THE MOX PLANT CASE

BETWEEN

IRELAND — Applicant

- and -

THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND — Respondent

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THE JAPANESE ROOM
THE PEACE PALACE
THE HAGUE
THE NETHERLANDS
WEDNESDAY 11TH JUNE 2003

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BEFORE:
THE TRIBUNAL:

HE JUDGE THOMAS A MENSAH (President)
Prof JAMES CRAWFORD SC
Maitre L YVES FORTIER CC QC
Prof GERHARD HAFNER
Sir ARTHUR WATTS KCMG QC

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PERMANENT COURT OF ARBITRATION:
Ms Anne Joyce (Registrar)
Mr Dane Ratliff (Assistant Legal Counsel)

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PROCEEDINGS DAY TWO
(Revised)

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THE PRESIDENT: As agreed yesterday and earlier this morning in our consultation, we will this morning give the opportunity to Ireland to present its submissions in respect of the issue of jurisdiction. I will now invite Ireland to make their submissions.

MR BRADY: Our submissions will be made initially by Mr Paul Sreenan, Senior Counsel and Member of the Irish Bar.

MR SREENAN: Mr President, Gentlemen, I propose in the course of my presentation to ask you to look at the Counter Memorial, Ireland's reply, and the Rejoinder. I will probably refer as well to the Judge's folder. I have produced a written summary of my submission to you for the assistance of the Tribunal.

Can I start by saying that the issue of jurisdiction raised by the United Kingdom involves identifying the relevant legal principles, identifying the actual dispute between the parties and applying those principles to the disputed issues. I propose to deal with the relevant legal principles applicable to jurisdiction. My colleagues, Professor Sands and Professor Lowe, will deal with the Irish case, namely the precise obligations that we say are owed under UNCLOS and how they are breached in detail. Having completed our submissions, we believe that the Tribunal will be in a better position to appreciate why we say that this Tribunal is not deprived of jurisdiction and ought to determine this dispute.

Before I go any further, it might be helpful, perhaps, if I addressed some of the terms that I propose to use. As the Tribunal knows, the European Community, formerly known as the European Economic Community, was established by the First Treaty of Rome of 25th March 1957. The European Atomic Energy Community, also known as EURATOM, was established by the Second Treaty of Rome, also of 25th March 1957. Each of those Communities has its own separate legal personality, each has a capacity to enter into international agreements. It is important for this Tribunal to note that it is only the European Community which is a part of UNCLOS, not EURATOM. Various references in the United Kingdom's legal arguments seem to conflate EURATOM and the European Community. That is especially so when they address annex IX of UNCLOS. We say that that is wholly inappropriate as a matter of law.

Reference has been made in the pleadings to the concept of mixed agreements. The European Community may, of course, become a party to international agreements, which contain provisions in relation to which it has competence. In relation to such international agreements, Member States may also have competence and may also join in those agreements. We refer to those agreements as "mixed agreements".

The fact that it is a mixed agreement simply indicates that some competence lies with the European Community and some competence lies with the Member States, but says nothing about the extent or character of that competence. For example, in a mixed agreement, the European Community may have some competence in some areas and it may or may not have exclusive competence in other areas, and that is an important issue that needs to be addressed.

Mixed competence, or what we also refer to as shared competence, refers to a situation where both the Members States and the Community are competent in relation to a certain matter. They share

competence. Exclusive competence refers to a situation where either the Community or the Member State exclusively has competence in relation to that matter.

In addressing the issue of competence, one of the important issues is the extent and nature of that competent in the context of the particular obligation that is under discussion.

The issue of the competence of the European Community and its Member States in the context of international agreements may appear complex, but, in reality, it is a relatively simple issue. In this case, particularly, we would be submitting to the Tribunal that the resolution of the issue of competence is a simple one. The question is, has the European Community got exclusive competence in relation to the particular area of obligation that is under discussion, or, to put it another way, has the competence of the Member States to undertake those obligations, namely the obligations in issue under UNCLOS, been excluded.

In dealing with the issue of exclusive competence, which is at the core of the resolution of this issue, there is one bright line to be identified, and that is whether or not Community provisions impose only minimum requirements. If Community provisions impose only minimum requirements then it follows that the Community does not have exclusive competence.

That having been said I of course have to deal on behalf of Ireland with the arguments raised by the United Kingdom and at the risk of making a simply issue complicated I propose to do so.

Gentlemen, Ireland intends to develop a number of arguments in response to the United Kingdom's submission on jurisdiction, and in summary they are as follows:

- Prima facie, this Tribunal has jurisdiction. The burden is on the United Kingdom to establish by reliance on some exception that it does not.

- Article 282 of UNCLOS does not deprive this Tribunal of jurisdiction.

- Thirdly, and perhaps the most important point in the context of the argument now made by the United Kingdom, the European Community does not have exclusive competence in the particular disputes with which this Tribunal is concerned.

- Fourthly, Ireland and the United Kingdom have not transferred their competence to the European Community.

- Fifthly, Ireland and the United Kingdom remain competent in international relations in the environmental field and retain their UNCLOS rights and obligations in relation to the matters in issue in this dispute.

- Next we submit that "transferring competence" within the meaning of Article 4.3 of Annex IX of UNCLOS means that the Community acquires exclusive competence.

- We next argue that the United Kingdom's reliance on Article 292 of the EC Treaty is misplaced.

- That the mere fact that the European Court of Justice may consider or interpret UNCLOS, in the course of determining a dispute on European Community law does not mean that the UNCLOS Tribunal is deprived of jurisdiction.

- Finally we argue that the United Kingdom's position is unsupported by authority and is

contradictory.

Can I first address the development of this argument on jurisdiction in the pleadings, very briefly, in order to submit a submission that the argument raised by the United Kingdom has not only been raised late, but has, in fact, changed significantly?

In its written response to the request for provisional measures submitted to the International Tribunal for the Law of the Sea, the United Kingdom based its argument, which it described as one of "jurisdiction", on Article 282 of UNCLOS. It argued that Ireland's case was based on the meaning and effect of certain European Directives and Treaties and that, pursuant to the EC Treaty and EURATOM Treaty, these issues had to be submitted to the European Court of Justice. It went on to argue in relation to the provisions of part 12 of UNCLOS that this was a matter for which the Community shared competence with the Member States and that the Member States were under an obligation to submit any disputes in relation to a matter in which the Community was competent (and that apparently included shared competence) to the European Court of Justice. When it came to its oral presentation before ITLOS, the United Kingdom, once again, firmly rooted its submission on jurisdiction in Article 282 of UNCLOS.

In its oral argument before the Tribunal for the Law of the Sea, the United Kingdom stated:

"It is, therefore, important to ascertain in respect of each and every obligation under the Convention whether competence lies in the Member State or in the Community. When ratifying the Convention, the Community made the declaration contained in Annex XVIII to the annexes of the written response of the United Kingdom, it will merit a little study."

However, the point about competence which appeared to refer only to exclusive competence was not developed nor was its relevance to the issue of jurisdiction explained. As we shall see in its Counter Memorial before this Tribunal, the United Kingdom paid no attention at all to the issue of competence.

In the United Kingdom's Counter Memorial before this Tribunal, the United Kingdom advanced a comparatively brief argument which it, again, based on Article 282 of UNCLOS, to argue that "a large part of Ireland's case" appeared to be based on the provisions of European Community and EURATOM law and that pursuant to Article 292 of the EC Treaty and 193 of the EURATOM Treaty, Member States undertook not to submit a dispute concerning the interpretation or application of those Treaties to any method of settlement other than those provided for therein. Although the United Kingdom referred in its Counter Memorial to the fact that the Community when lodging its declaration in accordance with Annex IX referred to the issue of competence, nowhere did it assert that the issue of competence now forms part of its argument as to jurisdiction. It does in the course of its Counter Memorial, I should say, mention the declaration and point out that the declaration deals with competence, but leaves it at that. It makes no argument based on it. The reference there is to paragraph 4.19 of the Counter Memorial.

The analysis of competence which the United Kingdom appeared in its oral argument to put before the International Tribunal of the Law of the Sea to consider to be relevant to the issue of jurisdiction never materialised. I should say, when it came to Ireland's reply, chapter 4 of Ireland's reply

then dealt with the issue of jurisdiction and it replied to the case that the United Kingdom had made based on Article 282 of UNCLOS. It argued that Article 282 was of no relevance to the issue of jurisdiction and explained why. The same argument had been advanced before ITLOS and had been accepted by ITLOS.

When it came to the United Kingdom's Rejoinder before this Tribunal in April of this year, competence again raised its head. The section on jurisdiction had now gone from some 22 paragraphs in the Counter Memorial, despite a very brief reply from Ireland, to some 51 paragraphs in the Rejoinder. Not only that, but now for the first time the United Kingdom sought to develop an argument that "As a matter of substance, Ireland is not the bearer of the rights that it invokes and the United Kingdom is not the bearer of the obligations."

There follows a discussion of competence without always making it clear whether what is being spoken about is mixed competence or exclusive competence. Article 4.3 of Annex IX is now added for the first time as the legal basis of the jurisdictional objection, and the issue of competence, rather than the terms of Article 282 of UNCLOS, now seems to take centre stage in the United Kingdom's arguments.

Can I just pause there briefly to bring the Members of the Tribunal to the Counter Memorial and the Rejoinder? In the United Kingdom's Counter Memorial, the chapter with which we are concerned is chapter 4, headed "Jurisdiction", and we see that it goes on at page 98 to deal with a section under the heading of "The Basis of the Tribunal's Jurisdiction". It then goes, on page 99, to deal with alternative means for settlement of disputes, and refers to Articles 281 and 282. Finally, it deals with Ireland's claim based on European Community law and then, at paragraph 4.19, simply refers to the declaration which states how competence is distributed, but makes no argument based on that. In paragraph 4.02 it refers to the jurisdiction of the Court of Justice to interpret UNCLOS.

But, if we then go to Ireland's reply, at chapter 4, that simply deals very briefly with the arguments put up. We then go to the United Kingdom's Rejoinder and we find that chapter 4, which has now become quite an extensive chapter, starts off not with the heading "Jurisdiction", but "Jurisdiction/UNCLOS as a mixed agreement". It has an introduction and the very next section, which gets into the meat of their case, addressed Annex IX of UNCLOS. This now comes in and it comes in at the very top of their jurisdictional argument.

In April of this year we now have this Annex IX argument developed which is developed on the basis of the Community's declaration which is covered in Section C of the Rejoinder. Section D then deals with the distribution of competence in mixed agreements. Section E, the third final section, deals with the jurisdiction of the European Court of Justice. There is then a section in which Articles 281 and 282 of UNCLOS is rolled in with Article 292 of the EC Treaty and Article 193 of Euratom. And then finally we have a section on Ireland's reliance on provisions falling within Community competence. So all of this comes for the first time, as I say, only in April of this year, and the Tribunal I trust will understand that this is the first time that Ireland has had an opportunity to reply to this substantive argument.

But I should observe that all of this contrasts with the attitude adopted by the United Kingdom before the Ospar Tribunal, where it did not take any jurisdictional point, presumably because it did not believe in it. On the contrary, it argued that it had complied with its obligations under EC law. If the jurisdictional argument which the United Kingdom now advances is correct it ought never to have submitted such an issue to any body other than the European Court if Justice. Let us be quite clear about this. Before Ospar the United Kingdom did not raise jurisdiction. On the contrary, it submitted an EC law question to the jurisdiction of Ospar. I should say that I was not counsel in the Ospar tribunal but Mr Fitzsimons and Mr Sands and the Attorney General were, and if necessary they can confirm to the Tribunal the position before Ospar as they have confirmed to me.

Furthermore, it should be observed that in the Ospar case Ireland's cause of action focused on Article 9 of the Ospar Convention on the right of access to information on the environment. That provision establishes broadly the same obligation as Directive 90/313/EC. One would have expected the United Kingdom to advance its present argument in that case, yet it did not.

Let me move now to the next argument that we make, that prima facie we say this Tribunal does have jurisdiction, and the burden is on the United Kingdom to rely on some exception to prove that it does not.

Article 288 of UNCLOS deals with the issue of jurisdiction, and I quote Article 288(1), but perhaps I should have the relevant article open before me it provides:

"A court or tribunal referred to in Article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part."

This Tribunal is such a court or tribunal as is referred to there and Ireland says that the dispute which has been submitted is one concerning the interpretation or application of this Convention. It might be worth referring as well to sub-paragraph 4 of article 288.

"In the event of a dispute as to whether a Court or Tribunal has jurisdiction the matter shall be settled by decision of that Court or Tribunal"

The United Kingdom has of course raised a dispute as to whether or not this Tribunal has jurisdiction, and the Tribunal will recall that in its own rules of procedure, I think it was rule 11, if the issue of jurisdiction was to be raised as a preliminary issue by a party that was to be done within three months.

We draw the Tribunal's attention to the fact that the International Tribunal for the Law of the Sea in its Order granting interim relief held that prima facie this Tribunal does have jurisdiction. We argue that the burden is now on the United Kingdom both because of the provisions of Article 288 (1) of UNCLOS and because of the findings of the International Tribunal for the Law of the Sea to which procedure it was a party, and before which it was fully heard on this argument, to rely on some exceptional provision to displace the prima facie jurisdiction of this Tribunal.

In discharging that burden, the United Kingdom must rely on principles of international law and in particular, the provisions of UNCLOS. Provisions of European Community law cannot in themselves

deprive an UNCLOS Tribunal of jurisdiction.

We go on to consider Article 282 of UNCLOS, which provides that: "If the States' Parties which are Parties to a dispute concerning the interpretation or application of this Convention ..."

PROFESSOR CRAWFORD: Could I just take you back to your last statement, I am sorry for interrupting you? You say that a provision of European Community law cannot deprive this Tribunal of jurisdiction. Obviously, that is true to the extent that they are two separate legal orders, but there may be a provision in one legal order which lets the other one in. In particular Article 282 says that, "If the States' Parties which are Parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise ..." Why could not an agreement within the framework of the EU, whether embodied in the EU treaties or otherwise, amount to an agreement for the purposes of Article 282?

