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
FRIDAY 13TH 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 FOUR
(Revised)

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THE PRESIDENT: Professor Sands, I think that it is agreed that you will give your replies this morning.

PROFESSOR SANDS: Mr President, Members of the Tribunal, I am responding, I hope briefly, to questions that were posed by the Tribunal. The questions, as I recall, were, firstly, whether Article 32 of OSPAR comes within Article 282 of the 1982 Convention, and, secondly, whether a judgment by this Tribunal under Article 213 in respect of a provision of another instrument, for example, OSPAR, would be res judicata for some future international tribunal established, for example, under OSPAR, to resolve a dispute concerning the interpretation. If I have not quite got that right, I am sure that you will come back to me.

Just to put these questions in their context, they are, of course, part of the broader framework within which UNCLOS falls to be considered. In essence, many of these issues with which we have been concerned over the past two days raise broader issues about the constitutional order that is established by the United Nations Convention on the Law of the Sea, and one's view on these questions turns, and is informed in large part, by the object and purpose of the 1982 Convention. We are struck by some of the points made by the United Kingdom in that context; the suggestion that Ireland and the United Kingdom are now in no different a position vis-à-vis the UNCLOS than Quebec and Ontario is one that did not, I think, immediately resonate on this side. I am not sure whether we are, on the Irish side, the Ontario or the Quebec of the operation. It also raises interesting questions which need to be considered as part of the context. Could Spain, again, commence proceedings at some future date against Canada, as it did in 1995 at the International Court of Justice, or does the United Kingdom's argument, effectively, mean that European Community Member States have now lost the ability to bring proceedings against third States under any area within UNCLOS over which the Community has a degree of competence. And of course there is the curious situation of Denmark, which is not a party to the 1982 Convention on the law of the sea but which on the United Kingdom's analysis as we understand it effectively now is bound by UNCLOS through European Community law, and presumably therefore subject to proceedings (although it would strangely be the situation that if Denmark were accused by some third state of causing pollution of the marine environment that third state would have to take proceedings against the European Community in relation to marine pollution). These are part of the background and broader issues that fall to be considered.

Turning to the first point, the article 32 point, I hope my friend Mr Bethlehem will forgive me if I say that we did not fully appreciate the weight that was given to this argument. He is absolutely right, that article 32 is referred to. But it is referred to in chapter 7 on pollution, it is not taken in the section on jurisdiction as such. We do not take the point, it was simply that we did not spot it buried away in that part of the written pleadings, and we did not see it as being argued upon in that way.

The real question that is posed by Professor Crawford's question is the relationship between article 213 and article 282 and the interplay of the relationship, and I take 213 as one example. There are other provisions that one could use. I think one ought to recall that article 213 obliges states and parties to take other measures necessary to implement applicable international rules and standards. That is the

language in the relevant part of article 213. That of course sends a signal to a tribunal that it is entitled to look to other applicable international rules and standards and we say to look to the substance of those applicable international rules and standards.

Then you have article 282 of the convention and again it is appropriate to look carefully at the language. If the State Parties which are parties to a dispute concerning the interpretation or applicable of this convention have agreed through a general regional or bilateral agreement or otherwise that such a dispute shall at the request of any party to the dispute be submitted to a procedure that entails a binding decision that procedure shall apply in lieu of the procedures provided for in this part unless the parties to the dispute otherwise agree. So the central issue is whether or not the OSPAR convention would effectively be dealing with this dispute, and I think at the heart of the issue is to reach an understanding as to what this dispute is about.

In terms of the appropriate step by step basis for considering 213 and 282 of course the starting point has to be the jurisdictional issue. You would only get to 213 if you have established as a tribunal that you have jurisdiction. But in effect that does not get you all the way to your answer because you then have to look to 213 to determine what the dispute is about. So in a sense the two provisions have to be treated in an integrated manner. You cannot take a decision on 282, you cannot characterise the dispute without looking at what issues are raised under article 213.

