: The point is certainly well taken by counsel. We shall do our best from our side, and I anticipate cooperation on the Irish side, in preparing something in the nature of a core bundle.

I now resume cross-examination of Mr MacKerron.

MR GORDON MacKERRON

Cross-examination by MR PLENDER (continued)

MR PLENDER: Mr MacKerron, do you hold yourself out as an expert on European Community law?

A. No, I do not.

Q. Is either Enese Lieb-Doczy or Martin Siner a specialist in European Community law?

A. No, they are not.

Q. Nevertheless, your witness statement contains a number of statements of what you claim to be European Community law, does it not?

A. If you direct my attention to those, I may well agree with that proposition.

Q. I shall. Take your second statement, paragraph 3.1.1.

A. Could you tell me which of the two witness statements you are referring to?

Q. I said the second at paragraph 3.1.1. The second sentence reads, "The UK Counter Memorial contains an admission that without the information sought the economic case for the SNP cannot be assessed, even though Ireland has a material interest in the environmental consequences of the SNP". I leave aside for the moment the question of whether there is any such admission at all. You continue, "This is contrary to Article 6 of Directive 80/836 EURATOM and Article 6 of Directive 96/269". That expresses your conclusion on a point of European Community law, does it not?

A. It does express a conclusion. It is a conclusion that was informed by legal advice which I took at the time.

Q. Did you take independent legal advice at the time?

A. No, I took advice from the legal team that represents Ireland.

Q. Did you take any steps to check it?

A. I certainly read the relevant articles.

Q. Did you enquire whether Directive 80/836 is even in force?

A. I cannot recollect at the moment whether I did so or not.

Q. Would it surprise you to learn now that it was repealed some two and a half years ago?

A. It would not necessarily surprise me. I admit to being unaware of it.

Q. If it was not even in force at the time that the decision was taken, the decision could not possibly be contrary to it, could it?

A. I am sure that that is a logical consequence of what you say.

Q. There is no such thing as a Directive 96/269, but I take it that that is a typographical error for Directive 96/29, is it?

A. I am prepared to accept your word for that.

Q. Let us assume that Directive 80/836 had been in force and, as you said, you read it and you came to the conclusion that a refusal to supply information would be in the present circumstances contrary to it - is that right?

A. I have read parts of the article, certainly, but, yes, your inference is correct.

Q. Let us find Directive 80/836 EURATOM, which I think is in authorities bundle 1, tab 7, article 6? Will you please take as much time as you need to read that article and then explain to me what are the words in that article which led you to the conclusion that a refusal to disclose information would be contrary to it?

A. For clarification, I think that I am directed to what is described here as page 6 of 18 in the document that has just been handed to me. Could you confirm that?

Q. Yes, page 6 of 18 contains article 6, immediately under title 3, "Limitation of doses for controllable exposures".

A. Yes, my answer to the question is as follows. There is within Article 6 a point (a) on line 2, which says that every activity resulting in an exposure to ionising radiation shall be justified by the advantages which it produces. I used that article in relation to the notion of justification. Justification has been established in prior cases as amounting to net economic advantage which should outweigh any radiological detriment and, although I may have expressed the point very briefly and could have elaborated upon it, it seemed to me that Article 6 was something which in the way in which the UK Government had chosen to conduct itself, whether or not the article was any longer in force, was contrary to that particular provision.

Q. What has that got to do with an obligation, which you say exists, to disclose particular information?

A. Because it is my view, expressed in my evidence, that without the information that has been removed from the documents that were supplied by the United Kingdom, it is not possible for any independent party to assess whether or not the justification has been properly made.

Q. What has Article 6 to do with the possibility for an independent party to assess whether the justification has been properly made?

A. Clearly, Article 6 did not direct itself to the details of this particular case. I used the notion of justification in Article 6 in combination with my knowledge of how this process has proceeded in previous cases in the UK to argue that such justification could not be publicly demonstrated and, of course, Article 6 is in itself limited, but it was one building block in an argument that I was making.

Q. Article 6 sets out the standard or test to be applied by the competent national authority, does it not?

A. I am sorry, I have not read the article sufficiently or the rest of the document to be sure that that is true, but I am prepared to accept on your word that it is so.

Q. Would you like more time to read Article 6?

A. No, I am prepared to accept your statement.

Q. Accepting that statement, if you choose to do so, I put my question again. If it is concerned with the standard to be applied by national authorities, the competent national authorities, what has it to do with the disclosure of information to third parties?

A. It is clearly the case that Article 6 does not talk about disclosure to third parties, but it is also the case that if justification is to have meaning, if it is to be demonstrated publicly, it must involve the provision of sufficient data so that others than those who have conducted the initial justification can make their own assessment of whether or not the justification has, indeed, been made. Of course, those words are not fully in Article 6 because I presume that Article 6 did not try to cover every possible eventuality.

Q. Take as much time as you wish to answer the next question. Is there anything in the whole of this Directive which deals with public consultations?

A. I have not read the whole Directive so I cannot answer that question.

Q. Take as much time as you wish and then answer the question, please.

A. Could I just for clarification please ask how many pages you would wish me to read?

Q. There are about six pages.

A. Mr Chairman, I am prepared to accept, if it is Mr Plender's point, that there may be no such mention of public consultation in Article 6.

Q. Will you accept that there is no reference to public consultation in the whole Directive ?

A. I would equally accept that if you tell me if it is so.

Q. Thank you, the Tribunal can check in its own time, if it wishes.

MR GRIFFITH: No, Mr Plender, I think that you should tell us. We are not here to do homework.

MR PLENDER: I am very happy to make my submission now during cross-examination.

Mr Chairman, gentlemen, there is nothing in this Directive which deals with consultation. This Directive is not concerned with consultation or with the rights of parties to obtain information. This Directive is concerned, among other matters, with the standard that is to be applied by competent authorities in any case in which they authorise the first use of an activity resulting in a radiological discharge. It is, in my submission, wholly irrelevant to the point for which it was cited by

Mr MacKerron. Since I have now answered your question, it will save time and it will certainly save Mr MacKerron time, if I say that I would say exactly the same of Article 6 of the modern Directive on which he relies, which is at tab 8. Sir, as I am breaking away from cross-examination to an explanation of points of law, but only at your invitation ---

MR GRIFFITH: On that point I just wanted to make it clear that it was not for us.

THE CHAIRMAN: Please conduct your cross-examination.

MR PLENDER: Thank you. Would you accept, Mr MacKerron, that the statements about the meaning and effect of these two directives are statements which you are not qualified to make?

A. I do not wholly accept that. Having read the directives and seen the need for justification and having then applied my own knowledge of the justification process as applied in the UK to similar cases in the past it seemed to me a fair inference from my reading of those directives that the test had not been passed. Having said that I entirely accept I am not a specialist in matters of law. I simply read the relevant sentence and combined it with my prior knowledge of justification processes as laid down in the UK courts in their interpretation possibly of these matters and possibly others, but certainly interpretation which I had read and knew about.

Q. I think you may have misunderstood me. Do you understand me when I say that the articles to which you refer are concerned with the standard for justification, they are not concerned with the procedure for consultation.

A. I had not mentioned the word consultation, nor have I raised the issue of consultation in this paragraph. You may wish to do. The question appeared to be about justification. Justification is mentioned in the relevant articles. I have knowledge of justification processes as they have proceeded in the past, where much greater information was placed in the public domain than in the present case. It was my interpretation from the words in the articles and my knowledge of those procedures in the past that justification was something that could not be properly said to have taken place in this case. The issue of consultation is one which you have raised separately from my own evidence and it seems separately from these articles and I am afraid I do not quite understand the purpose of raising the issue of consultation in the context of this paragraph.

Q. No, Mr MacKerron, I did not raise a point contrary to your opinion. Look at paragraph 3.1.1 again. What you say is that the failure to supply the information without the information sought is in contravention of the directive, without the information the economic case cannot be assessed.

A. That is correct.

Q. That is to say assessed by third parties.

A. Assessed by other parties and those who have made it, yes.

Q. Yes.

A. I still do not understand what that has to do with consultation. I am sorry.

Q. The third parties are the parties involving themselves in the consultation.

A. I am sorry, would you explain to me which consultation you are referring to?

Q. I think you know very well there have been five consultations in this case. You have participated yourself in a number of them and have submitted reports in them, have you not?

A. I have, but the point I am trying to make is that there is no statement in paragraph 3.1.1 that independent economic assessment of a particular case involves any formal process of consultation. Of course there has been an extensive process of consultation, but consultation is not an issue which I address at 3.1.1. It is a separate issue from that of whether or not it is possible to conduct an independent economic assessment which does not in itself depend upon any particular consultation exercise being in existence.

Q. You are dealing at paragraph 3.1.1 with disclosure of documents to third parties, are you not?

A. It would clearly be necessary for this assessment to take place for the information that had been removed from these documents to be supplied, yes.

Q. May I put my question again. At paragraph 3.1.1. you are dealing with the disclosure of information to third parties, are you not?

A. I am certainly dealing with that, yes.

Q. And what I put to you was that the texts that you rely upon are not concerned with disclosure of information to third parties?

A. That is true, but the conclusion I reach at paragraph 3.1.1 does not it seems to me depend upon that.

Q. Let us look at another of your views on European Community law: your first report, paragraph 1.3.3. It is a point you make twice. In your first report at paragraph 1.3.3, and if you would like to refresh your memory you also make it in your second report at paragraph 5.2.2, and you give documentary references in a footnote.

A. I am sorry, but can you explain to me how 5.2.2 relates to the subject?

Q. Footnote 58. Paragraph 5.2.2. Let me see if I can summarise your argument in terms which you will accept

as being fair. In these passages you contend, do you not, that European Community law provides support or a basis for the methodology that you adopt in determining whether the redacted information affects commercial confidentiality.

A. I listened to your words carefully and I am not clear whether it is written in European law. What I am asserting is that in practice in a number of court cases conducted within Europe they used particular methodologies that I approved of for the purposes of this particular piece of evidence.

Q. You use the term European Community law, do you not, at 1.3.3, at the end of the first line and the beginning of the second?

A. I do.

Q. Then you refer at paragraph 58 to a Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law.

A. I do, yes.

Q. Is it your understanding that the principles of Community law to which you are here referring have anything to do with the disclosure of confidential information?

A. I am not an expert, as I have said to you before, in the whole range of European Community law; what I know to be the case is that in a number of important cases which have been subject to the European courts a particular test has been used to determine whether or not particular commodities exist in the same market and that is the practical point on which I rely, not on any generalised knowledge of whether the issues to which you refer are covered in detail or at all in general European Community law.

Q. I hope that I can take this shortly. What I put to you is this. Of course, there are some cases in which European courts have to ask what is the relevant market, for example, when determining whether a person or undertaking has abused a dominant position in the market, but that has absolutely nothing to do with the principles of Community law governing confidentiality of information.

A. I would not expect it to relate to that particular topic, because these two things tend to be treated in separate boxes.

Q. Yes, so they do, and, therefore, I suggest to you that your reference to Community law here is misplaced, it is inapt.

A. I do not accept that that is the case. I was simply trying to make the point for the benefit of the Tribunal that there is an established practice in European Community law, when dealing with similar cases and in particular testing whether or not particular commodities belong in the same market, which uses a

test - and the fact that it is well enough established to be frequently used in European law and, indeed, in UK cases, gives it a certain credibility which it otherwise might not have.

Q. Let us look at another passage in which you express a view on European Community law. It is your first report, paragraph 1.2.1. Take your time to read the paragraph.

A. Yes, I have done so.

Q. You say, in particular, that the process of justification involves the need to show the detriment arising from a new source of radioactive emissions are outweighed by the benefits. In the context of this case, what do you understand by a new source of radioactive emissions?

A. Those emissions would arise from the operation of the Sellafield MOX plant.

Q. And in support of that you rely upon the judgment of Mr Justice Potts in a case instituted by Greenpeace. In fact, it is 1994 and not 1993, but I make nothing of that. Is that not correct?

A. If you tell me that it is 1994, I am happy to believe that it is so.

Q. You cite it in support of your conclusion,or view, that the process of justification involves the need to show taht thedetriments arising from a new source of radiation are outweighed by the benefits - the new source of radiation being here the approval of the operation of the Sellafield MOX plant? You rely upon the judgment of Mr Justice Potts in the Greenpeace case?

A. I am relying on the fact that that was a principle which he established, as I understand it, in the case.

Q. He established it in that case in interpreting the Directive which was repealed some two and a half years ago, did he not?

A. I am sure that that is right if you tell me it is so.

Q. Indeed, in the more recent application for judicial review instituted by Friends of the Earth, the Court of Appeal confirmed that the standard set out by Mr Justice Potts does not apply under the new Directive , simply because the terms of the Directive are materially different?

A. Yes, on a point of law I am sure you are correct, but, nevertheless, as a matter of policy, it seems to me that, as I understood it, the UK Government accepted, and the basis upon which especially the first consultation by PA was carried out supports this, that it was important to demonstrate what in the PA report was called substantial net benefit as a means of justifying the practice. You may recollect that in the PA report they defined this substantial benefit as a net present value of at least ?100 million, a substantial net benefit sufficient to outweigh the radiological detriment, such a test was dropped in the second A D Little report. I was reflecting on the fact that this appeared to be a consensus about the process by which justification would take place and the fact that the Potts' judgment was as it was

seemed to me at least relevant to the process that had taken place subsequently for the SNP.

Q. That judgment was certainly relevant for the first consultation process, but it was the interpretation of legislation not in force at the time when the decision to authorise MOX manufacture was taken in this case - is that not so?

A. I accept that it is so, yes.

Q. Do you hold yourself out as an expert on English law?

A. No, I do not.

Q. Nevertheless, in your report you make a number of statements on English law, do you not?

A. I expect that is so, yes.

Q. Let us turn to your second report, beginning at paragraph 4.1. You set out our views here on grounds for commercial confidentiality and you expand them in a half appendix, appendix A2.

A. Yes, I have the reference.

Q. At paragraph A.2.2 you refer to Hull's Book, "Commercial Secrecy". You say that it defines the legitimate scope of commercial confidentiality almost entirely in terms of the protection of inventions, technologies and so forth - do you not?

A. I do, yes.

Q. Let us see if we can find the book. Hull should be in our annexes. It is in annex 6, tab 3, beginning at page 24. It is the blue bundle of authorities.

A. I have a copy, thank you.

Q. Mr MacKerron, is it not clear, if only from looking at the titles of the subsections, that Hull deals with and necessarily acknowledges the existence of confidentiality in respect of such matters as information about customers, financial information, including information about prices, suppliers, products and markets, these being subheadings at pages 77 to 85?

A. Yes, I have not had a chance to read them, but the subheadings certainly correspond to those that you have just read out.

Q. The point may not be so important as one of law but as one of common sense. Do you not accept that commercial confidentiality extends well beyond inventions and techniques and in appropriate cases included information about customers, financial information, information about prices, suppliers, products and markets?

A. Yes, I accept that in all those cases it is possible. I was supporting my own reading of a particular book. In my own evidence I make it quite clear that there is information that is being withheld in the present

process that we are discussing in this Tribunal which I regard as legitimately withheld and some of it covers the categories which you have pointed out. So let me make it clear. I do not make it my case that it is only desirable, necessary and proper to withhold information if it is only about issues of information technology and processes. I merely wish to emphasise that in my reading of that particular book this was given primacy of place, other issues were not. If you want to have my own view, it is that there can be circumstances in which information should be withheld in a number of these other categories.

Q. I am very grateful. I was going to ask you next just about that. May I ask you to confirm what I understood you to have said, that you recognise as commercially confidential certain of the redacted data in this case?

A. Yes, as my evidence makes clear, the details of contracts between BNFL and its customers I regard as something that legitimately should remain confidential and without going through the whole list of data withheld (it is a very long list) there may be a few other cases where I would take the same view. However, my view in general is that the great bulk of the information that has been withheld has not been properly withheld in this case because it would not threaten the legitimate commercial interests of BNFL in relation to this plant.

Q. Thank you, that is a very helpful answer and I shall be asking you about some other categories. Will you please look at paragraph A.2.6 of your second report?

A. Yes.

Q. You say of the United Kingdom's case, "The Counter Memorial basically states that it is up to BNFL to decide what is commercial confidential and what is not". That is your view of a fair reading of the passage of the Counter Memorial to which you refer, is it?

A. It is my overall interpretation and the reference that I give is designed to support it, yes.

Q. Let us look at that paragraph. It is paragraph 5.26 of the United Kingdom's Counter Memorial.

A. Can I please request a copy?

Q. I was about to pass you one, as I will with anything on which I am asking you to comment. The wording of that paragraph is, so far as material, "a detailed review has been carried out in which the public interest in maintaining the commercial confidentiality of information held by BNFL has been balanced against the public interest in disclosure". Now is it your view, coming to this Tribunal as an independent expert, that a fair way of characterising that statement is in your words, "It is up to BNFL to decide what is commercially confidential and what is not"?

A. I accept that that particular passage is not sufficient to establish the statement made and I am sure I should have put in at least one further reference. There are other references. I am sorry, I cannot direct you to them now, but I remember references in the speeches made -- perhaps I could refer you to paragraph ---

Q. Could I just say for the record that a member of the Irish team had just handed to Mr MacKerron a note from which he will now read.

A. Thank you for that clarification. In paragraph 5.2.7 of the same memorial, in fact it is the same document which we already have open and on the same page, we read in (i)(c) that the redacted information talks about BNFL not consenting to its disclosure, and it may well be that the reference in the footnote was perhaps mistakenly paragraph 5.2.6 and should have been 5.2.7. 5.2.7 does suggest to me that BNFL has had a very strong influence in the question of whether or not information should be withheld and indeed my recollection from one of the Irish counsel's speeches yesterday was precisely to this effect, and there may be further references which I do not have with me at the moment.

Q. Mr MacKerron, you must not take Irish counsel's speeches to this Tribunal as evidence.

A. I shall ignore that point, sir.

Q. You were not intended to do otherwise. I was pulling the leg of those opposite me. What is the evidence for the proposition that basically it was up to BNFL to decide what was excised and what was not?

A. The evidence I have at the moment is that which is in paragraph 5.2.7 and it is clear that if BNFL does not consent to the disclosure of information that would seem to me a fairly substantial roadblock to the disclosure of information.

Q. Let us read 5.2.7. The relevant words are "The United Kingdom submits for the present purposes that the redacted information was (1) information that is capable of being treated as confidential and its disclosure would involve a breach of agreement and/or information supplied by BNFL,. (a) which was not under a legal obligation to supply the information (b) did not supply it in circumstances in which there was an entitlement to disclose it and (c) has not consented to the disclosure". Is it not clear from that paragraph and from the antecedent paragraph that what the United Kingdom is saying is here was information in respect of which BNFL enjoyed rights of confidentiality and "the public interest in maintaining the commercial confidentiality of information held by BNFL has been balanced against the public interest in disclosure".

A. If I read that passage clearly, yes, but I would also say that the notion that without any other qualification BNFL has not consented to disclosure does appear to give BNFL an extremely strong influence on whether or not information is disclosed.

Q. Do you know who took a decision as to whether information should be disclosed or not?

A. Are you referring to a person or an institution?

Q. I am referring you to the institution?

A. It is the case that the UK Government made the final decision upon the question of what should be excluded.

Q. In the case of the PA report the decision was taken by the Environment Agency, was it not, and in the case of the ADL report by Ministers?

A. I am sure that is true.

Q. And you are aware that BNFL complain that some information has been made available against their wishes, and indeed they have suffered harm as a result?

A. Yes, there are cases in which that has taken place.

Q. Thank you. Now I would like to take you to another point in your evidence: the first report, appendix A. Here you offer comments on the UK Government's reasoning. These are your comments on a letter written by Mr Richard Wood, and I think that Ireland made clear yesterday that the letter was written, and indeed I think Ireland appears recently to have discovered or worked out it was written, in belated response - I must say with a delay of more than a year - to a letter from Ireland.

A. Yes, I am sure you are right.

Q. And the letter from Ireland set out five categories of information which Ireland asked to be disclosed in particular. The letter in response from Mr Richard Wood stated why the United Kingdom was not disclosing those five categories.

A. Yes, I do not read the five categories but I am prepared to accept that was the context in which the letter was sent.

Q. You make the criticism that the reasoning given in the letter is inadequate. You say it was "a very general justification", "very general and unparticularised terms". Are you aware of any response from Ireland requesting further reasoning?

A. I cannot recollect it at the moment but if you direct me to it it maybe I will know.

Q. I am unable to refer you to it for I am not aware of it. Where a person receives a letter which he thinks gives inadequate reasoning would not his proper course in your view be to say I do

not understand, send me moire reasons?

A. This is a very general question which has no relationship to the expertise which I hopefully bring to this Tribunal. For the sake of speed I would suggest as a matter of common sense that seems a good idea, but I have not been involved in the correspondence between the Irish and the UK Government and my ability to help the Tribunal in this matter is therefore extremely limited.

Q. One of the points you make at paragraph A.2.29 is that the United Kingdom has failed to supply information about the number of voyages.

A. That is not what paragraph A.2.29 actually says, but I believe it to be the case when this was written that information had not been supplied on the question of the number of voyages.

Q. Had you been told at the time you wrote this report that the United Kingdom had offered to supply that information in confidence?

A. As an expert witness I was not party at this time to the details of the questions of the negotiations between the Irish and UK Governments. I am not part of the Irish Government, I simply have supplied expert testimony on their behalf, as I did on behalf of other parties we referred to yesterday, or information on behalf of those parties. So I think it is definitely the case that at that time I did not know that such an undertaking had been given.

Q. You say undertaking ..

A. I am sorry, I ---

Q. Can I paraphrase your answer as meaning No?

A. The answer is No, but I wish to explain the reason why it would not have been reasonable for me to be expected to know the answer to that question. I relied on the public record.

Q. Mr MacKerron, there is no criticism implied in my question. If you did not know then that is the end of it but I would simply like to know whether at the time you wrote this report you knew that the United Kingdom had offered as a matter of public record some months previously.

A. Whether as a matter of public record or not I cannot comment on, but yes, the short answer is No.

Q. Public record, that is record of the proceedings in the International Tribunal for the Law of the Sea. In the paragraph to which I have drawn your attention you state that were the United Kingdom to give the number of voyages it would give no indication of the destination. "Is not going to give competitors any indication of the geographical destination of the voyages". Is that right?

A. As a matter of logic if one simply tells people how many voyages there are going to be

that cannot in itself tell you where the ships are going to.

Q. Where might the ships plausibly have been going to, other than Japan?

A. They might have been going to parts of the European continent.

Q. If you look at your statement at paragraph 1.4.3 you state that the only possible future customers are Japanese.

A. My view, and I have not read again paragraph 1.4.3 at the moment, I will do so if necessary, is not that there might not be future MOX contracts as a consequence of plutonium already separated and in store at Sellafield on the part of European customers, but that future contracts for MOX and reprocessing with such customers are unlikely. So, if we are referring back, as I think you may be, to the question of the destination of voyages, it is perfectly possible that future voyages would be to the European continent, because it is certainly possible that there will be further contracts negotiated between BNFL and some potential European customers because those customers do hold separated plutonium at Sellafield.

Q. You state at paragraph 1.4.3 that Germany, Switzerland and Belgium all now have policy stances that are opposed to future reprocessing. Do you understand that to be correct?

A. I understand that to be correct, yes.

Q. Belgium is outside the reference case, is it not?

A. Yes, that is correct.

Q. Would you accept that the true position in Belgium is that governmental approval is required for any further reprocessing contracts?

A. Yes, and, because that is itself a change, I interpret that to mean that it would be more difficult to get future reprocessing approvals in Belgium.

Q. I accept that that is correct, that the Belgium Government is in general disinclined to give approvals for reprocessing, but has not made it a prohibition. I think that there is only a hare's breath between us on that point, if you are prepared to accept what I say.

A. I am prepared to accept that.

Q. In the case of Switzerland, what is the current position?

A. The current position, as I understand it, is that there is greater public opposition and, in fact, governmental difficulty in approval for future reprocessing.

Q. Again, I put it to you that you are diametrically wrong, that the Swiss National Council has voted by a narrow majority to reject the proposal to introduce a moratorium on the reprocessing of nuclear fuel.

A. Yes, I am sure that that is true, but it is still my interpretation, and I agree that the words are not now literally correct, but it is still my interpretation that future reprocessing in relation to Switzerland will be difficult. I accept the particular fact that you have just raised.

Q. Mr MacKerron, if you knew that the Swiss Parliament had voted to reject the proposal, do you not think that you should before now have taken the opportunity, even the one that I gave you at the beginning of your testimony, to correct the impression given by your first report?

A. I agree that the words as they are now written are not fully accurate and I regret that they are not fully accurate. I would say, though, that it is still very unlikely that there would be approvals, despite this particular vote. I accept that I could have been more helpful if I had said that in the evidence and it is true that there is a possibility that Switzerland will continue to reprocess, but it does not seem to me still to be very likely.

Q. You set out in an appendix the legal position, as you understand it to be in Switzerland, you refer to a law which you acknowledge to be inchoate, but you have not referred to the fact that the proposed law failed to get adopted.

A. I accept that that is probably an omission for which I apologise.

Q. Can I turn to your second report, paragraph 3.1.2 at pages 8 to 9? At the very foot of the page you begin the sentence "As far as I am aware virtually all the data requested by Ireland would have been generated by BNFL and not given it by third partes on a confidential basis?