MR SREENAN: I would argue, firstly, that Article 282 is specifically concerned with a dispute concerning the interpretation or application of UNCLOS and, accordingly, that the EC Treaty would not fall within that category. If it could, I think that I would have to accept, in principle, that one could refer to that internal legal order in order to consider whether or not that was the effect of the agreement. Particularly, though, when one comes to Annex IX of UNCLOS, where provision is made for the deposition of a declaration of competence, there is there within UNCLOS a mechanism whereby the international organisation and Member States notifies UNCLOS of the division of competence with a view to enabling UNCLOS to decide its own jurisdiction. It is up to the international organisation and the Member States concerned to update that declaration. It is not up to UNCLOS to carry out its own investigative exercise in order to find out whether the competence has in some way developed beyond the declaration. That is the mechanism provided for in the Convention. I would say that that is as far as the Tribunal then goes in deciding on its own jurisdiction. But, in deciding on its own jurisdiction under Article 288, of course, this Tribunal addresses whether or not Article 282 is triggered by such a bilateral or multilateral agreement. We say that it is not for the reasons that we advanced before ITLOS and accepted by them and which we also advance here. I do not know if that goes some way to answering Professor Crawford's question.

PROFESSOR CRAWFORD: Obviously, it answers it to a certain extent. The question is that one might take a hypothetical argument that UNCLOS itself is a European Treaty, that is a treaty to which the EU is a party. It is, therefore, European law internally within the EU. Obviously, you would say that that internal operation is relative only to the competence of the EU, which is that spelt out in the Annex IX declaration.

MR SREENAN: Absolutely.

PROFESSOR CRAWFORD: But let us assume that it was argued that the matter went further than that and that any dispute between the EU Member States involving UNCLOS was as such a matter of European law and that it triggered the obligation in the EU Treaty to settle that dispute before the ECJ. That argument may or may not be a good one, but, if it was made, would that not, in principle, be a position which could have effect under Article 282?

MR SREENAN: I think that it would only have effect under Article 282 if it could be said, and I take this to be the premise to your question, Professor Crawford, that the EC Treaty in those circumstances would be a treaty which enabled a procedure to be operated whereby a dispute under UNCLOS could be determined between the parties. If one accepts that as a premise and one also accepts that the mere signature of the Community to UNCLOS makes UNCLOS absolutely for all purposes a question of European Community law, essentially of the same status as any other internal provision of European Community law, such as a regulation or a directive, then it would seem to follow, but I think that, in order to get to that point, one has to go a very great distance, and a distance well beyond that which the European Court has gone in any case to date, and one which I would say is not justified. We can develop this argument later, but it would mean that, once the European Community signs up to an international agreement, the Member States effectively have their sovereignty affected to the point that, although they have competence, apparently, to enter into the international agreement, they do not have competence to work the dispute resolution mechanisms within them. We would argue that that is a conclusion not justified by the present state of EU law and one which we would submit almost certainly virtually ever Member State of the European Community would strongly oppose.

At any rate, we quote here Article 282 and I do not need to open it fully, because I know that the Members of the Tribunal are familiar with it, but we say that Ireland and the United Kingdom are parties to a dispute concerning the interpretation or application of this Convention. However, they have not agreed that such a dispute shall, at the request of either party to the dispute, be submitted to any procedure other than binding arbitration before this Tribunal.

Going back, perhaps, to Professor Crawford's question, I think that I should point out, perhaps, that, if it was a situation where the European Community had exclusive competence and if the Member States attempted to raise a dispute on such an issue, then I would, of course, accept that, certainly, Annex IX would kick in at that stage and, certainly, I think Article 282 would kick in as well. But the key to the issue really is exclusive competence once again, as I said in my opening remarks.

The agreement or agreements relied on by the United Kingdom in its attempt to avail of this exclusion of jurisdiction, are the EC Treaty and Euratom Treaty. However, the dispute settlement procedures under the EC Treaty and Euratom Treaty deal with disputes concerning the interpretation of EC law. This remains the case notwithstanding the fact that some provisions of international treaties entered into by the European Community within its competence become a part of Community law. The task of the European Community institutions delivering binding decisions in disputes within the Community nevertheless remains an obligation to decide matters according to Community law.

The ITLOS Tribunal in its order, paragraph 49, considered that the dispute settlement procedures under OSPAR and the EC Treaty and Euratom Treaty dealt with disputes concerning the interpretation or application of those agreements, and not with disputes arising under the Convention. At paragraph 50, it considered that even if the OSPAR and EC Treaty and Euratom Treaty contain rights or obligations similar to or identical with the rights or obligations set out in the Convention, the rights and obligations under those agreements have a separate existence from those under the Convention.

This point is important. Even if Community law contains identical provisions based on the fact that the Community had become a party to UNCLOS and even if disputes under EU law have to be submitted to the Court of Justice, rights and obligations under UNCLOS nevertheless have a separate existence and allegations of breach of UNCLOS can be submitted to the UNCLOS Tribunal.

Paragraph 51 of the ITLOS Tribunal order also recognises that if UNCLOS obligations become part of the corpus of Community law, they do not necessarily, in the Community law context, receive the same interpretation because they are necessarily interpreted by reference to other provisions and obligations.

It is worth looking at the precise statements of principle in the ITLOS order and I quote those three paragraphs there.

In paragraph 49 on page 11 of the written document, the ITLOS Tribunal said,

"Considering that the dispute settlement procedures under the OSPAR Convention, the EC Treaty and the Euratom Treaty deal with disputes concerning the interpretation or application of those agreements and not with disputes arising under the Convention, considering that even if the OSPAR Convention, the EC Treaty and the EURATOM Treaty contain rights or obligations similar to or identical with the rights or obligations set out in the Convention, the rights and obligations under those agreements have a separate existence from those under the Convention. Considering also that the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, inter alia, differences in the respective contexts, objectives and purposes, subsequent practice of parties and travaux preparatoire."

We include in our Judge's book copies of the separate decisions of some of the Judges, Judge Anderson, Judge Traves, Just Wolfstrum. I do not think that I need to open those, but we do point out that in Judge Wolfstrum's decision he emphasises (a) the wording of Article 282, (b) the context in which it has to be read and, (c) the objective pursued. The dispute settlement system of OSPAR and the EC Treaty are designed to settle disputes concerning the interpretation and application of those codes of law. He stated:-

"If the OSPAR Convention, the Euratom Treaty or the EC Treaty were to set out rights and obligations similar or even identical to those of the Convention on the Law of the Sea, these still arise from rules having a separate existence from the ones of the Convention of the Law on the Sea."

Thus, both Articles 220 EC Treaty and 292 EC Treaty, upon which the United Kingdom relies, refer expressly to the task of the interpretation and application of "this Treaty", namely the EC Treaty. Article 220 EC Treaty empowers the Court of Justice to "ensure that in the interpretation and application of this Treaty the law is observed." [emphasis supplied]

Article 292 EC Treaty provides:-

"Member States undertake not to submit a dispute concerning the interpretation and application of this Treaty to methods of settlement other than those provided for therein."

Indeed, the United Kingdom's reliance on Article 282 UNCLOS is entirely inconsistent***, we say,*** with its subsequent argument (which has now become its primary argument) that the matter is governed

by Article 4.3 of Annex IX UNCLOS. Under the latter provision, the United Kingdom argues, the rights and obligations of the United Kingdom under UNCLOS have been transferred to the European Community and accordingly, the United Kingdom may not exercise any competence transferred to the Community. If that is so, than in relation to disputes arising out of such matters, the United Kingdom could not have competence to enter into the type of agreement contemplated by Article 282 of UNCLOS.

The true position is that by virtue of Article 292 EC Treaty, Member States of the European Community have undertaken not to submit a dispute concerning the interpretation and application of the EC Treaty to methods of settlement other than those provided for therein. However, this dispute is not about the interpretation or application of the EC Treaty or Community law. It is about the interpretation and application of UNCLOS. The body having jurisdiction under Article 288 UNCLOS is this Tribunal and Article 282 UNCLOS does not exclude that jurisdiction.

As I said in reply to a question from Professor Crawford, exclusive competence, in our submission, is the foundation to consideration of the whole issue.

PROFESSOR CRAWFORD: There is obviously a dispute between the parties as to Article 292 and in some respects Ireland has relied on provisions of European law as in some way or another relevant to the application of UNCLOS obligations. To what extent does the dispute concerning the interpretation or application of UNCLOS become a dispute concerning the interpretation or application of other legal provisions or legal obligations by reason of their implication, as it were, incidentally or additionally in the course of the argument between the parties? It is clear that your claim is made under certain provisions of UNCLOS. Do you say that, once that is true, it does not matter how much you invoke any other provisions, this remains an UNCLOS dispute, as it were, through and through.

MR SREENAN: Can I answer it in this way, Professor Crawford? We say that we have a dispute under UNCLOS and in the course of arguing our dispute under UNCLOS, we are entitled to make reference to other international instruments, but my colleague, Professor Lowe, is going to follow me briefly on the issue of applicable law and the jurisdictional consequences of that and I think it would, subject to this Tribunal, be more appropriate if I left that question to him, because I know that he intends to answer it.

SIR ARTHUR WATTS: If I may just ask a simple question, you put some emphasis on the provision of the EC Treaty, giving the Court of Justice jurisdiction in respect of disputes about the interpretation of ~~this treaty~~. I think that you also accept, however, that those references to "this treaty" can be extended to cover instruments that have been adopted within the framework of the EC Treaty. Have I got that right?

MR SREENAN: Yes.

SIR ARTHUR WATTS: Does that not also apply to treaties which have been concluded under the powers which have been conferred by the EC Treaty?

MR SREENAN: There are circumstances in which an issue relating to an international agreement arise for consideration by the European Court and the European Court has, in certain circumstances, jurisdiction to provide an interpretation of such treaties, but European law has not gone so far as to say that all disputes in relation to the interpretation or application of international agreements to which the

Community is a party must be submitted to the European Court. If one looks at the case law of the European Court in which the power of the court to interpret provision of international agreements to which the Community is a party have been considered, one finds that the preponderance of those cases relate to agreements which are known as "association agreements" with which the Members of the Tribunal will be familiar, where the Community enters into an association agreement, usually with one other country, but it could be with a group of countries, and usually these are mixed agreements. Member States also join in these agreements, but invariably one finds that the Community has guaranteed performance of the agreement even on behalf of the Member States. Those international agreements are regarded as being in a particular category of their own calling for a entitlement of the Court of Justice to be in a position to interpret them.

SIR ARTHUR WATTS: Those agreements, as you have just put it, are in a category of their own. They are not, in your view, part of the corpus of Community law?

MR SREENAN: Those agreements are part of the corpus of Community law and, because of the particular character of those agreements, the European Court of Justice has power to interpret them. But the European Court has never gone as far as to hold that even if it has power to interpret an international agreement such as UNCLOS, that that means that all disputes between member states in relation to UNCLOS have to be determined by the Community Courts. One can say to the extent to which the European Court has power to interpret a provision of such an international agreement in appropriate circumstances, it will not necessarily do it in every case but in appropriate circumstances, it will do so on the basis that it considers that in the circumstances that arise there is a sufficient nexus there with Community law that one can say it is part of Community law which requires the court in that particular case to interpret the provision of UNCLOS or the provision of any other international agreement as part of its determination of the overall issue of Community law which is before it. It does not say that there is one particular issue here in relation to UNCLOS and we are not going to have any regard to UNCLOS in deciding this overall question of Community law. In the same way as this Tribunal we would submit in deciding a dispute in relation to UNCLOS would not say there is one argument there that might involve us looking at a Community law instrument and we are not going to look at that. It is part of its jurisdiction to decide Community law issues. It will interpret if necessary a provision of an international agreement which is raised before the court. But the court has never said that in any of the well over 1,000 international agreements signed by the European Community to date, and many more no doubt in the future, if any dispute arises between member states in relation to the interpretation or application of such agreements they must all come before the European Court. That would be a very radical step and one with significant consequences, not just in terms of the workload of the Court but in terms of state sovereignty more importantly.

PROFESSOR CRAWFORD: So you are saying that the European Court does not necessarily have exclusive jurisdiction over everything which it may have jurisdiction to interpret?

MR SREENAN: Yes, that would be a shorter way of saying something that I have said in a much more

roundabout way.

Can I move now to the question which I submit is the key question for the consideration of the issues by the Tribunal, and that is the question of exclusive competence and to argue that the Community does not have exclusive competence in the particular disputes with this Tribunal is concerned.

The distinction between exclusive competence and shared or mixed competence is critical we say to the argument that the United Kingdom makes under Article 4.3 of Annex IX UNCLOS. It is only in the case of exclusive competence that Member States cede or transfer their competence to the European Community. In areas of shared or mixed competence, Member States remain competent to undertake obligations to each other and to third States. It makes no difference whether the mechanism for undertaking those obligations is through bilateral, regional agreements or other international agreements such as UNCLOS.

The European Community does not have exclusive competence in environmental matters. The Tribunal can take that as a clear principle of law which will not be gainsaid by any authority produced by the United Kingdom. Indeed, the Single European Act acknowledged the right of individual Member States to conclude agreements with international bodies in relation to the environment. Article 174 EC Treaty which we have copied in the Judges' book but we also quote here in the written argument, says that:-

"4. Within their respective spheres of competence, the Community and the Member States shall co-operate with third countries and with the competent international organisations. The arrangements for Community co-operation may be the subject of agreements between the Community and the third parties concerned, which shall be negotiated and concluded in accordance with Article 300."

It then goes on to say, importantly: "The previous sub-paragraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements."

So here we have one of the key articles in the section of the EC Treaty that deals with the environment. It expressly provides that within their respective spheres of competence the Community and member states shall cooperate with third countries and competent international organisations.