So the question that has to be asked really is: what is the dispute that Ireland has submitted to this tribunal? That is the key question. As we mentioned yesterday this dispute concerns the manner and the conditions under which the United Kingdom authorised the MOX plant in late 2001. That is the dispute, the manner and the conditions. The dispute, and we say that there is really just one dispute, arose, we say, because of the failure of the United Kingdom to assess environmental effects, to cooperate with Ireland and to prevent pollution, including through the failure to implement applicable international standards. Throughout our case you will see that assessment, cooperation and pollution are tightly interwoven. It is quite difficult to take the threads apart and separate them. On one approach to illustrate the point, we would say - it is not the totality of Ireland's claim, but it is a part of it - that, if there had been a proper assessment in the first place, which would have looked at the direct and indirect consequences, including THORP, if it had looked at the cumulative effects on concentrations of radionuclides in the Irish Sea and if it had then identified whether the technologies being used - by reference to alternative options - were best available technologies, this dispute may never have arisen. That is the nub of the argument. The differences on cooperation and on pollution prevention might have been avoided if the assessment had been carried out in a different way.

As we said yesterday, to take this as one illustration, the assessment part of the dispute cannot go to OSPAR. The cooperation part of the dispute cannot go to OSPAR. Parts of the pollution of the dispute can not go to OSPAR. In simple terms, that is the end of the matter. The dispute concerns the totality of the issues. That is the context in which UNCLOS has been negotiated and drafted, precisely to provide, as I think the President of the United States put in his transmittal letter to Congress, a comprehensive environmental agreement with a comprehensive system of dispute settlement.

PROFESSOR CRAWFORD: It seems to me in working out and identifying the dispute for the purposes of Article 282 that it is important to look at the diplomatic record. In the Tuna case, and I am speaking only on the basis of the published material, it is clear that the parties had throughout treated that as a single dispute and that the dominant instrument in the diplomatic negotiations until a fairly late stage was the 1993 Convention. UNCLOS was also referred to and, obviously, issues arose under UNCLOS and that was sufficient for the Tribunal to be able to say that the dispute arose under UNCLOS, but you could not say that, as it were, there was a larger dispute under UNCLOS, some parts of which might have been brought under another instrument. The two instruments were co-extensive and in the diplomatic history, the 1993 Convention actually figured - whether that was wise or not may be a question - but it did actually figure more extensively. In the diplomatic negotiations between the parties which preceded the commencement of these proceedings, what was the relative weight given to UNCLOS and OSPAR?

PROFESSOR SANDS: I will do my best to answer that question, I am fairly on top of it, Professor Lowe is, if he has the opportunity, going to deal with that when he deals with the cooperation issue, because he is hoping to take you to some of the correspondence. You can, I think, divide the dispute into various phases. There was an initial flurry in the period 1993/94, where Ireland's concerns were focused on the quality of the Environmental Statement that had been prepared. The dispute then went, such as it existed at that point, into a sort of abeyance whilst the consultation process in which the United Kingdom engaged in relation to the economic justification of the plant proceeded. That was, of course, then interrupted by the data falsification issue in 1998/99 which somewhat delayed the whole process. As I recall from the correspondence, it was then in 1999/99 - Professor Lowe will take you to the correspondence - that totality of the dispute really first arose in the context of an understanding, apparently, that authorisation was now proceeding, although it did take two more years for the authorisation process to conclude. I think that the relevant letter which crystallised all of this is the letter of 23rd December 1999 which sets out a range of issues, including, I believe, the UN Convention on the Law of the Sea. It may even be, but I do not recall off the top of my head, that there was an earlier letter in which UNCLOS was already mentioned. I am not absolutely clear on that. In any event, for two years before the dispute process was initiated, UNCLOS was on the agenda and, certainly, throughout that period the correspondence will indicate that Ireland took the view that provisions of UNCLOS were not being given effect by the United Kingdom. Around two years before the dispute settlement procedures were initiated, the case was cast as raising issues under the United Nations Convention on the Law of the Sea.