A. Yes, that is correct.

Q. What enquiries did you make in order to reach your conclusion that, as far as you are aware, all the data would have been generated by BNFL and not given by third panties?

A. Well, the direct answer to your question is that I did not make enquiries, I analysed the documents and, when we are talking about data as opposed to opinion or other kinds of information, the most important data requested in my interpretation of the matter is data that could only be generated by BNFL, because it is data that stems from BNFL and has to do with BNFL's own assessment of its activities, so I did not see it as necessary to make further enquiries. I made what seemed to me to be entirely fair inferences from the kind of data that I knew would be most valuable to Ireland in reaching an independent assessment of the justification.

Q. That included reading the redacted version of the ADL report?

A. It did, yes.

Q. Now would you look at that report? I shall take you to some examples of information supplied in

confidence by customers. Page 15, figure 11, footnote 3. As you will see in figure 11, a statement has been omitted as against the third of the conditions laid down there, making sufficient progress in restoring public confidence in BNFL in Japan.

A. Yes, I do.

Q. And the footnote says "Text deleted, private Japanese opinion".

A. Yes, you may note that the document of my own evidence from which you originally quoted did talk about a category known as data. Private Japanese opinion about rebuilding public trust in BNFL was not in my mind in the category of data when I wrote this particular passage.

Q. Look at appendix 3, page 7, footnote 1.

A. Yes, I have it.

Q. There is an expectation by customers that certain conditions will be met in - and then we suppose from the omission that there is a date.

A. Yes, that seems a reasonable inference.

Q. That has been omitted as an expression of Japanese opinion?

A. Yes, that is right.

Q. Now look at Appendix B5, page 48, footnote 1. Here we have a table of risk scenarios and one risk scenario is Japanese delay and mitigation, Japanese respondents advise, and then it appears that the Japanese respondents advised what they could do or what could be done to mitigate the loss in the case of delay.

A. Yes, that is true. Let me say again - and we can, of course, if you wish, continue to find examples - it is still my contention that the great bulk of the data requested by Ireland - and I did not at this time, because it did not seem important or necessary to make a distinction between data and all the redacted information - data it seemed to me that had been requested by Ireland would not in every case, but in the great bulk of cases would have been generated by BNFL. I was perfectly well aware that there was information and opinion that came from other sources - indeed we have done an analysis subsequently of that - but my view was and is that virtually all the data of the kind that you need to assess whether or not the justification has been well carried out and does, indeed, justify the omission, does still come from BNFL.

Q. I wonder whether in view of that helpful remark, I can now cut these matters short. Will you accept that there are quite a significant number of omissions of data or something, omissions, attributable to third parties? In saying quite a significant number, I hasten to add that I entirely accept that the great

majority through the excision of figures emanate from BNFL.

A. Yes, I have no difficulty with that at all.

Q. In relation to this information, supplied by third partes in confidence, is it your view that information which has been supplied by third parties in confidence, that is to say on express terms that the confidentiality will be respected, can be disclosed to the general public without affecting commercial confidentiality?

A. The question of whether it affects commercial confidentiality is a separate one to which we may or may not return, but, as a matter of general principle, I would, of course, believe that information provided on a confidential basis should normally be honoured and respected,. It is probably partly for that reason that I initially wrote that the data that Ireland would need would principally come from BNFL. It is probably true that in my mind at that time was the expectation that it would be inappropriate and difficult and probably impossible, and rightly so, to break such confidentiality agreements with third parties. BNFL is a different matter, because it is a Government owned company and most of the important data, I think that you have agreed with this yourself, as opposed to other things, do come from BNFL. So it is not part of my case that one should in most cases, indeed only very rarely would one contemplate releasing to the general public information supplied by third parties initially on the confidential basis.

Q. As I understand it, there are two categories of the excised information, which in your judgment affect commercial confidentiality or are ordinarily treated as confidential.

A. Those are two categories. Whether or not they affect commercial confidentiality, as I said in my last answer, is a separate question.

Q. That is quite right. It is a question of law. I accept your correction. I put to you a question of law and I must put to you a question of fact. I am trying to summarise your evidence. I understand you to be saying that there are at least two categories of excised information in respect of which you would expect that confidentiality would ordinarily be protected. Is that a formula that you would accept?

A. It is getting close, but it is not quite right.

Q. Put it in your words.

A. In relation to contractual information, I would go so far as to say that there would be virtually no circumstances in which that should be disclosed and, indeed, detailed contractual information is not necessary and it is, therefore, entirely inappropriate that it should be released, in my opinion. On the subject of third party information initially given in confidence, there may be cases - and I am not going

to go into them now because I am not prepared for this particular question in detail - where it would be extremely valuable if such information were released. In such a case I would expect some process to take place where it might be possible to see whether or not those that originally supplied the information would be willing under the circumstances to waive the confidentiality. If they on those occasions decide that they did not wish to raise the confidentiality, then it may well not be appropriate to have the data released.

Q. Thank you, you have put it at greater length and no doubt with greater precision what I was suggesting to you. There are at least two categories of information in respect of which you envisage that confidentiality might need to be respected?

A. I wholly agree with that.

Q. I come to your commercial experience. Have you at any time worked in a commercial undertaking?

A. I presently work in a commercial undertaking.

Q. As a consultant, as an adviser.

A. Yes, it is a commercial undertaking, I am a consultant, yes.

Q. Have you experience of redacting information yourself to protect confidentiality?

A. No, I have no direct experience of that.

Q. Have you experience of reading redacted information in order to extrapolate from that which has been disclosed that which the redactor thought to excise?

A. I believe that it is true that I have on one occasion, yes.

Q. In the light of that experience, albeit on one occasion, would you accept as a general proposition that information in a redacted document may be inter-dependent, that is to say, if items A, B, C, D and E are excised, but items F and G are not, it is sometimes possible by using items F an d G to identify one or other of items A to E?

A. My experience is not extensive in this. I can accept that it may be possible in some cases.

Q. If it may be possible in some cases, that could explain, could it not, why those whose duty it is to redact information have to consider the relationship between items of redacted information ?

A. Yes, this is not an area of great expertise on my part, but I am sure the proposition is correct.

Q. Thank you. We will hear from, I think, one who has expertise in the subject. In your second report you state in paragraphs 6.2.8 and 6.2.9, "Swaps would allow movement to take place but it is clear that no such swaps have taken place". Do you remember the context?

A. Yes, I do.

Q. You go on to say that Dr Varley's description makes it clear that any such swaps would be on a small scale.

A. Yes, that is right.

Q. At (e) you say that it is clear that some of these arrangements are as yet hypothetical and have not taken place. They would be on a small scale, but they will need the agreement of both COGEMA and BNFL given the binding contractual commitments on the owners of plutonium.

A. Yes, that is right.

Q. Those statements are incorrect, are they not?

A. Yes, I did not have full information at the time. I probably made a judgment which overreached my knowledge, for which I apologise. On the other hand, it is important, perhaps, to point out - and I think that it is in Mr Rycroft's evidence of August to which we may turn in a moment - that in attempting to try to return some plutonium to a customer who has been unable to have the plutonium - MOX, I am sorry, fabricated by BNFL, it has been unable to arrange such a swap, and that implies to me strongly that swaps are not straightforward or common and, although I accept that there are elements of text here which are not entirely accurate, my general position, which is that swaps are very difficult and unlikely to become a major part of the market, is something that I would still hold by.

Q. There are several issues there. First of all, the evidence is that BNFL have had difficulty in arranging a swap, that is to be expected, is it not, because BNFL is not the owner of the plutonium, it has nothing to swap?

A. No, but, if a swap is economically advantageous - and, of course, to take place it must be economically advantageous - it might in principle be possible for BNFL to organise a swap in such a way as to make clear to the parties that it would be advantageous. The fact that it appears to have tried but failed suggests to me that it has not been economically advantageous for those who might have been candidates to swap so to do. It confirms my view that swaps are not easy and unlikely to become a major feature - indeed, not a feature that will make a substantial difference at all to the question of attempting to move plutonium between the two sites in England and France.

Q. The evidence of Dr Varley and Mr Rycroft, who have the advantage over you of actual experience in the industry, is that in point of fact swaps are a regular occurrence, some hundreds of swap and loan arrangements have actually been publicly reported over the last five years.

A. It may or may not be hundreds, there are certainly reports of swaps. They do not all involve separated plutonium. Although I do not have detailed information, I would infer - and I can be corrected if I am wrong - that the volumes involved of most of these swaps are small and that in most cases they would

not have taken place as part of the process whereby customers, either COGEMA or BNFL, are attempting to introduce competition in the market for MOX. It may be that we can have an elaboration on the nature of these swaps from those who know more about them than I do, but it would be a great surprise to me that such swaps that have taken place had have much relevance to inducing competition between these two companies in the MOX market.

Q. As to numbers, we have annex 1 to Mr Rycroft's second statement, tab 30 to the United Kingdom's rejoinder. It is the first tab in the United Kingdom rejoinder. Mr MacKerron, if you are at any disadvantage, we will pass it to you, but it is a very short point. Mr Rycroft lists some 60 reported swap contracts, but they are totals of uranium and plutonium, and some 44 loan contracts, and he says of this that such arrangements are routine.

A. Yes, I read that.

Q. Do you accept that?

A. I do not deny that there have been a large number of swaps and that they may be routine. What is difficult to identify from this data - and what I still have doubts about and it is a reiteration of an answer that I gave you a few moments ago - that it seems to me unlikely that these have involved significant quantities of material and unlikely that they make a material difference to the possibility of competition between the two companies in the market for MOX using customers' plutonium which each company currently holds at its own reprocessing sites.

Q. Let us look at another of your statements, the first report, paragraph D3.4 on page 60. You state "while it is possible that a significant proportion of plutonium will be used as MOX fuel there are currently no signs that the reprocessed uranium will be recycled".

A. Yes, that is right.

Q. Is that correct?

A. That is correct.

Q. Look at Mr Varley's second report at paragraph 2.17. Tab 29 to the United Kingdom's rejoinder. It begins "Mr MacKerron's lack of market knowledge is exhibited where he incorrectly claims that there are no signs of reprocessed plutonium being recycled. The commercial practice of recycling reprocessed uranium has been underway for more than ten years and is continuing today in at least eleven rectors operated by nine utilities in four different countries". Is Dr Varley correct?

A. Yes. As is often the case Dr Varley is technically correct and he clearly has substantial expertise in the details of nuclear fuel markets. However, what remains true and is not contested by Dr

Varley is the fact that the intention that BNFL originally had to use reprocessed uranium from Thorp as part of its MOX manufacture process has at least for the time being been discontinued. The plant that BNFL planned to use to treat the reprocessed uranium so that it would be suitable for reuse as a fuel, investment in that plant, has for the time being been abandoned due to lack of any demand from customers for its use because it is too expensive. The technical facts that Dr Varley refers to at 2.1.7 are correct but he omits to mention in paragraph 2.1.7 that the most important single instance of that which would be the reuse of the reprocessed plutonium from the Thorp plant in MOX or other manufacture is actually if not permanently then at least temporarily abandoned. The fact that there are technical possibilities in other utilities doing it somewhere does not prove that it is a major part of the market. In the last sentence of Dr Varley's statement the 15,000 tonnes of magnox depleted uranium was re-enriched and recycled, yes, that is true historically, but of course AGRs are nothing to do with MOX because AGRs at least at present are virtually incapable of taking it. So the sense in which I meant paragraph D.3.4 though it may not be explicit was that there are no signs that the reprocessed uranium will be economically recycled and certainly no signs that it will be recycled in the UK, which is the most relevant case, and those judgments I still have confidence in.

Q. In stating that there are currently no signs that the reprocessed uranium will be recycled are you speaking of the position at Sellafield or of the position in the world market as you understand it?

A. It is clear that the sentence does not distinguish between the two. What is plain is that it is not an economic process, that BNFL has no plans to do it. I accept that it has been done in the past and it is done on an occasional basis in my opinion not in relation to any commercial criteria, but it is being done on a small basis elsewhere. But it seemed to me that that was not relevant to the question of what will happen at the Thorp and the Sellafield MOX plant because as I have told you already as I understand it, and I am sure this will be confirmed, BNFL currently has no plans to recycle its reprocessed uranium at Thorp or SNP and that seems to me the most important single fact that needs to be established.

Q. I understand you now to be saying that paragraph D.3.4 is not confined to Sellafield, you are talking about the world market?

A. No, I am not saying that. I am saying the paragraph did not make it clear whether it was Sellafield or the world market. While we can debate at some length if you wish what exactly it might mean or should have meant the point I would like to put before the Tribunal which I think will help is

that it is my view it is not an economic thing to recycle reprocessed uranium and that BNFL currently has no plans to do so in relation to its Thorp plant and in relation to inputs to its SMP plant. We may if you wish continue to debate the exact meaning of my language in D.3.4.

THE CHAIRMAN: I propose that we take a five minute stretch at this point.

(Short adjournment)

MR PLENDER: Mr MacKerron, before the adjournment I was referring you to paragraph D.3.4 of your second report where you state "there are currently no signs that reprocessed uranium will be recycled."

A. Yes.

Q. To avoid any further wrangling about what those words meant let me simply ask you for your present views. Is it your evidence that currently reprocessed uranium is not being recycled for economic purposes and on an economic scale?

A. Yes, that my view, and I would perhaps elaborate very slightly as we are still on D.3.4 and say that because of the sentence after the one to which you have referred which said "It is likely that the reprocessed uranium will have to be classified as waste and also require long term disposal", is clearly a reference to the UK situation, and it is the UK situation to which I was principally referring in D.3.4.

Q. Let us get away from what you were referring to. Is it your opinion or impression that in the world market today there are no signs of reprocessed uranium being recycled on an economic scale?

A. Yes, if by economic scale you mean routinely and in relation to most of the products of reprocessing when it is conducted in relation to economic viability as opposed to other criteria.

Q. I mean on a significant scale by a limited number of actors in the market?

A. I think the categories are changing as you move the question. We did talk about economic. By economic I mean in such a way as in a commercial context would be worth doing because it would be profitable to do so.

Q. That is exactly what I mean. Let me put my question. Your evidence is that there are not commercial enterprises engaging on a significant scale in the recycling of reprocessed uranium for commercial purposes?

A. That is yet another formulation of the question and my answer to that is No.

Q. Tell the Tribunal which undertakings to the best of your knowledge are in fact recycling

reprocessed uranium on a commercial scale?

A. I know for sure that it happens in Belgium, and it is perfectly possible that it may happen in France. I do not have detailed knowledge, but I revert to Dr Varley's evidence, eleven reactors is a relatively small number in relation to those that are licensed to use MOX. it is a very small number in relationship to the total world market for fuel, and let me say again that in relation to BNFL's own plans there are no signs that the reprocessed uranium will be recycled.

Q. Have you followed the news in the trade press about the Framatome Elektrastal joint ventures?

A. I have not followed those recently, no.

Q. Had you followed them some time ago?

A. Those are particular joint ventures about which I know very little.

Q. Does it surprise you to learn, if you will accept my word, that Framatome and Elektrastal are engaged in recycling reprocessed uranium, largely of Russian origin, on a significant and growing scale?

A. It would not surprise me but it would not alter my view that this is most unlikely to have been taken on the basis of orthodox economics. The recycling of Russian material immediately suggests to me that economics has been probably only one part of the enterprise and almost certainly there would have needed to be various kinds of political agreements, various kinds of pricing that will have taken place, which would not be those that would take place in a market. BNFL operates in an environment much closer to a market in general and has not found it, because it is enjoined to make profit where it can, it profitable to resite its own reprocessed uranium.

Q. I will turn to another subject. At paragraph 1.4.3 of your first report, you write, "There is no realistic chance of future European customers for reprocessing". Do you think that there is a realistic chance of post-base load orders for reprocessing with non-European customers?

A. There is a chance. It is perfectly possible that in time some Japanese utilities may wish to sign reprocessing contracts. There are no signs of it now, but I think elsewhere in my evidence I make it clear that it is at least a possibility.

Q. The words you use are "realistic chance". Do you think that there is a realistic chance of post-base load orders for reprocessing with non-European customers?

A. My judgment would be at present there is no realistic chance and it is difficult to forecast what may happen when complete trust is re-established, whenever it is, between BNFL and its Japanese customers. At

that time there is a chance. Seen from the various perspectives, it seems to me a slim chance.

Q. Would it, therefore, surprise you to learn that BNFL has received post-base load orders for Thorp worth some hundreds of millions of pounds and has had discussions with other post-base load customers - that is to say other than in Japan, Germany, Switzerland and Sweden - which are considering MOX fuel as a route?

A. I am aware of the discussions. I am not entirely clear which contracts you are referring to in relation to the hundreds of tonnes of post-base loan contracts. It would help me if you could tell me which contracts you are referring to. There were contracts initially with Germany utilities and also with British Energy, but you may be referring to others, I am not clear.

Q. I am not going to identify the contracts, but the expression that I used was "contracts worth some hundreds of millions of pounds".

A. I am aware that there may be some.

Q. Indeed, you ought to be aware that there are some, because it is mentioned in the ADL report, tab 5, in the annexes to the UK's memorial at page 30.

A. I read the relevant passage. My interpretation of that passage, because I have not any information in the public domain to the contrary, was that these post-base load orders might refer either to some German contracts, originally signed earlier, or might possibly refer to some contracts with British Energy renegotiated several times, most recently in 1997.

Q. If it were Germany, as you surmise, that would not be consistent, would it, with your statement that there is no realistic chance of future European customers for reprocessing?

A. That would be so. My interpretation was that because of changes in German policy, the chances of new German contracts would be very slight. I was not clear whether or not there was some residual from earlier German contracts that were post-base load and I also thought that it was possible that some of these orders were in relation to contracts which I know about that have been signed with British Energy.

Q. There is another point on your second report, paragraph 1.4.3. There you say, as indeed in various other places, "COGEMA is BNFL's only conceivable customer".

A. Did you say "customer"?

Q. Competitor. I did say "customer" and I meant competitor. Thank you.

A. That is right.

Q. Against that Mr Rycroft, giving evidence of fact, states that there is competition between BNFL and

Belgonucleare in the MOX fuel market.

A. Yes.

Q. As I understand it, you dismissed Belgonucleare on the ground that it acts in most respects jointly through a junior partner with COGEMA?

A. I do and I rely partly for that on the statements evidently of fact in the ADL report to which I would like to refer you, if members of the Tribunal have that available. In the ADL report at page 22, appendix paginated 103 in some of the documents, there is a statement that I will, with your permission, read. It says "The Belgonucleraire plant at Dessel" - the only plant relevant - "is operated in tandem with COGEMA's Cadarache and MEROX MOX plant and in a so-called COGEMA group MOX platform of the three plants".

THE CHAIRMAN: What page is that again?

A. It is appendix 22, but also paginated as 103 in the copy that I have in front of me of the ADL report.

MR PLENDER: Mr Chairman, I have it as appendix A8.2 and, as the witness says, page 22.

THE CHAIRMAN: Thank you.

A. Perhaps if I could just refer to that again for the benefit of the Tribunal. Half way down this section which says "Background information", it talks about the Belgonucleraire plant being operated in tandem with COGEMA, marketing is joint and it is true that Belgium nuclear markets MOX on an individual basis separate to COGEMA. However, because Belgonucleraire only has approximately 15 per cent of the capacity of the three companies combined and only part of that is separate, I did not regard Belgonucleraire as a serous competitive force within the market and, because there are clear indications from Belgium that the Dessel plant may well close down within the next few years, the realistic competition that Belgonucleraire might offer to BNFL seemed to me to be so marginal as to be hardly worth considering.

MR PLENDER: Do you understand Belgonucleraire to compete with COGEMA in the supply of MOX fuel?

A. I am not entirely clear about how the relationship works, but I can see that it is possible on this very small scale that there may be competition and, of course, there could be competition, because it is possible to move separated plutonium between different plants in France and Belgium.

Q. You have referred us to appendix A8.2 which refers to their marketing arrangement through COMMOX. There have been significant recent market developments in relation to COMMOX. Are you aware of them?

A. No, I am not aware of them.

Q. Are you aware that Belgonucleraire is at the moment engaged in legal proceedings against COMMOX, a company of which it is a minority shareholder, alleging that the marketing organisation has not fairly marketed its MOX fuel as compared with COGEMA's MOX fuel?

A. I am sorry I was not aware of that, but from your description of it it sounds to me as if there was a clear agreement between the two companies. It may not have worked very well, but it seems to me to confirm the point that COGEMA is the dominant party and that Belgonucleraire is a relatively junior and relatively unimportant part of the overall MOX production picture.

Q. Mr MacKerron, I am happy to confirm to you and the Tribunal that Belgonucleraire has, as I understand it, 40 per cent of the shareholding, COGEMA having the other 60 per cent, therefore a minority shareholder. And as for firm agreements, I am afraid that it is all too often a regular experience of lawyers that they think that they have agreements until dispute emerges.

I can now turn to what you say about the Thorp plant. You argue repeatedly that as significant amounts of data were made public in relation to Thorp similar data should be put on record in relation to the MOX plant. Is that fair?

A. That is fair.

Q. But, as you yourself point out at paragraph 1.1.8 of your first report, the Thorp plant was financed in this way, "overseas customers put up 1.9 billion of the $2.6 billion costs with Japan the largest contributor". Then I omit a sentence and continue, "This means that the relationship between reprocessor and customer is not in most cases an arm's length one. If customers act as principal financiers for a large plant, they are likely to get access to much more financial data than is usual for a conventional customer". In view of your own evidence on that point, do you not accept that there is a fundamental difference between an arrangement in which customers put up the capital and can, therefore, expect information and a situation in which BNFL puts up the capital and has to compete for customers?

A. Well, on your latter point about whether it has to compete for customers there is difference between us, but I shall ignore that for the time being. The point to which you have referred is one by which I obviously stand. When I say if customers act as principal financiers for large plant, they are likely to get access to much more financial data than is usual for the conventional customer, I was not referring to the amount of data that was put on the public record in the consultation, but my presumption - again I cannot know because it is confidential - is that those customers would have received substantially more data than the aggregated data put into the public domain for the four

consultations. You should not take from the passage that you have quoted any presumption on my part that the data available to those customers was limited to that which emerged during the consultations process for Thorp.

Q. Where an undertaking makes an investment, particularly a large investment in a market in which there are rather few players, would you not expect it to be more scrupulous about commercial confidentiality than is the case when a group of customers get together to finance the greater part of the erection of a plant?

A. I am sorry, would you please ask me the question again, I did not quite get the full import of it, I apologise?

Q. I shall hope to repeat my words, but I hope that you will not accuse me of varying it if I have forgotten the formula I used a moment ago. Where an undertaking invests a substantial sum in a venture in a market in which there are rather few players, would you not expect that the undertaking would be more scrupulous about the protection of information of a commercial kind about that venture than is the case when a group of customers get together to finance jointly a plant in which they have a common interest?

A. There are two different issues, one is the issue of which information is shared with customers and the other is which information is shared with the world at large and the general public. I would expect that where customers were not intimately involved, the organisation would seek to protect its legitimate commercial interests from its customers to a greater extent than at Thorp. My strong expectation, as I have said to you before, is that the amount of data available to the customers at Thorp will almost certainly be much greater than that that has been put on the public record. I doubt very much whether, if you had financed a plant to the extent of £1.9 billion, you would be satisfied with the aggregated data that was supplied at Thorp, aggregated data which, nevertheless, was very significant and allowed a much more close-scrutiny of the case than has been possible for the SMP plant.

Q. If the customers had the public data and more in the case of Thorp, then would you not expect in the opposite case, where customers do not put up the capital or a significant part of it, that the undertaking investing the capital will be much more scrupulous than in the case of Thorp to ensure that there is not placed on the public record material which would be valuable to customers?

A. In cases like that all enterprises will try to protect information if they possibly can, yes.

Q. Thank you very much, that is a most helpful answer. Now can we turn to what you say at paragraph 1.7.2 of your second report?

A. Perhaps I could add, if I may, a rider to my last answer. The fact that a company attempts to ensure that its customers do not get particular data does not mean that in terms of particular processes which may be necessary in this case to justify a plant that the wishes of the company must on all occasions be respected. As we know in the present case, a separate process was undertaken by the British Government to ask whether or not that interest of the company did, in fact, satisfy wider public interests and wider public interests may on those occasions override some of the desires of a company and require more data to be put in the public domain than the company would wish if left to its own devices.

Q. Thank you, Mr MacKerron, there is no dispute between us on that. Now can we come to paragraph 1.7.2, where you argue that information of the kind requested by Ireland is routinely put in the public domain in other industries, including those relating to MOX and reprocessing. You then refer to appendix D. If we turn to your appendix D, which begins at page D1, you state at paragraph D.1.2 that you have organised the presentation of relevant information according to Dr Varley's eight categories. That is the methodology you followed in the presentation of this appendix, is it not?

A. Yes.

Q. It may be helpful to have two documents open at this stage, Dr Varley's eight categories, which may be found, for example, in the United Kingdom's Counter Memorial at page 17 and Mr MacKerron's annex D. We shall go through only that part of appendix D that is concerned with COGEMA. Dr Varley first identifies as excised information MOX sales volumes including volumes of business secured and forecast. You state that information of this kind is regularly made available by COGEMA.

A. No, I think that what I actually say is information of the kind requested by Ireland is available. I did not say that that particular information was available. I could point you, for example, to D.1.4 and over the page, where COGEMA has made clear that the level of production annually at its plant - and that implies knowledge, that tells us about capacity utilisation and that is something which we are told for BNFL is unavailable in relation to the Sellafield MOX plant.