But it goes on to provide that the paragraph in question is without prejudice to member states competence to negotiate in international bodies and to conclude international agreements. So that the Treaty itself expressly recognises the competence of member states to negotiate and conclude environment agreements.

PROFESSOR CRAWFORD: You would say that that recognises their competence to conclude environmental agreements inter se? Inter se as between themselves or agreements which may be with third states but also have effect inter se?

MR SREENAN: Yes. We quote there in the footnote from two texts which are included in the Tribunal's book of authorities, but I will simply go to the quotes for ease of reference.

Vaughan: Law of the European Communities Service: Butterworths: paragraph 4.13 states "The crucial issue is what constitutes a Community policy and it seems clear that in the environmental field,

the policy of the Community needs to be much more highly developed to confer exclusive jurisdiction on the Community than in other areas, such as transport, fisheries or general commercial policy."

And in McLeod, Hendry and Hyett, the External Relations of the European Communities, the authors state in relation to the nature of Community competence in the external field in the pursuit of environmental objectives:-

"(a) The Community has power to enter into international agreements on environmental matters, but its competence is not in principle exclusive. Thus it is open to the Community and the Member States to participate together, or separately, in international agreements and negotiations;

"(b) However, where the Community has adopted common rules internally to regulate an environmental issue, the Community alone is competent to enter into international agreements which affect such rules or alter their scope. To that extent, Community competence in certain environmental matters is exclusive;

"(c) Where, however, the internal rules adopted by the Community are in the nature of "minimum requirements", Article 176 EC has the effect that it remains open to the Member States to participate in agreements relating to the matters covered by such internal rules."

There is a lot in that neat summary of the position in relation to external competence of the Community. It is an important summary and perhaps I should go back over it. The Community has what is known as common policies and these are laid down in the Treaty. Thus, for example, it has a common fisheries policy. It has a common commercial policy. And in the area where the Community has a common policy it has exclusive competence. Thus for example the members states could not enter into international agreements relating to fisheries. But even in areas where there is not a common policy the Community can acquire exclusive competence as a result of internal common rules that it adopts. So below the hierarchy or below common policies in the hierarchy of legislation the next step down we have are what are known as common rules, and in the same way as the Treaty refers to common policies the Treaty also refers to common rules. For example the section of the Treaty dealing with competition, state aids and approximation of laws is headed Common Rules on these topics; and the Community has power to lay down common rules.

Below the level of common rules the Community has power to lay various measures which would not be sufficiently extensive or harmonising in effect that one could say that they were common rules.

But below the level of common policy, if one is at the level of common rules, and if in addition one can say that those common rules are affected or would be affected by the international obligation in question, then in those circumstances the Community can acquire exclusive competence.

That can be a difficult question sometimes to answer, but where we are assisted in this case is that there is one clear bright line, there is one clear answer where one can say that even if there are common rules (and we would say that there are not common rules) but even if there are, they are not affected in the circumstances where the rules in question simply lay down minimum standards. In those circumstances although the Community may have a competence it is not exclusively competent. The

member states retain their competence. There is no transfer of competence to the Community. We say that in the present case we are concerned entirely with rules that lay down minimum standards.

PROFESSOR HAFNER: As a matter of clarification, in footnote 16 where you cite the summary in McLeod's book concerning the competence of the Community and the member states, it is said that where there are minimum requirements it is open to the member states to participate in agreements relating to a matter covered by such internal rules. Is it not so that this must be interpreted in the sense as saying as far and only as far as the minimum standards are not affected?

MR SREENAN: In principle I think that must be correct in the sense that to take an example, suppose that there was an internal rule which said that in relation to standards for drinking water a certain minimum quantity of fluoride must be introduced into public water supplies, then member states would affect that common rule even if it was a minimum standard if they entered into an international obligation to the effect that they would not introduce into public drinking water a quantity of fluoride in excess of a maximum standard which was itself below the Community minimum standard. In that sense I accept the point.

PROFESSOR HAFNER: Would you go along with the opinion of the European Court in the case of ILO Convention, number 170 in this respect?

MR SREENAN: Absolutely. I think the opinion of the Court in the ILO case was to the effect that the members states were in a position to comply with the international obligation under the ILO and the obligation under European law at the same time, and accordingly the obligations under European law were not affected.

PROFESSOR CRAWFORD: I had a related question, maybe the same question asked from the perspective of a former Australian federal constitutional lawyer. We are familiar with these problems in the context of the so called obey both law rules of inconsistency where you can go above a level but not below it. The problem here of course is that we are not dealing at the international level with a rule which specifies a specific amount. In the example you give, it is quite clear we are concerned with a general rule about the protection of the environment or about assessment or reporting or whatever. It is going to be very difficult to say what is the relationship between a general obligation of environment protection on the one hand and a more specific European regulation or directive aimed at the same thing. How do we apply the minimum standard test? If you say member states are free to enter into international agreements inter se which go above a minimum standard but not those which fall below, how do we apply that in relation to a provision of a general character?

MR SREENAN: Firstly the United Kingdom would have to show that the provisions in question fall within the category of legislation known as common rules, in other words they would have to show that the extent of legislation in the particular field produced a degree of harmonisation which would be a very high degree of harmonisation amounting to almost complete harmonisation. Those rules would then have to be affected in some way. If they are simply minimum rules then the likelihood is that they are not common rules in the first place, although clearly they could be. But we would have to consider whether there was any plausible case made out in the first place that minimum rules could be affected by

the obligations in question. The first thing one has to look at is the precise obligation that is invoked, and the precise obligation that one says has to be performed which has not been performed, and whether or not the state in question is, for example, pointing to a common rule and saying "if I was to comply with that international obligation I would be in breach of that common rule" or "I would affect the efficacy of that common rule in some way. I would undermine it". Clearly if one contradicted the common rule that would be a clear answer. It does not necessarily have to be a contradiction in every case, one could have a clear undermining but that sort of undermining would only be found in the area of common rules. In the absence of common rules it does not arise.

If I could briefly regain where I was in relation to that before asking the Tribunal if this would be a convenient point to break. Just going back to the previous page in footnote 19 we also refer there to an extract from a text that we also include in our book of authorities, Kapteyn and Verloren Van Themaat, Introduction to the Law of the European Communities (3 Edition, 1998). Of course Judge Kapteyn was on the bench of the European Court of Justice for opinions 2/91 and 1/94, where they say:

"In opinion 2/91...the Court held that there is no question of complete cession of competence to the Community whether internal or external, if internal Community competence is exercised through the adoption of provisions laying down minimum requirements. This is the case in the fields of social policy; consumer protection, and environmental protection, and in practice is quite often the case in harmonisation of laws in the technical field." So here once again one has an authoritative statement that in the field with which this Tribunal is concerned, environmental policy, one has not got complete harmonisation. Such rules as are laid down are properly described as minimum rules, and accordingly the competence of the Community in this field is not exclusive. There is not a complete cession of competence by the member states to the Community. The Community does not have exclusive competence. So on this issue as to whether or not minimum requirements means that common rules cannot be affected, or are minimum requirements going to be affected, in a sense one is brought beyond that because all of the authorities say that in the field of environmental protection there is no exclusive competence on the part of the Community. And indeed that is the position recognised by articles 174 and also 176 of the Treaty.

Accordingly at paragraph 28 we say there is no academic authority that we are aware of that supports the contention that the European Community enjoys exclusive competence in the sphere of environmental activity. Indeed it seems clear that the Community itself does not claim exclusive competence in that sphere. There is for example no decision of the European Courts affirming that the Community enjoys exclusive competence in the Environmental sphere.

We also point out that it is a necessary corollary to the argument that the Community enjoys exclusive competence in the environmental sphere that the Member States do not enjoy competence. It is axiomatic in Community law that Community measures establishing minimum standards which leave Member States free to establish higher standards or take more stringent measures, do not result in the creation of exclusive competence for the Community. That this applies throughout the entirety of the environmental sphere is clear from Article 176 EC Treaty (formerly Article 130t). Addressing the

measures which may be adopted by the Community in the environmental sphere under Article 175 EC Treaty (formerly Article 130s), it states:-

"The protective measures adopted pursuant to Article 175 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. They shall be notified to the Commission".

So here at a much higher level than the ordinary directives which say that these are minimum standards, we have the Treaty itself saying that measures adopted in the environmental sphere, pursuant to Article 175, do not prevent Member States adopting more stringent standards and, as we have seen from Article 174, the Member States remain free to enter into international obligations and have competence in that area.

We say that, where the Community acts pursuant to Article 175 EC Treaty, the Member States retain competence to introduce more stringent measures. This is entirely inconsistent with the notion of exclusive competence on the part of the Community.

I propose now, Gentleman, to go to the Community's declaration, and I do not know, if, President, this might be a convenient place to take a short break.

THE PRESIDENT: We will break now for 15 minutes.

MR SREENAN: Thank you.

(Short Adjournment)

MR SREENAN: President, Members of the Tribunal, I had got as far as paragraph 21 of the written note of my submission and I was now going to address the issue of the declaration of competence, lodged by the European Community. I quote there from the declaration, which says,

"The Community has exclusive competence for certain matters and shares competence with its Member States for certain other matters."

It then goes on to list the "matters for which the Community has exclusive competence" and the "matters for which the Community shares competence with its Member States". We see that exclusive competence exists in relation to matters such as the common fisheries policy. However, issues such as maritime transport, safety of shipping and the prevention of marine pollution are listed under the heading of shared competence.

We go on then to quote further from the declaration, but it would, perhaps, be better if we looked at the document itself, which is in the Judge's folder, at tab 20. This is, of course, a core document in terms of the argument that we are having at the moment. If I could just turn to the first substantive page of the declaration and the last paragraph there, which says that, "in accordance with the provisions referred to above, this declaration indicates the competence that the Member States have transferred to the Communities under the Treaties in matters governed by the Convention and the Agreement."

It then goes on, having used the words of Article 2.3 of Annex IX(c), "The scope and exercise of such Community competence are by their nature subject to continuous development and the Community will complete or amend this declaration, if necessary, in accordance with Article 5.4 of

Annex IX to the Convention". I do not believe that that has been supplemented.

Then in another key paragraph, it says, "The Community has exclusive competence for certain matters and shares competence with its Member States for certain other matters." So straightaway the Community is drawing a distinction between exclusive competence and shared competence.

Then under the heading of "1. Matters for which the Community has exclusive competence", it says at the first indent, "The Community points out that its Member States have transferred competence to it with regard to the conservation and management of sea fishing resources. Hence, in this field, it is for the Community to adopt the relevant rules and regulations which are in force by the Member State and within its competence to enter into external undertakings with third States or competent international organisations."

Can I just pause there, because that paragraph tells us a lot, in my submission, because it is firstly dealing with exclusive competence and there it uses those words "The Member States have transferred competence" - the words of Article 4.3 of Annex IX - and it uses those words in relation to exclusive competence. It then goes on in the next paragraph to deal with matters for which the Community shares competence with its Member States and it does not refer there at all to transfer, but it does refer to exclusive competence.

The second indent there is one that is particularly important for this Tribunal, where it says, "With regard to the provisions of maritime transport, safety of shipping and prevention of marine pollution contained, inter alia, in parts 2, 3, 5, 7 and 12 of the Convention, the Community has exclusive competence only to the extent that such provisions of the Convention or legal instruments adopted in implementation thereof affect common rules established by the Community." That is the first principle. The Community is saying "WE don't have exclusive competence except if UNCLOS or the instruments adopted thereunder affect common rules". It goes on then to assist UNCLOS and the UNCLOS Tribunal by saying, "When Community rules exist" - and again it uses the term here "Community rules" rather than "common rules" - "When Community rules exist, but are not affected, in particular in cases of Community provisions establishing only minimum standards, the Member States have competence, without prejudice to the competence of the Community to act in this field; otherwise competence rests with the Member States".

So what the European Community is telling the United Nations there is that, “in relation to common policies, such as fisheries, we have exclusive competence. That is a transfer of competence to us within the meaning of Article 4.9 of Annex IX. In other areas, we share competence. In those circumstances we only have exclusive competence where there are (a) common rules and (b) they are affected. In terms of having to work out that difficult formula, we can tell you that, where Community rules exist, but they establish only minimum standards, then they are not affected. In those circumstances, Member States have competence.” It is without prejudice to the Community's competence to act. Of course, the Community, if it has power in the Treaty or otherwise can legislate, but that is neither here nor there in terms of whether it has exclusive competence. It goes on then to say, "A list of relevant Community Acts appears in the appendix. The extent of Community competence

ensuing from these Acts must be assessed by reference to the precise provisions of each measure and, in particular, the extent to which these provision establish common rules."

Again, very important wording, because the Community is saying, "We are giving you a long list of provisions in which competence is shared with Member States rather than exclusive competence". But, in terms of whether or not we have exclusive competence, you have to look at these and decide, firstly, do they establish common rules? Not just are they Community measures, but do they establish common rules? Secondly, do the UNCLOS provisions affect common rules in any particular case, which they do not in the case of minimum standards. The Tribunal will see then in the appendix a long list of provisions conveniently gathered under the headings, for example, of "Marine Pollution", "Protection and Preservation of the Marine Environment", etc. Some of the directives mentioned in the course of the pleadings are listed there. Importantly, you will not find any of the EURATOM directives listed there, because, of course, EURATOM is not a party.

It is an extraordinary feature, if I may so observe, of my friends' Rejoinder that, when they chose in their Rejoinder to re-orientate their case and direct it at Article 4.3 of UNCLOS, and they spend over 50 paragraphs on it, that they simply quote this key paragraph and offer the Tribunal no assistance in terms of the meaning of this paragraph. The issue of whether or not the directives or the treaty simply establish minimum standards in the sphere of the environment is simply not addressed. So, having put up the most important legal text, having quoted what the Community said about it in its formal instrument of ratification, it then does not address the point, and Ireland and the Tribunal are at a loss as to what the United Kingdom says all of this means in the context of this case.