PROFESSOR CRAWFORD: I note that the United Kingdom does not dispute that there is a disagreement under UNCLOS. Of course, Japan did dispute that. Japan's view was that the whole of the Tuna dispute was a dispute under the 1993 Convention. There were certainly better grounds for that assertion in that case than there would have been for an equivalent assertion here, which is not made by the United Kingdom.

PROFESSOR SANDS: You will have noted that we are not really making much of the Southern Blue-Fin Tuna decision, in part because, of course, it raises a fisheries issue. As I mentioned yesterday, the rules on fisheries really are very different from the rules on marine pollution - we say. On that basis, alone, one

can treat them differently. But, of course, both cases do raise the issue of what is the 1982 UN Convention Law of the Sea to achieve? Is it truly to be a comprehensive environmental framework with a comprehensive system of dispute settlement or is it to be something else? Of course, that is an issue which this Tribunal, I am sure, will be aware of, the responsibilities that it has for the future well-being of the 1982 Convention.

Our simple point is that that is what the dispute is. Of course, it will be said, or could be said, that, in fact, this is not one dispute, but rather a series of judicially distinct disputes and one of which concerns, in the words of the United Kingdom, breaches of OSPAR. I think that Mr Bethlehem referred to it yesterday as a sort of salami-slicing activity, where, in relation to the WTO, one could slice up different parts of a dispute and, as he put it, and we do not express a view now as to whether that is the correct position on what WTO does, the WTO appellate body, for example, will not touch issues that are not within its exclusive jurisdiction. In fact, our view, I think, would not be identical to that view. There is recent jurisprudence from the WTO appellate body in the two Shrimp/Turtles cases that we will come back to in due course, where the appellate body happily reaches out to other international conventions and draws them into the WTO system. Even the Law of the Sea Convention in that case, Article 56 I think it is, is invoked by the WTO appellate body, and, of course, the WTO appellate body is expressly directed to apply certain international standards in relation to the agreement on technical barriers to trade and the agreement on phyto- sanitary measures. I have not had time, I am afraid, to check whether each of those international conditions or rules have their own dispute settlement mechanisms, but the appellate body has certainly never taken that point or has never been faced with the point that it cannot do that, because it would be interfering with the exercise of jurisdiction of some other body. But, of course, that is not our case. Our case is that this is a single dispute. I may be accused here of being excessively formalistic, but Ireland's claim, for example, under Article 213, is that the United Kingdom failed to implement the standards and rules required, for example, by Article 3 of OSPAR to apply best available techniques and best environmental practices.

In our submission, that is not necessarily precisely the same thing as a claim that the United Kingdom has breached the standards of the OSPAR Convention. Let me illustrate what I mean by that and I accept that it is not necessarily self-evident. The United Kingdom's case may be that all that is required by Article 213 is to adopt domestic legislation. That was its argument in the OSPAR case, that it implemented Article 9 of the OSPAR convention by implementing regulations giving effect to the relevant EC directive. In this case, of course, they cannot make that argument precisely because they have not adopted domestic legislation giving effect to the standards which Ireland says they should have applied. As we will explain, when we come to deal with the prevention issues, in almost all cases of environmental protection in the United Kingdom under English law, which is generally governed by the 1990 Environmental Protection Act, the standard to be applied is best available techniques not entailing excessive cost. In some cases, such as offshore pollution from oil installations, it is best available techniques, and there is statutory instrumentation that we will take you to to show the standard that they applied in the United Kingdom in those cases. Radionuclides are completely excluded from that regime

and are governed by the 1993 Radioactive Substances Act, which directs the application of a very different standard. We say that you can answer the question of whether they implemented their obligations simply on the face of the material that is in front of you. You do not need to go on one level of analysis any further than that. You can simply resolve that part of the dispute by declaring that the United Kingdom has not implemented the requirement to apply, for example, best available techniques in relation to a nuclear facility, such as the MOX plant, and adopt an order that it should do so. That would address that point discretely.