Q. You are going ahead of me, we have yet to come to Dr Varley's other categories. The first category was MOX sales volumes, including volumes of business secured and forecast. Do you say that that information or information of that kind is regularly made available by COGEMA?

A. Well, information on MOX sales volumes in terms of tonnages, yes, it is made available and D.1.4 actually tells us something about that.

Q. There is all the difference in the world, is there not, between the figure that you point to in D.1.4, that is the

aggregated tonnage sold in the past, and the figure to which Dr Varley is referring, volumes of business secured and forecast?

A. No, I am sorry, if I am being in any way misleading, the sentence to which I refer, and I will read it out for the purposes of the record, says that a total of almost 141 metric tonnes of heavy-metal innoxions were produced for the year. Belgonucleraire added 15 metric tonnes to the total, thus confirming the close relationship between COGEMA and Belgonucleraire, under a longstanding cooperation agreement. That is specific data about sales volumes for a particular year which, on the evidence provided under PA, ADL and the UK process, we are told it is not possible to disclose because it would give undue advantage to customers or competitors.

Q. Mr MacKerron, is there not a difference between the past and the future?

A. When customers are seeking to negotiate future contracts, it will according to the UK evidence be valuable for them to know the kind of plant utilisation that is possible, presumably because that allows them to get some estimate of the way in which costs are spread in tonnages. So to know what a particular tonnage has been in a particular immediately recent year would according to UK evidence, though not mine, be of great value to customers in seeking to negotiate future terms.

Q. You have gone immediately to the third category and we are still dealing with the first. One of the excised types of information is information about MOX sale volumes including volumes of business secured and forecast. Is it your evidence that COGEMA regularly makes available information about volumes of business secured and forecast?

A. Perhaps we can shortcircuit this process. I have not claimed that in all the categories in which Ireland seeks data COGEMA has made available data on the public record. On the other hand COGEMA has made available some data on the public record of the kind which we are told is not possible in this case, and I do not make any claim that in all categories this information is available.

In terms of Dr Varley's categories they are of course not in all respects the same as those which Ireland has requested.

Q. Let me see if I can get a yes or no answer to my question. Have you found any evidence of COGEMA making public the volumes of business secured and forecast in respect of MOX fuel?

A. In relation to that particular question I will give you the direct answer No.

Q. Thank you. Now we come to the second category, MOX sales prices including prices for particular customers or markets as well as the variables affecting price and price sensitivities Have you come across that information disclosed by COGEMA?

A. Let me go back to the nature of the question. It is not part of the case that I would make that one needs to know sales prices for individual customers and I would not ever expect COGEMA to disclose those for reasons which we have rehearsed earlier on. The answer to your question is No.

Q. Thank you. The third category. MOX plant capacity and production capability including data on ramp up expectations expected average operating level and risks to production. Was this made available by COGEMA?

A. Again the listed data is longer than that which I has requested to the best of my knowledge, but the answer to this question is to a significant extent Yes. The ramp up rate is no longer relevant because the plant has now been running for some time, but the answer I gave you a few moments ago about the 141 tonnes of heavy metal is substantially the answer Yes to that question.

Q. As regards the ramp up rate I suggest to you it is highly relevant because at the date of the publication of the ADL report the commissioning had not taken place nor could have taken place.

A. I am sorry, we are talking about data that COGEMA might put in the public domain about its own ramp up rate. I am aware that the ADL report data was released and possibly against BNFL's wishes about the ramp up rate for the SNP that had not been made available previously.

Q. Category 4, production costs at the MOX plant including estimates of fixed and variable costs, break down of costs into detailed categories, sensitivity of production costs to various parameters and scenarios. Do you say that this is information that COGEMA makes available?

A. On the whole the answer is No, but again the categories are much broader than those which were originally requested. They are Dr Varley's categories and not the Government of Ireland categories.

Q. In relation to the fifth, contractual details, I accept before I even put it to you that the phrase contractual detail is extremely broad and flexible.

A. It is a sensitive area and I would not expect it to be released.

Q. Thank you. Category six, details of statements given in confidence by utilities and other individuals.

A. Let me try and speak for myself. The Irish Government will speak for itself. I have never asked for nor thought that such information was relevant or important.

Q. I understood you earlier to say - and do correct me if I am wrong - that details of statements given in confidence by third parties such as utilities could be properly excised on grounds

of commercial confidentiality in appropriate circumstances?

A. Yes. Whether it is commercial confidentiality or just ordinary confidentiality, his note I think is ordinary confidentiality rather than commercial, yes, my previous answer was that unless the parties have consented subsequently to the release, or the party that gave the information, it would not normally be appropriate to override confidential agreements of that kind.

Q. Can we come to Dr Varley's category 7, outputs from economic models, including sensitivities to various market and operational factors, have you seen this material published by COGEMA?

A. No, I do not regard it as important to get outputs from economic models in the way that Dr Varley suggests has been asked for.

Q. Now we van turn to the eighth category, information that would reveal insight into BNFL's perception of backend markets and MOX market drivers. BNFL strategy in respect of MOX fabrication market and more broadly BNFL's strategy in the spent fuel management market. Substituting COGEMA for BNFL in that description have you seen such material published in the case of COGEMA?

A. No, I have not, but these again are Dr Varley's categories and most of them that you have described are not things that I believe the Government of Ireland has requested and are certainly not things which I would need in order to conduct an independent appraisal of the case for the Sellafield MOX plant, so we are dealing with a whole set of categories that do not relate directly to the request that Ireland have made, and indeed in many respects go well beyond them.

Q. You will perhaps remember, Mr MacKerron, that Dr Varley in his second report refers to the URENCO litigation in the United States. Are you familiar with that?

A. I have some knowledge of it.

Q. Look at a bundle about that litigation which will be handed to you, appendix 8, tab 7. This is a bundle of authorities. I have given Mr MacKerron my own copy so I shall cross-examine without my own copy. We have authorities bundle 8, tab 7.

THE CHAIRMAN: What is the title of the document you are referring to?

MR PLENDER: Mr MacKerron now has it. This is the Department of Commerce Investigation into the complaint of URENCO against COGEMA. I am sorry, it is USET against COGEMA and EURODIF.

MR FITZSIMONS: It appears that we got two copies of this yesterday. I have not seen it

and I do not think any of us have seen it, and I am told it has been copied. That is not Mr Plender's fault obviously, but I assume that these are authorities and not new factual material upon which it is intended to rely, because again per the agreement I referred to yesterday we have not had notice of it.

THE CHAIRMAN: Before we take up Mr Fitzsimons' intervention I would like to find the document so I know what it is. I am holding a blue bundle 8 and it is not the document you are referring to.

MR PLENDER: Tab 7 of that bundle should contain a Department of Commerce questionnaire entitled Low Enriched Uranium from Europe, Response of EURODIF and COGEMA.

THE CHAIRMAN: Thank you.

MR PLENDER: In response to Mr Fitzsimons before I go on with the witness, I have to say I was taken by surprise yesterday, as I have said to the Attorney-General, at the suggestion that there was some agreement between us that anything to be shown to the witnesses would be disclosed in advance. I am not aware of any such agreement but I do understand that Ireland is under the impression that there was one. I was not myself a party to such an agreement.

MR BRADY: There was a very clear understanding and agreement that in the interests of not taking people by surprise that documentation would be exchanged between the parties. The whole purpose of this arbitration is to enable you to make a proper adjudication, not to have a trial by ambush. We have given our documentation to the other side and we are now being ambushed and I object to this.

THE CHAIRMAN: Are you introducing this material as fact or as law? What is its function?

MR PLENDER: The function is to question Mr MacKerron on the question of the sort of material that COGEMA regularly makes public and material excised in COGEMA's interests from documents that will be made public. I was proposing to put this document to Mr MacKerron, particularly in the light of the helpful answers he has given me to my last eight questions, to see whether he would agree that COGEMA did indeed object during the course of the United States litigation to the disclosure of just such information as we see excised from the present document. That was the purpose of the question. As to surprise I am now told that four copies of this bundle were given to Ireland on Sunday evening, but whether Sunday evening is a lot better than Monday really is a matter for Ireland to judge.

As for ambush I am very sorry that the Attorney should think there is an ambush. We are not conscious of it on our part. We would of course have agreed if any new point of law was

going to be taken we would let the other side know so they could research it. I am in the Tribunal's hands.

MR GRIFFITH: Mr Plender, I came in at lunch time on Sunday because I was told that many volumes had been received. Is the purpose of these eight volumes to provide a general background of documents for cross-examination or is it for some other purpose?

MR PLENDER: The purpose of the volumes is principally to contain legal authorities for submissions on points of law. But Mr MacKerron's answers this morning and particularly his rather helpful answers as it seems to me on questions 1 to 8, induced me to put to him this last material.

MR GRIFFITH: I Must say I had thought that the various annexes to the memorials which constituted the legal authorities was the salient legal authorities to be relied upon by the Respondent.

MR PLENDER: The additional authorities were prepared by both parties and exchanged by each party to the other over the last very few days. While we have supplied materials very recently to Ireland so also Ireland have supplied materials very recently to us. It is my understanding that the material from Ireland raised no wholly new submissions. I can confirm that the authorities submitted by the United Kingdom contain no wholly new submissions. But my question to Mr MacKerron was to be a one of opinion or fact.

MR GRIFFITH: I am just trying to work out the status of these eight bundles. My bundles have numbers, OSPAR bundle 8. Are you telling us that these eight volumes are common bundles of Ireland and the United Kingdom?

MR PLENDER: Yes, Ireland have prepared bundles 1 to 3 and we then prepared bundles 4 to 7 and 8, and Ireland supplied bundle 9.

MR GRIFFITH: Speaking for myself, Mr Plender, I do feel that we will have to have some breaking down of these documents, identification of what each one is, and whether it is from the point of legal submissions or further documents of fact. Will that be possible?

MR PLENDER: They are all there for legal submissions, although this case is helpful to me in cross-examining this witness at this stage. Just as I have referred to other cases, for example the Greenpeace case and the Friends of the Earth case, in questioning Mr MacKerron.

MR GRIFFITH: One last question., Are they all to be relied upon from volume 4 onwards prepared by the United Kingdom every document?

MR PLENDER: No, sir, and as I indicated in response to the Chairman this morning it is my hope that the two sides can winnow down the volume of material that has been presented to the

Tribunal so as to get a core bundle, or at least a limited number of core bundles.

MR GRIFFITH: Perhaps colour coded.

MR PLENDER: Yes.

THE CHAIRMAN: In this universe of nine volumes four have been submitted by Ireland and five have been submitted by the United Kingdom, and the last volume was submitted by Ireland.

MR PLENDER: Correct.

THE CHAIRMAN: The sequence number is in fact the temporal sequence in which the volumes were submitted?

MR PLENDER: They have been done in such haste over the last few days that I hesitate to say which side got the bundle to the other's room first, but in general my understanding is bundles 1 to 3 were first presented by Ireland, 4 to 7 then by the United Kingdom, the parties were working simultaneously on 8 and 9 and as I speak Mr Wood tells me that volume 9 was delivered to us by Ireland before our volume 8 was handed to Ireland.

LORD MUSTILL: I am a confused myself about what the status of these, even when I can find them. I was just looking at bundle 8, tab 8, which is in a bundle of authorities, but is actually reported in the US Department of Commerce with verification of questionnaire responses. It may have value for us, I am not saying that it does not, it may be useful for cross-examination material, but I do not at present see why it should be classed as an authority.

MR PLENDER: My Lord, the reason why we originally put it in the bundle and have thought of it as an authority is that I contemplated relying upon the Department of Commerce's practice pursuant to United States law as one aspect of the case which you have seen that we have developed.

A. Yes, I do not want to get into prolonged argument, we need the time, but there is in my mind a difference between authorities which are sources of law from which we should be invited to draw when reaching our conclusions of law and on how to apply them. In principle, the reason for disclosing those as early as possible is so that everybody will have the opportunity to review the material and prepare themselves to make such submissions on it as are needed to help the Tribunal. What I would think of as cross-examination material may itself be useful, but the reason for supplying that early is not for the purpose of drawing on sources of law, but drawing the witness's ideas and answers and experience. That also should be brought forward early so that everybody knows what is in play. That is the only point that I want to make and I am doing so because I am picking up - I think it was the Chairman's question - or perhaps it was Dr Griffith's question about whether these materials are put forward as

authorities or put forward as material in the case itself on the factual issues. That is all. One wants to know, that is all.

MR PLENDER: They are certainly not put forward on the case itself as evidence of fact. They were put forward in connection with a submission on general principles of law, including United States law, and we were practically at my last question to Mr MacKerron, which I have now trailed well in advance and can and think I should in the present circumstances make to him without necessarily troubling him with the document. I can make my own submissions on the document.

THE CHAIRMAN: Before we do that, the problem that has been encountered may be raised by the United Kingdom with respect to Ireland later, so I would like to understand is then Attorney-General's objection to the admission of all nine volumes or this particular document?

MR BRADY: I have no objection to booklets of authorities in the sense that I understand the term, case law and related legal material. What I did object to which is exactly the point that Lord Mustill has averted to is materials that have been put in that are of evidential value which appears to have been a purpose that was intended by Mr Plender, because you will note as well, when he was explaining the content of one of the booklets, he said that it was principally authorities. He did not say exclusively authorities. Some of the materials are not authorities in the legal sense in which we use that phrase. I do not want to delay this arbitration any further. WE are trespassing on the time allotted to deal with this matter in dealing with what appears to be a logistical issue. But in the light of what Mr Plender has now said, in the light of my objection, that he will not be putting this document to this witness, but will be using it simply for the purpose of his submissions, we can now proceed as we are. I will make sure over lunch that everything that logistically can be drawn in relation to those nine volumes will be drawn, so that no one else will find themselves in the state of confusion that we, unfortunately, find ourselves in this morning. I think that the matter can proceed in the light of what Mr Plender said. My objection, with respect, is validated by the remarks that have been made by Mr Plender.

MR PLENDER: Mr Chairman, I think that it appears from the Attorney-General's comments that the matter that has occupied us for the last 15 minutes or so is a total misunderstanding. The reason why I said that these documents are "principally" legal authorities is because that is what the parties agreed and confirmed to the court by letter dated 4th October, there will be a "joint bundle of authorities and other materials". As I confirmed to Lord Mustill, it is not and never has been the United Kingdom's intention to rely upon this URENCO litigation as evidence - USET litigation as evidence. It is something that has been mentioned, in any event, in Dr Varley's report and, as Mr MacKerron is in general terms

aware of it, I can now, I think, put my questions to him which he can answer without the benefit of the material before him. I had only hoped to put the material before him in fairness.

THE CHAIRMAN: Proceed.

MR PLENDER: Mr MacKerron, aware as you are, at least in general terms of the USET litigation, are you also aware that the public record of the Department of Commerce inquiry in that litigation was very heavily redacted?

A. Yes, I am aware.

Q. And it was redacted in the interests of COGEMA.

A. Fine.

Q. My suggestion to you is that what this experience shows is that COGEMA has just as much interest and concern about the disclosure publicly of information about its activities in relation to reprocessing as has BNFL. I acknowledge in asking that question that what was in issue was reprocessing and not MOX manufacture.

A. Well, companies operate in some kind of commercial environment clearly have an interest in protecting information wherever they can. It does not surprise me at all that COGEMA wishes to have information protected or that in certain circumstances about which I do not have detailed knowledge this was permitted. The evidence that I am giving suggests that, although in general there was a presumption that companies may protect information of a sensitive kind, that the circumstances of this particular case, because there is no real competition in the market for MOX and in my view customers can gain no benefit from having available to them the kind of information that I think that they could reasonably get in the process, my evidence is that this is an unusual case and the fact that there are general principles here is true, but there are exceptions and the exceptions refer - I think that my UK evidence as well as mine agree - to situations in which there is no effective competition and where customers may gain no advantage. Because there is then a public interest in exposure, and my view is that no significant harm will result, this case is different from any number of cases which you might have put before me.

Q. Mr MacKerron, through inadvertence I used the wrong word. Tell me simply if it affects your answer. I said "reprocessing" I should of course have said "enrichment".

A. It does not affect my answer.

Q. We are nearly at the end. Yesterday when you were being asked about work that you had undertaken for Friends of the Earth, Greenpeace and others, you stated that you have received more payment from

BNFL than from Friends of the Earth. Do you remember that?

A. Yes, that is right.

Q. Is it the case that BNFL pays you expenses for your work in the shareholder dialogue discussions - this is paid, in fact, by the Environment Council, which receives funds from BNFL?

A. That is true, it is not the point that I was making yesterday. The point that I was making yesterday was that in the early 1990s BNFL paid a total sum of I think approximately £3,000 to the research unit for which I was then working. The bulk of that money was paid to me for work that I was then doing on nuclear power. Yes, I expect BNFL -perhaps ultimately - have paid some expenses of mine in relation to stakeholder dialogue, but I did not actually count that money at all. I do not count expenses in my summation of payments that I have received in my career.

Q. Thank you. I was going to come to the second payment. In relation to the first, the records of the Spent Management Working Group Report are available on the Environment Council website and you are listed there, are you not, in the participant list as a Green Technical Adviser?

A. I agree that that is a phrase that was used, yes.

Q. And in the case of the other funds to which you are referring, these were paid not to you but to the SPRU?

A. They were paid to the SPRU in the first instance, but the internal decision in SPU, as it is otherwise known, was that the money would support work that I otherwise would not have been able to do.

Q. My information is that the payments were made in the 1970s and 1980s. I am not sure that it matters very much. Are you sure that you are right when you say 1990s?

A. I was not working for SPU in the 1970s. It may be possible that it was in the late 1980s, but I would be very surprised if it was not within the last 15 years, at the most. I am not sure that it is a very material point.

Q. And BNFL has now withdrawn support from the SPRU?

A. It has, yes.

Q. Thank you. Can I now summarise the main principles which I shall submit we have established and you have only to say whether you agree or not? You presented yourself as an independent expert, but you had concluded long before you were asked to give your opinion for Ireland that the operation of the MOX plant was not justified, you had published reports to that effect and you had made three sets of representations to that effect to the public consultation between 1997 and 2000. Is that right?

A. I certainly made the three sets of representations and my conclusions about the lack of justification was not because I was absolutely certain that there was no economic case. They relied mainly on the absence of the relevant information which would allow an assessment to be made with more

confidence and accuracy.

Q. I was going to come to that point, because my submission to you is that what you said was that on the basis of the published materials which you considered inadequate you were able to express your views with confidence and that, far from being captive, customers had a range of alternatives, including the use of other MOX processing facilities?

A. I am sorry, that is not at all accurate. I do not think that I remotely suggest that the information that had been provided was adequate and I did not suggest that customers had a range of other alternatives. I said, and I think that I did this at length yesterday, there were in principle alternatives which customers would wish to explore. I did not comment at that time on the feasibility of those options in the real world.

Q. Mr MacKerron, I think that you misheard the first part of my question. The question was that you criticised the information as inadequate, but were, nevertheless, able to express your conclusion with confidence?

A. I am sorry, I misunderstood you. I thought you said adequate not inadequate. Yes, my conclusion was that at that time it was unwise for Ministers to give their go ahead, because, on the balance of information available, it seemed more likely than not that the plant was not justified, but I could not make a precise assessment because of the absence of relevant information.

Q. In our review of the information made available by COGEMA, you have not been able to locate that which has been made available corresponding to Mr Varley's eight categories of excised information?

A. Well, Dr Varley's categories are not the same as those that I recognise. In some cases such information has been made available, but, of course, we are not dealing with a situation in which COGEMA is currently subject to a process of justification or a critique or question about its justification process and, because I have accepted that commercial enterprises try to protect data wherever possible, it is not a great surprise to me that this information is not currently available on the public record from COGEMA.

Q. Finally, you are unable to support Ireland's claim for publication of the full and unedited copies of the ADL report since you, yourself, acknowledge that there are categories of information which have been excised and in respect of which commercial confidentiality could properly be claimed?

A. Yes, my professional view is that some of those categories could and should be legitimately withheld. However, if other information were released, it would, nevertheless, enormously assist Ireland to do what it has stated it wishes to do, which is to conduct its own scrutiny of the justification process and

perfectly adequate data could be made available without trespassing on those areas to which we have both agreed are generally inappropriate for data release because of conventional commercial confidentiality restrictions.

MR PLENDER: Thank you, Mr MacKerron, I have no further questions. Please stay where you are. Mr Fitzsimons may have some questions for you.

RE-EXAMINED BY MR FITZSIMONS

MR FITZSIMONS: I have a number of short questions, Mr MacKerron. You were questioned by Mr Plender in relation to the principles of Community law in the area of competition law and there was reference made to a test that you said was applied in the European Court of Justice and also in the United Kingdom courts for the purpose of ascertaining the relevant market for a particular commodity or product. What is that test? You refer to it in your report. Could you just mention what it is?

A. It is conventionally known as the "SSNIP" test, the small but significant non-incremental increase in price, and then analysis of the impact that such an increase in price for one commodity would have on the demand for and willingness to supply some other commodity with which it is held to be in a competitive relationship.

Q. Does that test contain any thresholds?

A. The nature of the test is that one applies a five to ten per cent variation in the price of one commodity and then examines the impact that it will have on the demand for and supply of the supposedly competing commodity.

Q. Can you provide a simple example of how that works?

A. Yes, the example would perhaps be as follows. Dr Varley has argued that there are reasons to suppose that prices of conventional uranium fuel may rise in the near future either because enrichment may become more expensive or the basic uranium ore may become more expensive, and in those circumstances a five to ten per cent increase in the price of uranium only fuel is certainly possible, indeed possibly likely. The question would then be in common-sense terms, if the price of that uranium fuel rose by five to ten per cent, what would be the increase in the demand for mixed oxide fuel as a consequence of this change in the price relativities? It is a difficult test to conduct because the market does not work in such a way as to allow them to do so, but it is my strong judgment that, because the MOX market is essentially a separate market, a much higher priced market than the uranium fuel market, that the small but significant and, we must presume, lasting price increase, because that is an important part of the test, would have no significant effect at all on the demand for MOX and that is because

those people who want MOX actually want to have it as a way of having their plutonium returned to them and it is not price sensitive in relation to the standard test.

Q. Moving on to another matter, information supplied in confidence by third parties to BNFL, is there any evidence in the PA and ADL reports in the form of contracts evidencing or supporting assertions that may be made or have been made by BNFL that information was supplied in confidence?

A. In relation to contracts ....

Q. When I say "evidence" I am talking about written documents. Whether in the form of letters or contracts requiring BNFL to keep confidential information supplied by third parties.

A. Well, my recollection - and it may not be entirely full - is that certainly the information that was put to me by Mr Plender was not contract information. My presumption, and I stand to be corrected, is that contract information was placed there by BNFL and not by third parties and that the extent of information supplied by third parties, according to my own analysis, was actually rather limited.

Q. My point is that on a reading of the PA and ADL reports, does it not appear that the authorities accepted the word of BNFL that information was supplied in confidence without testing those assertions in any way?

A. It is not clear to me whether those were tested and there is no evidence in the reports that they were.

Q. On the same theme, assuming that there is a test in law for what is or what is not commercially confidential, could parties be permitted to subvert that test by simply agreeing to say that matters were confidential?

A. Clearly not.

Q. That may be a matter of law, of course. Mr Varley's eight categories, you mentioned what they were wider than the categories of information that Ireland requested, namely Ireland's 14 categories set out in paragraph 75 of Ireland's memorial. IN what way are they wider?

A. I can think of one example now and that is the presumption that Ireland is seeking the outputs of particular models that might forecast the future or that it was requiring data to be provided about the way in which BNFL saw market prospects either from MOX or from other commodities. These seem to me not to be categories that one finds excised in the PA and ADL reports and, therefore, not categories which I understand Ireland have been asking for.

Q. I think that we had better give the Tribunal the reference later. In your report you identify five areas that fall outside the categories that Ireland has requested. I am afraid that I do not have that reference just now.

A. I believe that to be the case and I do not have it to hand either.

Q. The references to COGEMA, I think that you dealt with that. You indicated that there was no evidence of a process of justification where COGEMA was concerned.

A. That is correct.

Q. There was a reference finally to funds paid to organisations by BNFL. I will ask Mr Rycroft about this, but can you say out of what part of BNFL's budget these payments would have been made?

A. I am afraid that I cannot, no.

Q. Can you tell us whether or not BNFL have what they describe as a research and development budget?

A. Yes, BNFL do have a very substantial budget for research and development.

Q. What does that amount to?

A. Well, my recollection of their recent annual reports and accounts is that BNFL spends of the order of 80 million a year on research and development, some of it for outside customers but the bulk of it on its own account and chargeable against its own revenue.

Q. Can you assist us as to where those payments might be made?

A. The payments are made, I am sure, to a wide variety of sources, including universities. BNFL has a policy of supporting particular centres of excellence in technology which is relevant to its own activities, but I am sure that it is paid to many other companies, commercial companies as well.

Q. Would it be paid to consultants?

A. I imagine it is paid to consultants as well.

THE CHAIRMAN: Thank you, Mr MacKerron. We will take a five-minute break now.

(Witness withdrew)

(Short Adjournment)

THE CHAIRMAN: I understand that Ireland is going to have a brief five-minute intervention for a summary before the United Kingdom makes its presentation. I may also say at this juncture that the Secretary of the Tribunal will be talking to agents and counsel about the, if you like, to modalities of the in camera deliberations.