In paragraph 25, we say that a number of points emerge from the declaration. Firstly, it is clear that the Community does not assert that all the matters covered are the matters referred to in UNCLOS are matters for which the Community has exclusive competence. These are matters for which the Community shares competence. Exclusive competence in this area is very much the exception and only arises where the provisions of UNCLOS or legal instruments adopted in implementation thereof affect common rules established by the Community. And this cannot be the case where those rules establish only minimum standards.

Thus, to take an example, in the environmental field, Council Directive 85/337/EC, as amended, on environmental impact assessments, provided by Article 13 that Member States were entitled to "lay down stricter rules regarding scope and procedure when assessing environmental effects". When Council Directive 85/337/EC was amended by Council Directive 97/11/EC, Article 13 of the original Directive was deleted but this was because Council Directive 97/11/EC was based on Article 130s (now Article 175 EC) and accordingly by virtue of Article 130t EC Treaty (now Article 176) the Member States automatically had the power to maintain or introduce more stringent standards. This was expressly recognised by Recital 3 to Council Directive 97/11/EC which provided that "The Member States may lay down stricter rules to protect the environment".

Similar observations apply in relation to Council Directive 90/313 on access to information on the environment. This Directive predated the Community's declaration but is not listed amongst the

Community Acts which refer to matters governed by the Convention. So 90/313 is not listed in the appendix to the declaration. It was based on Article 130s of the EC Treaty (now Article 175 EC) and is therefore subject to the provisions of Article 130t of the EC Treaty (now Article 176 EC). Furthermore, it is evident from its terms that it does not provide the uniformity of rules or the "complete harmonisation of rules" referred to by the ECJ in its Opinion 1/94. Rather, what it does is to establish basic rules or a floor below which no Member State may go. We have included a copy of Opinion 1/94 as a supplement to the book of authorities that was delivered this morning. It was inadvertently omitted yesterday. There in Opinion 1/94 the European Court referred to the fact that one requires a complete harmonisation of rules in the context of its discussion of common rules.

The same observations apply in relation to the other instruments relied upon by the United Kingdom. Council Directive 96/29/Euratom is not referred to in the Community's declaration for the reason that Euratom is not a party to UNCLOS. The United Kingdom also refers in paragraph 4.49 of its Rejoinder to a number of specific Directives. Directive 76/464/EEC on pollution caused by certain dangerous substances discharged into the aquatic environment again clearly establishes only minimum standards. Indent 11 to the Preamble and Article 10 provide that the Member States may, where appropriate, take more stringent measures individually or jointly than those provided for under the Directive.

We then address a number of other directives and copies of the relevant provisions of these are included in the Judge's folder. I do not think I need to turn to them at this stage. It is simply to make our submission.

Directive 84/360/EEC on the combatting of air pollution from industrial plants provides at Article 14 that Member States may, in order to protect public health and the environment, adopt provisions stricter than those provided for in the Directive. The Preamble is also instructive. At Indent 11 it provides that the Community's endeavours to introduce the principles designed to prevent and reduce air pollution can only be gradual bearing in mind the complexity of the situations and the fundamental principles on which the various national policies are based. Again, it is a Directive which clearly establishes only minimum standards.

Directive 82/501/EEC on the major accident hazards of certain industrial activities expressly does not apply to nuclear installations and plants for the processing of radioactive substances and materials and does not appear relevant to the MOX plant. If it does apply, it is still only a minimum standards directive and provides at Article 17 that it may not restrict the right of the Member States to apply or adopt administrative or legislative measures ensuring greater protection of man and the environment than that which derives from the provisions of the Directive. The primary purpose of the Directive is to provide for the provision of specified information to the Commission after a major industrial accident.

Finally, Directive 93/75/EEC concerning minimum requirements for vessels bound for or leaving ports and carrying dangerous or polluting goods as amended by Directive 98/55/EEC and Commission Directive 98/74/EEC is by its title, concerned with the minimum requirements for vessels

bound for or leaving Community ports and carrying dangerous or polluting goods. It leaves Member States free to impose higher standards. Indeed, the Preamble specifically states that it does not affect the right of the Member States to impose additional requirements in respect of vessels. The two amending Directives do not alter this situation.

Thus, all of the Directives referred to by the United Kingdom, are Directives where the Community has laid down minimum standards and where the Member States are free to establish stricter rules. This situation is specifically addressed by the declaration as one in which the Community does not enjoy exclusive competence. It is curious that the United Kingdom has not dealt with the difficulties that the express wording of the declaration poses for them.

So the Tribunal does have the assistance, if one likes, of a double or perhaps even a treble or quadruple layer of assurance. One has the Treaty which says Environmental policy - the Community has competence but the member states also retain competence. One has the directives raised by the United Kingdom and to which of course I must respond, which are on their face minimum standards directives. One has the Community's declaration which says minimum standards, directives, legislation - the Community does not have exclusive competence. One has the academic authorities all of which say the Community does not have exclusive competence in the sphere of the environment.

We then go on to addressing the subsequent and linked argument that transferring competence within the meaning of Article 4.3 of Annex IX of UNCLOS means that the European Community acquires exclusive competence.

PROFESSOR CRAWFORD: It is probably an entirely trivial point, but while we are on the EEC declaration itself, Ireland in ratifying said that a detailed declaration on the nature and extent of the competence transferred will be made in accordance with the provisions of Annex IX. I take it that what that is interpreted as meaning is that it will be made by the European Community. The United Kingdom I think have said the same thing. You have not made yourself any subsequent statement, so I take it that the EEC statement was made on behalf of the member states as well.

MR SREENAN: That is correct, sir, I omitted to mention that, but the inference is correct. It is not entirely clear from Ireland's instrument of ratification but the subsequent declaration referred to is indeed the declaration that would be filed by the European Community.

PROFESSOR CRAWFORD: There is just the slight problem that Article 5(2) of Annex IX says a member state shall at the time when the organisation deposits its instrument make a declaration specifying the matters. I suppose we have to say that the European Union did it for you.

MR SREENAN: Yes. As I say it is not entirely clear on the basis of the instrument that we lodged, but the intent was to make that declaration of competence by reference to the community's subsequent declaration that would be lodged. The Community as I understand it then files the one declaration which covers the member states as well, rather than having the individual member states simply providing a mirror image of what the Community has filed.

In paragraph 30 we refer to Article 4.3 of Annex IX which provides that an international organisation such as the European Community "shall exercise the rights and perform the obligations

which its member States which are Parties would otherwise have under this Convention, on matters relating to which competence has been transferred to it by those member States. The member States of that international organisation shall not exercise competence **which they have transferred to it.**"

Sharing competence is not the same as transferring competence. It is clear from Article 4.3 that the concept of "transfer" referred to is one which is incompatible with the retention of competence by the Member States. It is one by which the Member States cede their rights and transfer their obligations to the international organisation, which then exercises those rights and performs those obligations, which the Member States would otherwise have under the Convention. Indeed, this is the sense in which it is understood by the United Kingdom which has argued that as a matter of substance, Ireland is not the bearer of the rights that it invokes and the United Kingdom is not the bearer of the obligations.

That this is also the sense in which it is understood by the European Community is evidenced by the terms of the declaration which it made, "specifying the matters governed by this Convention in respect of which competence has been transferred to (it) by its Member States...and the nature and extent of that competence." The declaration makes it clear that it is only in areas where the Community enjoys exclusive competence, that competence has been transferred to it, otherwise, to quote the words of the declaration, "competence rests with the Member States". This must by definition be the case within Article 4.3 since the transfer of competence referred to in Article 4.3 is co-extensive with the concept of freedom to act and responsibility. If the Member States retain freedom to act (i.e. competence), it must remain responsible for the discharge of its obligations under UNCLOS. It is only where the State Party has no freedom to act having transferred competence, that it is entitled to assert that the obligation is that of the international organisation.

To look at the matter another way, the United Kingdom would at the present point in time, remain competent to enter into UNCLOS and in particular, assume the rights and obligations of Part XII. This is because the Community does not enjoy exclusive competence in this field. If the United Kingdom is considered competent to enter into the international agreement and does so, then it must remain competent to enforce its rights and be responsible for the discharge of its obligations under the international agreement.

In an area of shared competence, such as the environment, the principle that the competence of the Community is exclusive only to the extent to which national or international rules might "affect" common rules established by the Community is fundamental. Thus, in the frequently quoted passage from the AETR case, the Court held that when the Community adopts common rules, Member States no longer have the right "to undertake obligations with third countries which affect those rules". In other words, one cannot have the Community adopting common rules and Member States on the international stage undertaking obligations which are inconsistent with those common rules. However, to the extent to which obligations are not inconsistent with those common rules, the Member States remain free to act when competence is shared. The United Kingdom treats the AETR case as establishing a much wider principle than that which it was careful to establish.

The decision in Opinion 2/91 (Re ILO Convention 170) is to the same effect. There, the court

said:-

"The Community's tasks and the objectives of the Treaty would also be compromised if Member States were able to enter into international commitments containing rules capable of affecting rules already adopted in areas falling outside common policies or of altering their scope." The background to that passage is that there was a suggestion that in the original AETR case you had to have common policies rather than either common policies or common rules being affected and they were making it clear there that if common rules were affected you did not have to have common policies.

However, in that case the court did not accept that all conventions which addressed the same subject matter as Community rules adopted outside the area of a common policy would affect or alter the scope of rules already adopted by the Community. In rejecting the Commission's view, it ruled that ILO Convention No. 170 was "not of such a kind as to affect rules adopted pursuant to Article 118a".

The Court said:-

"If, on the one hand, the Community decides to adopt rules which are less stringent than those set out in an ILO Convention, Member States may, in accordance with Article 118a (3), adopt more stringent measures for the protection of working conditions or apply for that purpose the provisions of the relevant ILO Convention. If, on the other hand, the Community decides to adopt more stringent provisions than those provided for under an ILO Convention, there is nothing to prevent the full application of Community law by Member States under Article 19 (8) of the ILO Constitution, which allows member states to adopt more stringent measures than those provided for in conventions or recommendations adopted by the organisation."

Precisely the same reasoning applies to activities in the sphere of environmental protection where States retain their competence to act, the rules laid down by the Community being no more than minimum standards.

Member States do not "transfer" competence unless the international organisation becomes exclusively competent in that sphere. How can it be said that competence has been transferred to the European Community, if Member States remain competent to maintain or introduce more stringent measures (Article 176 EC) and if Article 174(4) EC provides that the competence of the Community to co-operate with third countries and with competent international organisations is without prejudice to the Member States' competence to negotiate in international bodies and to conclude international agreements? Quite simply, in such circumstances it cannot be said that a transfer of competence has taken place between the Member States and the Community.

Accordingly, Ireland and the United Kingdom remain competent in international relations in the environmental field. This is inconsistent with any "transfer" of competence to the European Community. As a result, Ireland and the United Kingdom retain their UNCLOS rights and obligations in relation to the matters in dispute in this arbitration.

We go on to argue, and we do not mean this in any offensive way to our friends, that the United Kingdom's argument on competence is opaque.

The United Kingdom's Rejoinder is a web that is very tightly and carefully spun. To

understand what is actually been said it needs to be carefully read. It might be worth looking at just three paragraphs in it.

I would ask the Tribunal to open the Rejoinder and look at paragraph 4.2, 4.3 and 4.4 at the very beginning of chapter 4.

4.2 says that "Annex IX to UNCLOS makes it clear that it is for the European Community and not for its Member States to exercise rights and obligations under UNCLOS on matters for which competence has been transferred to the Community by those Member States." Note the word "competence". "That rule prescribed by UNCLOS is consistent with a well-established principle ,of European Community law whereby any rights or obligations that may rise under provisions of a mixed agreement, which may affect the Community's common rules, may be exercised only by the Community in its relations with third States. Such rights and obligations may not be exercised by the Member States."

4.3, "To the extent that a provision in UNCLOS may affect the Community's common rules, the rights and obligations that apply as between Member States are the rules of Community law which give rise to the Community's exclusive external competence, implement the agreement internally on the part of the Community and require the Member States to take all appropriate measures, whether general or particular, to ensure fulfilment of the Community's obligations and facilitate the achievement of the Community's tasks. Those rights and obligations which exist in European Community law are justiciable between the Member States only in the European Court of Justice."

Finally, paragraph 4.4, "In the present proceedings Ireland asserts its own rights and the United Kingdom's obligations under various provision of UNCLOS in respect of which competence has been transferred to the Community." It does not tell us whether it is talking about shared or exclusive. "That is the case, for instance, with Article 206 of UNCLOS, on which Ireland relies in the context of its submissions on environmental assessments. Ireland pleads that the meaning of Article 206 is informed by Directive 85/337 on the assessment of the effects of certain public and private projects on the environment. That directive is indeed informative in the context of Article 206, although not in the sense which Ireland contends. Directive 85/337 was amongst the provisions listed in the declaration made by the Community when depositing its instrument of confirmation of UNCLOS to identify a matter on which the Community has competence to the exclusion of the Member States". That, of course, is just simply not the case. It was not listed in the appendix as an instrument which identified a matter on which the Community had competence to the exclusion of the Member States. It was identified as an instrument which was relevant to the issue of an area in which the Community had some competence.

We comment on those paragraphs by way of example and say that the statements in paragraphs 4.2 and 4.3 are premised on UNCLOS provisions affecting the Community's common rules. Without addressing the key question as to whether this essential premise is satisfied or not, (and in fact it is not). Paragraph 4.4 of the Rejoinder simply asserts that competence has in fact been transferred to the Community. What is not so clear is that, on the basis of the preceding paragraphs, the "competence" spoken about by the United Kingdom in paragraph 4.4 must be exclusive external competence.

The same paragraph boldly asserts that Directive 85/337/EEC was amongst the provisions listed in respect of which competence was transferred, and we point out that that, of course, is wrong.