PROFESSOR CRAWFORD: In any event, if I could summarise, your position is that this dispute is primarily, leaving aside European issues, a dispute under UNCLOS and that both the diplomatic history of the dispute and the range of issues raised indicate that the dispute, as such, could not be wholly resolved under OSPAR?

PROFESSOR SANDS: That is correct. We say then that you do not even need to go to the question of distinct disputes, because the approach taken by Ireland is shared by other distinguished international commentators and, indeed, by the International Maritime Organisation. I referred you yesterday to documentation made available by the United Kingdom, a 2003 report, adopted by the International Maritime Organisation, and I took you to various passages of that. It was very clear in that document that the IMO secretariat took the view that Article 297, paragraph 1(c) submitted to the compulsory jurisdiction of UNCLOS all the instruments listed in that report. Interestingly, and they gave many examples, there are two examples I cite, because they are distinguishable in one material respect. The London Dumping Convention 1972 contains no dispute settlement clause. There is no provision for compulsory arbitration. On one analysis the IMO's view is that UNCLOS provides compulsory dispute settlement where the London Dumping Convention does not. I could quite see that, if OSPAR did not contain a dispute settlement clause, our distinguished friends on the other side would say, well, you are seeking to bring within UNCLOS a dispute that the parties have expressly agreed not to be subject to compulsory adjudication. But, of course, the IMO does not take that approach. It takes the approach that that Convention also is subject to dispute settlement resolution.

To take another example which goes the other way, the MARPOL Convention, which the President, I know, has a great deal of knowledge of, does provide in its Article 10 for a compulsory dispute settlement clause, which is in all material respects identical to the Article 32 relevant provision. "Any dispute between two or more parties to the Convention concerning the interpretation or application of the present Convention shall, if settlement by negotiation between the parties involved has not been possible, and if these parties do not otherwise agree, be submitted upon a request of any of them to arbitration as set out in Protocol 2 to the Convention". Again, the IMO secretariat takes the view that that, too, is subject to the compulsory dispute settlement requirements of UNCLOS. That, of course, also is the view of Professor Oxman. We are not especially attracted to the idea of writing to secretariats in relation to any aspect of this dispute. They are entitled to have their views. They may or may not be right, they may or may not be authoritative, but, if the Tribunal was minded to start writing, then it may also wish to write to the IMO secretariat to find out the basis on which they have expressed this view in

relation to the report. That is not a task, we would stress, that we think that it is appropriate for this Tribunal to embark upon.

What we say is that it plainly was not the intention of the drafters of UNCLOS to exclude from the scope of Article 213 certain categories of conventions. They did not put in any limiting language. Article 213 talks about applicable international standards and that is plainly the situation in relation to the OSPAR Convention to which both Ireland and the United Kingdom are parties.

That conclusion we say is also consistent with international judicial policy such as it might be said to exist. Why have two, three, four five arbitrations on the issues raised in this dispute settlement process when you can have one in front of this tribunal; what policy objectives are fulfilled by requiring Ireland to initiate an entirely new arbitral procedure in which effectively the only difference would be that there would be three arbitrators instead of five in relation to the procedural type of issues.

I think by conclusion we would simply say that the drafters of UNCLOS must be taken to have thought through logically their work and to have been serious about putting in place the comprehensive dispute settlement which they have indeed already established.

The second question I can deal with very briefly, on res judicata. Assuming that there is a rule of public international law on res judicata - and assuming it is a rule which is akin to the domestic rule in Ireland or in the United Kingdom or elsewhere - you would need of course identity of parties, identity of issues, identity of facts. There is very little international jurisprudence on the issue. There is some but I have not had time to look at it. Of course we have the recent decision of the arbitral tribunal and the Swedish courts in a Czech republic series of arbitrations which some in the room are very familiar with, and that took a very formalistic view on identity, particularly in that case, in relation to parties both in the context of litis pendens and res judicata.