MR BRADY: Thank you, Mr Chairman. It would be exaggeration and something of an indulgence if I was to arrogate to myself the ability to summarise in five minuets the many exchanges that have taken place over the last two days, so I will avoid the temptation to engage in that exercise.

If I can perhaps address some practical and logistical matters, which are these. As you are aware from earlier exchanges, I have not seen and have no desire to see the unredacted

version of both of these reports. Accordingly, when one comes to the point that it will be necessary to look at the unredacted versions, I will, of course, withdraw so as to avoid myself being in the invidious position of acquiring knowledge that is of such importance to the British Government. However, there is one matter which I wish to flag and it is this. I am in a slightly embarrassing position, but three of my colleagues have read the unredacted version. They tell me that they wish to make an application to the Tribunal, but, unfortunately, because of the nature of that application and it deriving from the knowledge that they have acquired, I do not know what the application is. I have to mention at this stage an application which will be made on behalf of Ireland about which I do not know, but about which I can only presume, in the light of the esteem of my colleagues, it is of some importance and some import. So, if I may flag for the Tribunal our intention to make an application in relation to the unredacted versions and say no more for the risk of compounding my ignorance of this matter, and say that that application will be made at the end of all of the evidence. It would be generous if you did not ask me why at that particular point in time the application will be made, but I simply do not know. It will be made at a later stage. Subject to what may seem a rather quizzical application, members of the Tribunal, I propose to very briefly close the Irish case.

I am not going to attempt to summarise the many arguments made on behalf of Ireland and, indeed, the issues that arose in cross-examination. I say only this. At the end of the case presented by the UK Government and in particular, no doubt, the learned legal submissions of Mr Plender, we will be relying to many of the legal submissions that they bring up in relation to Article 9, the issue of jurisdiction, the issue of whether it qualifies as information and then, of course, there is the issue of fact as to whether or not this information is confidential. I with respect believe that it would not be necessarily of beneficial use of everybody's time if I were to start at this stage making a summary of our case without having had the benefit of hearing all of the arguments made by the UK side, then being teased out with questions from the Tribunal. With that and subject to that qualification, if the Tribunal would treat my five-minute allocated time as having been expended in making an application about which I know nothing, and giving an indication to you that we will respond in time and in response to the British erudite submissions on the law in relation to this matter.

I will close the Irish case and we will deal subsequently with these other matters. Mr Chairman, if that is appropriate in the circumstances, I propose now to invite you to indicate to the British side that they may now commence their side of the case.

THE CHAIRMAN: Thank you very much, Attorney-General. I call the United Kingdom.

MR PLENDER: Chairman, members of the Tribunal, there are two brief housekeeping points to mention. First, we are as much in the dark as is the Attorney-General of Ireland as to the application that independent counsel wish to make. If they will tell us what it is, we will try to agree on a suitable procedure subject to the court's consent. Secondly, we have noted the court's desire to be supplied with a bundle containing the authorities upon which counsel shall rely. That request has come in relation to me too late for that to be achieved, but it will be done for Mr Wadsworth who is to follow me.

At the outset of its memorial, Ireland states that the dispute between the parties is a narrow one. So it is. The question for this Tribunal is whether the United Kingdom acted consistently with its obligations under the OSPAR Convention in failing to supply to Ireland at its request complete and unedited copies of the PA and ADL reports. Following the exchange of pleadings, it is apparent that the question can be broken down into four parts and must be addressed in those parts sequentially.

The first is this. Does Article 9 of the OSPAR Convention confer upon contracting parties, in their capacity as such, a right governed by international law to receive certain information (as Ireland contends) or does it rather require contracting parties to establish a domestic framework for the disclosure of information, with appropriate provisions under that law for the review of any particular decision to withhold information, as the United Kingdom contends.

If that question is answered in the United Kingdom's favour then no other question arises. But if it is answered in Ireland's favour then the second question arises, and that is this: Do the names, figures and other data which were excised from the public domain versions of the PA and ADL reports constitute information on activities or measures adversely affecting or likely to affect the maritime area within the meaning of Article 9(2) of the OSPAR Convention as Ireland contends, or do they fall outside Article 9(2) as the United Kingdom contends.

If that question is answered in the United Kingdom's favour then that is the end of the case. But if it is answered in Ireland's favour then the third question arises. Does Article 9(3) of the OSPAR Convention require the Tribunal to engage in an assessment de novo of the refusal to supply information, as Ireland contends, or does the contracting party fulfil its obligations when it acts properly within the range of possibilities permitted to it under the Convention, as the United Kingdom contends. Adding, as the United Kingdom does, that it has acted properly within the range of discretion or appreciation or appraisal that the Convention contemplates.

If that question is answered in the United Kingdom's favour then that is the end of

the case. Only if that question is also answered in Ireland's favour does the fourth question arise: Is the material that Ireland seeks information that does not affect commercial confidentiality, as Ireland contends, or does it affect commercial confidentiality as the United Kingdom contends.

I shall in due course deal with that final issue. I hope I shall not lose the Tribunal's attention at once by indicating that that issue arises only if the three anterior questions are all answered in Ireland's favour.

But before we can address those four issues I must devote a certain amount of time to the facts, and a certain amount of time to the issues with which this Tribunal is not concerned. The necessity of dealing with issues with which the Tribunal is not concerned arises because so much time has already been expended in addressing such matters. I shall also have to correct some misapprehensions in the account that you have received of the underlying facts.

In the first place the Tribunal must be clear that the issue is not whether the United Kingdom's authorities erred in characterising as confidential one or two or more particular items in the PA and ADL reports. The question is whether Ireland is entitled to receive full and unedited copies of those reports. On that point Ireland has been consistent and insistent. By its letter of 30th July 1999 Ireland requested an "unedited and full copy of the PAR report". Ireland repeated that demand in identical language by its letter of the 18th November 1999. On the 25th May 2000 Ireland sent a further letter, this time referring to Article 9 of the OSPAR Convention and claiming that the United Kingdom is "under a duty to make available all the information set forth in the PA report which has so far been omitted".

By further letter dated 21st May 2001 the Irish Minister of State reiterated Ireland's demand for the unedited and full copy of the then PA report, and he stated that if this was not done Ireland would institute proceedings to obtain the unedited and full copy.

On the 15th June Ireland submitted an application and statement of claim, asserting in paragraph 30 a right to "a complete and unedited copy of the PA report". On the 7th August 2001 Ireland wrote to the United Kingdom requesting the "full version of the ADL report". and indicating that if this was not forthcoming the statement of claim would be amended and it was duly amended on the 10th December 2001 to include a demand for "a complete and unedited version of the ADL report." Indeed Ireland maintained this position throughout the written phase, subject only to one footnote to which I shall shortly refer. At paragraph 13 of its reply Ireland states the report was created as a whole and cannot be sliced into individual pieces of data. Ireland does not need to address the

question whether each individual piece of data constitutes environmental information. Here I interpose that the correct word should not be environmental but commercial, and Ireland continues "The question is whether the reports as a whole are to be treated as such".

This Tribunal is in no position to speculate on what the position would have been if Ireland's request had been for the disclosure of one or other particular item of information. Indeed the Tribunal now knows that the United Kingdom has long been willing to supply to Ireland in confidence information on the projected annual number of marine transports of MOX fuel. It is the United Kingdom's conclusion that the figure must be kept confidential for reasons of security as well as commercial confidentiality, but the United Kingdom's difficulty appears to have been in persuading Ireland to accept Yes for an answer. The offer of that information was made in the United Kingdom's written response to Ireland's request for provisional measures before the International Tribunal for the Law of the Sea at paragraph 195. It was then reiterated since Ireland had failed to respond in writing at the oral hearing on the 20th November 2001. i did not respond to that offer either. On the contrary it lodged its amended statement of claim in these proceedings on the 10th December stating in paragraph 11 "∂f particular significance to Ireland is the removal of information relating to the number of transports that are likely to occur". Ireland did not mention there that the United Kingdom had by that stage repeatedly offered to make that information available but on a confidential basis.

In its memorial dated 7th March 2002 Ireland stated more than once "The United Kingdom has refused to supply Ireland with any information on such transports". Again there was no mention of the offer to supply it on conditions of confidentiality.

Having received no answer the United Kingdom wrote to Ireland again on the 19th April 2002, reiterating the offer. Ireland responded that it wanted to discuss the information but did not accept that it was confidential. On the 16th May 2002 the United Kingdom again reiterated the offer. Only after submitting its reply in this case did Ireland consent to receive the information on a confidential basis without prejudice to its claim that the information should have been withheld sooner.

As the Tribunal knows the United Kingdom supplied to Ireland the information which was excised from the PA report, and it has subsequently supplied to Ireland on the basis of confidentiality further information so as to bring the figure up to date. This is material which we would have been very happy to supply to the Tribunal, but we were a little surprised to find that Ireland having accepted confidentiality did disclose it, even to so reliable a source as this Tribunal

without first mentioning to us that they proposed to do so.

If Article 9 of the OSPAR Convention conferred on Ireland the right to receive that information, namely the figure excised from the PA report in relation to the number of MOX transports, Ireland could not now complain that it has not been supplied. It may have another complaint but the complaint cannot be that it was not supplied. What the episode demonstrates is that the Tribunal cannot speculate about what the position would have been in relation to this or that piece of information. Ireland did not express an interest in receiving one or another item individually. If it had made a request for a particular item that request would have been considered. That is not what Ireland asked for. Ireland demanded repeatedly and emphatically and consistently full and unedited copies of the PA and ADL reports. The dispute that this Tribunal was established to adjudicate upon is the dispute arising from Ireland's claim to be entitled to the full and unedited copies of the PA and ADL reports. That is the matter submitted to arbitration.

Nor can the Tribunal speculate on the question whether the excised information, even all of it, could have been presented by alternative means; for example by presenting it in aggregated form. The Tribunal would have noted that this morning Mr MacKerron was himself unable to support Ireland's demands for full and unedited copies of the reports. He accepts, for example, that it would be unreasonable to expect all individual MOX prices to be disclosed, and in relation to giving advantages to the customers it may be inappropriate to divulge all specific contracts. But Ireland's demand is precisely for the disclosure of those data among others. Even Mr MacKerron's evidence therefore fails to support the case submitted by Ireland and the United Kingdom for adjudication by the Tribunal.

Now I stated a moment ago that there is one footnote in Ireland's memorial which raises the question of having something less than the full and unedited copies. You will find that in the memorial of Ireland at footnote 11 on page 31. There for the first time Ireland raises the suggestion that it might be satisfied with partial disclosure. It says "by partial disclosure is meant disclosure of the information in disguised or aggregated form. For example if a table lists the amount of MOX ordered by various customers instead of deleting the whole table an aggregate figure could be given". I stop there, though of course not without inviting the Tribunal to read the whole of the remainder.

Members of the Tribunal will scour the antecedent correspondence in vain for any suggestion on Ireland's part that it would be satisfied with less than the full and unedited copies of the two reports. Indeed, it is precisely the extremity of Ireland's demand which forms the matrix of the

dispute. As a matter of fact the United Kingdom did make available the aggregate amount of MOX ordered by the various customers. In the bundle of public consultation documents which were supplied this morning and no doubt elsewhere in the Tribunal's bundle as well, members of the Tribunal will find a figure to which I referred in the cross-examination of Mr MacKerron. In the bundle supplied this morning it will be found at page 455, though my recollection is that yesterday Professor Sands was good enough to refer me to another place in the bundles before the court where the same data will be found. But if you look at page 455 you will there see expressed as a proportion of BNFL's reference case the volume contracted for. The volume is subject to letters of intent and the volume forecast. I think Lord Mustill has the right bundle.

LORD MUSTILL: That is a rare event!

MR PLENDER: Page 455, that gives the position as it was in June 1999, and then again at page 668 we have the figures as they were in March 2001. It will be a simple matter for a reader to extrapolate the tonnage if he wanted it by reference to the case. The figures are presented in a manner which appeared helpful to and was used by Ireland and Mr MacKerron in making their submissions as to the proportion of the reference case contracted to. There has been no reluctance to supply data on an aggregated basis and it maybe that aggregated figures might be available in relation to a particular matter if requested.

Nor is this Tribunal concerned with the sufficiency of the reasons given by the United Kingdom. This is a new matter raised for the first time in Ireland's memorial. Before reading the memorial there was no suggestion from Ireland that the reasons given were obscure, unclear, required elaboration. had Ireland made such a representation the United Kingdom would have been in a position to respond. No such representation was made and it was only when the memorial was received that these complaints were voiced for the first time. They are founds in paragraphs 3, 60 and 106-116 of the memorial.

In the event the PA report set out at some length the criteria used by those consultants in determining whether information was treated by them as confidential, and indeed with the application of only a modicum of common sense the reasons for the excision in each individual case appears from the context. Indeed, one of the advantages of the 1999 version of the PA report, as compared with the 1997 version, is that it sets out the context for each deletion at greater length, so that the reader can identify the nature of the material excised. The ADL report is written in a slightly different style. Instead of setting out at the beginning the criteria by reference to which the authors

considered that matter, the draftsman inserted footnotes against each deletion providing aggregated information where they thought right.

Will members of the Tribunal please look at the ADL report, which is, of course, at tab 5 to the United Kingdom's Counter Memorial at paragraph 1.2.2? On page 12 we have footnote 2. It reads "Text deleted, price information, actual figures, commercially sensitive, but in the reason plus or minus 20 per cent" and many similar examples could be given. Members of the Tribunal can with considerable ease find them themselves by simply skimming through the report.

By letter of 5th September 2001, the United Kingdom explained to Ireland why the full text of the two reports could not be published. The letter will be found at page 171 of the annexes to Ireland's memorial. It will now come as no surprise to the Tribunal to see that the letter begins by referring to a request for the full version of the Arthur D Little report, not a request for elaboration of reasons, not a request for a particular item, but for a full version of the report. In the third paragraph the writer says, "I wish to explain the reasons for which the information was excluded and the manner in which this was done. AS is made clear in the public version of the report, it contains all the information on which the ADL conclusions are based, other than excised for reasons expressly given in the public version of the report. In particular, excisions had been made on the grounds that the publication of the information would cause unreasonable damage to the commercial operations of the British Nuclear Fuels, P=BNFL, or to the economic case for the Sellafield MOX plant itself".

May I pause at that juncture in the reading to deal with a detailed and novel point which has been made a couple of times in oral argument. It has been suggested that, since the writers of the report, whose language is picked up in this letter spoke about information which would cause unreasonable damage to the commercial operations of British Nuclear Fuel or to the economic case for the MOX plant, it must be taken that there are two separate categories, harm to BNFL and harm to the MOX plant, only the former could be protected by commercial confidentiality, the second is beyond it. It is in our submission quite unrealistic and unfair to the lay (that is non-lawyer) author of the report to read his wording as though he were a statutory draftsman. It is plain in my submission that when the author speaks of information that would cause unreasonable damage to the commercial operations of BNFL or to the MOX plant, what he had in mind was damage to BNFL's business other than the MOX plant, its existing business, such as Thorp, or to that which is not yet BNFL's business but which it hopes to be its business, namely the MOX plant. There is no basis for the suggestion that the authors of the report were taking account of considerations other than commercial confidentiality, but

I continue.

"In determining what information should be omitted from the public version of the ADL report, my authorities have not been driven by the concerns of BNFL alone, but have sought the views of ADL on the part that should be omitted. Thereafter following independent consideration by officials, Ministers decided on the content of the published documents. In such cases it is always possible that there will be objections both from the undertaking itself on the grounds that more should be kept confidential and from interested parties who would like to see more disclosure. Ministers were anxious not merely to strike a balance between competing interests, but also to ensure that there is disclosure of all information relevant to the decision on the justification of the Sellafield MOX plant which can be made public without causing unreasonable damage to the undertaking concerned."

That second paragraph drives home the point that I was making of the antecedent paragraph.

The decision taken, therefore, was a decision which balanced the interests in public disclosure against the interest in maintaining commercial confidentiality, but one which at all times was driven by the need to ensure that there should be available such information as is necessary for the purposes of the consultation.

Nor is this Tribunal concerned with questions of Community law. Your jurisdiction is founded on Article 32 of the OSPAR Convention. Your jurisdiction is to adjudicate on disputes relating to the interpretation and application of that Convention which cannot be resolved by the parties otherwise. Therefore, save for the purposes of background information, you are not concerned with the interpretation of provisions of European Community law. In particular, this is not the right forum for the ventilation of Ireland's submissions on the meaning of Council Directive 90/313 on access to environmental information or EURATOM Directive 96/29 on the protection of workers against ionising radiation. I shall in due course have to correct some submissions made by Ireland and in some respects to give an account of the rules of Community law which are relevant by way of background, but the resolution of a dispute on questions of Community law is not a matter for this Tribunal. Nor yet is this Tribunal concerned with the interpretation of the Aarhus Convention, an instrument about which Ireland makes a number of submissions, particularly at paragraph 100 of its memorial. The Aarhus Convention is not in force between the parties. It has not been ratified by the United Kingdom and to our latest information it has not been ratified by Ireland. It is not even soft law. It is not law. Nor yet need the Tribunal be concerned with safety standards or compliance with

United Nations Convention on the Law of the Sea. Ireland claims in its memorial, paragraph 29, that it wants to know whether appropriate safety standards are being applied. At paragraph 2 of its memorial, it says that it wants to assess the United Kingdom's compliance with its obligations under the OSPAR Convention and under the Convention on the Law of the Sea.

The excised material has nothing to do with safety standards. Nor will provision of the excised material assist Ireland in assessing the United Kingdom's compliance with United Nations Convention on the Law of the Sea. As Ireland itself says at paragraph 23 of its memorial, the excised material consists of such matters as sales prices, sales volumes and the number and state of contracts concluded or anticipated or projected. Disclosure of these materials would not assist Ireland to police the United Nations Convention on the Law of the Sea.

Nor yet to take my final category is this Tribunal concerned with the Thorp plant. It is a dispute about information relating to the MOX plant. It is not a dispute about the Sellafield site generally, although we on our side are extremely conscious of Ireland's repeated and public statements of its dissatisfaction with the Sellafield site generally.

In the course of its submissions in this case, Ireland makes a number of claims about the Thorp plant in the context of the United Kingdom's obligations under the United Nations Convention on the Law of the Sea. I refer, for example, but without asking members of the Tribunal to look at each paragraph here and now, to paragraphs 16, 33, 33, 36, 118 and 122. These claims are beyond the scope of the present arbitration. The Tribunal will take particular care to avoid dealing with them, because, as you know, some are actually the subject of separate proceedings instituted by Ireland in another forum. Ireland does, however, make clear that its concern in these proceedings is that the commissioning of the MOX plant will result in a prolongation of the use of the Thorp plant. Indeed, it is that concern - the concern that there might be prolongation of the use of the Thorp plant - together with Ireland's longstanding objections to the Sellafield site generally, that appears to account for these proceedings. But in its submission to the public consultation of July 1999, which will be found in the annexes to Ireland';s memorial at page 140, Ireland says that there is real doubt as to the proposed plant's ability to achieve an adequate level of profitability as it is difficult to see from what source or sources further orders might originate. If it really is difficult to see from what source or sources further orders might originate, Ireland's professed concern about the prolongation of the life of the Thorp plant would be misplaced. There is, therefore, a tension between Ireland's position in this case, in which it emphasises doubt as to the plant's ability to obtain further orders over and

beyond the reference case and its position in the alternative tribunal in paragraphs to which I shall in due course refer.

If I have had to dwell for some time on the issues with which the Tribunal is not concerned, I hope that by doing so I shall ultimately shorten the time that members of the Tribunal will need to address to consideration of this matter. It is however necessary for me to correct a number of statements made on behalf of Ireland in writing and orally, not because they are relevant, but because dissemination of information which is not accurate may cause public alarm.

LORD MUSTILL: I thought that it would be convenient to interpose because you are moving on to something different. I would like to ask you for some clarification about the submissions that you have been making on one aspect of what is the actual issue. You have drawn attention in your skeleton argument to a number of instances where Ireland has adopted what one might call the all or nothing approach to disclosure. Your submission is that, if we read the letter, we can see that they want the whole document and nothing else. Now, I just wanted to follow through the implications of this submission. But before asking the question could I just, first of all, draw attention to Article 32.3(a) of the OSPAR Convention, which we are getting to know now. It requires a request for arbitration to state the subject matter of the application. That is the initiating step in the arbitration. It identifies the subject matter of the arbitration. Then, if we could go on to Ireland's memorial, which I draw attention to for the depressing but candid reason that ... It is where I find the request for arbitration, if it is different from the norm. Could you remind me of that?

MR PLENDER: There is a statement of claim and request for the submission of the dispute to arbitration, which will be found in terms very close indeed to the memorial and has been supplied.

LORD MUSTILL: Yes, I am sure that it has. It may be that the point that I am about to make is falsified if one looks at that. Just for the moment, may we look again at the memorial of Ireland which we have already looked at briefly once. Can we look at paragraph 160 and 161?

MR PLENDER: Yes, I am very conscious of those.

LORD MUSTILL: Just laying the ground for my question, the first is the test as postulated by Ireland, 160, sub 3, demonstrating that disclosure of each item of omitted information would cause serious and unreasonable detriment, and then 161, which is rather more germane, the request for relief under subparagraph 2 of that. As a consequence of the aforesaid breach the UK shall provide Ireland with complete copy of the PA and ADL reports; alternatively, a copy of the PA report and the ADL report that includes all such information, the release of which the Arbitral Tribunal decides will not affect

commercial confidentiality.

Subject to my having overlooked something in the request for arbitration, that appears to delineate the dispute at a very early stage in terms of either the whole lot or the bits from which there is no justification for withholding disclosure. That is the background. I would first of all like to ask you, if I may, how that sits with your conclusion that we are really concerned with all or nothing. That is my first question, perhaps you can deal with that.

MR PLENDER: Yes, I can. Paragraph 161 describes the relief sought. It does not describe the dispute. There has been no previous dispute on any question, save the United Kingdom's refusal to supply to Ireland at its request a complete and unedited copy. It is true that Ireland indicates, first in the footnote, to which I drew your attention, and then in the prayer for relief, that it will be satisfied with something else, but this is the first time that this matter had been raised and it is neither the subject matter of the dispute nor a mater which could not be resolved otherwise in accordance with Article 32; and we cannot be certain that it could not have been resolved otherwise because there has been no attempt to resolve otherwise any dispute other than the dispute in respect of full and complete copies.

LORD MUSTILL: Your submission founds on Article 32(1) I imagine. That describes the circumstances in which a matter is to be submitted to arbitration. As I understand this, you say that that relates only to disputes between contracting parties and you say that there is no dispute as to individual items. I would now like you to answer this question. Does not a claim for the greater involve less?

MR PLENDER: In the circumstances of the present case, no. Where one party has been so clear and emphatic in demanding the whole, that is the matter considered by the recipient of the request. We can demonstrate that by the position in relation to shipping. On particular items, one item or two items, this or that, the United Kingdom might have given a different answer. It was not asked the question. The only question that it was asked was supply the whole. That is the only matter that the United Kingdom has been able to consider. Had it been presented with a different request, it could have considered the different request.

LORD MUSTILL: Just pursuing the logic of that answer, it would seem to follow - and if it does not follow please explain why not - that a dispute as to part not being referred to arbitration, any award that some of the matters should be disclosed would be empty of content - is that right - because we would have no jurisdiction to make it?

MR PLENDER: That is correct. Of course, both parties will no doubt hear what the Tribunal has to say by way of observation which does not form part of its award, but the Tribunal's jurisdiction is to make an

award on a demand for full and unedited copies.

LORD MUSTILL: It is for the Tribunal to decide, but it should not necessarily be assumed that a wise tribunal, having been physically reminded that it has no jurisdiction to award on a particular topic, would go ahead and make some observations about it, anyway; that will be for the future.

My last question to carry the logic through is this. There would be nothing to stop Ireland starting another arbitration to get those bits of information which your side would have persuaded us we could not order and the whole procedure could be gone through again. Is that right?

MR PLENDER: Of course it depends on the terms ...

LORD MUSTILL: May I just elaborate for a moment and then I will switch off? If you are right so far, anything that the Tribunal said by way of either a decision on partial release of information or by way of observation thereon would either be obiter or an excess of jurisdiction and totally ineffectual. There would be no issue estoppel as between the parties and nothing to stop Ireland from starting all over again. I just wanted to know whether that was indeed the position in your side's contention and if that is what they really want to happen.

MR PLENDER: It does indeed follow that there could be no question of issue estoppel in relation to a request that Ireland might make for a particular item. But then there might be no need for litigation on the point.

LORD MUSTILL: I do not follow that. Imagine the Tribunal

to be quite silent on any disclosure of part, that it accepted your submission that all it was called upon to do was to say whether or not the whole document should be disclosed, imagine it said that the whole document need not be disclosed, what next. Do you contemplate that the matter could then be settled in a friendly way on the basis of bits of it; in which case I do not see the point of this arbitration.

MR PLENDER: We do not know what bits if any will content Ireland. I doubt that there could be a Tribunal properly constituted to determine a dispute formulated in some such way as follows. The United Kingdom's refusal to supply so much of the material as the Tribunal may feel appropriate. Such a formulation would not be a true dispute because there could be no refusal in respect of something which is as yet undefined. No doubt the United Kingdom might feel that if a Tribunal were constituted and if it decided against the United Kingdom the United Kingdom would be obliged to comply. A dispute could only properly be formed on the basis of a refusal to supply identified information. We wait to hear what identified information other than the whole might satisfy

Ireland.