Then in paragraph 43, we point out that we have already observed that the argument in relation to Article 4.3 of Annex IX to UNCLOS is a new jurisdictional argument raised for the first time by the United Kingdom in its Rejoinder. It is to say the least, a little surprising, that it is introduced in the Rejoinder under the cloak of the following sentence:"Neither in its Memorial nor in its Reply does Ireland make any mention of the character of UNCLOS as a mixed agreement. In these circumstances it appears necessary to restate the United Kingdom's argument in some detail." It is certainly stated in some detail, but we would say not restated.

PROFESSOR CRAWFORD: Mr Sreenan, if I may say so, Mr President, obviously, there has been a development of the argument as the pleadings have emerged and one is used to introductory sentences in which pleaders, as it were, make up for earlier deficiencies.

MR SREENAN: And I am sure that I have been guilty of exactly the same thing myself.

PROFESSOR CRAWFORD: But the argument is here now.

MR SREENAN: Yes, it is, of course. I make no technical point on it. It is an exercise in point scoring and no more.

PROFESSOR CRAWFORD: Your objection to paragraphs 4.2, 4.3 and 4.4 is that, although that may be true for certain categories of Community law or Community rules, it is not true in this case.

MR SREENAN: Yes, and we would say that this is indicative of the whole of the Rejoinder, competence is used without ever being consistently clear about what type of competence the United Kingdom says is necessary in order to effect this transfer of rights and obligations. They sometimes talk of shared competence, they sometimes talk of exclusive competence and, finally, they come to talk about extensive competence, but we would say, as a matter of legal principle, and we believe that, when one carefully looks at the United Kingdom submission, this is, in fact, what they are saying, although it is not clear, it has to be exclusive competence.

PROFESSOR CRAWFORD: As I understand it, it is the case that competence which was at one point shared may become exclusive as a result of the development of European law.

MR SREENAN: That is correct.

PROFESSOR CRAWFORD: The problem that we face is that there might, hypothetically, be a European process which would clarify whether that has happened in this case. Obviously, you have a view about whether it has happened and the United Kingdom may have a view as well, but at some level that is really a European matter, is it not?

MR SREENAN: There are two points that I would make in relation to that. In principle, it is possible that, where the Community has measures in a certain field, that those measures may progress to the point where they would become common rules, but, firstly, common rules are not expressly envisaged for the area of the environment by the Treaty. Secondly, the Treaty does not envisage any rules of the Community advancing to the point where the Community would acquire exclusive competence in the environmental field. Thirdly, if there has been a development, the primary responsibility is on the Community to file the

declaration setting out the instruments in respect of which there is a development in terms of transfer of competence. An UNCLOS Tribunal cannot be expected to look beyond the declaration. Finally, if I am incorrect in that, my friends have been free and have exercised that freedom to refer to instruments other than those referred to in the declaration of competence. It would be up to them, in discharging their burden of proof, to establish that the Community has now acquired exclusive competence in that area. Ultimately, of course, under Article 288.4, it is for this Tribunal to address the issue of jurisdiction, as to whether it has jurisdiction or not.

Going on to paragraph 45, we say that, having considered the terms of Annex IX of UNCLOS and the terms of the Community's declaration, the United Kingdom at paragraph 4.24 then correctly states that "the essential statement is that to the extent that provisions of UNCLOS may affect common rules, the Community has exclusive competence". There is no difference between Ireland and the United Kingdom on that statement of legal principle. It repeats this in paragraph 4.25 and 4.27 but again, fails to address the issue. It then goes on to address the distribution of competence in mixed agreements and jurisdiction of the European Court of Justice and Articles 292 EC and Article 193 Euratom without ever addressing the question of whether competence has in fact been transferred, a question which would depend on demonstrating that Community rules are affected by the relevant provisions of UNCLOS. That, of course, should be common rules.

When eventually, the United Kingdom comes to address the issue of what it is in relation to UNCLOS that allegedly affects the Community's common rules, it does no more than advance a series of assertions rather than argument. In paragraph 4.45 it asserts that in so far as Article 206 of UNCLOS may require States Parties to make appropriate environmental impact assessments, it affects the Community rules established in particular by Directive 85/337/EEC and claims that that appears from the declaration on Community competence appended to the Community's instrument of formal confirmation of UNCLOS. However, it is simply not the case that it appears from the declaration on Community competence that Article 206 of UNCLOS affects the Community's rules. Nowhere does the United Kingdom say why those rules should be affected by Article 206 of UNCLOS given that Community rules, (to use the words of the Community's declaration) "are not affected...in cases of Community provisions establishing only minimum standards" (as is the case with Directive 85/337/EEC).

Similar observations apply to the arguments set out in paragraph 4.47 (in relation to cooperation) and 4.48 about Directive 90/313 on freedom of access to information on the environment and the miscellaneous directives mentioned in paragraph 4.9.

Directive 96/29/Euratom, of course, is not listed in the Community's declaration for the simple reason that Euratom is not a party to UNCLOS. Accordingly, there can be no question of rights and obligations under UNCLOS having been transferred to Euratom.

It is noteworthy that having selected out Directive 85/337/EEC and Directive 90/313/EEC, two Directives which manifestly establish minimum standards, the United Kingdom then concedes at paragraph 4.49 that "the remaining arguments that Ireland advances on the basis of Articles 123 and 197

of UNCLOS do not appear to rely on provisions that may affect common rules established at the Community level, save in the case of the allegation of non co-operation with respect to the protection of the marine environment." However, apart from listing various Directives, nowhere does the United Kingdom argue that any obligation of co-operation under those Directives is anything other than a minimum standard.

So one is left in the situation where the United Kingdom says that it accepts that not all competence has been transferred, but is not entirely clear as to what competence it says remains with UNCLOS in respect of which it happens to accept that this Tribunal has jurisdiction and in relation to the remaining matters it simply lists a number of provisions and blandly asserts that the declaration indicates that competence has been transferred, without ever analysing the question which it itself has posed as to whether common rules have been affected.

Finally, in paragraph 4.50 of the Rejoinder, having referred to the Community's "extensive" competence in respect of the protection of the marine environment (rather than "exclusive" competence), the United Kingdom simply blandly asserts that "To the extent that Articles 194, 207, 211, 213, 217 and 222 of UNCLOS affect the Community's common rules on the protection of the marine environment, it is for the Community and not for the Member States to exercise the rights and obligations deriving from those provisions of UNCLOS", but again it avoids the real question - do those Articles affect the Community's common rules?

We then go on to address the relevance of the jurisdiction of the European Court of Justice to interpret the agreement.

We point out that starting at paragraph 4.30 of the Rejoinder, the United Kingdom addresses the entitlement of the European Court of Justice to consider the terms of international agreements to which the Community is a party. It relies on a quote from Case 104/81 of Hauptezollant Mainz v. Kupferberg. The case concerned the provisions of an agreement concluded between the Community and Portugal at the time when Portugal was not a member. It concerned the question of imposition of duty on wine. An Article 177 reference was made from the German Court and the question that arose was whether a provision of the agreement could have direct effect in the Member States. The judgment of the Court requires careful reading. It has been cited by the United Kingdom in support of a very wide proposition that the Member States may not invoke the dispute resolution procedures of an international agreement as that agreement becomes part of Community law once the Community signs up to it. However, the dispositive passages in the judgment do not in fact support such an interpretation of Community law. Indeed, such a wide interpretation of Community law is contrary to the statement of principle which the United Kingdom itself makes at paragraph 4.31 of the Rejoinder that it is "to the extent that provisions of international agreements impose obligations on the European Community, or confer rights on the Community" that "the European Court of Justice has jurisdiction to interpret such provisions". That, in turn, depends on the competence of the Community.

Here again we have the United Kingdom making this point. It is quite an important point, because it detracts from any suggestion that a mere power to interpret on a reference from a national

court in the context of a Community law case establishes a preclusion or exclusion of the right of sovereign Member States to avail of a dispute resolution mechanism in an international agreement. Contrary to that, the United Kingdom does say that it is to the extent that provision of international agreements impose obligations on the European Community or confer rights on the Community that the European Court of Justice has jurisdiction to interpret such provisions.

That acquisition of rights or obligations by the European Community depends in turn on the transfer of rights and obligations which in turn depends on exclusive competence.

Furthermore, the passage from the Kupferberg judgment relied upon heavily by the United Kingdom at paragraph 4.31 is in fact only a restatement of a well established principle of uniform application of Community law. If a provision of an agreement is part of Community law, it would naturally flow from this that it must be interpreted uniformly. However, to use this statement as the basis for an assertion that Community law requires that no other Tribunal provided for in that international agreement remains competent to interpret the provisions of such an agreement as a matter of Community law, goes far beyond the finding of the Court. Other parts of that judgment, not referred to by the United Kingdom, specifically acknowledge the complementary roles of the two legal orders.

At paragraph 17 of the judgment, in an important statement, the Court notes that the effects within the Community of provisions of an agreement concluded by the Community with a non member country may not be determined without taking into account the international origin of the provisions in question. It also states:-

"In conformity with the principles of public international law Community institutions which have power to negotiate and conclude an agreement with a non member country are free to agree with that country what effect the provisions of the agreement are to have in the internal legal order of the contracting parties".

In the case of UNCLOS, the EC Treaty itself recognises the competence of Member States in international relations in the environmental field. Furthermore, the declaration of competence of the Community at least partially deals with the effect of the agreement in the internal legal order of the contracting parties, insofar as the Community has set out the matters in respect of which it has competence. By explicitly acknowledging the retention of competence of the Member States in certain areas, it is implicitly acknowledging that in the internal legal order the Member States retain that competence. Otherwise, the declaration of competence would lead to the strange situation that for the purposes of international law the Member States retain competence but for the purposes of Community law they would lose competence which in turn would affect their competence to invoke the dispute resolution procedures laid down by the international agreement and thus mean that they had in fact lost jurisdictional competence under international law. It is hard to avoid the conclusion that this would render the declaration quite redundant.

Alternatively, if the United Kingdom is arguing that it is only as a matter of Community law that Member States lose competence and that it has no repercussions in international law, then it cannot object to an individual Member State relying on its rights under the international agreement quite

separately to any question of its obligations under Community law.

The ensuing paragraphs of the judgment in that case emphasise that the two different legal orders may enforce the provisions of the agreement in their own legal order according to the principles applicable in that legal order. Thus, even if it is not accepted that the declaration deals with the effect of the agreement in the internal legal order of the contracting parties, the judgment reaffirms that each legal order determines its own method of enforcing the agreement and that different methods of enforcing the agreement are permitted in different legal orders. Accordingly, Ireland is perfectly entitled to rely on the methods of enforcement provided for by UNCLOS and rejects any assertion that such reliance is in breach of Community law.

As for the United Kingdom's reliance on the decisions in *Hermes, Dior and Commission v. Ireland* the first (*Hermes*) simply establishes the proposition that where Member States and the Community share competence in respect of an international agreement, the European Court of Justice may, on a reference from a national court on the meaning of an aspect of that international agreement, provide such an interpretation in the interests of uniformity. But it is the uniformity of Community law. The case is not authority for the proposition that in a mixed agreement, a Member State looses competence to rely on the enforcement provisions of an international agreement. Indeed, the Court did not address that question. *Dior* decides that the provisions of TRIPS do not have direct effect in that they do not create rights upon which individuals might rely before national courts by virtue of Community law. *Commission v. Ireland* was a case which addressed the issue as to whether the Berne Convention came within the scope of Community competence so as to enable the Commission to assess compliance with a requirement for the parties to the EEA agreement to adhere to the Convention. The Court decided that it did. The Tribunal will probably be aware that in that case one had the strange situation where Ireland signed up to the EEA agreement which included the obligation to adhere to the Berne Convention, and it was a mixed agreement which the Community was also a party. Ireland was late in adhering to the Berne Convention and the European Commission brought proceedings against Ireland. Ireland's attitude to this was “we signed the agreement and the Commission is responsible for seeing that this agreement is enforced, so, hands up, we agree we failed to perform our obligation under Community law and it is a Community law obligation.” Strangely enough the United Kingdom came in as an intervenor in that case and told the European Court it had no jurisdiction to consider the question of that mixed agreement and the European Court said all very well, a very interesting argument but that is not an argument made by Ireland and an intervenor cannot raise an argument which has not been raised by the respondent and accordingly we will not consider that argument. Clearly there has been a change of approach to the question of competence on the part of the United Kingdom in the intervening period.

In paragraph 67 we point out that none of these cases are authority for the proposition (if this is the proposition that the United Kingdom intends to advance) that in a mixed agreement, the power of the European Court of Justice to interpret provisions of an international agreement precludes a Member State, in an area within its competence, from relying on the enforcement provisions of that agreement.

If this is indeed the argument which the United Kingdom is now advancing, there are a number of points that should be made in response.

Firstly, if the argument is correct, it is an argument based on internal Community law. An UNCLOS Tribunal is not entitled to refuse jurisdiction where there is prima facie jurisdiction under UNCLOS on the basis of an alleged breach of a different legal order.

Secondly, the dicta in Kupferberg, to the effect that the effects within the Community of provisions of an agreement concluded by the Community with a non member country may not be determined without taking into account the international origin of the provisions makes clear that Community law derived from international agreements has a different character from "ordinary" Community law. This conclusion is reinforced by the decision in Dior. Thus, even though the international obligation becomes part of Community law, it is not automatically subject to all the same rules as a provision of Community law that originates within the Community.

Thirdly, there is no case law of which Ireland is aware, which specifically sets out the principle for which the United Kingdom may be contending. The cases cited by the United Kingdom are generally concerned with establishing a proposition that international agreements when acceded to by the Community become part of Community law - a proposition with which Ireland does not in principle take issue.