So, in answer to the question that was put, I do not think one can exclude the possibility that there might be a res judicata, assuming those conditions were fulfilled and assuming that international law knew of such a rule. But on the factual issues in particular and the cause of action it may be that there are material differences between an obligation under article 213 and the underlying substantive obligation under the OSPAR Convention which might cause a tribunal to form a view that those are not the same legal issues. That raises very complex issues and we are here I think slightly in the realms of speculation because I am not sure that there is a real issue as to whether or not any of these parties would wish to go off and litigate anywhere else. Certainly there is no present intention to do that.

So I think the best I can do is to indicate that we cannot exclude the possibility but certain conditions, the precise content of which are not clear, would have to be satisfied.

That concludes the submissions. If I may by concluding remarks thank on behalf of Ireland the Tribunal for being so very attentive to us and the other side over the past three days. We know you recognise the attachment to which Ireland has to the protection of the marine environment, we know that you too attach considerable importance to the UNCLOS system and to the UNCLOS dispute settlement mechanism, and to take the words of my distinguished Attorney-General in the closing comments on the OSPAR we wish you good speed as you deliberate and we are sure that you will come to the right

decision. Thank you very much.

THE PRESIDENT: Thank you.

MR WOOD: Mr President, if it were possible Mr Bethlehem would like to make a very brief reply to those remarks.

THE PRESIDENT: Yes, certainly.

MR BETHLEHEM: Mr President, members of the Tribunal, just one or two very brief remarks in response to Professor Sands' statement this morning.

There is an irony that is beginning to emerge in these proceedings because what we now seem to be hearing is a position from the applicant in this case that the UNCLOS element of this dispute can be completely segregated from the OSPAR and the EC elements, and it seems that what we have here is a permeable membrane that flows in one direction only. The OSPAR and the EC elements can be taken into account and applied in the context of UNCLOS but that the dispute as it were does not flow in the other direction.

The first point of substance that I would make is that Professor Sands seeks to minimise the importance of article 282 of UNCLOS by saying there are parts of the dispute which do not arise under OSPAR, and he refers to aspects of cooperation, and aspects of environmental impact assessment and aspects of pollution. We accept that there are aspects of the dispute that do not come within the total purview of the OSPAR Convention. We do not accept that the OSPAR Convention is quite as limited as Professor Sands would suggest. But in reality this is really to sidestep the issue, because as I made quite clear yesterday in response to a question from Professor Crawford, the article 282 point is relevant not only to OSPAR but to the EC and Euratom aspects as well, and my submissions were really parallel submissions to those advanced by Dr Plender.

Professor Sands then suggested that we might take the view that this could be said to be a series of judicially distinct disputes. Well, yes, there is certainly that view. I would however take you back to the observations by Dr Plender and the table that he put before you which really indicated that in the context of the European Community virtually everything was covered by the EC dimension. So if Ireland had actually wanted to plead out the whole of its case but by reference to an appropriate forum and an appropriate treaty really there is the EC dimension.

I should say that the most important point - and this is really the last point that I will be making - for our purposes is that Professor Sands accepted that it was not self evident that Ireland was not alleging a breach of non-UNCLOS provisions and that what Ireland was really saying was simply an allegation of non-implementation. I have to say that on our side of the room that is absolutely right, it was not self-evident and is not self-evident from the pleadings that Ireland was not alleging a breach of non-UNCLOS provisions. The point is really very cogently illustrated by the example that Professor Sands gave throughout his brief submissions this morning. He referred to the allegations under article 213 of UNCLOS and he said that really the United Kingdom had failed properly to implement article 213 of UNCLOS because the Radioactive Substances Act had not perfectly given effect to those obligations.

If one were to turn, and I am not going to ask the Tribunal to turn to the allegations in the Memorial on article 213 - for reference it is at page 238 of its Memorial - but if one turns up that allegation we have five pages of comment. Those five pages address OSPAR, address SINTRA, address the EC, address a range of other measures. There is not a single reference to the Radioactive Substances Act. There is not a single reference in respect of this aspect of Ireland's pleadings which takes the Tribunal to the point or takes the United Kingdom to the point where it could reply to the allegations that the United Kingdom has failed to implement or failed to implement properly.