LORD MUSTILL: I am sure there will be no misunderstanding and I am not addressing these questions in either a pedantic spirit or still less in an hostile spirit, but we have been addressed to the effect that we have been asked to do something and are at risk of doing something which is in excess of jurisdiction.

MR PLENDER: Yes.

LORD MUSTILL: One must follow this through. Responding to your most recent comment why should not Ireland, if the arbitration fails to produce a useful result because the Tribunal may not be able to give one, why should not Ireland produce a list of the material which it says has been wrongfully withheld - it would not be a very big job considering we have been hearing argument about it for a day and a half already - and raise the dispute that way. I am not asking these questions to raise impediments or out of idle curiosity. We are being told or it is being submitted that e are at risk of acting in excess of jurisdiction, and I just wanted to follow it through and give you an opportunity to put it in a practical context. Having done that I will desist and perhaps give the Chairman an opportunity to respond to what I have just said.

MR PLENDER: Ireland's present request can equally be formulated as a request for a list of information, that is to say a list of all the information excised from the PA and ADL reports. It is however of great practical importance in the present case to bear in mind a point that I foreshadowed in questions with Mr MacKerron and about which you will hear more; that is to say that the excision of information may depend a great deal upon the interdependence of material. Those whose work it is to deduce information from redacted documents can work by reference to the interdependence of materials. It matters very much to know in a particular case what exactly is being asked for out of the whole. Here Ireland has made our case simple by its emphatic and repeated reiteration of its position. But a mere request for a list would be unsatisfactory to the recipient for the recipient is then not in a position to judge which parts of the material on the list might have a bearing upon the disclosure of other information to the confidentiality of which it attaches very great importance.

I was turning to a second topic, and that is correction of some statements made in the Irish memorial or in oral observations, not as I say because they are relevant - indeed most of them are not - to a matter which this Tribunal has to decide but because if they go uncontested in this public forum they may lead to concern.

In the course of his speech yesterday the Attorney-General gave an account of the

data falsification incident. I quote from the transcript of yesterday's hearing at pages 20-21. He said: "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. ... It validates and justifies Ireland's concern all along to know about matters that affected the safety of the operation of this plant because, quite fortunately, no human life was lost or no property was damaged."

The correct position is as follows: some employees at the MOX demonstration facility who were engaged in measuring diameters of MOX fuel pellets for the purposes of quality control supplied false readings. the readings that they falsified were not safety records. The antecedent did not affect the safety of the plant. In the words of the Nuclear Installations Inspectorate, whose report of the incident we could retrieve last night on the internet, "NIL is satisfied that in spite of the falsification of the quality assurance related data the totality of the fuel manufacturing quality checks were such that the MOX fuel produced for Japan will be safe in use".

Having said that I do not of course minimise the incident. Any malpractice in a nuclear plant is a serious matter because there are issues of safety. This was a serious matter, although it did not involve an issue of safety and it was treated as such.

Secondly it is misleading to state as Ireland does at paragraph 14 of its memorial that the fuel containers aboard the Pacific Pintail and Teal are built to withstand fire at a temperature of 800 degrees for 30 minutes, whereas Ireland states in any serious fire both the temperature and the time are likely significantly to exceed these values. The figures given by Ireland for temperature and time resistance are the minimum figures prescribed for the transportation of radioactive materials by INF code 1993. Of course the flasks of all BNFL vessels meet the minimum standards prescribed by the INF code, but it is misleading to suggest that they could not withstand heat or temperature greater than that prescribed in the code. In the UNCLOS litigation Ireland has sought an assurance from the United Kingdom that the containers can withstand marine pressure -- I will stop here if Ireland has an objection to my referring in a public forum to a request for information made by Ireland in those proceedings.

MR BRADY: I would gratefully accept my friend's kind offer that it would not be dealt with in public at this stage because of the existence of the confidentiality agreement.

MR PLENDER: I think I can deal with it in this way. I can refer to a paragraph number.

MR BRADY: I will be guided by my friend's sense of confidentiality.

MR PLENDER: You will see that Ireland has made some observations on this point in volume 2 page 435, and the United Kingdom will respond in due course before the appropriate Tribunal.

It is also potentially misleading to state, as Ireland does at paragraph 19 of its memorial, that MOX production involves the production of radioactive wastes in solid, liquid and gaseous forms, a significant proportion of which will be discharged into the Irish Sea, and that information about such discharges is limited. MOX manufacture is a dry process. It involves the mixing of powders. The radioactive discharge produced by the process is minuscule. It is produced by the absorption of ambient radioactivity into the air or into water used for such purposes as washing floors. There is no shortage of public information about it. It has been widely and freely disseminated. I referred to it in the international tribunal for the law of the sea and shall in due course take this Tribunal to what I there said.

But to give it a sense of scale I can illustrate it in this way. BNFL has calculated that the annual combined liquid and gaseous discharges from the MOX plant would give rise to a dose of radiation to the most exposed members of the public equal in the course of that year to the dose of radiation that a member of the public receives every two seconds in a flight on a commercial aircraft at 30,000 feet or in 9 seconds spent in Cornwall, because of the underlying granite in that part of the country. I shall not give examples from holiday resorts in Ireland lest I be accused of spreading alarm there!

Mr Chairman, is this a convenient moment to adjourn?

THE CHAIRMAN: If this is a moment that is convenient for you to pause we can. I am concerned, as are members of the Tribunal, about having sufficient time to complete the British case by the end of tomorrow, projecting also the cross-examination that Ireland is entitled to.

MR PLENDER: If Ireland takes no longer for all three of our witnesses than I have taken with their one we shall be safe in terms of time. But I do appreciate that Ireland may want considerably more time with our three witnesses than I have spent with their one. So it really is up to Ireland. I think we will probably be through most of our formal presentations today.

THE CHAIRMAN: By the end of today?

MR PLENDER: By the end of today. No, says Mr Bethlehem, he will take more time. I think we will be through with myself and Mr Wordsworth at least.

THE CHAIRMAN: Then may I propose that you proceed for another half hour?

MR PLENDER: I am very happy to. It is again potentially misleading to state as Ireland does

in paragraph 24 of its memorial that terrorists could take the MOX fuel from the ship and attempt to separate plutonium to make a nuclear weapon. Indeed, MOX is often commended on the ground that it is safer than plutonium. Mr Justice Collins made that point in his judgment at annex 7 to the United Kingdom's memorial and Ireland itself acknowledged "the incorporation of plutonium in MOX might make it less amenable for terrorists." Annexes to Ireland's memorial, page 142. It would be fair to say that there is a division of opinion among environmental specialists on the relative merits of recycling spent nuclear fuel and mining and milling thresh uranium. The competing views are set out in a publication to which I referred in the cross-examination of Mr MacKerron, a publication of the OECD. This concluded that the environmental advantages and disadvantages are finely balanced, or to put it more accurately that the radiation disadvantages were approximately equal. On behalf of Greenpeace Mr MacKerron criticised that report in draft, and of course I accept that there is a divergence of views on where the balance of advantage lies. What is conspicuous in Ireland's memorial and evidence is the failure so much as to acknowledge the fact that there is an environmental case to be made for reprocessing as an alternative to mining and milling of uranium as well as the case to be made against it.

Finally on this point all three of Ireland's counsel have drawn attention to the fact that we did not bring with us a witness from PA Consultants or Arthur D Little. The question appears to be based upon a misconception. As we pointed out in our Counter Memorial at paragraph 2.18 and 2.22, it was not left to PA Consultants or Arthur D Little to decide what material should be published. The decision was not theirs. The decision was taken by the Environment Agency prior to the entry into force of Directive 96/29 and by Ministers thereafter.

It was not until yesterday did we hear any suggestion that Ireland wished to hear evidence from the consultants. Had they raised the point earlier, for example, in their rejoinder, we could have considered it and responded.

I now turn to the facts. An account of MOX production is set out in the judgment of the Court of Appeal of 7th December 2002. It is in the annexes to the United Kingdom's memorial, volume 2 at tab 8. At paragraph 6, Lord Justice Simon Brown stated, "It has been known for some time that UK reactors can operate effectively using a fuel called MOX, which is a mixture of plutonium oxide and uranium oxide. The manufacture of MOX enables the reclaimed plutonium to be recycled. It has the advantage of reducing the amount of stored plutonium and saving the fresh use of uranium so that the environmental hazards of mining new uranium can be reduced. In addition, it avoids the need

to transport plutonium back to the customers for reprocessing in a third country." That appears to be an error. I suggest that the word "reprocessing" there should read "MOX manufacture" in order to make sense of it. "MOX fuel in the form of what is known as ceramic pellets are said to be less attractive to terrorists and safer than plutonium which is transported in the form of plutonium oxide powder."

As the same judgment shows, BNFL applied in 1993 for permission to build a MOX plant adjacent to the Thorp plant in Sellafield. It submitted an environmental statement. A substantial number of representations were received from supporters and opponents, the supporters outnumbering the opponents. ~Ireland was among the objectors. It made a submission to the planning authority in which it argued that the demand for SNP product is not commercially based and, furthermore, for the future enriched uranium is likely to remain cheaper than MOX fuel. Ireland's objections did not prevail. Planning permission was given. Construction was completed in 1996.

Then on 2nd August 1996 the United Kingdom made a report to the European Commission in accordance with Article 377 of the EURATOM treaty. I should here explain that the procedure under Article 37 of the EURATOM Treaty is very well established and not infrequently applied. There are always two or three - a limited number of cases each year. The article provides that in any case where a Member State has planned for the disposal of radioactive waste it must first provide the Commission with information enabling the Commission to determine whether the implementation of the plan is likely to result in radioactive contamination of the water, soil or air space of another Member State. The Commission then consults a group of experts. They are appointed by the Scientific and Technical Committee from among the health experts of the Member States. It then delivers an opinion which while not strictly binding demands the most careful attention. The procedure is rigorous and is described by the European court in the case of *Salem v The Minister for Industry* - I think that I need not trouble the Tribunal with that, beyond referring the Tribunal to it. It is not I think a contentious case in any respect. It is a helpful and authoritative description of the procedure that is applied by the Scientific Committee in such cases. You will find that best produced in the opinion of Sir Gordon Slymm at page 5034 in the left column.

The United Kingdom was, therefore, required to supply and did supply to the Commission a substantial body of information. It did so both with its own original application, dated 2nd August, and in exchanges which continued for a further six months. After consulting experts, the Commission delivered an opinion. At this I do ask the Tribunal to look. It is at volume 2 of the annexes

to the United Kingdom's Counter Memorial, tab 9. The first page of the opinion sets out in the usual form the context of the request, the data supplied, the principal conclusions by the Committee and then the overall conclusion which is on the reverse of the page. That reads:

"In conclusion, the Committee is of the opinion that the implementation of the plan for the disposal of radioactive waste arising from the operation of the BNFL Sellafield mixed oxide plant, both in normal operation and in the event of an accident of the magnitude considered in the general data, is not liable to result in radioactive contamination significant from the point of view of the health, the water, soil or air space of another Member State".

I should here elaborate only on the phrase "considered in the general data". There is a reference to this in subparagraph D on the first page. The general data include a series of scenarios plausible, accidents, attacks, geological changes or other circumstances, which in the opinion of the appropriate experts must be taken into account in determining whether there is a risk of contamination significant from the point of view of health, of water, soil or air space of another Member State.

If Ireland had considered that the United Kingdom had failed in its obligations under Article 37, for example, that it had failed to supply sufficient information or accurate information, it could have instituted proceedings against the United Kingdom under Article 142 of the EURATOM Treaty. If Ireland had considered that the Commission had failed to discharge its duties under Article 37, it could have instituted proceedings against the Commission under Article 148 of the EURATOM Treaty. Ireland did not bring any such proceedings. Prof Sands responded to that yesterday, "We have the right to institute our proceedings where we choose". With respect, that is not right. Ireland and the United Kingdom are under an obligation to refrain from submitting disputes onuses questions of Community law to any means of settlement other than those provided for in the founding treaties. This is an express term of Article 193 of the EURATOM Treaty and Article 290 of the EFE Treaty, which will be found in authorities bundle 4 at page 49. Indeed, the Commission's opinion is not only conclusive, it is also inevitable. As I indicated earlier, any discharges from the MOX plant will be microscopic. I put it in graphic terms a few moments ago. Let me now put it in more scientific terms. I can best do this by referring the Tribunal to the United Kingdom's original response in the proceedings instituted by Ireland in the International Tribunal for the Law of the Sea in November 2001 at paragraphs 56 and 59. This will be found in the authorities bundle which I submitted this morning, volume 8 and at tab 15. It should be paragraphs 56 and 59. I have them before me. The best

course at this hour is for me to read them into the record and we will see what has happened to the paper.

THE CHAIRMAN: What tab is it again?

MR PLENDER: It ought to be in tab 15, but I was just handed a copy and it was not there. What was at tab 15 is an extract from the United Kingdom's written observations to the Law of the Sea Tribunal, but omitting the paragraph that I wanted to refer to, but I can simply read it now.

"The impact from the MOX plant in radiological dose is measured in microceverts" - that is not milliceverts. Gentlemen, you may not be familiar with the terminology. The basic unit for the measurement of radioactive dose is the cevert. 1,000 milliceverts make a cevert. 1,000 microceverts make a millicevert. But the doses with which we are concerned here are to several decimal points by my present recollection, .0007 of a microcevert.

I continue, "in other words, the impact is very small indeed. Indeed, within one fraction of one per cent of permissible limits. As noted in the Environment Agency's proposed decision of October 1998, the United Kingdom Ministry of Agriculture Fisheries and Food estimated that the total ..." Gentleman, I now see that my recollecting was wrong. "The dose to the most exposed UK group, known as the critical group, to gaseous discharges from the MOX plant to be 0.002 milliceverts per year." That is two thousandth of a millionth of a cevert. "It is estimated that the dose to the critical group in reflation to the liquid discharges from the plant is 0.000003 microceverts per year". Three millionth of a millionth of a cevert. "As noted by the Environment Agency, those doses are of negligible radiological significance. The Environment Agency further noted that the MOX plant would make a very small contribution to the critical group dose for the Sellafield site as a whole. The exposure of the critical group in Ireland to gaseous discharges from the MOX plant is thus 0.00004 microceverts per year". Four hundredth thousandth of a millionth of a cevert. "The submission also noted that the exposure of the critical group in Ireland to liquid discharges would be considerably less than the exposure to the United Kingdom critical group which is 0.000003 microceverts". Three millionth of a millionth of a cevert.

The United Kingdom invites there Tribunal to examine in its own time the estimated figures given in Ireland's submission to the UNCLOS Tribunal at page 58. The case for the United Kingdom is that the radiological doses, aerial and gaseous, which are involved in the present case are truly microscopic. For this reason, it is the position of the United Kingdom that in point of fact the active discharging, aerial or gaseous matter, from the MOX plant is not an activity adversely affecting

or likely to affect the maritime area. Ireland points out in its reply at paragraph 2 that we have not taken and argued that point here. That is true. We have not done so because this is one of the issues raised before another Tribunal. It does not seem helpful to duplicate the matters. But the Tribunal is not to infer that by failing to run the same argument in two tribunals simultaneously the United Kingdom must be taken to have conceded, as Ireland maintains, that the operation of the MOX plant constitutes an activity adversely affecting or likely to affect the maritime area.

Having satisfied the Commission that the implementation of the plant was not liable to result in significant contamination to another Member State, the United Kingdom considered whether the operation of the plant was justified. I would at this point propose to consider the process of justification.

THE CHAIRMAN: This would be a good time to break for lunch. I would hope that the United Kingdom would use the time now to try to assemble a judge's folder, so that we have access to the documents. You will appreciate that it is very difficult to conceptualise many numbers without seeing them. The documents would be appreciated in a folder.

MR PLENDER: The page which should have been in annex 8 will be put there straight away. Would it be helpful in the limited time available to try to put together in one bundle, though it would be additional material, additional copies of material that you already have, everything that is going to be referred to this afternoon?

THE CHAIRMAN: That is precisely what I mean. Of course, a copy for Ireland and a copy for the secretary.

We are adjourned until 2.30.

(Luncheon Adjournment)

THE CHAIRMAN: Please proceed.

MR PLENDER: Mr Chairman, members of the Tribunal, at this stage in my submissions I am dealing with the facts. Before the adjournment I had come to the first consultation and I hope in the next 30 minutes or so to take the Tribunal quickly through the process from the first to the fifth consultation.

At the date of the first consultation there was in force Euratom Directive 80/836. That directive was the subject of litigation by Greenpeace in proceedings which were heard by Mr Justice Potts. One of the issues arising in that litigation was whether the Secretary of State was under an obligation to conduct a public inquiry. Mr Justice Potts held that he was not. But another of the issues was the interpretation of the directive. Did it apply to a plan generically such as a proposal to

manufacture MOX fuel, or did it apply to a particular site. mr Justice Potts held that on the proper wording of the directive of 1980 it applied to each particular site. You have that in the bundle for this afternoon at page 1 at about 12 lines from the foot of the page. The crucial words are "In my view ICRP 60 and the Directive are concerned with justification of particular practices which affect particular individuals in particular circumstances". It was therefore necessary for the Environment Agency to consider whether the particular practice of manufacturing MOX at the Sellafield site was justified by reference to any economic advantages that it might have among other matters.

Professor Sands stated yesterday that for this purpose BNFL submitted a request for justification pursuant to the Radioactive Substances Act 1993. That is incorrect. There is no such thing as an application for justification as a matter of either European Community law or national law. Justification is not a matter for which application is made. Justification is the standard that the competent authority must apply in determining whether to approve a new type of practice. Euratom law requires that before a relevant practice is authorised the competent authority must determine whether it is justified, but Euratom law does not prescribe applications for justification, nor does it prescribe the holding of public consultation. However, the Environment Agency took the view that the question of the justification of the Sellafield MOX plant should, as a matter of good government, be considered in a public consultation. To that effect, it required BNFL to make an application for variation of its discharge authorisation. I hasten to add that it was not otherwise necessary for BNFL to make any such application. That is so because the discharge from MOX, as you will appreciate from what I said this morning, could very easily be accommodated within the existing licence. They are infinitesimally small. But BNFL was required to apply for a variation of its discharge authorisation. It did so. In this means the Environment Agency ensured that there should be a public consultation. To that effect, it published a consultation paper, which is supplied in the grey bundle of documents that I gave to the Tribunal this morning and to which I now take you.

BNFL also published a consultation document which can be found in the same bundle.

The Environment Agency solicited the views of interested partes, such as Friends of the Earth. You see a letter inviting them to give their views. The Agency decided that the issue should be a matter of public consultation, the subject of that consultation was an inquiry into the economic case for the MOX plant, as well as any detriments of the plant. At that stage the inquiry was a broad one, the benefits and the detriments of the MOX plant.

The first round of public consultations took place over eight weeks, ending in April 1997. Ireland made submissions to the consultation. Ireland made clear that its opposition to the MOX plant was part of its long-standing objections to nuclear installations at the Sellafield site generally. Ireland contended that there had not been adequate presentation of the justification for the MOX plant and that the Environment Agency should undertake a wider assessment of the benefits and disadvantages relating to the commissioning of the MOX plant at Sellafield. Then, as the Attorney General rightly observed yesterday, the Environment Agency in the light of comment that it had received from a number of quarters decided to conduct a second consultation to assess the justification for the plant.

For the purpose of the second justification, more information was provided. The Environment Agency requested BNFl to submit a business case which could be subjected to independent scrutiny. There was then a public tendering exercise, as a result of which PA group was awarded by the Environment Agency the contract to conduct the independent inquiry. PA submitted to the Environment Agency a full version of its report, which PA then reviewed in order to determine what data should be withheld.

Prof Sands contended yesterday that BNFL secured the redaction of information under the Radioactive Substances Act. That is not correct. By its express terms, section 39 of the Radioactive Substances Act applies to the Agency only. It is specifically addressed to the Agency, not even to Ministers. It provides for the publication of materials subject to an exception for trade secrets. Mr Bethlehem will enlarge on this aspect of the matter. A separate edited version of the PA report was prepared for dissemination in the consultation.

In determining what should be excised from the PA Report, PA engaged in discussions with BNFL, but PA took an independent view and submitted its view to the Environment Agency. The final decision was taken not by PA but by the Environment Agency, which published a public domain version of the report in December 1997. This was one of a number of documents published in connection with the second consultation and the second consultation materials are in the bundle which was supplied this morning.

PA set out the criteria by reference to which it took its decision as to whether material was to be excised, but its decision was, as I say, not the final decision. Where excisions were made, it identified the excisions by some form of words. For example, page 47 of the annex just says "conclusions in confidence". I accept, however, that in the 1997 version the nature of the excised

material was defined only in general terms. It is clear, I submit, that what was excised was all commercial information. It is clear that none of it was, for example, information about discharges from the plant, planned or accidental, or the consequences of discharges. But the 1997 report did not descend to detail in describing the terms or nature of the commercial information excised. It concluded that the operation of the MOX plant was likely to prove highly beneficial economically. It would, in the words of PA, "produce a strongly positive net present value".

With the benefit of the information contained in all the documents for the second consultation, Ireland made a submission to the second consultation in March 1988. This will be found at page 3 of this afternoon's bundle. Under the heading "comments on the SNP economic case", Ireland made a series of submissions or contentions. Ireland argued that following what it called a collapse of the plan for the development of fast-breeder reactors, the economic justification for reprocessing contracts, such as those carried out at Thorp, has evaporated. It argued that further separation of plutonium at Thorp should cease, it argued that many of the assertions set out in the PA report are not verifiable, because information on - and here I emphasise Ireland's words - cost and price data and plant process and performance has been omitted. Ireland did complain of the omissions but was very clear that the nature of the omissions was cost and price data, plant, process and performance. Ireland argued that the capital cost of the erection of the plant ought to have been included in the calculation. This, as the Tribunal will now know, was an argument advanced to the High Court by Greenpeace in *Queen and Secretary of State, ex parte Greenpeace* and dismissed both at first instance and on appeal. Ireland argued that plutonium ought not to be treated as free, that is to say, though the plutonium will be in many cases at the site as a result of reprocessing, it is a valuable resource and ought not to be treated as free in the calculation of the benefit. Ireland argued that the high level of automation presents a risk of plant breakdown and "whatever may be the position about the positive economic case for the MOX plant, portrayed in the PA Consultant report, it is the view of the Department that any economic benefit from MOX production does not in any way outweigh the detriment to society which manifests itself in terms of increased risk to public health, environment or security".

The last argument I hope that I may paraphrase fairly to Ireland in the following terms. Any economic advantage is outweighed by a potential environmental or other disadvantage. AT that date, therefore, Ireland clearly understood that the excised data comprised information on cost and price, data and plant, process and performance, there was no suggestion that it might be

information about the activities of the MOX plant that might affect the environment or that it was information that Ireland needed in order to police the OSPAR Convention or the Law of the Sea Convention, nor did Ireland contend at that stage that it was unable to express a view or a conclusion on justification by reason of the absence of excised material.

Mr MacKerron and two of his colleagues made a submission to the same consultation. His criticism, made on the fourth page of his memorandum, is that, whereas Thorp was constructed on the basis that guaranteed its profitability, because customers underwrote the production costs, there was no guarantee of profit for the MOX plant. MR MacKerron and his colleagues said that they were aware of only one firm contract. They said others may be forthcoming, but at the material time they were only potential customers. Nothing was said about the absence of competition between BNFL and COGEMA or between the upper end of uranium oxide prices and the lower end of MOX assembly prices. The objection then was that sufficient contracts might not materialise.

Following that consultation, the Environment Agency published its draft decisions on the commissioning of the MOX plant. This will be found at pages 4 and 5 of this afternoon's bundle. The draft decision was a substantial document. It ran to about 100 pages, 20 being devoted to the argument for and against uranium commissioning and 80 to the argument for and against plutonium commissioning and the full operation of the plant. It is important to read just two paragraphs, the first paragraph 22 at page 4. "The assessed radiation doses to members of the public as a consequence of discharges from the MOX plant have negligible radiological significance." At paragraph 31, under the heading of "Environmental and Other issues", "The Agency has considered radioactive discharges, waste management, health and safety operations on the MOX plant's plant transport, the safety of the MOX fuel in nuclear reactors, radiological impact, sustainable development, proliferation of nuclear weapons and the plutonium stockpile. The Agency has identified some small benefits and some small detriments among the issues but takes the view that overall the balance is broadly neutral."

Given its conclusion on environmental and other issues, that the balance is broadly neutral, the draft decision then went on to consider the economic case and concluded that there was a case for approval. This is the point in the stage of consultations at which consideration of the environmental issues was concluded and from this point onwards, essentially, the issues being considered are no longer environmental, a decision on that point having been made in the terms that I

have just set out, the issues considered hereafter were the commercial arguments for and against the plant or the process.

After receiving representations from Ireland and others and considering the matter independently, the Department, at that time the Department for the Environment, Transport and Regions and the Ministry of Agriculture, Fisheries and Food, scrutinised the PA report and a revised public domain version was published by the Secretary of State in June 1999. Yesterday, Prof Sands sought to persuade the Tribunal that there was little difference between the 1999 version and the 1997 version. I invite you simply to compare the two yourselves. The differences are substantial. Let me just illustrate one case. On page 7 of this afternoon's bundle, there begins an extract from the 1999 version, beginning at paragraph 2.4 sales volume. It continues over to pages 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20. This may be compared with the table from the 1997 version that you have at page 22. The brief table on page 22 was in the 1997 version, the dozen or so pages of amplification followed in the 1999 version. I have set out in my skeleton argument for this afternoon a number of other examples of substantial amplification in the 1999 version of the 1997 version of the PA report. These are not, however, two separate reports. These are two versions of the same report, the 1999 version revealing much more of the information than was revealed in the 1997 version. That is to say a fresh exercise of reviewing the redacted information was undertaken with the express object of placing as much as possible into the public domain.