Fourthly, the proposition for which the United Kingdom appears to contend, is radical in its effect and contradictory in that it acknowledges that Member States may retain substantive rights i.e. retain competence in respect of an international agreement, but loose the right to enforce those rights. In this respect the declaration of competence becomes meaningless from the Member States' point of view since even in respect of areas where the retain competence they are not entitled to use the dispute resolution procedures of UNCLOS.

Fifthly, this principle, if correct would have far reaching implications. It would mean that no member state could litigate against another member state before a court or tribunal established by an international agreement. For example if the European Community was to accede, as it intends to do according to the draft convention on the future of Europe, to the European Convention on Human Rights, no member state could sue another member state before the European Court of Human Rights. The theory is particularly problematic in relation to environmental conventions given that Article 174(4) EC and Article 176 EC. specifically provide in relation to Article 174 that it is without prejudice to the Member States competence to negotiate in international bodies and conclude international agreements. And by virtue of Article 176 the competence includes the power to adopt more stringent standards, The United Kingdom's argument would mean that the Member States retain the right to negotiate and conclude international agreements but not to avail or subject themselves to the agreed specialist enforcement mechanisms. This would indeed be a significant limitation on member state competence in an area where the competence is expressly recognised by the EC Treaty. Just to pause for a moment and ask oneself the question, if competence is transferred in that way what is meant to be the effect for Ireland? it cannot be said that Ireland should have sued in the European Court of Justice for breach of

UNCLOS obligations. Sue who? Sue the United Kingdom? The United Kingdom says its obligations have been transferred to the European Community. Sue the European Community? In respect of what rights? We are told our rights have been transferred to the European Community by virtue of Article 4.3 of Annex IX. We could of course sue for a breach of ----

SIR ARTHUR WATTS: I am sorry to interrupt, Mr Sreenan but a question occurs to me on the point you make in paragraph 69 of your paper, where you say that an UNCLOS tribunal is not entitled to refuse jurisdiction where there is prima facie jurisdiction under UNCLOS on the basis of an alleged breach of a different legal order.

It occurs to me that there may be a distinction to be drawn in our circumstances - and this is what I would like your comments on - between a mere breach of a provision of a different legal order - and I will come to that in a moment - and a question of capacity, because in a sense the real question here is whether Ireland and the United Kingdom ought to be before this Tribunal at all. It is not just a question of a breach, or it may not be just a question of a breach of a community rule of some kind, but a question of capacity. As to the breach of the community rule being a breach of a different legal order that legal order stems from an international law instrument, namely a Treaty, so it may in a sense be a different legal order but in a sense it is the same legal order as that which this Tribunal is to apply. I would welcome your comments on that distinction between capacity and breach, if I have made it clear.

MR SREENAN: Yes, I think I would agree with that. The essential question is one of capacity for this Tribunal, and I have possibly gone too far in addressing the additional question of whether or not there is some breach of European Community law which would entitle the European Commission, for example, to complain, but which would not have the effect of depriving this Tribunal of jurisdiction. That is perhaps an additional issue that really does not arise because it is essentially a question of capacity. I take the point.

PROFESSOR CRAWFORD: An example might be a requirement under European law that you consult with the EC before commencing proceedings that you are entitled to commence.

MR SREENAN: Yes.

PROFESSOR CRAWFORD: It would not be our function to say because you did not consult with the EC therefore we do not have jurisdiction; at most it might be a discretionary bar.

MR SREENAN: I think that would be a good example.

PROFESSOR CRAWFORD: Can I take you to the observation you just made about whose rights. Take the case where the EU is the only party to the Treaty. I suppose in every such case there is EU legislation which gives effects to the Treaty and gives the member states as it were rights inter se, which they would have if the EC did not exist and all of the states parties were parties to the Treaty. Is that right? It would be rather odd if the member states in respect of the matter of transferred competence had fewer rights within the European order than they would have if the EU did not exist.

MR SREENAN: I accept that where competence has been transferred to the European Community, in other words in a field where European Community is exclusively competent, then it owes the obligation to discharge the undertakings which it has taken on board in UNCLOS, and it discharges those obligations

internally by way of internal legislation - regulations, directives or decisions. But in those circumstances of course one sues for breach of the internal European Community legislative instruments. Perhaps it begs the question in a way as to whether competence has been transferred. If competence has not been transferred then it follows that the Community does not have the obligation to ensure that the relevant provisions of UNCLOS are fully honoured within internal Community legislation. Rather the obligations are those of those of the member states. The member states are obliged to discharge their UNCLOS obligations, they do so by way of domestic legislation perhaps or domestic administrative arrangements, and accordingly they are answerable for failure to discharge their UNCLOS obligations. But I take the point of course that if competence has been transferred to the Community then by definition one assumes that one's UNCLOS rights are honoured within the context of internal community law. But we say of course that the Community is not exclusively competent and accordingly we have rights under UNCLOS which are different in nature and we are entitled to rely on them. Indeed even if they were identical as the Tribunal held we would be entitled to rely on them, because we seek to enforce them in their UNCLOS context rather than in a Community law context.

PROFESSOR CRAWFORD: There are legal systems in which the exclusive jurisdiction, for example of a Supreme Court, is not co-extensive with Federal law. For example the Court might have exclusive jurisdiction to deal with disputes between the states or the component units, the provinces.

MR SREENAN: Yes.

PROFESSOR CRAWFORD: Even though the source of that law was not federal law, it might be for example in relation to a boundary, it might be the common law. But nonetheless the jurisdiction would be exclusive. Your view however is that there is no exclusive jurisdiction of the European Court independent of the provisions of actual European rules or of exclusive competence.

MR SREENAN: Yes. Disputes between member states arise before the European Court in the context of one member state alleging a breach of Community law by another member state.

PROFESSOR CRAWFORD: And only then.

MR SREENAN: Yes. This Tribunal approaches it of course from the point of asking on what legal basis does it lose jurisdiction? And the Tribunal only loses jurisdiction if the United Kingdom can establish an agreement such as that under Article 282 or a transfer of competence within the meaning of Article 4.3. But it is a point that perhaps I should have made; the EC treaty could not in our submission ever be that type of agreement under Article 4.3 of Annex IX; under the hierarchy of law in the European Court coming to address issues of Community law it gives priority to the international agreement over and above instruments such as regulations or directives, but ultimately the paramount consideration for the European Court is the EC treaty itself. So that UNCLOS does not acquire priority within the sphere of Community law to the Treaties on which the Community is founded, and of course Article 9.6 I think it is of Annex IX would be particularly relevant in that regard.

PROFESSOR HAFNER: On a point of clarification did I understand you correctly by saying that in the area of transferred competence a member state of the EU cannot sue another member state before the European Court?

MR SREENAN: No. I may have said that but if I did I did not mean it, in an area of transferred competence of course the competence to legislate is that of the European Community, but if there is then a breach of Community Law by a member state, for example failure to implement a directive, another member state can of course sue.

Then I go on to deal with Article 292/EC, Article 193 EURATOM and Articles 281 and 282 of UNCLOS, using my friends' heading in their Rejoinder.

In its Rejoinder, the United Kingdom rolls these Articles into one section. Firstly, Article 193 EURATOM is not relevant, EURATOM not being a party to UNCLOS.

Secondly, Ireland does not disagree with the United Kingdom (if it correctly understands the United Kingdom's submissions) on the principles applicable. Its difference with the United Kingdom is in the application of those principles.

Thus, at paragraph 4.36, the United Kingdom states:-

"The rule which prohibits Member States from submitting disputes concerning the interpretation or application of the EC Treaty or the EURATOM Treaty to any method of settlement other than those for which those Treaties provide is the counterpart of the rule whereby provisions of UNCLOS on which Ireland relies are matters of Community competence."

It seems clear that the competence that the United Kingdom is referring to there is exclusive competence. Indeed, that is confirmed by paragraph 4.42 of the United Kingdom's Rejoinder which states:-

"The United Kingdom and Ireland have agreed, through the EC and EURATOM Treaties, that any dispute concerning the interpretation or application of provisions of an international agreement to which the Community is a party and for which the Community has exclusive competence shall not be submitted to any method of settlement other than those for which those Treaties provide."

Ireland agrees that that is the true meaning of Article 292 EC. There is, accordingly, no dispute between the parties as to the meaning of EC law. The discussion of mixed agreements is therefore a distraction. The true issue is, regardless of whether it is a mixed agreement or one to which the Community only is a party, does the dispute concern an area in which the Community enjoys exclusive competence? For the reasons outlined, we say that it does not.

In conclusion, what is now the United Kingdom's primary argument on jurisdiction namely, Article 4.3 of Annex IX to UNCLOS, depends entirely on the Community having exclusive competence in the context of a mixed agreement in which competence is shared between the Member States and the Community. This, in turn, depends on the provisions of UNCLOS affecting Community rules. As the Community has itself asserted in its declaration, a position, which is entirely consistent with the case law of the European Community, those rules cannot be affected where they simply establish minimum standards. The Community's rules in the environmental field do no more than establish minimum standards. It is a field in which the Community does not enjoy exclusive competence. Accordingly, the United Kingdom's Article 4.3 argument simply never gets off the ground.

As for the Article 282 UNCLOS argument, in its Rejoinder, the United Kingdom has all but

abandoned it. As my colleagues will demonstrate, as they explain in more detail our arguments about environmental assessment, pollution and cooperation, this Tribunal has been asked by Ireland to do no more than interpret and apply UNCLOS. That activity does not affect Community law or common rules of the Community, It is this Tribunal which is vested with the jurisdiction to determine this dispute between Ireland and the United Kingdom as to the interpretation and application of UNCLOS.

Contrary to what the United Kingdom asserts, the obligations owed under UNCLOS are the obligations of the United Kingdom - not the European Community. It cannot transfer its obligations in this area to the European Community. It must face up to them. Its arguments on jurisdiction is groundless. Instead of taking jurisdictional points, it must concentrate its arguments on the merits. This is a case for the United Kingdom to meet. It is a case about breaches of its obligations - not the obligations of the European Community. It must meet that case. It must meet it now and we say that t must meet it before this Tribunal.

There are certain matters, Mr President, that the Tribunal may wish me to address in a confidential session and I am quite prepared to do that if the Tribunal would wish at this stage.

SIR ARTHUR WATTS: Mr Sreenan, this is a question not of the kind that you just referred to, but a general one relating almost to the whole of your presentation, which I found most illuminating, if I may say so.

It is quite clear, and I think that you said this yourself at the outset, that really the heart of this whole area of law is the question of European Community competence. That brings into question issues such as whether there are common rules and whether, if there are common rules, they are affected in some way. It seems to me that those issues are issues which it is necessary to address before this Tribunal can do what you said it had to do, namely decide the issue of jurisdiction. The question is whether those issues of Community competence, common rules being affected and so on, are issues which this Tribunal is competent to decide. That is what I would welcome your comment on.

MR SREENAN: Clearly, I accept that the question of jurisdiction is something that the Tribunal has to decide before it decides on the substantive dispute and the question is when the Tribunal decides on jurisdiction, if it is competent to decide on jurisdiction. The Tribunal would have the option open to it, having heard the entire case before it delivers its decision, to address the issue of jurisdiction firstly, which would be an appropriate way in my submission to deal with the matter. This Tribunal is in the unusual position in that a jurisdictional objection is taken by the United Kingdom. It is not taken as a preliminary objection which could have been taken. The party who raises the objection had a mechanism open to it under European Community law whereby it could have brought this issue, itself, before the European Court for decision. It could even have sought interim relief, if its arguments were sufficiently strong, precluding Ireland from bringing this dispute before this Tribunal. It chose not to do so. No other body has sought interim relief against Ireland. This Tribunal is in a position where, at least on the United Kingdom's case, part of the issues before the Tribunal are not subject to the jurisdictional objection at all, although it is not clear what parts are not subject to the jurisdictional objection. Under Article 288, it is this Tribunal, which in the first place - and I would say pre-eminently - is entitled to decide upon its own jurisdiction. It is given the material by the international organisation concerned to decide upon the

jurisdictional issue. The international organisation knows a jurisdictional issue may arise, as a result of delineating the area of transfer of competence. It knows that Article 288 provides that the Tribunal will decide the issue of jurisdiction. It assists the Tribunal by providing the declaration, and the Tribunal's task is, fortunately, not as difficult as it would be if the Community simply said, "Anything which affects common rules would be a matter where competence had been transferred to the Community". The Community has gone further and said, "If the rules in question simply establish minimum standards, then the Member States remain competent". Although it is a difficult question and does involve the Tribunal looking at issues which, perhaps, are not in the first instance at the core of UNCLOS, it is nevertheless the sort of jurisdictional question that many arbitral tribunals have to decide upon. The difficulty is that, if the Tribunal was not to decide it or to defer deciding it in some way, there would be significant consequences, certainly for Ireland which has come here in the hope of getting assistance and some resolution to this dispute, particularly in circumstances where on Ireland's case there is ongoing damage to the marine environment which cannot be remedied over a period of two or three years, or whatever it would take while some other body was to consider it. If that other body was to consider it, what mechanism is there? It is not as if - and I just pose this as a rhetorical question, I do not mean to be impolite in any way - what mechanism is there? It is not as if this Tribunal has power to make an Article 234 reference as a national court would have. Indeed, the OSPAR Tribunal, if I remember correctly, did have a limited power to make a reference in relation to a certain discrete area, but this Tribunal does not have such a jurisdiction. It has a case before it. A party takes a jurisdictional objection, it is resisted and, in my submission, no matter how difficult the task is, it must be decided ultimately by the Tribunal.

PROFESSOR CRAWFORD: If I can follow up on that, ultimately by the Tribunal, yes. It is a bit like an incidental question that might arise before the Court of Legal System A, the incidental question being one about Legal System B (this can happen) and there are or will shortly be pending proceedings in Legal System B that will resolve that question. I put that as a hypothesis. What do you do in that situation?