So with respect we think that Professor Sands has made our point for us. Ireland has pleaded its case as if it were alleging and indeed we say it was alleging that the United Kingdom was in breach of these non-UNCLOS obligations. If that is not Ireland's case it really needs to replead it.

Thank you, Mr President.

THE PRESIDENT: Thank you very much. As we have agreed this brings us to end of the submissions and representations on the issue of jurisdiction which we wanted to address. But before we adjourn I would like to ask the United Kingdom a question to complete the record. Dr Plender, at the end of your submissions in camera you did respond to the question that the Tribunal had put as to what the United Kingdom felt should be the future course of proceedings. Those remarks were in camera so they will not be available on the public record, and we would be very grateful if you could find a way of putting those submissions as to what the United Kingdom felt should be done into the public record. They are actually in the transcript at page 6 I think, starting at paragraph 30.

MR BRADY: Sir we have not received those. Would it be possible to get a copy of those?

THE PRESIDENT: We will adjourn for five minutes, because I think it would be useful to have it in the public record. We will adjourn for five minutes to enable you to have a look at it and also for Ireland to have a look at it. We will then resume to have it put in the record.

(Short Adjournment)

THE PRESIDENT: Mr Brady, have you had a look at the closed session transcript?

MR BRADY: Yes, I have had an opportunity to read it. I understand that the representative of the United Kingdom intends to read out the relevant passages into the record, minus one sentence which refers to Mr Bethlehem.

THE PRESIDENT: That is exactly what we expected. Dr Plender.

MR WOOD: Chairman, Members of the Tribunal, I will repeat our response to your invitation to the parties to suggest how the Tribunal might now proceed. Our position is as follows. First, we maintain our submission that the Tribunal does not have jurisdiction over Ireland's claims or, at least, the great majority of Ireland's claims, or that they are otherwise inadmissible. The EC point is a central element in this submission. We did not and do not ask that these are decided as a preliminary point. That is a matter for the Tribunal. We could, nevertheless, understand it if the Tribunal now felt, having heard the arguments, that it should now decide the preliminary issues.

As regards the procedures that may take place in the Luxembourg Court, these are, in our submission, a real possibility and we shall, presumably, know more over the next few months. We

consider that they are highly material to the present proceedings, but it is, as we see it, very much a matter for the Tribunal to decide how to deal with this unfortunate reality. One obvious possibility, which we have already suggested, would be to invite the Commission and/or Ireland to keep the Tribunal informed of developments over the next few months and to take matters from there.

Professor Crawford asked earlier what course the Tribunal should take if it found that it did not have jurisdiction except in respect of a very limited part of Ireland's claims. It is, of course, ultimately a matter for the Tribunal's decision, but we would certainly see no objection to the Tribunal making an award on the merits in this limited respect. The circumstances might, of course, be relevant to the question of costs. Thank you, Mr President.

THE PRESIDENT: Thank you very much. That, I think, finally brings us to the conclusion of this part of the proceedings and, as we indicated earlier, we will now withdraw to deliberate on the submissions. We envisage meeting this afternoon at around 3 o'clock, at which point the Tribunal will indicate its decision with respect to the subsequent proceedings. In the meantime, we would be very grateful to meet with the Agents at around 2.30 in order to consult before we come to a decision on our final ruling. We will adjourn until 3 o'clock. Thank you.

(Short Adjournment)

THE PRESIDENT: May I make a statement? This is not an order. It is a statement.

STATEMENT BY THE PRESIDENT

1. On behalf of the Tribunal I should first of all like to thank the Parties, their Agents, the two Attorneys-General and counsel, for the courteous and most helpful way in which the proceedings so far have been conducted. The Tribunal has paid careful attention both to the written and oral arguments presented, and has been able to reach a clear understanding of the Parties´ respective positions on the issues which have so far been debated.