In June 1999 the Secretary of State at the Department for the Environment, Transport and the Regions announced that he and the Minister of Agriculture were inviting fresh comments in the light of the circumstances that then existed.

A third public consultation then took place. Again the Government published a consultation document in addition to the amended version of the PA report. Again Ireland participated in the consultation. Ireland's submission to that consultation merits reading but I fear we may not have in this afternoon's bundle. I will however read some of it aloud, and I apologise that time has prevented us from getting that in. In due course it may be consulted in the annexes to Ireland's memorial and it is at page 137. In its memorial in these proceedings Ireland recalls that in that submission it complained of excision from the public domain version of the PA report, but Ireland does not set out in its memorial what exactly it said in response to the consultation. Ireland's arguments were seven-fold. First, whereas the MOX plant needed to operate continuously at 30 to 40 per cent of the reference case output ion order to cover its future costs there were contracts in place

for only 6.7 per cent of the projected output, with letters of intent for a further 11 per cent. those were among the aggregated data to which I took the Tribunal earlier. They were found in the consultation pack distributed by the Government of the United Kingdom in June 1999.

Mr Rycroft, by the way, makes the point in his evidence that BNFL objected to the disclosure of that aggregated information because it helped customers and competitors, but BNFL's objection on that point was over ruled.

Secondly Ireland argued that it was difficult to see from which sources further orders might originate. That was presumably in view of Ireland's stated conviction on the poor prospects for reprocessing generally.

Third Ireland said that the future of nuclear power world wide remained uncertain.

Fourth, Ireland said that all potential customers for BNFL are overseas - and now there comes a passage on which I do heavily rely in Ireland's words, and they are these. "BNFL's competitor COGEMA, removed over 9 tonnes of plutonium from storage for MOX fabrication. Moreover Japan has its own plans to produce MOX fuel which would further decrease the demand for Sellafield produced MOX. There is no evidence that uranium prices are likely to increase in the medium term, which might make reprocessing and by implication the manufacture of MOX fuel - and here I question whether Ireland have not made the same mistake as Lord Justice Simon Brown - a more attractive option. And then Ireland contemplates the cost of decommissioning may rise significantly and that the demand for MOX is likely to be strongly influenced by political and contractual considerations rather than technical or cost advantages.

The conclusions I draw are these. Far from contending that there was no competition between BNFL and COGEMA Ireland was at that stage expressly acknowledging that COGEMA was, in its words, "BNFL's competitor". Ireland also refers to the Rockashamora reprocessing plant as a source of further potential competition in the future reducing demand for the MOX plant. Far from contending that there was no competition between MOX and uranium oxide assemblies Ireland argued that an increase in uranium prices would make MOX more attractive. Ireland proceeded on the premise that the essential question was whether the MOX plant would attract the volume of business that it needed.

Mr MacKerron and his colleagues made their contribution to the same consultation. I took him to his evidence yesterday and you will remember it. He and his colleagues stated "the provisional view of ministers that the balance of argument is in favour of economic justification

appears to be incorrect. ... We are able to state these conclusions with confidence despite the fact that the most recent extension of the consultation process has not removed the overall criticism that insufficient information is being placed in the public domain." Asked by me yesterday how he reconciled that with his statement that in the absence of the unredacted version of the report the economic case for the MOX plant cannot be assessed, mr MacKerron replied, in the words recorded at page 108 of the transcript: "The conclusions states 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."

He was however able to set out a business model in which he concluded that BNFL would secure less business than it hoped. He argued that BNFL would have to charge higher prices than COGEMA and that as utilities had been unhappy with COGEMA's price BNFL would be forced to drop prices. At that stage Mr MacKerron did not appear to agree with Ireland's view of COGEMA as BNFL's competitor.

The PA Consulting sent a report indicating where they disagreed with Mr MacKerron and his colleagues writing as they then were for Friends of the Earth. The heart of the matter was very simple. Mr MacKerron thought that BNFL would secure less business and lower prices than PA estimated. The review was interrupted in 1999 when BNFL discovered that some of its staff had falsified fuel pellet diameter readings at the MOX demonstration facility. BNFL drew this to the attention of the nuclear installation inspectorate and this had the result amongst others of interrupting the consultation process.

In March 2001 there followed the fourth consultation process. On this occasion the subject of the consultation was defined by the new directive, Council Directive 96/29 Euratom. This had come into force in May 2000. This makes it clear by its express terms that contrary to the old directive as interpreted by Mr Justice Potts an inquiry is to be into a type of practice, for example MOX manufacture, not the advantages or otherwise of a particular site or the conduct of the practice at the site.

I emphasise the test is generic because Ireland has throughout its pleadings used language indicating that the test was site specific or specific to Sellafield. They have even given as the title of the approval decision the decision approving the MOX plant. it was not a decision approving the MOX plant, it was a decision approving the process of MOX manufacture, though I readily add the qualification that the consultation considered the question, that is to say the approval

of the process, in the context of the proposal that was on the table at the particular moment to conduct that process at Sellafield.

For the purpose of the new consultation there was published in March 2001 a document prepared by BNFL, the economic and commercial justification for the MOX plant. This is at pages 24-26 of this afternoon's bundle. Again Ireland participated in the public consultation, again its submission merits reading. I am not sure that we have it in the hurriedly produced bundle. I shall give you the reference. It was in the annexes to Ireland's memorial at page 161. I think it is here. Sunk costs should have been taken into account. That is at page 163. It is at page 35 of this bundle. I hope that I shall not be accused of characterising the document in the wrong number of categories. I detect eight arguments advanced by Ireland in this response. First, that sunk costs should have been taken into account. That was the point rejected by the Court of Appeal in the *Greenpeace* case. Secondly, the plus or minus 20 per cent sensitivity case adopted by BNFL was insufficiently proven. Thirdly, transport and security costs ought to have been taken into account. Ireland argues that transport costs should be taken into account. The Tribunal may notice that the consultant ignored profits resulting from transport. Ireland considers that there are serious question marks over the market for MOX fuel, a reference to the prospects in the Japanese, German and Swiss markets, which Ireland assessed as poor. The economic benefits in Cumbria are peripheral. BNFL at the material time took the view that 40-50 per cent of its reference case would be needed to cover future costs as against 30 per cent previously. That again was taken from a public document, the second MOX market review for DETR, published by BNFL in March 2001. Although BNFL had reached preliminary agreements which, if honoured, would bring the amount of MOX business over 40 per cent, firm contracts were not yet in place. Finally, in so far as the three markets in this paper are concerned, Japan, Germany and Switzerland, there would appear to be contracts in place for only 9.6 per cent of the BNFL reference case and a further 12.6 per cent attributed to letters of intent.

Once again it is profitable to compare Ireland's submission to the consultation with its submissions to this Tribunal. IN its submissions to the consultation, Ireland did not suggest that the MOX market is one in which there is no competition. It did not resile from its previous submission referring to COGEMA as BNFL's competitor and to the imminent entry of the Rokishamor plant on to the market. On the contrary, Ireland reminded the consultation of its previous submissions and reiterated them. It criticised the methodology applied to assess profitability, but was fully informed of the portion of the reference case attributed to concluded contracts and the essential point of

disagreement was once again a simple one. An expression by Ireland of lack of confidence in the achievement by BNFL of sufficient contracts at a sufficient price. Once again, the consultation had the benefit of a submission made by Mr MacKerron. This was his third report. This was delivered in response to the reasons given by PA Consultancy on the instructions of the Department for failing to accept the business case that he had accepted in a previous consultation. In his paper dated May 2000, Mr MacKerron far from contending that the reprocessing customers were captive contended that they had several options. You will remember that I took him through this in cross-examination. The crucial words are these, "The alternatives include plutonium immobilisation, return of plutonium in separated form and use of other MOX fabrication facilities. These include the plant at Dessel in Belgium and at Katarash and Markul in France. The Markul 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."

Yesterday I put this to Mr MacKerron, who stated in the transcript at page 115, "Utilities would be interested if it were feasible to use other fabrication for the plutonium that had been separated at Sellafield, but it is not realistic".

I invite you to conclude that this is not a convincing response. Utilities would have no reason to be interested in a course of action which is not feasible. In setting forward the various options that customers have, it would serve no purpose to refer to an option which was not feasible, for that would not be a true commercial option at all.

THE CHAIRMAN: I have just a question. The reference in the transcript is to what page?

MR PLENDER: Page 115. What Mr MacKerron was plainly stating in his paper dated May 2000 was that the prospects of the MOX plant were not as favourable as had been maintained by the consultants because utilities had a number of options, one of those options being processing elsewhere. Moreover, he was right.

In April 2001 ADL was commissioned following a public tendering exercise to carry out a further review of BNFL's revised economic case. A clause in ADL's contract with the Department for the Environment Food and Rural Affairs specified "the contractor will form its own view on whether information to be identified by BNFL really is commercially sensitive. It will advise DEFRA whether any of this can be published. Before advising DEFRA, it will consult BNFL and take account of its views, but it will then make its representation and leave any further discussion to DEFRA and BNFL. The contractor's report will then be published, excluding only commercially sensitive data."

This clause was supplemented by express instructions by DEFRA encouraging ADL to put as much information into the public domain as possible (see the United Kingdom's Counter Memorial at paragraph 222).

ADL produced a full version of its report for Ministers, together with a proposed public domain version. BNFL did not share ADL'S views as to what could be made public and made its position clear to Ministers, but Ministers continued to follow the policy that as much information should be put into the public domain as possible. The ADL report was available in a public domain version from July 2001. A copy is appendaged to the Counter Memorial at tab 5.

There was yet another period of consultation. This time Ireland and Mr MacKerron did not participate. The consultation ended on 24th August 2001, a decision that the manufacture of MOX fuel was justified was published on 3rd October 2001. This was then challenged by Greenpeace on the grounds that I have described. The application for judicial review failed. The appeal failed. Ireland instituted proceedings for provisional measures before the International Tribunal for the Law of the Sea. By order dated 3rd December 2001, that Tribunal unanimously rejected Ireland's request for provisional measures restraining the United Kingdom from engaging in the plutonium commissioning of the plant, but ordered that pending the constitution of an Annex 7 Tribunal the United Kingdom and Ireland should cooperate and, in particular, should exchange information. ON 19th December 2001 the Nuclear Installations Inspectorate gave BNFL consent to proceed with plutonium commissioning and the plutonium commissioning of the plant was put into effect on the following day.

Mr Chairman, members of the Tribunal, those are the United Kingdom's submissions on the facts and I now pass to Mr Wordsworth on the first of the issues of law before the Tribunal.

THE CHAIRMAN: Thank you very much, Mr Plender.

MR PLENDER: Mr Chairman, a ten-minute adjournment to enable Mr Wordsworth to get the bundles in proper order would be very much appreciated.

THE CHAIRMAN: I think that it would be appreciated by the Tribunal as well. We will adjourn for ten minutes.

(Short Adjournment)

THE CHAIRMAN: Do we have the judges' folders?

MR WORDSWORTH: They are just on their way.

With your leave, I am going to be addressing today the issues on the interpretation and application of Articles 9(1) and 9(2) of the OSPAR Convention. These are the nature of the

obligation and corresponding right under Article 9(1) and the question whether the information at issue is information for the purpose of Article 9(2).

It is common ground, as Prof Sands suggested yesterday, that these two provisions, and indeed Article 9(3) as well, fall to be interpreted in accordance with the rules on customary international law encapsulated in Articles 31 through to 33 of the Vienna Convention. Article 9(1): I am just going to look very quickly at the wording. "The contracting parties shall ensure that their competent authorities are required to make available the information described in paragraph 2 of this Article to any natural or legal person in response to any reasonable request without that person having to prove an interest, without unreasonable charges, as soon as possible and at the latest within two months."

The obligation on the contracting parties is to ensure that their competent authorities are required to make certain information available. According to its ordinary meaning, this is not an obligation for the contracting party to supply specific information on request. It is an obligation to ensure that an appropriate legal or regulatory framework is in place by which the information may be supplied by the competent authority. That framework will prescribe the detailed nature of the duties owed by each competent authority towards each natural or legal person, including the detailed nature of the derogations from such duties.

This interpretation is confirmed by five factors. First, and most obviously, the need to give effect to the words "ensure that their competent authorities are required to". Ireland interprets the article as if it read "the contracting party shall make available information described in paragraph 2. This is not what Article 9(1) says. I refer to the *Anglo-Iranian Oil Co* case, which is at tab 1 of your judge's folder, which is the slim yellow bundle, and tuming to page 2, approximately one third of the way down the page, "The Government of the United Kingdom has further argued that the declaration would contain some superfluous words if it is interpreted as intended by Iran. It asserts that a legal test should be interpreted in such a way that a reason and a meaning can be attributed to every word in the text. It may be said that this principle should in general be applied when interpreting the text of a treaty". That was the United Kingdom's position and the Court accepted that. It then does not apply that in the particular case. Our submission is that the Tribunal should seek in this case to give a reason and a meaning to the words "ensure their competent authorities are required".

Secondly, the wording of Article 9(3), this affirms the right of contracting partes, in accordance with their national legal system and applicable international regulations, to provide for a

request to be refused where it affects certain specified categories of information. Article 9(3) does not contain a straightforward right to refuse. It is concerned with the exceptions that a contracting party may allow for in its implementing legislation. Again, Ireland's interpretation depends on omitting key words from the treaty tems. Ireland interprets Article 9(3) as if referred to the right of contracting parties in accordance with their national legal systems and applicable international regulations to refuse a request for information where it affects, etc. Again, this is not what Article 9(3) says.

My third point is the requirement to make available the information to any natural or legal person. This was a focus in questions from the Tribunal yesterday. This makes no sense if the obligation of the contracting party is to make available specific information on request. This is a treaty. A natural or legal person other than an OSPAR party has no standing under the Convention. It has no basis on which to make a request. If a contracting party sought to exercise a right of diplomatic protection, this could only be exercised after the exhaustion of local remedies, as was accepted by Prof Sands yesterday. But this simply brings the matter back before the domestic courts. Once it is accepted that this is the necessary result of the provision, save in the exceptional case of a contracting party, surely the straightforward interpretation is to find that this was what the OSPAR parties always intended, as opposed to seeing this as an unfortunate by-product of the rules on diplomatic protection. Also, of course, it must be added that States other than the contracting parties fall within the rubric of natural or legal persons and a right of diplomatic protection cannot be exercised on their behalf.

Now, if it is said that somehow a contracting party may have a right to receive specific information where every other natural or legal person has none, there is a problem that nothing in Article 9(1) suggests this or suggests the intention that contracting parties be in any way singled out for special treatment. If, however, the obligation is merely to put in place an appropriate legal or regulatory framework, these issues simply do not arise. If the competent authority fails to supply information on request, the natural or legal person, including possibly a State or a contracting party, may pursue the request in accordance with the legal or regulatory framework that the contracting party has put in place. If the contracting party fails to put in place that legal or regulatory framework, it is susceptible to an allegation of breach of Article 9(1) by another contracting party.

Fourthly, I would like to turn to the nature, object and purpose of the OSPAR Convention. The OSPAR Convention is primarily concerned with the adoption by contacting parties of programmes and measures to prevent and eliminate pollution and protect the maritime area. See, for

example, Article 2(1), which is at tab 2 of the judge's folder, if I can turn you there to page 4. Article 2, General Obligations. "(a) The contracting party shall in accordance with the provisions of the Convention take all possible steps to prevent and eliminate pollution and should take the necessary measures to protect the maritime area against the adverse effects of human activities so as to safeguard human health and to conserve marine eco systems and, when practicable, restore marine areas which have been adversely affected. (b) To this end contracting parties shall individually and jointly adopt programmes and measures and shall harmonise their policies and strategies."

We see a working example of this at Article 3 over the page. "Pollution from land-based sources". "The contracting parties shall take individually and jointly all possible steps to prevent and eliminate pollution from land-based sources in accordance with the provisions of the Convention, in particular as provided for in its annex 1." If we turn on to page 8 in this tab, we see what the obligations are under annex 1. "When adopting programmes and measures for the purposes of this annex, the contracting party shall require either individually or jointly the use of best available techniques, best environmental practice, etc". The point there is, adopting programmes and measures, that is the primary focus.

Under Article 2(1), "Point source discharges to the maritime area and releases into water or air which reach and may affect the maritime area shall be strictly subject to authorisation or regulation by the competent authorities of the contracting parties. Such authorisation or regulation shall, in particular, implement relevant decisions of the Commission which bind the relevant contracting parties".

Again, it is about the passing of authorisations or regulations. In this respect, I would like you to turn back one page to see Article 22, dealing with reporting to the Commission, and there is the obligation. "The contracting parties shall report to the Commission at regular intervals on the legal regulatory or other measures taken by them for the implementation of the provisions of the Convention and of decisions and recommendations adopted thereunder, including in particular measures taken to prevent and punish conduct in contravention of these provisions."

Under Article 23, compliance, "The Commis sion shall on the basis of the periodical reports referred to in Article 22 and any other reports submitted by the contracting parties assess their compliance with the Convention".

My submission is that the Convention as a whole, its nature, object and purpose, is about creating obligations on the contracting parties to enact regulations or to adopt programmes and

measures and Article 9 fits precisely into this scheme.

Fifth, I would like to refer to the travaux preparatoires and the circumstances of the conclusion of OSPAR, and particularly the circumstances relating to the adoption of Articles 9(1) and 9(3). Of course these only constitute a supplementary means of interpretation pursuant to Article 32 of the Vienna Convention, but they are very revealing in this case. The travaux confirm that the wording of Articles 9(1) and 9(3) were specifically amended in order to secure conformity with Articles 3(1) and (2) of Directive 90/313/EEC.

I would now like to turn to some extracts from the travaux which are at tab 3 of the judge's folder. We start in November 1990 and on page 10 I would like to draw your attention to paragraph 4.9 "The ad hoc working group agreed to include in the Convention text on a new article on the exchange of information on the implementation of the Convention as outlined in OSPAR reg 1/1/4. It was necessary however to ensure that the wording of paragraph 3 was not in conflict with the recent EEC directive on freedom of access to environmental information. To this end the EEC delegation undertook to provide the relevant text prior to the meeting of the PWG in January 1991."

If we turn over the page to the meeting in April 1991, and then on to page 14, I would like to draw your attention to the original of Article 9 which was then Article 5, and you can see there it is a very different looking provision, "contracting parties shall ensure that their competent authorities are required to make available to any natural or legal person at his request and without his having to prove an interest, information relating to", and then you see applications for authorizations, authorizations and conditions, samples of water or effluent or emissions in the air and steps taken in relation to that.

Then we see the comment of the EEC at page 16 of the bundle half way down, and you see that the working group are moving forward towards what will eventually become article 9, and it is then article 7 quater exchange of information, and half way down it says "Article to be renamed access to information". Then a couple of detailed suggestions on the article, and then "Spain suggested deletion of the square brackets around para 2 and the retention of the text. The EEC delegation entered a reservation on Article 7 quater. In its view the provisions were too weak compared with relevant provisions in the framework of the EEC". Then over the page on the footnote, page 17, the same point is made "EEC reserve on the grounds that these provisions were weaker than corresponding EEC rules." Then what we see in January 1992 is that (page 19) Article 7 quater becomes what we now know as Article 9, access to information. There you see the wording there is

essentially identical to the wording that we are becoming familiar with.

The key point is that this wording is also the wording of the directive, and if I can ask you to skip forward to tab 6 where you see on the second page of the tab, Article 2, "For the purposes of this directive (a) information relating to the environment shall mean any available information in written, visual or database form etc", and I do not want to focus on that for the moment. Article 3.1 "Save as provided for in this Article, Member States shall ensure that public authorities are required to make available information relating to the environment to any natural or legal person at his request and without his having to prove an interest". Then Article 3(2) "Member States may provide for a request for such information to be refused where it affects", and you can see at the bottom of the page "commercial and industrial confidentiality, including intellectual property".

The adoption of language from directive 90/313 makes it clear that the contracting parties were concerned with the passing of domestic legislation, not the creation of a right to receive specific information on request. That flows naturally from the nature of a directive, and at tab 4, page 22 of the bundle, I have inserted an extract from Wyatt & Dashwood which also sets out Article 249 of the EEC Treaty. Article 249:

"A directive shall be binding as to the result to be achieved upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods". "The choice left to Member States of the form and methods for the implementation of directives allows a Member State to choose the legislative format which it considers appropriate. Thus the legislation adopted to implement a directive need not use the same words as the directive itself." Then I have indicated another sentence slightly lower in the page, "Implementation of a directive requires the transposition of the requirements of the directive by binding measures of national law". So, so far as directive 90/313 is concerned, it is evident that by using a directive and by the language used in Article 3(1) the EEC Member intended that the obligation undertaken by each Member State was to take legislative or administrative measures to achieve the stated objective. They did not intend that a Member State would use Article 3(1) as a means of demanding specific information from another Member State. This would be quite inconsistent with EEC law and practice.

By adopting the language from Article 3 of directive 90/313 the contracting parties to the OSPAR Convention showed their intention to adopt precisely the same approach. All that was intended was that the contracting parties put in place the required domestic legislation.

LORD MUSTILL: If I might say so you are going at a gratifying

speed, but just panting behind for a minute or two, could we go back to the final form of the directive at page 47. You have been concerned to draw the parallel with Article 3 when we come to look at our own particular problem. That is right so far, is it not?

MR WORDSWORTH: Yes, my Lord.

LORD MUSTILL: My eye lit on Article 7, and if it is a point you have made I am afraid I failed to catch it as it passed. But Article 7 has a different formula which might be significant when you come to think what Article 3 means in its familiar directive type language, because there the Member States are not required to ensure that public authorities are required to do something, but the Member States are themselves to provide information. That might be said to show that the language of Article 3 is more distanced from direct action by the Member State. Do you understand what I am saying?

MR WORDSWORTH: I do understand that and I think I agree with that because our position is that it is not just that Article 3 is in a directive, but that of itself is extremely important, but the language of Article 3 adds an extra gloss and makes it quite clear in the language, in the reference to shall ensure that public authorities are required to etc, that is precisely language of requiring a state to enact domestic legislation as opposed to requiring a state to provide specific information on request.

LORD MUSTILL: What I am trying to say is that perhaps Article 6 being next door to Article 7 points the contrast between the setting up of a system -- I am not saying you are right but I am just offering this to the world at large as a thought -- the difference between the setting up of a system which Article 6 looks like with the actual activity itself which Article 7 looks like. Do you understand my point, or shall I say it again?

MR WORDSWORTH: Please say it again. I am sorry.

LORD MUSTILL: Article 7 says Member States shall take the necessary steps to provide, so that is the state itself doing the job, and it is a direct obligation on the state. Article 6 is concerned with some of the same subject matter, but in a different language; "shall take the necessary steps to ensure that information relating to the environment etc" are under the control of public authorities, is made available. That is a slightly more distanced obligation. Then you finally get to Article 3 and what the Member State has to do is not the same as it has to do in Article 7.

MR WORDSWORTH: I absolutely agree with that.

LORD MUSTILL: I am not making points in your favour, I am

just offering it as a thought.

M,R WORDSWORTH: But that is precisely the United Kingdom's position, that Article 3 is at two points of remove from an obligation to give information on specific request.

LORD MUSTILL: This is a typically English method of interpretation, playing one provision off against another, and I apologise for it. I suspect that the language of the Community legislation is littered with examples like this, of the nuancing of language to distinguish between that which the state has actually to do and obviously has to do effectively itself, and the setting up of a proper system for getting other people to do it. End of intervention. If that is a question I am not sure, but you could attach a question mark to the end of it if you like!

MR WORDSWORTH: We would absolutely recognise the difference in the language between Articles 3, 6 and 7 and effectively Article 6 can be seen as a way through to Article 7.

LORD MUSTILL: Thank you very much. Do not use your precious time any more on that, thank you.

MR WORDSWORTH: The next question I want to address is whether it is possible to get to another result as a matter of EEC law, such that Article 9 should be looked at in a different light, because of course in certain circumstances directives are capable of having a direct effect. I would like to turn to the test set out in Wyatt & Dashwood which is at pages 23 and 24 of tab 4. I am looking at Article 7 as I speak because that may be a provision that would be capable of having direct effect in theory. Page 23 of tab 4 of the bundle at the bottom, "The current formulation of the test for direct effect applied by the European Court appears as follows in the Cooperativa Agricola case". Over the page, "The Court has consistently held that whenever the provisions of a Directive appear, as far as their subject matter is concerned, to be unconditional and sufficiently precise" - it may be that Article 7 of Directive 90/313 is within that rubric. "Those provisions may be relied upon before the national courts by an individual against the State where the State has failed to implement the Directive in national law by the end of the period prescribed or where it has failed to implement the Directive correctly. The Community provision is unconditional where it sets forth an obligation which is not qualified by any condition."