MR SREENAN: Again, in a case such as that, which, again, essentially, unless there are proceedings pending, is a speculative situation, that one party comes before the Tribunal seeking an adjournment and the Tribunal decides on an application for an adjournment, depending on the merits on either side as to whether it will grant it or not. But there are many cases as well, of which this Tribunal would be aware, where cases come before courts or tribunals, and it even happens with the European Community, an issue of Community law comes before a national court. I can remember one case in relation to points of interpretation of the Pharmaceutical Directive. A point comes before the national court in circumstances where the court is informed that precisely the same issue or almost the same issue is already before the European Court on a reference from another Member State, but neither party applies for an adjournment. And the court, nevertheless, decides of its own motion - there will be no application, it decides the issue. In the particular case which I recollect, the court, which clearly had the option, having heard the case, of delaying its judgment without any application, did not delay its judgment and delivered it before the European Court had delivered its decision. Indeed, there was no conflict ultimately. I do not know

if that answers your question.

THE PRESIDENT: Thank you very much. I take it that you have completed your presentation.

MR SREENAN: I have completed my presentation, President.

THE PRESIDENT: We have a problem of timing. We, of course, did not start at the appointed time. The issue is whether we will need any time this afternoon at all. I think that I would like to ask the United Kingdom, because we could go on and listen to the presentation that was envisaged at the beginning, but, if we do that, what I wanted to find out was whether the United Kingdom would be willing and able to respond today or whether they would need some time. We discussed this earlier.

MR BRADY: If I could just mention one matter of detail before the United Kingdom answers, I had indicated earlier on that Paul Sreenan would be making submissions and they would then be followed by Professor Vaughan Lowe. I think that that will take no more than half an hour. The issue as to whether or not, having heard all of our submissions, including those in conclave, if I may put it that way, the issue then as to whether the United Kingdom should follow and when they should follow raises other logistical matters, which I would like to address at that point in time and at the conclusion of the totality of ours submissions. I am sorry for interrupting.

THE PRESIDENT: Thank you.

LORD GOLDSMITH: I think that it is difficult for the United Kingdom, and particularly Dr Plender, to be able to respond immediately this afternoon to submissions which have only been heard for the first time this morning and, indeed, some further ones which we understand we will hear during the earlier part of the afternoon. Without having seen precisely on some quite difficult and important issues the written record of what has been said, which will not be available until tonight - we will talk about it over the luncheon adjournment - I think that there is a real issue about whether it would be appropriate to do that. When this question was raised, and I hope that you would just permit me a moment to say something about this, we did indicate at that stage - and Dr Plender indicated - that it might be necessary to consider what was being said, and I think that everybody thought at that stage, including Ireland, that that would be a reasonable approach.

That is I think where we are going to go. Could I just say this, though, because others, and this is taking place in public, will know that we have had some discussion about these issues, which have not been in this room -I am not going to disclose, of course, what has taken place in private session - but I think that it is right simply to say, in the light of what has been said, so that it is on the record, that the United Kingdom is not at all hesitant to defend this case on the merits. We have come here ready to deal with it on the merits. We have got witnesses, experts, voluminous pleadings on the merits. We have never been concerned about that. We have not indeed asked for, as indeed Ireland complains that we have not asked for, a preliminary hearing on jurisdiction. We have not. We have raised this issue. We recognise that there are real practical difficulties to which that gives rise which the Tribunal, in our respectful view, is entirely right to want very carefully to consider. I would not like anyone to think out there that we are not ready, able and determined to demonstrate that on the facts and on the law of the substance of this, Ireland's case is misconceived.

The second small point, if I may, is that, if you were contemplating having a private session at two o'clock, I have to indicate - and I am afraid I had to leave the room this morning, I hope that it has not been inconvenient, because of other matters which are happening back home - and I will not be available between 2 and 2.15, if that makes any difference to your timing.

THE PRESIDENT: I asked that question because I wanted to find out whether we could extend the time. We are now at five minutes past one. I think that we could hear Professor Lowe for about half an hour. Then we will break. It may well be then that we will decide whether we want to meet again. If so, when. If we decide that we do not want to meet again, then, of course, we will give enough time to the United Kingdom to be able to prepare for whatever presentation, and it will have to be made tomorrow. We will go up to about 1.30/1.35.

Could we listen to Professor Lowe first and then we will decide what is to be done thereafter?

PROFESSOR LOWE: Mr President, Members of the Tribunal, I shall be as brief as I can, now that we are running up to extra time, as it were, but I do want to make some remarks on the question of the relationship between jurisdiction and applicable law, because there is some scope for confusion there. I want to begin by retracing very briefly the short journey that this Tribunal has to make to establish its jurisdiction under UNCLOS. It is worth emphasising that this Tribunal has to establish its jurisdiction under UNCLOS; and every court and tribunal, even international courts and tribunals, are rooted in some legal system and some constitutive document. It is the UN Convention through which this Tribunal here has to examine its relations with the outside world. Indeed, it is the UN Convention which stipulates how this Tribunal is to handle its relations with other courts, tribunals and legal systems, and, indeed, other legal instruments.

Let me begin by saying very briefly a word or two to you about jurisdiction. As Mr Sreenan has said, the Tribunal plainly has prima facie jurisdiction under Article 288 of UNCLOS. "A court or tribunal referred to in Article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part".

We accept that the effect of Article 288 is limited by UNCLOS Articles 281, which excludes from Part XV disputes which the parties have agreed to settle by procedures of their own choice, and also by UNCLOS Article 282, which provides that, if the parties have agreed to submit disputes to a binding procedure, then that procedure shall apply in lieu of UNCLOS Part XV. The United Kingdom has argued in chapter 4 of its Rejoinder that the EU Treaties operate under UNCLOS Articles 281 and 282 to take this matter out of UNCLOS Part XV, and that is the matter that Mr Sreenan has just addressed. But, as the Tribunal will see, Ireland makes no complaint that the United Kingdom has violated any obligation under EC law. Ireland's complaints before this Tribunal are all of violations of UNCLOS. It is clear that the parties agree that this Tribunal has jurisdiction over any dispute concerning the interpretation or application of UNCLOS. You see that accepted in paragraph .9 of the United Kingdom's Counter Memorial, although you will see at paragraph 4.22 a cautious qualification of that in the context of the EC law. Mr Sreenan has taken you through the subsequent development of that argument and the implications that it has for the Tribunal's jurisdiction here.

It is also the case that this Tribunal's jurisdiction might depend upon fulfilment of the exchange of the Parties' obligation under Article 283 of UNCLOS. That was a matter that the United Kingdom raised in ITLOS, but which it has not raised before this Tribunal.

But the point with which I should really deal is the next one. That is that the United Kingdom argues in chapter 4 of its Counter Memorial, and perhaps also in chapter 5 of its Rejoinder, that by referring to international legal instruments, other than UNCLOS, Ireland is seeking to extend the jurisdiction of this Tribunal. This is, we submit, a simple confusion of questions of jurisdiction, on the one hand, and applicable law, on the other hand.

UNCLOS draws the distinction clearly. Jurisdiction over a dispute concerning the interpretation or application of an international agreement related to the purpose of UNCLOS is set out in Article 288 paragraph 2.

On the other hand, the question of applicable law is dealt with in Article 292 of UNCLOS. That refers to a Tribunal having jurisdiction under Part XV being obliged to apply both UNCLOS and, as it says in that provision, "other rules of international law not incompatible with this Convention", that is with UNCLOS.

The distinction is entirely clear within the Convention. Article 288, headed "Jurisdiction", does provide for an expansion of the jurisdiction of UNCLOS Tribunals to deal with other instruments. It does allow this Tribunal, or any other Part VX Tribunal, to deal with non-UNCLOS treaties. The design there is perfectly evident. UNCLOS established, for the first time, a specialist international tribunal in the ITLOS. This was provided for also with Annex VII and Annex VIII tribunals set up under UNCLOS Part XVI. It is part of a comprehensive dispute settlement mechanism in the Law of the Sea. It is perfectly reasonable that States might think that it was desirable to transfer to this ITLOS and arbitral comprehensive dispute settlement system any disputes arising under other international agreements relating to the law of the sea that predated UNCLOS or have been concluded later. They might wish to stipulate in any future agreements that they make that ITLOS or an Annex VII/Annex VIII Tribunal or whatever, should have jurisdiction. It is Article 288, paragraph 2 that makes that possible. It permits the extension of jurisdiction to cover other treaties. In this sense UNCLOS is operating as a framework convention. Its drafters were perfectly well aware of the existence of many other instruments on the law of the sea, and UNCLOS does not ignore them. It seeks to integrate them into its dispute settlement system.

The crucial point is that Article 288 is quite distinct from Article 293. Article 293 is entitled "Applicable Law". Article 293 stipulates that a Tribunal that does have jurisdiction under UNCLOS Part XV may, nonetheless, have to apply certain rules that are found outside UNCLOS. Indeed, it goes further than that and makes this an obligation upon the Tribunal. It says that the Tribunal shall apply both UNCLOS and other rules of international law not incompatible with UNCLOS.

The position on Ireland's part is perfectly simple. Ireland does not claim that this Tribunal has expanded jurisdiction under UNCLOS Article 288, paragraph 2. Ireland does assert that Article 293 of UNCLOS applies to this Tribunal, and it submits that the application of it will operate in one of two

ways.

The first way is that it will require this Tribunal to consider the provisions of some non-UNCLOS instruments as an aid to the interpretation of UNCLOS articles.

Ireland claims that the Tribunal has jurisdiction under UNCLOS Article 288 (1) to interpret UNCLOS and in particular UNCLOS Articles 123, 192, 193, 194, 197, 206, 207, 211, 213, 217 and 222 of UNCLOS.

Some of those articles contain obligations that are phrased in very general terms. Articles 123 and 197, for instance, refer to duties to "cooperate" and "coordinate", but UNCLOS does not explain the meaning of either of those terms.

Articles 192 and 193 refer to duties to protect and preserve the marine environment.

Article 194 imposes duties to take "all measures consistent with this Convention that are necessary to prevent, reduce and control pollution" using "the best practicable means" and to "harmonise their policies" and to ensure that "damage" is not caused. States are obliged by that article to "minimise to the fullest possible extent" the release of "toxic, harmful and noxious substances", and so on. Article 207 has some similar provisions. None of those terms is defined in UNCLOS. Article 206 (which we say imposes a continuing obligation, which is unlike the EC Directives obligations which is spent once planning permission is obtained and, therefore, is stricter than the EC measure) that imposes a duty "as far as practicable [to] assess" the potential environmental effects of activities undertaken by States. That is not defined in UNCLOS.

Articles 212 and 213 also contain provisions obligating States to "prevent, reduce and control" pollution, as do Articles 217 and 222.

The Tribunal plainly needs to interpret these provision and to decide what precisely they mean in the context of this dispute. What precisely is “persistent” and “toxic pollution”, what precisely does cooperation require in this context? There are also other questions of interpretation. For example, is there a de minimis exception to the definition of pollution in Article 1(4) of UNCLOS?

Ireland's submission is simply this: that this need of the Tribunal to interpret these measures has to be approached in the same way that any other treaty would be approached. If we take the approach in the Vienna Convention on the Law of Treaties, we look for the ordinary meaning of these terms in the light of the object and purpose of the Treaty.

UNCLOS was not drafted in a vacuum, it was drafted in full knowledge of the mass of detailed regulation in other treaties that deal with law of the sea matters. One has to assume that there was no intention that terms used in UNCLOS should bear a meaning that was markedly different from the meaning which they are given in other relevant treaties. So in the absence of a precise definition in UNCLOS it is appropriate to see what those who are drafting other international conventions at around the same time understood by the terms that they used; and in that context reference to other treaties that use a term and give some further indication of its more precise meaning can cast light on what the term was generally understood to mean, and therefore on the meaning that should be given to it under UNCLOS.

For example, international agreements regarding cooperation over search and rescue activities at sea can give an indication of the kind of contacts and activities between states which fall within the concept of cooperation. Similarly the guidelines under the London Dumping Convention which specifically address the question of de minimis exceptions from definitions of pollution can give some guidance on that question. So the approach adopted in these instruments, Ireland submits, can be used as an aid to the interpretation of UNCLOS which the Tribunal is perfectly entitled to apply in accordance with basic principles of treaty law.

But to be clear on what happens there: if the Tribunal does use the London Dumping Convention, for example, to assist in the interpretation of UNCLOS the Tribunal will have to understand and therefore in some sense interpret the meaning of the London Dumping Convention. But the Tribunal will not be ruling on the meaning of the London Dumping Convention. What the Tribunal will be ruling on is the meaning of the relevant UNCLOS provisions, the definition of pollution in Article 1.4. If the Tribunal then goes on to determine that the United Kingdom is, given that interpretation of pollution, in breach of an UNCLOS obligation - say Article 213 - then the Tribunal will be determining that there has been a breach of UNCLOS and will not be determining that there has been a breach of the London Dumping Convention.

Ireland submits that this is an entirely proper use of non-UNCLOS materials to which no objection can possibly be made. Indeed we would submit that it does not even need the authorisation of UNCLOS Article 293. This is what Ireland means when it says that the content of certain UNCLOS rules is “informed” by the existence of rules arising outside UNCLOS. Ireland sometimes refers to the content of certain UNCLOS rules being “developed” by the existence of rules arising outside UNCLOS, and there we mean simply that the interpretative exercise that I have just described does not have to be confined to legal instruments that were in existence in 1982, when UNCLOS was concluded. Later instruments may be taken into account, even if they point to a meaning that is not identical to that which would have been indicated by the instruments which were in existence in 1982. There is nothing novel in this either, it is exactly the approach that the International Court adopted in the Aegean Sea Continental Shelf case, when interpreting provisions accepting the Court's jurisdiction and the notion of what “territory” was. it is the approach which the International Court enjoined in the Gabcikovo case, where it talked about the developing obligations under international law.

That is the first of the two ways in which Ireland says that non-UNCLOS instruments are relevant and may quite properly be referred as an aid to the interpretation of UNCLOS provisions.