Just pausing there, again I would distinguish between Article 3 and Article 7, because Article 3, of course, is qualified by a condition, which is contained in Article 3(2), which is the derogation allowing Member States to provide for a request for such information to be refused where

it affects the list of different matters. "A Community provision is unconditional, where it sets forth an obligation which is not qualified by any condition, or subject in its implementation or effects to the taking of any measure either by the Community institutions or by the Member States. Moreover a provision is sufficiently precise to be relied on by an individual and applied by a national court where it sets out an obligation in unequivocal terms."

Continuing at the bottom of the page, "It is to be noted that the provision of a Directive may only be relied upon by individuals before national courts where the Member State has failed properly to implement that Directive within the period prescribed for that purpose; where a Directive has been properly implemented by national measures, its effects extend to individuals through the medium of those implementing measures; and where a Directive has been properly implemented by national measures, it is not open to the litigant to sidestep the appropriate provisions of national law and rely upon the direct effect of the provisions of the Directive ."

There is a slight gloss on that. I have not actually put the authority into this judge's folder, but it is in our bundle of authorities, and that is authorities bundle 8, tab 2, which is a recent case of the ECJ, in July of this year, *Marks & Spencer v The Commissioners of Customs & Excise*, where there is a slight gloss on that, because what the ECJ is saying is that, on the one hand, the national measures must be correctly implemented, but also that they have to be applied in such a way as to achieve the results intended by the Directive.

The obvious point is that in order to be able to rely on Directive 93/313 Ireland would have to show two things. It would have to show that it was capable of direct effect. And we would say that Article 3 probably is not because of the derogation in Article 3(2), but, anyway, it would have to show that the Directive was not being correctly implemented or applied as a matter of the United Kingdom domestic law. Of course, this has never even been suggested, so the issue of direct effect could not arise.

As a matter of EC law, Ireland would get nowhere if it pursued a request for specific information under the Directive . This is not to say that Ireland has no right at all under EC law. Of course, it does have rights, including its rights under Article 227 of the EC Treaty. "A Member State which considers that another Member State has failed to fulfil an obligation may bring the matter before the Court of Justice". Of course, there is a pre-condition to exercising that right, which is to bring the matter before the Commission. But Ireland's right under Article 227 would be in respect of a failure property to discharge the duty to implement Directive 90/313, ie a failure to ensure public

authorities are required to make information available. We say why should the position be any different under the OSPAR Convention Article 9? It seems most unlikely that the OSPAR parties would have adopted specific wording from Directive 90/313 but had intended that such wording have a quite different effect.

Ireland relies on the absence of certain provisions in the OSPAR Convention. Those are provisions equivalent to Articles 4 and 9 of Directive 90/313. This is at tab 6, second page of the judge's folder. You see that 4 there is the right of somebody whose request has been unreasonably refused or ignored. They have to have access to a judicial or administrative review. At Article 9, over the page, Member States shall bring into force laws, regulations and administrative provisions, etc. by 31st December 1992. Ireland says, "Well, if you are right, United Kingdom, about the meaning of Article 9(1), how come these provisions are not contained in the OSPAR Convention?"

There are three answers to that. The first answer is that in part, in fact, they are. If we can turn back to Articles 22, especially 23, of the OSPAR Convention, we can see that there is at least a move in that direction, because under Article 22, the contracting parties have to report to the Commission at regular intervals on the legal regulatory or other measures taken by them for the implementation of the provisions of the Convention. Then we have Article 23 concerned with compliance. "The Commission shall on the basis of the periodical reports referred to in Article 22 and any other reports submitted by the contracting parties assess their compliance with the Convention". Then under 23(b), "When appropriate decide upon and call for steps to bring about full compliance with the Convention". So there is an overseeing power which is aimed at ensuring that the contracting parties do, indeed, adopt the domestic legislation that Article 9(1) requires them to do, Article 9(1) not being a unique exception in that case.

There are two other points on this. First, one has to take into account the fact that the OSPAR Convention is not a specific Directive and it is not a freedom of information treaty. So it is not concerned in quite the same way with detailed provisions of implementation. A subsidiary point is simply that the essence of Articles 4 and 9, may be rather suggesting that the obligations under the OSPAR Convention are less not more extensive, that they should not be used as a stepping stone to saying that there is a specific right to receive discrete information under Article 9(2).

THE CHAIRMAN: Excuse me, can you take us back for a moment to the travaux that you explored a moment ago? The European Community was dissatisfied with the early drafts because it was less than a

directive.

MR WORDSWORTH: That is correct.

THE CHAIRMAN: Now you are saying that the intention of the final draft of Articled 3 was to be less than a directive.

MR WORDSWORTH: No. We are saying that it is aimed at precisely the same object as the Directive , but when it comes to the enforcement powers of the relevant overseeing body, in this case the OSPAR Commission, as opposed to the EC Commission, those enforcement powers are slightly different, but that is what you would expect because this is a treaty about, for example, protection of the maritime area against pollution. It is not a directive which is requiring specifically and nothing else but states enact certain legislation relating to access to information. We say that the true position is that the primary obligation under Article 9(1) is the same as the obligation under Article 3(1) of Directive 90/313. Ireland has relied on the *Heathrow Airport User Charges*, but this does not detract at all. The contention rejected there by the Tribunal was that the best efforts obligation could be met by simply having a power to take steps to regulate charges and the Tribunal could not accept these overtones of passivity. In the instant case the United Kingdom's position is that there is an obligation to act, which is to enact domestic legislation. Of course, the *Heathrow* case is quite different for precisely the same point on which we rely, because there there is not an underlying EC directive. There is no underlying EC legislation which shows what the true intent of the parties is.

Ireland's other main point is that the UK's interpretation of Article 9(1) is new and that it only appeared for the first time in the counter-memorial. Well, that is correct, but the answer to that is, surely, slightly "So what?" The object is obviously to get to the correct interpretation of Article 9(1) not to investigate the question of when parties first set out in full their legal arguments, first addressed all the elements of their legal arguments. In any event, as a point of formality, it was only at the counter-memorial stage that the United Kingdom was required to set out its submissions on the law and that is set out in Article 19(3) of the Rules of Procedure. We say that that is a slightly formalistic point that does not get Ireland that far and does not really help the Tribunal on what the true meaning of Article 9(1) is.

In conclusion then, Ireland has not alleged that the United Kingdom has failed to adopt an appropriate legal or regulatory framework. It is only the obligation in this respect that is opposable before the Tribunal. Ireland does assert the right that a natural or legal person must have to receive information, which is a matter that can only be governed by the national legal system of the

State concerned. In this case, this is the Environmental Information Regulations 1992, which also implement Directive 90/313. Ireland took the point yesterday that these do not implement OSPAR. The United Kingdom's position is precisely that they do. There is no specific reference to OSPAR, of course, that is correct. The point is that the Regulations needed to implement Article 9 fit within the Regulations needed to implement Directive 90/313. So there was no need for a further set of regulations.

Of course, a refusal of a request for information under the 1992 Regulations would be susceptible to judicial review, but Ireland has never sought to take this route. It follows that Ireland does not seek to oppose the cause of action available to a contracting party and also that it has no cause of action in this case.

We make the final point that under Article 292 of the EC Treaty, Ireland has undertaken as a Member State not to submit a dispute concerning the interpretation or application of the EC Treaty to any method of settlement other than those provided for in the EC Treaty. This obligation, obviously, extends to secondary EC legislation, such as Directive 90/313. Ireland has not availed itself of the remedies under EC law despite its own obligation under Article 292. This is no doubt for good reason, but the United Kingdom, nonetheless, submits that Ireland's claim should never have been made before this Tribunal.

I move on to Article 9(2). Ireland's primary case on Article 9(2) is as follows. It says that the MOX plant results in radioactive discharges into the Irish Sea. It then says that the PA and ADL reports have the MOX plant as their subject matter. The final conclusion is that the PA and ADL reports therefore contain information on an activity likely to affect the maritime area. This is not a correct interpretation or application of Article 9(2). Article 9(2) provides "The information referred to in paragraph 1 of this Article is any available information in written, visual, aural 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".

So Article 9(2) covers three different but clearly related types of information. First, we see information on the state of the maritime area. This could most obviously be information on pollution levels in the sea. Secondly, information on activities or measures adversely affecting or likely to affect the state of the maritime area. An obvious example there is information showing that an activity at issue is polluting or threatens to pollute the sea. Thirdly, information on activities or measures introduced in accordance with the Convention. An example there is information on a

measure introduced in accordance with Annex 1, Article 2, which provides for the regulation of point source discharges into the maritime area.

The issue before the Tribunal obviously is just focused on the second of these different types of information, but the other two types of information in Article 9(2) provide an important part of the relevant context. This context is the definition of information by reference to the maritime area and the activities or measures of protection introduced in accordance with the Convention.

The United Kingdom's main point is that information on an activity or measure adversely affecting or likely to affect the state of the maritime area fits in with this context. Those words, given their ordinary meaning, require a direct relationship between the information on the one hand, and the activity and its effect on "the state of the maritime area" on the other. The word "information" is not qualified solely by the words "on activities or measures", as Ireland's case seems to require, but it is also qualified by the words "adversely affecting or likely to affect". If the information has no relation to the adverse or likely adverse affect, it falls outside the intended scope of Article 9 and it is not information so far as this Tribunal is concerned.

To put it another way, the activity that Article 9 is concerned with is the activity or measure adversely affecting or likely to affect the maritime area. In the instance case the relevant activity would be the discharging of radioactive elements from the MOX plant into the maritime area. It is not the activity in the broadest sense, the MOX plant, which in many of its aspects has nothing whatsoever to do with the maritime area.

Article 9(2) does not license disclosure requests for any and all information on activities merely because aspects of those activities may impact upon the maritime area. Any other interpretation would be at odds with the object and purpose of the Convention, but also would open the door to abuse.

To require some direct link between the information and the potential adverse effect fits with the object and purpose of the Convention. Turning to tab 2, page 3 of the judge's folder, you see there the preamble and I just want to read a couple of paragraphs from the preamble to make the rather obvious point that the OSPAR Convention is concerned with protection against pollution.

At the bottom, "Recognising that it may be desirable to adopt on the regional level more stringent measures with respect to the prevention and elimination of pollution of the marine environment or with respect to the protection of the marine environment against the adverse effects of

human activities that are provided for in international conventions or agreements with a global scope."

Then under "Considering" - the next paragraph is not too relevant - "Considering that the present Oslo and Paris Conventions do not adequately control some of the many sources of pollution and that it is, therefore, justifiable to replace them with the present Convention, which addresses all sources of pollution of the marine environment and the adverse effects of human activities on it. It takes into account the precautionary principle and strengthens regional cooperation".

The basic and obvious point is that this is not a freedom of information treaty. I would just like to refer back to the long list of access to information instruments that Prof Sands referred you to yesterday as being part of the relevant context for Article 9. We say that that is a rather odd take on what the relevant context is and that it is far more appropriate to be looking at the specific terms of the treaty and other provisions of the treaty and also the overall object and purpose of the treaty. We say that Article 9(2) draws its meaning from this focus, because the OSPAR parties are concerned with protecting the environment. They are not concerned with creating a right to know, say, to take an absurd example, the electricity bill for the Sellafield site or how many people work there, how many were male, how many were female, etc. If Article 9 of the OSPAR Convention had been intended to secure disclosure of any and all information of whatever nature on an activity whose operation affected or potentially affected the state of the maritime area, clearer language would have been used.

Ireland has two answers to this interpretation. First it says that time has moved on and then it says, anyway, on the precedents and other materials available information does include financial analyses etc. I should add at this point that in both cases Ireland always refers to environmental information, which is slightly odd because that term never appears in Article 9(2), but I think this is Ireland's stepping stone to the Aarhus Convention and also to EEC jurisprudence on directive 90/313.

So the time has moved on argument, Ireland says the Tribunal must look at and really in effect apply the 1998 Aarhus Convention because it says the Aarhus Convention makes express that which is implicit in Article 9(2).

If we can turn to tab 5 of the Judges' folder there are some extracts from the Aarhus Convention, page 27. Article 2(3) we have the definition of environmental information. I just want to

focus on the fact that it looks awfully different from the Article 9(2) definition, and there you will see under Article 2(3)(b) towards the end of the paragraph the reference to cost benefit and other economic analyses and assumptions used in environmental decision making.

The Aarhus Convention does not contain any relevant rules of international law applicable in the relations between the parties. The point has already been made that the Convention is not in force between the parties, it has not been ratified, either by the United Kingdom or by Ireland. In fact it has only been ratified by three EEC Member States. I want to take a little time to trace through what has been happening in terms of the EEC's approach to the Aarhus Convention to make the point that it is not just that the Aarhus Convention is not in force, but the point that for present purposes the Aarhus Conventions contains something which is rather new.

In 1998 the Aarhus Convention is signed and in June 2000 if we can turn to tab 7 of the Judges' folder you will see there is a report from the Commission to the Council on the European Parliament on the experience gained in the application of directive 90/313. This report is really looking towards, as you will see in the next tab in a moment, the adoption of a new directive to replace directive 90/313. Page 30 of the bundle, half way down under Article 2(a), definition of information relating to the environment. "In some Member States a strict interpretation had led to refusals to provide information considered not to fall within the scope of the definition. Examples of such information included information on the public health effects of the state of the environment, radiation or nuclear energy, and on financial needs analyses in support of projects likely to affect the environment."

At page 31 there is a comment on the Aarhus Convention. Picking up from the second paragraph, "Although the first draft of the provisions in the Convention relating to access to environmental information" - and the reference there to the Convention is to the Aarhus Convention - "were largely inspired by the directive. Subsequent negotiations highlighted the weaknesses or shortcomings of the latter in the light of experience gained in its application. NGOs concerned with the environment participated actively and constructively in the negotiations on an equal footing with national delegations. The Commission considers that the final text of the Convention represents a clear advance on the provisions of the Directive. The main improvements may be summarised as follows: An extended definition of environmental information, which encompasses a wider range of matters related to the environment such as human health and safety, conditions of human life, cultural sites", and then the key words we are really interested in, "cost benefit and other economic analyses

and assumptions used in environmental decision making".

If I can ask you to turn over into tab 8 we will see that there is a proposal of exactly the same date, June 2000, for a new directive, and at page 33 under definitions, half way down, "Environmental information. Even though directive 90/313 already contained a broad definition of environmental information experience suggests that the definition needs to be made more comprehensive and explicit so as to encompass certain categories of environmentally relevant information which have been excluded from the scope of the directive due to a restrictive interpretation. In particular it should be made clear that the definition includes information on emissions, discharges and other releases into the environment." I just want to pause there because there they are saying there is something already in the directive but it is not sufficiently clear.

Then in the next paragraph a rather different point is being made. "The definition contains a specific mention of cost benefits and other economic analyses used within the framework of activities and measures affecting or likely to affect the environment. This will remove uncertainties identified during the review process as to how the current definition applies to economic and financial information". So on the one hand there is a lack of clarity but here they are trying to address a flaw in the existing directive.

Turning over the page to page 34 of the bundle under paragraph 10, "the definition of environmental information should be widened so as to encompass specifically information in any form on the state of the environment". Then a few lines down we see the key words "on the cost benefit and economic analyses used within the framework of such measures or activities". So they are there talking about the widening of the definition of environment information.

Professor Sands took you yesterday to the DEFRA proposal for introducing new regulations, and that proposal was made at the same time as they thought an EEC proposal or a new directive was imminent, so the chronology is that at June 2000 you have a proposal for a new directive from the EEC. October 2000, which is tab 9 of this bundle, you have a proposal for a revised set of regulations from DEFRA. Professor Sands took you yesterday to the passages on page 36 under definitions, and here we have precisely the same point under paragraph 14, "The definition of environmental information is clarified to refer specifically to the atmosphere, landscape, biological diversity etc. It is also defined to include cost benefit economic analyses and other assumptions used in the decision making process." So on the one hand clarification, but then on the other hand we have an addition. In the document at tab 10 we have at page 37 the EEC Commission's amended proposal

for a new directive, and at page 38 is the passage I wanted to bring to your attention, referring to the fact that the central elements of the proposal are a wider definition of environmental information. That is how things were seen in June of 2001.

Then the last of these documents that I would like to take you to is at tab 11 where we have an EEC common position dated in January of this year, and I would like to turn to page 40 of the bundle, analysis of the common position. "The Council's common position while maintaining the approach proposed by the Commission modifies the provisions of the proposal in order to clarify or to strengthen them or to make them more practicable. Many modifications aim at reinstating the original text of the Aarhus Convention." So we have this rather odd situation where the initial EEC proposal is looking at language that is different from Aarhus and here we have the Commission being steered back towards Aarhus. Continuing, "The common position widens the definition of information relating to the environment contained in directive 90-313 EEC, so as to cover", and it continues and there we have a reference again at the bottom to economic analyses and the state of human health.

Since then matters have been moving forward, but perhaps slightly slowly. The European Parliament has adopted a series of amendments to the Council's common position, and that was in May of this year, and in September the Commission adopted 12 of these but rejected the remaining 35.

So the position before the Tribunal today is that there is no EEC directive and no Aarhus Convention in force for the parties. The only way that either could assist in the interpretation of Article 9(2) is the fact that they are perceived as introducing something new in so far as the definition of environmental information in directive 90/313 is concerned. In truth the Aarhus Convention has a completely different object and purpose to the OSPAR Convention and sets down a series of new international rules including in relation to the disclosure of environmental information. This is confirmed by the mandate of the ad hoc working group which was charged with preparing the first draft of the Aarhus Convention and that is at tab 12 of the Judges' folder, page 42 paragraph 3, "The working group will prepare provisions for the Convention that are aimed at providing practical concise and action oriented procedures and tools and will avoid overlap with existing international legal instruments". So we say this is not a case of making express that which is implicit in the 1992 OSPAR Convention. There is no link at all between the two conventions and there is no overlap.

I would also note in passing that there is no compulsory dispute settlement condition in the Aarhus Convention. At Article 16(2) there is a provision which is roughly equivalent

to Article 36 of the ICJ statute. The interesting thing there is that no party has made a declaration accepting compulsory dispute settlement, so it should not be open to Ireland to get around the fact that (1) the Aarhus Convention is not in force between it and the United Kingdom, (2) there is no compulsory dispute settlement procedure under the Aarhus Convention by bringing its case under OSPAR.

Just a quick word on treaty interpretation, because Ireland I think rather forgets about the basic rule of treaty interpretation, which is that a treaty is to be interpreted in the light of the general rules of international law applicable at the time of its conclusion, and I have set out a passage from Oppenheim at tab 13 of the bundle. If I could take the Tribunal to that briefly, page 1281 at the bottom, paragraph 11. "A treaty is to be interpreted in the light of general rules of international law in force at the time of its conclusion, the so called inter-temporal law. This follows from the general principle that a juridical fact must be appreciated in the light of the law contemporary with it. Similarly a treaty's terms are normally to be interpreted on the basis of their meaning at the time the treaty was concluded and in the light of circumstances then prevailing." Then there is a reference there to the Namibia exception, but as Ireland is not relying on the Namibia exception in this case perhaps we do not have to spend too much time on it, but I will read the passage anyway.

"Nevertheless in some respects the interpretation of a treaty's provisions cannot be divorced from developments in the law subsequent to its adoption. Thus even though a treaty when concluded did not conclude with any rule of jus cogens it will become void if there subsequently emerged a new rule of jus cogens with which it is in conflict. Similarly the concepts embodied in a treaty may not be static but evolutionary, in which case their interpretation cannot remain unaffected by the subsequent development of law. Moreover an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. While these considerations may in certain circumstances go some way towards negating the application of the inter temporal law that law will stand even in such circumstances provide at least the starting point for arriving at the proper interpretation of the treaty". So we say that when you turn to the issue of the interpretation of Articles 9(1), 9(2), and 9(3) you should be looking as your starting point at the situation in 1992 and you should not be looking at the 1998 Aarhus Convention.

In conclusion this case must be addressed on the basis of the law as it is and as it applies between the parties, which is on the basis of Article 9 and its meaning as intended by the OSPAR parties.

I just want to turn now to the EEC jurisprudence on directive 90/313.

LORD MUSTILL: Before you move on to that I would like to go backwards through your argument. Could I go back to Article 9(1) which you were considering some time ago. The thesis as I understand is that unlike some provisions which require the state itself to do something here we have a provision which requires the state to put in place a system for having it done. Is that by somebody else, namely the competent authorities?

MR WORDSWORTH: Precisely so. There is an obligation but the obligation is to put the system in place.

LORD MUSTILL: If that is a correct statement of your proposition, and I hoped it was, in a sense the competent authorities delegates the state in a rather idiomatic sense for getting in this case the information made available - do not worry about that formulation, it is idiomatic. In order to test your proposition that a complaint that the information was not in fact made available is outwith the purview of this Tribunal's jurisdiction, which is what you are arguing on 9(1) as I understand it.

MR WORDSWORTH: Yes.

LORD MUSTILL: And that if there is a complaint it must lie somewhere else requires one to assume for the sake of argument that Article 9(2) information has not been made available -- otherwise you are not testing the proposition. Assume against yourself that all the other arguments have gone except this.

MR WORDSWORTH: That has to be right, because in a sense you get to Article 9(2) before you get to Article 9(1).

LORD MUSTILL: Let us test the argument on 9(1) by assuming that an item of information of a kind referred to in 9(2) has not been disclosed, now that could happen as it seems to me in one of two ways. First of all that the contracting party had not put in place an appropriate system for compliance with Article 9(1), or alternatively that it had put in place an appropriate system but it had gone wrong, slipped a cog if I may be permitted a common phrase. is that right so far? Either you have got a system that is good or it has not worked correctly.

MR WORDSWORTH: Yes.

LORD MUSTILL: Then one addresses what possible remedies there might be. Taking the slipping cog situation first one would be looking to administrative law to see if it afforded a remedy. In a case in the United Kingdom it would be judicial

review.

MR WORDSWORTH: Yes.

LORD MUSTILL: A good system but one that has not been operated properly. You go to the Administrative Court and get some kind of order to make it work properly or some other remedy. You say here that Ireland has not done that here, and if it could have done it it has not tried to do it. Is that right so far?

MR WORDSWORTH: That is right.

LORD MUSTILL: So that your proposition would therefore be that if there is any remedy for information within the purview of Article 9(2) not having been in fact been available it must be a complaint about the system. Now after that rather lengthy preamble can I ask quite a short and simple question. Because this point came forward a little late it has not been completely focused on I think in all the writings, which leads me to have some problems with identifying the system which you say was put in place, which you say conforms with Article 9(1) which would be within the purview of this Tribunal if it were a poor system. Am I right there, or do you say that even that would not be within the purview of our Tribunal?

MR WORDSWORTH: An action in respect of a failure to apply domestic legislation would be brought naturally in front of a domestic court rather than in front of an international tribunal.

LORD MUSTILL: We seek two possible causes for the hypothetical failure to make available the information. One is that the system has broken down and lacks a domestic "remedy". It has not been asked for here so we need not bother about it. I am just trying to lean a little bit more on what happens if the system is not as it should have been.

MR WORDSWORTH: If the system is not as it should have been, then surely there is a question of, indeed, a breach of Article 9(1), but that simply brings us back to the nature of the obligation under Article 9(1).

LORD MUSTILL: Yes, to ensure that competent authorities are required to make available the information, to set up a system that is going to ensure that the competent authorities make available the information. What I want you to help me with a little bit is what was the system here. What does the UK say was the system that was put in place in order to require the competent authorities to make the information available?

MR WORDSWORTH: The UK say that it is the Environmental Information Regulations 1992.

LORD MUSTILL: I thought that you would say that. That is what you say is the United Kingdom's compliance

with Article 9(1) which is justiciable before us, but, in fact, no breach has been shown.

MR WORDSWORTH: Precisely so.

LORD MUSTILL: Thank you.

MR WORDSWORTH: Mr Chairman, I was going to move on to the *Mecklenburg* case.

THE CHAIRMAN: Can we ask how long you are going to be?

MR WORDSWORTH: Not longer than about 15 minutes. Looking at the EC jurisprudence and before turning the EC jurisprudence, I think that it is important to have another look at Directive 90/313, which is at tab 6 of the bundle. This time I want to have a look at the definition of information relating to environment, which is Article 2(a), because the point that is being made by Prof Sands yesterday was that the definition is identical, when speaking broadly - I think that that is being slightly unfair. He was saying that broadly speaking the Directive was identical to Article 9 of OSPAR save for the omission of certain Articles. But that is not correct in relation to Article 2(a) of the Directive. This provides information relating to the environment shall mean any available information in written visual, aura or database form on the state of water, air, etc on activities, including those that give rise to nuisances such as noise, or measures adversely affecting or likely to affect the ... So it is all very familiar so far save for the transposition in relation to the state of maritime area. "And on activities or measures designed to protect these including administrative measures and environmental management programmes". That is a very significant difference between Article 3(a) and Article 9(2), because Article 9(2) is only concerned with measures of protection introduced in accordance with the OSPAR Convention, whereas this is far broader, because it is concerned with any measures of protection (full stop).

The point when you come to the *Mecklenburg* case is that what the European Court is doing is actually looking at this final phrase of Article 2(a), so it is not bang on point in terms of reasoning. If you, the Tribunal, want to be assisted by the reasoning in *Mecklenburg*, you have to look at it in quite a circumspect way, because it is looking at a part of Article 3(a) which is not in Article 9(2).

In the *Mecklenburg* case, the court found that a statement of views provided by the competent countryside protection agency in connection with planning approval for a new road fell within the Article 2(a) definition.