The second way in which non-UNCLOS provisions are relevant is what Ireland has called a renvoi to other instruments. What Professor Crawford might refer to as UNCLOS letting other instruments in. Articles 213 and 222 of UNCLOS refer specifically to non-UNCLOS rules. Article 213 says

"States shall enforce their laws and regulations adopted in accordance with Article 207 and shall adopt laws and regulations and take other measures necessary to implement applicable international rules and standards established through competent international organisations or diplomatic conference

to prevent, reduce and control pollution of the marine environment from land based sources".

Article 222 contains two such references. It says:

"States shall enforce within the air space under their sovereignty or with regard to vessels flying their flag or vessels or aircraft of their registry, their laws and regulations adopted in accordance with article 212, paragraph 1, and with other provisions of this Convention, and shall adopt laws and regulations and take other measures necessary to implement applicable international rules and standards established through competent international organisations or diplomatic conference to prevent reduce and control pollution of the marine environment from or through the atmosphere, in conformity with all international rules and standards concerning the safety of air navigation".

Both of those articles plainly impose a duty to implement something, and when the Tribunal has to apply those UNCLOS articles it has to ask itself, what is it that the state is obliged to implement? The answer clearly is, what it says in the Articles themselves. The state is obliged to implement "applicable international rules and standard established through competent international organisations or diplomatic conference" - whatever the relevant phrase might be.

In other words the content of the UNCLOS obligation to implement is itself determined by a renvoi, a reference to other legal instruments. This practice is by no means unknown elsewhere in international law and in our Reply in paragraph 21 we have given some other instances where a similar technique is adopted.

What is an applicable international rule or standard"? There is a range of possible interpretations which would extend at the one extreme from those rules and standards that are already legally binding on the parties to the UNCLOS dispute - Britain and Ireland in this case – to, at the other extreme, rules and standards adopted by international or regional organisations or conferences in which the disputing states may not even have been entitled to participate. Ireland has relied in this case on the narrowest interpretation. It has relied upon the rules and standards that are already legally binding upon the United Kingdom; and whatever that phrase in articles 213 and 222 of UNCLOS might mean it must at least include that basic minimum of legal instruments already binding on the parties to the dispute. So, if the Tribunal determines that for example a provision of Ospar is among the applicable international rules or standards - Mr Sands will be addressing you later on on the question of the Ospar obligations to apply best available technology and best environmental practices - and if the Tribunal determines that a state that has failed to implement it under UNCLOS Article 213, then the Tribunal would be finding not that there has been a breach of Ospar but that there has been a breach of UNCLOS Article 213. The Tribunal in that case would be applying UNCLOS. It would be deciding a dispute under UNCLOS. One might say in a sense that it is applying Ospar, and if so article 293 of UNCLOS plainly provided authority for doing so. But one might put it differently and more accurately and say that the Tribunal is "referring" to Ospar or "taking Ospar into account" in determining the meaning of UNCLOS; or that there has a renvoi to OSPAR by UNCLOS. But however it is described, this is what Ireland means by a renvoi; and Ireland submits that this is not merely permitted but is actually demanded by the express terms of UNCLOS itself.

PROFESSOR CRAWFORD: What if under OSPAR there was a provision requiring the two parties in question to resolve any question of the interpretation of OSPAR under OSPAR procedures? Would that make any difference to your argument?

PROFESSOR LOWE: No, it would not, sir, because the Tribunal's task here is to apply the UNCLOS Article 213 provisions and this Tribunal would have to be satisfied, in the normal way, of proving what the obligations under OSPAR were; and, because it is a reference out to the substantive standards in OSPAR, the Tribunal should apply those standards, as proven. The Tribunal will hear both sides on the matter and take its decision accordingly.

There is nothing unusual in this. It probably does not need saying that, if, for example, a German private international law rule directed a German court to refer an issue, such as the validity of a marriage or a contract, to, say, Canadian law, the German court would apply the relevant rules set out in Canadian law. But the German court does not thereby become a Canadian court. The German Court's interpretations of Canadian law are not precedents binding on Canadian courts, nor could they be appealed through Canadian courts. Nor does the German court acquire jurisdiction to determine each and every dispute that might arise under Canadian law. Canadian law in that context is simply a fact applied by the German court just as it might, for example, apply a New York interbank interest rate. It is a standard which has been referred to in a contractual provision.

The United Kingdom raises the spectre of the wholesale incorporation into and application as part of UNCLOS of every far-flung rule of customary or conventional international law merely by reference to a test of compatibility with UNCLOS, as they put it in their Rejoinder at paragraph 5.15. But that is not at all what Ireland is suggesting. Ireland is submitting merely that, where UNCLOS requires the implementation of applicable international rules or standards, one has to look to other instruments to determine what those rules and standards are. Indeed, it may be that in paragraphs 5.11 and 5.12 of the British Rejoinder, there is some recognition of that fact.

The Rejoinder also makes a number of further points based on some misunderstanding, I think, of Ireland's submissions. For example, at paragraph 5.16 there is a discussion of UNCLOS Article 297 that entirely misses Ireland's point. Ireland did not cite Article 297 because it needed to rely upon it, but merely because that Article clearly presupposes in its terms that under UNCLOS Part XV, tribunals sometimes have to interpret and apply international rules and standards for the protection of the marine environment that lie outside UNCLOS. The reason that it was referred to in the Irish pleadings was that it is an example drawn from Part XV itself and, therefore, has a particular relevance to these proceedings.

I should say also, for the sake of completeness, that other rules of international law, such as the Vienna Convention on the Law of Treaties, principles of customary law and so on, are also to be applied by the Tribunal to the extent that it needs to do so for the purposes of resolving the dispute. That, too, is plainly stated in Article 293, and we have made detailed submissions on that in our Reply.

As I hope is now clear, Ireland is not submitting that Article 293 authorises this Tribunal to decide disputes concerning each and every rule of treaty or customary international law that is

compatible with UNCLOS. It is a provision on applicable law and it is not a provision on jurisdiction.

Finally, there is a further matter that I should refer to briefly, and that is the question of the temporal aspect of jurisdiction. There is a suggestion that some parts of Ireland's case are premature. It is a recurrent theme in the British response that future developments at THORP and MOX will require the approval of the British Government and the suggestion is that Ireland should await the seeking of permission from the British Government before it makes any complaints about future activity. Ireland submits that this is not only contrary to common sense, but it is also wrong as a matter of law. It is contrary to common sense, because, inasmuch as the United Kingdom has planned for these future discharges, it is better for Ireland and for the United Kingdom that the matter be resolved now. It is better for Ireland, because it will reduce the uncertainties regarding nuclear risks in the Irish Sea, and because Ireland will not face the possibility of having to raise a new legal action each and every time that it learns a new contract is contemplated. It is better for the United Kingdom because it will not have to inform Ireland each and every time the possibility of a new contract arises - and, presumably, the United Kingdom is contemplating giving some sort of an undertaking to inform Ireland of these new contracts, because there is no other way in which Ireland could find out that they were arising. It is also better because it resolves the uncertainties for the United Kingdom, either by giving it time to adjust its plans to bring them into line with its UNCLOS obligations or, if the United Kingdom's views should entirely prevail, by clearing the UNCLOS obstacle out of the way. It also removes any temptation that there might be for the United Kingdom later on, in a subsequent case focused on a new contract, to say that Ireland should have objected earlier when it first became aware of the intention to try to negotiate new contracts for MOX and THORP.

But, as a matter of law, the timeliness of Ireland's present application follows directly from the principle that States are responsible for intended and foreseeable consequences of their action. In so far as we will show that the United Kingdom does intend or foresee that future contracts will be concluded in the wake of the MOX project, those future consequences are cognisable by this Tribunal now. Ireland has demonstrated in its written pleadings and in the submissions by the Attorney and by Mr Fitzsimons that the future contracts are, indeed, both foreseen and intended by the United Kingdom.

To summarise, Ireland's submission on this issue comes down to seven propositions.

First, that this Tribunal has jurisdiction in respect of the dispute concerning the interpretation and application of UNCLOS.

Secondly, that Ireland has not submitted to the Tribunal a dispute concerning the interpretation or application of any other treaty.

Thirdly, that the Tribunal is directed by UNCLOS to apply both UNCLOS and other rules of international law not incompatible with UNCLOS in order to determine the dispute before it.

Fourthly, international rules and standards that are set out in other instruments may be referred to in order to determine the meaning of general or unclear provisions in UNCLOS.

Fifthly, that some provision of UNCLOS specifically refer to international rules or standards that are set out in other international instruments and peg the UNCLOS obligations to them, and such

provisions require that reference be made to other instruments in order to determine what the UNCLOS obligation is.

Sixthly, that, in applying or referring to any other rule or standard in those ways, the Tribunal will be interpreting UNCLOS and determining the dispute arising under UNCLOS and not interpreting or deciding a dispute arising under the other instrument.

Seventhly, there is no legal obstacle to the Tribunal exercising jurisdiction as requested by Ireland.

I should, for completeness, add the eighth submission, which is that, under Article 288, paragraph 4, it is for this Tribunal, and no other, to determine the scope of this Tribunal's jurisdiction in this dispute.

I thank you, President.

THE PRESIDENT: Thank you very much.

SIR ARTHUR WATTS: Professor Lowe, could I take you back to a point that you made at the very beginning of your submissions? It is point 4 of the paper that you circulated. You say, "As the Tribunal will be aware, Ireland makes no complaint that the United Kingdom has violated any obligation under EC law". That does not seem at first sight, and I would welcome your explanations on this, to sit very well with at least a couple of provisions in Ireland's memorial. In the memorial, paragraph 7.6, where there is a reference to the rules of interpretation of the Vienna Convention, and the need to take treaty texts in their context, it says (this is in the middle of paragraph 7.6) "the context includes the United Kingdom's obligations under other international agreements and instruments, notably the 1985 EC Directive 85/337". Then it goes on lower down, "These instruments are relevant as [amongst other things] instances of the other rules of international law not incompatible with the Convention which the present Tribunal is directed to apply to the case". That suggests that this Tribunal is under the guise of another rule directed to apply that particular directive and, presumably, therefore, to form views about whether the United Kingdom's behaviour has been consistent with obligations that are asserted to exist under that directive. The same sort of point arises on paragraph 7.55, it is half a dozen pages further on. It quotes a letter sent by the Irish Government on 23rd December 1999. Two thirds of the way down that quotation, it says, "A decision to authorise the operation of the MOX plant would be based upon an EIS which was incompatible with the UK obligations under [amongst other things] Directive 97.11/EC and consequently be in violation of the requirements of that instrument."

I do not quite see how what is said in the memorial fits with what you have just said, that Ireland makes no complaint that the United Kingdom has violated under any obligation under EC law. That seems to be exactly what the memorial is saying.

PROFESSOR LOWE: Let me explain it in two parts and deal, firstly, with the 1999 letter. That letter was, of course, not written as part of Ireland's pleadings. It was written two years before the action was instituted. It plainly is addressing two different questions; questions of UNCLOS obligations and questions of EC obligations. That does not mean that, simply because that letter was dealing with two issues, we are asking the Tribunal to deal with them here. What we are asking the Tribunal to deal with,

(and this is the point that relates to paragraph 7.6 to which you have directed me) is a situation where it is true that all of these obligations are part of the context, and that context is how general provisions in UNCLOS on duties to cooperate and prevent pollution and so on have to be viewed. We are not saying that it is illegitimate for the Tribunal, when it is considering what amounts to "pollution", to look at the EC Treaty. It may be that our friends themselves want to refer to international instruments of this kind to explain what is understood by pollution in this context. But, as I said in the first part of my submissions on the distinction between applicable law and jurisdiction, that does not mean that those rules are being applied. It is just a way of trying to understand what UNCLOS means by those provisions. The issue could only really arise under 7.6 in relation to the second of the arguments that I was putting forward, which is the renvoi possibility. In that context, let me try to make the Irish submission clearer. It is that what UNCLOS is doing is pegging an UNCLOS obligation in some of these circumstances to outside instruments and trying to determine, as a matter of UNCLOS law, how you judge in detail the compliance by a State with the expectations of UNCLOS for the protection and preservation of the marine environment.

Now, UNCLOS drafters could have done this by sitting down for even more years and drafting out more and more detailed provisions on exactly what kind of discharge standards there had to be, exactly what kind of environmental impact assessment obligations had to be gone through and things of this sort, knowing that, if they did do it, the matter would become out of date within a short period of time and the rather cumbersome process for amending UNCLOS would impede any development to this process. So they take the obvious and sensible step of saying what the basic obligation of States is and then saying that the performance of that obligation is to be gauged by a standard which is measured according to these other international obligations.

What you are doing there is taking a sight line on these obligations in order to determine what the UNCLOS obligation is. You are not actually enforcing the obligation under the other instruments themselves. My answer to you, sir, would be, with respect, that in the situation which was contemplated in paragraph 7.6, this Tribunal would certainly not be applying a matter of EC law. It would not be determining whether Ireland or the United Kingdom had fulfilled their duties under EC law. It would be deciding on the basis of Articles 213 and 222 of UNCLOS.

THE PRESIDENT: Thank you. That brings your presentation to a close.

PROFESSOR LOWE: Yes, sir.

THE PRESIDENT: I think that the situation is as follows. Lord Goldsmith has quite rightly pointed out that it is no secret that there have been discussions before this. There are certain parts of the presentations which can only be held in camera. We would suggest that we adjourn now and we come back at three o'clock, at which point we will invite Ireland, as indicated by Mr Sreenan and also by the Attorney General, to make the presentation that they want to give us in camera. On that basis, then we will be able to indicate the time when we will expect the United Kingdom to make a response.

Will that be acceptable?

MR BRADY: Yes, sir.

THE PRESIDENT: On that basis then, we will adjourn until three o'clock.

(LUNCHEON ADJOURNMENT)

(See separate transcript for hearing in camera)