One is rather tempted to say, "Well, there is nothing very surprising about that at all". If I can take you to tab 14 of the bundle, to the passage at page 50 that Prof Sands took you to

yesterday, I want to pick up from half way down roughly paragraph 13. "The concept of information relating to environment is by the express intention of the Community legislature, all embracing". Obviously, Ireland focuses on that phrase. "For the rest it is possible to identify it on the basis of the two criteria that the provisioning point of the Directive implicitly lays down. The first relates to the substantive element ..." and we are not concerned with that. "The second is concerned with the relationship in linking the information to the protection of the environment. 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". There is nothing in here that is remotely exceptional once you have had a look at the definition of Article 2(a) of Directive 90/313.

If we tum over the page, page 51 of the judge's folder, you will see from the question, question one under paragraph 15, "Does the statement of views given in development consent proceedings by a subordinate countryside protection authority participating in those proceedings as a representative of public interest constitute an administrative measure designed to protect the environment within the meaning of Article 2(a) of Council Directive 90/313?"

That is the question that the court is addressing. It is rather unsurprising that it comes up with the answer that it does.

Reading on from 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 relating to the state of those aspects."

Picking up from paragraph 21, as I do not think that paragraph 20 helps, "In order to constitute 'information relating to the environment for the purposes of the Directive', it is sufficient for the statement of views put forward by an authority, such as the statement concerned in the main proceedings, to be an act capable of adversely affecting or protecting the state of one of the sectors of the environment covered by the Directive. That is the case, as the referring court mentioned, where the statement of views is capable of influencing the outcome of the development consent proceedings as regards interests pertaining to the protection of the environment."

We say that there is nothing very surprising in that and that the equivalent question under Article 9(2) would be whether the PA and ADL reports are capable of influencing the outcome of proceedings as regards interests pertaining to the protection of a measure or pertaining to protection in accordance with the OSPAR Convention, because that is what Article 9(2) says.

The answer to that is quite simple. PA and ADL are not capable of having such an effect. That is because justification has nothing whatsoever to do with the OSPAR Convention. It is not a measure introduced in accordance with OSPAR. So there is a danger in trying to transpose this Directive directly without having a careful look at the language.

Moving on the application of Article 9(2), we say that this is a relatively straightforward matter. The information as categorised by Dr Varley contains sales volumes, sales prices, capacity and production capability, production costs, contractual details, etc. We say that none of this is aimed at or related to or affects or is likely to affect the state of the maritime area. There is no surprise in that at all, because by virtue of the context in which they were commissioned there is no reason why the PA and ADL reports should contain any such information on likely effects to the state of the maritime area. That is because they are independent reviews of the business case. It is not because they constitute one aspect of the justification exercise that they suddenly become information on a maritime area. This would be the case if justification were a measure introduced in accordance with the OSPAR Convention but it is not.

On the other side of the balance or the other side of the justification exercise, there is ample information on the likely effects to the state of the maritime area. This has been in the public domain for some years. For instance, information on projected ariel and liquid discharges and on the activities generating such discharges has been in the public domain since the 1993 Environmental Statement, further information in terms of the United Kingdom's position under Article 37 EURATOM and also even more information, rather extended information on discharges, etc, in the Environment Agency's proposed decision of October 1998.

Ireland takes the point that the Tribunal did not look closely at all the information and that it is only the information as a whole to be assessed. It relies on the *Birmingham North Relief Road* case to that effect. But there are two very important factors to bear in mind, because, first, the point was conceded in the *Birmingham North Relief Road case,* so it does not help so much. Secondly, there the case concerned a complete agreement which was characterised as commercial on an overall basis, not a series of redacted pieces of information, each of which is said to be outside the

scope of Article 9 (2). There is nothing in the OSPAR Convention to support Ireland's blanket approach. I would add that there is no obvious rationale for it, because in circumstances where Ireland has intimated that it is going to be inviting you to look at each and every piece of redacted piece of information to decide whether it is commercially confidential or not, it may be that at the same time the Tribunal can be looking at the information to see whether it fits within Article 9(2) or not. There does not seem to be any particular reason why the Tribunal should not be looking at the information in detail.

Ireland also argues that the redacted material is information under Article 9(2) because it concerns the treatment of environmental and safety costs. This is something which is touched on in Ireland's memorial, but becomes much more of an emphasis in the reply. Again, it was emphasised yesterday. The answer to this is simple, because there has been no redaction of specific information about meeting such costs. This is not to suggest that such costs have not been taken into account, but simply that they are not separately identified in the two reports and there is no reason why they should have been.

It follows that as the information is not information within Article 9(2) that Ireland's case fails on the merits. We take the additional point that, as the information is not information within the treaty, it follows that the Tribunal also lacks jurisdiction. The parties to OSPAR have consented under Article 32(1) to submit a particular category of disputes to arbitration. The dispute obviously must be one relating to the interpretation or application of the Convention. A difference between two States does not amount to a dispute relating to the interpretation or application of the Treaty merely because one asserts that the dispute falls within the scope of the Treaty and the other denies that this is so. To establish jurisdiction under the compromissory clause, the applicant must show that the alleged breach does, indeed, fall within the relevant treaty. In this case that means that Ireland must show that the information sought falls within the OSPAR Convention, such that a failure to supply that information may constitute a breach of Article 9. I can see that that point comes as counter intuitive to somebody coming at it from a viewpoint of international commercial arbitration, because that argument does not really work when you are looking at the application of municipal laws, but it does work as a matter of international law.

I would like to take the Tribunal to the *Oil Platforms* case where precisely this issue came up five or six years ago in front of the International Court of Justice. That is at tab 15 of the judge's folder. Under paragraph 15 there, I would just like to ask you to look at the terms of the

relevant compromissory clause that the court was then looking at, Article 21 of the Treaty of Amity. "Any dispute between the high contracting parties as to the interpretation or application of the present treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the high contracting parties agree to settlement by some other specific means". It is substantively the same thing as Article 32.

What the court says is as follows: "It is not contested that several of the conditions laid down by this text have been met in the present case; a dispute has arisen between Iran and the United States; it has not been possible to adjust that dispute by diplomacy and the two states have not agreed 'to settlement by some other pacific means' as contemplated by Article XXI. On the other hand, the parties differ on the question whether the dispute between the two States with respect to the lawfulness of the actions carried out by the United States against the Iranian oil platforms is a dispute 'as to the interpretation or application' of the Treaty of 1955. In order to answer that question, the court cannot limit itself to noting that one of the parties maintains that such a dispute exists and the other party denies it. It must ascertain whether the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the court has jurisdiction ratione materiae to entertain pursuant to Article 21, paragraph 2."

We say precisely the same in the instant case. There the court is saying that the only way of determining whether the compromissory clause contains the necessary consent to jurisdiction is to interpret the substantive provisions of the treaty that Iran is relying on and see if the facts as alleged by Iran could lead to a treaty breach. Here what the United Kingdom asks the Tribunal to do is to interpret Article 9(2) and see whether from the facts relied on by Ireland there could be a breach of Article 9? We say that, no, there could be no such breach, because there is no information in accordance with Article 9(2). To give a very simple example of how the court is thinking in that case, suppose that Article 9(2) concerns access to samples of seawater and the State then asks for soil samples, the court then says, "Oh, this is not a soil samples treaty, therefore we are not within the treaty, therefore, we never get to the compromissory clause and, therefore, we do not have jurisdiction".

There is an interesting insight, perhaps that is the way to put it, on how the court is looking at this issue of jurisdiction and how it can decide this issue in the separate opinion of Judge Higgins, which is at paragraphs 30 to 32. That is not in this bundle here, but I can add it at the back. I

would invite you to look at that further, but the *Platforms* case has been applied relatively recently in the *Legality of Use of Force* case and the reference there is in my speaking note, authorities bundle 1, tab 13.

Then there is the conclusion. As on the basis of Ireland's claim of fact there could be no violation of the OSPAR Convention - and this is because the information is outside Article 9(2) - the parties are outside the scope of OSPAR and the necessary consent under Article 32 is lacking.

Mr Chairman, that concludes my presentation.

THE CHAIRMAN: Thank you, Mr Wordsworth. We will take a ten-minute stretch before we hear Mr Bethlehem.

(Short Adjournment)

THE CHAIRMAN: There is a scheduling matter. The juridical spirit is indomitable, the arbitral flesh is weak. The Tribunal would like to stop tonight at 6 o'clock, despite the interests in proceeding further. We do plan to start at 9 o'clock tomorrow and we will presumably finish up the witnesses and the summary by the UK by tomorrow evening, I trust. That will allow ample time for the cross-=examination.

MR PLENDER: I think, Mr Chairman, there is no problem in that. We anticipate being able to meet that.

MR BETHLEHEM: In fact, Mr Chairman, I was going to make a proposal along similar lines. My presentation has been divided into two parts. I should get through at least the better part of the first half this evening and then resume tomorrow. We do not anticipate that there will be a problem with timing.

THE CHAIRMAN: Thank you. Proceed.

MR WORDSWORTH: I have completed my presentation so it is a simple question of whether there are any questions and, if not, I will hand over to Mr Bethlehem.

THE CHAIRMAN: NO thank you.

MR BETHLEHEM: Mr Chairman, members of the Tribunal, before I start on my presentation for this afternoon, there are one or two general matters relating to the organisation of the bundles which you should have before you and how I propose to proceed.

As I indicated just a moment ago, my presentation, in fact, is divided into two parts. I hope to get through at least most of the first part this evening and then will pick up on that tomorrow morning. You have a number of documents to which I would like to refer you in due course in the yellow bundle which Mr Wordsworth used as well. There are eight documents, documents numbered 16 through to 23, which I propose to refer you to in due course. You will see that in my skeleton argument which I hope that you all have as well that there are references to the material in the

other bundles and I certainly anticipate that those will be important, but I do not propose to take you to those. That is really simply by way of an aid memoire for you.

I propose to talk to the skeleton and not to go through it as a verbatim text. I wonder whether I might just as a housekeeping matter bring your attention to a number of quick corrections in the references at tab 16 through to 23.

THE CHAIRMAN: Just before you go on, since we anticipate that you are presenting part two tomorrow morning, is it possible for the Tribunal to get part two this evening?

MR BETHLEHEM: Yes, indeed it is. We have it here and I can hand it up.

THE CHAIRMAN: If you could give it to the secretary at the end of the session today.

MR BETHLEHEM: There are just one or two typographical corrections simply for cross-referencing purposes. If you have a look at the yellow bundles that you have from tab 16, there are just four typographical glitches. In item 16 you will see the reference in square brackets to from bundle 5, tab 1 and that should be 1D. There could be a second page of the index. It is simply so that you know where it comes from. Then a further one down at number 17, it should be tab 1F. The following one down should be tab 1Z. Finally, number 20, tab 2H.

Mr Chairman, members of the Tribunal, there is one other preliminary matter which I ought to raise before I turn to the substance of my presentation, and that is to pick up in response to a question by Lord Mustill to Mr Plender earlier one, and it is simply to say that the competence of the Tribunal in respect of remedies in our view will depend very much on the scope of the Tribunal's functions and I will certainly be making some remarks along those lines today.

You have just heard from Mr Wordsworth who has advanced a number of arguments to the effect that Ireland's application is inadmissible or that the Tribunal lacks jurisdiction to hear the case. He has argued that there is no basis under Article 9 of the OSPAR Convention for the cause of action relied upon; that the claims are inadmissible as they are claims that engage another forum; and thirdly that the information sought by Ireland is not information that comes within Article 9(2). I simply punctuate those points that Mr Wordsworth has made because the submissions that I am about to put to you are quite naturally submissions in the alternative. They are argument that only become relevant if you decide against us on each of Mr Wordsworth's points. So what I am about to say is in the alternative.

There are three main issues that I will cover in my submissions divided into a number of sub-issues. First of all the nature of the rights and the obligations under Article 9(3);

second the role and function of the Tribunal in reviewing compliance with Article 9(3). Those two submissions comprise my Part 1. I may not get through them all today. Then the third submission is the law relevant to the application of Article 9(3) which certainly I will turn to tomorrow morning. And on the last of these points I propose to address both the law that is directly relevant to the question of commercial confidentiality, namely English law as we will contend, as well as wider principles of law which although we accept are not directly relevant, and I am not putting them to the Tribunal as of direct relevance, they may nevertheless be a useful source of guidance for the Tribunal and that is the reason I will be referring to them.

I would like first of all to turn to the nature of the rights and obligations under Article 9(3);. Article 9(3) provides in relevant parts - and it is extracted at the top of page 2 of my skeleton - that the "The provisions of this Article shall not affect the ~~right~~ of Contracting Parties, ~~in accordance with their national legal systems and applicable international regulations~~, to provide for a request for such information to be refused where it affects": and then (d) "commercial and industrial confidentiality, including intellectual property ". As Mr Fitzsimons mentioned yesterday I think both sides are simply using the shorthand for commercial confidentiality for that sub-paragraph (d).

I would like to make two observations about the language of 9(3). The first observation is that in the event that Article 9 (1) and (2) do indeed require the disclosure of information, the exemption in Article 9(3) is cast in terms of a ~~right~~ of a Contracting Party to provide for a request for information to be refused. Now this is a relatively common formula found in a number of international instruments. The formula adopted here is material and I should say that although it is relatively common it is not uniform, and I would like simply to take you to one or two instruments in which a different formula has been used. The first one you will find at tab 16 of the yellow bundle, and that is Article 14 of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment of, 1993

If you look to the bottom of that page you will see Article 14, access to information held by public authorities. Paragraph 1: "Any person shall at his request and without having to prove an interest have access to information relating to the environment held by public authorities. The parties shall define the practical arrangements under which such information is effectively made available."

Then sub-paragraph (2) "The right of access to information may be restricted under internal law where it affects" and then there are a number of sub-parts, and if we turn over the page we

will see a reference to " ... commercial and industrial confidentiality" at the top of the page. I would simply note here that this is a formula which is different to the formula in Article 9(3) of OSPAR. It does not speak in terms of a right of the contracting parties to provide for a request for information to be refused, it merely qualified the right of access to the information.

The same point emerges in slightly different language in the next Convention, the Convention on Mutual Administrative Assistance in Tax Matters and that is at tab 17 in the yellow bundle. You will see at the bottom of the page Article 21, protection of persons and limits to the obligation to provide assistance. This whole chapter deals with assistance. Then sub-paragraph (2) of Article 21, "Except in the case of Article 14 the provisions of this Convention shall not be construed so as to impose on a requested state the obligation", and then over the page, (d) "to supply information which would disclose any trade, business, industrial, commercial or professional secrets."

Once again that formula is slightly different from that adopted in the OSPAR Convention.

The final text to which I would like to take you is at tab 18, which is an annex to a WTO agreement on the application of sanitary and phytosanitary measures, and you will see at sub-paragraph (1) at the top of that first page numbered 4 in the bundle that "members shall ensure that all sanitary and phytosanitary regulations which have been adopted are published promptly in such a manner as to enable interested members to become acquainted with them", and then over the page and over the page again to sub-paragraph (11) "nothing in this agreement shall be construed as requiring (b) members to disclose confidential information which would impede enforcement of sanitary and phytosanitary legislation or which would prejudice the legitimate commercial interests of particular enterprises".

There are a number of other Conventions which also use language different to the OSPAR Convention and I put a number of those at the bottom of the page on page 4 in the skeleton argument. I do not propose to take you to them. But as all of these Conventions illustrate a formula adopted in a wide range of international instruments, and the ones I have taken you to address environment, health, trade and commercial matters, and they are all broadly contemporaneous with the OSPAR Convention, in a number of international instruments the language used differs from that in Article 9(3) of OSPAR. OSPAR speaks of a right to provide for a request for information to be refused.

In our contention this is significant for four reasons. First of all it is a positive affirmation of the right of a Contracting Party to act in the manner envisaged. In other words, it is not

simply an afterthought, clawing back something minor from an otherwise all-embracing right of access to information. It is more than just a limitation on the right of access.

Second, the formula used in Article 9(3) implies a balancing of rights. Primacy is not given to a right of access to information. There are two competing rights that are apparent. And the formula in Article 9 of OSPAR reflects this balance. In our contention this is material to the present case as Ireland in its written submissions would have the Tribunal read an additional public interest test into Article 9(3). In our view there is a public interest element in Article 9 but it emerges from the structure of Article 9 as a whole. There is a right of access to information under 9(1) and (2) - this is assuming that you are against us on Mr Wordsworth's argument - and there is a right to refuse information under certain conditions in 9(3), and that is the public element, it is that balancing which introduces the public interest. There is no cause to read into Article 9 some additional public interest requirement.

By way of support of the proposition that I have just put just such an argument was put to the US Court of Appeals for the District of Columbia in the 1999 decision *Public Citizen Health Research Group v. Food and Drug Administration*. This was a case that arose under the freedom of information legislation in the United States. I accept right from the outset that this is a case of only indirect relevance here, it is a case from another jurisdiction. I draw attention to US jurisprudence with some hesitation. But let me simply take you to the relevant extracts of the *Public Citizen* decision. You will find that at tab 22 in the bundle.

Just by way of a very brief background this was a case that concerned an action under the Freedom of Information Act challenging a refusal by the Food and Drug Administration to disclose documents relating to a drug application that had been withdrawn or had been abandoned for health reasons, and one of the issues that arose was the application of exemption 4 of the Freedom of Information Act in the United States concerning commercial or financial information. The relevant extracts that I would like to take you to are on page 903 of the bundle. It is the second column towards the top, sub-heading B, Exemption 4. If I may go through the relevant provisions.

"Exemption 4 of the Freedom of Information Act permits an agency to withhold commercial or financial information that was obtained from a person and is privileged or confidential. Information that a person is required to submit to the Government is considered confidential only if its disclosure is likely either (1) to impair the Government's ability to obtain necessary information in the future or (2) to cause substantial harm to the competitive position of the person from whom the

information was obtained. In the present case the Food and Drug Administration and Schering invoked the latter standard. Meanwhile Public Citizen claims disclosure would prevent other drug companies from repeating Schering's mistakes and thereby avoiding risks to human health and it relies on dicta in several District Court opinions in arguing that under exemption 4 the Court should gauge whether the competitive harm done to the sponsor of the investigative drug by the public disclosure of confidential information 'is outweighed by the strong public interest in safeguarding the health of human trial participants'".

If I may just interpolate for a moment here. We say there is an analogy with the argument that is being put by Ireland in this case. They are saying that there is a wider public interest in the disclosure of certain information because we are concerned with the nuclear industry, and clearly here in this case from the extract that I have just read there was an argument in similar terms advanced on the grounds of a health interest.

If I may take you over the page to page 904 you will see there in the left hand column towards the top, the first full paragraph, the decision of the Court. "We reject Public Citizen's proposal because a consequentialist approach to the public interest in disclosure is inconsistent with a balance of private and public interests the Congress struck in exemption 4." If I may skip to paragraph 4 at the bottom of the page - the intervening text refers to dicta from a number of previous decisions - the Court goes on "In other words the Congress has already determined the relevant public interest. If through disclosure the public would learn something directly about the workings of Government then the information should be disclosed unless it comes within a specific exemption. Indeed Public Citizen's main reason for seeking this information is to 'review whether the Food and Drug Administration is adequately safeguarding the health of people who participate in drug trials'. The information sought in other words would reveal what the Government is up to. It is not open to Public Citizen however to bolster the case for disclosure by claiming an additional public benefit in that if the information is disclosed then the other drug companies will not conduct risky clinical trials of the drug that Schearing has abandoned".

Essentially what the Court was there deciding was that the public interest is to be found in the balance of the legislation itself, and this certainly is our contention here. There is a public interest element, but it emerges from the balance between, if you are against us, the right to information in Articles 9(1) and 9(2) and the right to withhold that information on grounds of commercial confidentiality in Article 9(3)(d).

The third point under this head is that, as with the exercise of all rights, the language of Article 9(3) implies a discretion on the party exercising its right, a degree of flexibility or a margin of appreciation. I should say that I will now come to the points that were the subject of some questioning yesterday to Mr Sands. I will return to this in a little more detail, but there are one or two preliminary points that I would like to make at this stage.

Rights are seldom confined with a degree of precision that only allows their exercise within extremely narrow parameters. In fact, if we need some judicial support for this, I believe that the case that Lord Mustill referred to yesterday, the case in the European Court of Human Rights of *Vogt* in fact makes that proposition very, very clearly. Rights are seldom confined with a degree of precision that only allows their exercise within extremely narrow parameters.

States can choose how to exercise their rights within an acceptable margin.

The point was made in the 1989 judgment of the European Court of Human Rights in the case of *Markt Intern v Germany* in the context of the application of the margin of appreciation doctrine in European human rights law. Mr Chairman, members of the Tribunal, let me just lift the veil on this argument on the margin of appreciation for just a moment, because I suspect that it is only something to which I will come in detail tomorrow. Let me say that we are not here contending that you should simply adopt the margin of appreciation standard used in the European human rights system or in the WTO system or in the NAFTA system or anywhere else. What we are contending is that there is a question of the function of this Tribunal - what the scope of your function is. We consider that the fact that a margin of appreciation or standard of review argument has been relied upon by courts and tribunals in a number of different jurisdictions is rather important. But I wonder whether I might just take you to the *Markt Intern* decision of the Court of Human Rights. This will I think set up the argument for tomorrow morning, helpfully.

You will find it at tab 14 of the bundle. Just by way of factual background on this case, the case concerned an article that was published by a publishing company which pointed to the dissatisfaction of a single consumer who had been unable to obtain a reimbursement from a mail-order firm. It concerned some cosmetics. The real cause of complaint here was that the publishing company extrapolated from the single point of dissatisfaction of the single consumer to allege the dissatisfaction of consumers more widely and Cosmetics Club, the cosmetic company concerned, initiated proceedings in the German courts and, in fact, this went all the way through the German courts. You will see in the judgment a summary of the decision of four or five German courts.

It then subsequently went to the European Court of Human Rights under Article 10, which is the Freedom of Expression Article. If I can simply take you page 170 and 171 in that bundle and take you to the language of Article 10, you will see at the bottom of page 170 there is the reference to Article 10 of the European Convention. "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."

Then paragraph 2, "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation of rights of others" - and the we come to a very relevant provision - "for preventing the disclosure of information received in confidence, or for mainlining the authority and impartiality of the Judiciary."

This was the provision at issue in the court.

LORD MUSTILL: The judgment was given exactly 14 years after the publication of the article in question.

MR BETHLEHEM: I hope to get through my submissions rather more quickly than that!

Mr Chairman, let me again make a point against myself as no doubt this is a decision that you will perhaps reflect on before I return to it again tomorrow. This is a decision that was split 9:9 in the court with a casting vote of the President. I say again that I did not draw this to your attention and make these submissions more generally for the purposes of urging this Tribunal to adopt the European margin of appreciation standard, but simply for exploring the argument.

Mr Chairman, I am conscious of the fact that it is now 6 o'clock. Perhaps if I could just spend two minutes taking you to the basis of the decision and then I could come back to it tomorrow.

The Court of Human Rights addressed the margin of appreciation argument at paragraphs 33 and following. You will find that on pages 174 to 176 of the judgment. I just propose to draw your attention to a number of these paragraphs and make further submissions on them tomorrow. Paragraph 33 at the top of page 174 says,

"The Court has consistently held that the Contracting States have a certain margin of appreciation in assessing the existence and extent of the necessity of an interference, but this

margin is subject to a European supervision as regards both the legislation and the decision applying it, even those given by an independent court. Such a margin of appreciation is essential in commercial matters and, in particular, in an area as complex and fluctuating as that of unfair competition. Otherwise, the European Court of Human Rights would have to undertake a re-examination of the facts and all the circumstances of each case. The Court must confine its review to the question whether the measures taken on the national level are justifiable in principle and proportionate."

If we move to the bottom of the page, paragraph 35, there is some further explanation of the complexities of the commercial market.

"In a market economy an undertaking which seeks to set up a business inevitably exposes itself to close scrutiny of its practices by its competitors. Its commercial strategy and the manner in which it honours its commitments may give rise to criticism on the part of consumers and the specialised press. In order to carry out this task, the specialised press much be able to disclose facts which could be of interest to its readers and thereby contribute to the openness of business activities.

However, even the publication of items which are true and describe real events may under certain circumstances be prohibited: the obligation to respect the privacy of others or the duty to respect the confidentiality of certain commercial information are examples."

Then a final extract from the bottom of that page, paragraph 37,

"In the light of these findings and having regard to the duties and responsibilities attaching to the freedoms guaranteed by Article 10, it cannot be said that the final decision of the Federal Court of Justice -confirmed from the constitutional point of view by the Federal Constitutional Court - went beyond the margin of appreciation left to the national authorities. It is obvious that opinions may differ as to whether the Federal Court's reaction was appropriate or whether the statements made in the specific case by *Markt Intern* should be permitted or tolerated. However, the European Court of Human Rights should not substitute its own evaluation for that of the national courts in the instant case, where those courts, on reasonable grounds, had considered the restrictions to be necessary".

Mr Chairman, members of the Tribunal, States have a degree of discretion when it comes to the exercise of rights. The human rights analogy is by no means exact, for present purposes, but it is illustrative of a broader principle applicable in the case. The scope of the margin of appreciation doctrine is usefully summarised in a recent text, a monograph, published this year by a

Japanese scholar, Yutaka Arai-Takahashi, which is in the general bundle and I will not take you to it. I will return to this point, perhaps, tomorrow if this is a convenient point.

THE CHAIRMAN: Yes, we will recess until tomorrow at 9 o'clock.

(Adjourned until tomorrow morning at 9 o'clock)

1