2. The Tribunal considers that before proceeding to hear further evidence on the the merits of the dispute, and in particular the witnesses presented by the parties on questions of fact and scientific opinion, it has first to determine that there is a reasonable likelihood that it has jurisdiction over the merits of the dispute, and to form a sufficiently clear view of the extent of that jurisdiction under the 1982 Convention of the Law of the Sea..

3. The jurisdictional objections presented by the United Kingdom fall into two groups. First, there are a number of questions of jurisdiction and admissibility raised in respect of United Nations Convention on the Law of the Sea, itself, and other international commitments invoked or referred to by Ireland. I will refer to these, for present purposes, as the international law points. Second, there are

certain objections relating to the position of the parties under the law of the European Communities. I will refer to these as the EC law points.

4.. The Tribunal would begin by observing that the parties are in agreement that there is a dispute concerning the MOX Plant, and that this dispute is a dispute concerning the interpretation and application of the 1982 Convention. The International Tribunal for the Law of the Sea held that it had prima facie jurisdiction over this dispute and so far the present Tribunal sees no reason to disagree.

5. As to the international law points raised by the United Kingdom, the Tribunal does not believe that these cast any doubt on its prima facie jurisdiction. There has already been (and the United Kingdom does not now contest this) an exchange of views between the parties as required by Article 283 of the 1982 Convention. It is true that the OSPAR Convention is relevant to some, at least, of the questions in issue between the parties, but the Tribunal does not regard that fact as calling into question the characterization of the present dispute as one essentially involving the interpretation and application of the 1982 Convention. Nor is it presently persuaded that the OSPAR Convention substantially covers the field of this dispute so as to trigger Articles 281 and 282 of the 1982 Convention on the Law of the Sea. The Tribunal agrees with the United Kingdom that there is a cardinal distinction to be drawn between the scope of its jurisdiction under Article 288 of the 1982 Convention and the applicable law under Article 293 of the Convention. It is also inclined to agree with the United Kingdom that aspects of the written pleadings of Ireland raised questions arising directly under other legal instruments, and it agrees that, to the extent this is so, any such claims would be inadmissible. It does not, however, agree that Ireland has failed to state and plead a case arising under the 1982 Convention. For these reasons, among others, the Tribunal maintains the view that it has prima facie jurisdiction under Article 288 (1) of the 1982 Convention.

6. As to the EU law points, however, there is a serious difficulty. The Tribunal has been invited to consider the implications of the fact that the 1982 Convention is a mixed agreement to which the EC is a party along with its Member States. Moreover, the Tribunal is requested to consider the fact that, pursuant to Annex IX to the Law of the Sea Convention, it is for the EC, not its Member States, to exercise rights and obligations under the 1982 Convention in respect of matters in relation to which competence has been transferred to the EC by those of its Member States that are also parties to the

Convention.

7. The Tribunal notes, in this regard, the statement in a Parliamentary Answer of 15 May 2003 by the European Commission to the effect that the provisions of the 1982 Convention on which Ireland relies in the present case must be regarded as provisions of EC law, either generally or to the extent that they fall within EC competence. The Commission has added that it is examining the question whether to institute proceedings under article 226 of the EC Treaty.

8. There is, therefore, a real possibility that the European Court of Justice may be seised of the question whether the provisions of the 1982 Convention on which Ireland relies are matters relating to which competence has been transferred to the EC, and indeed that issues concerning the interpretation and application of the provisions of the Convention are as such matters of EC law. In these circumstances, whether, and if so to what extent, all or any of the provisions of the 1982 Convention fall within the competence of the EC or its Member States would fall to be decided by the European Court of Justice. Moreover, while neither the United Kingdom nor Ireland sought to sustain the view that the interpretation of the 1982 Convention in its entirety falls within the exclusive competence of the European Court of Justice as between Member States of the European Community, it cannot be said with certainty that this view would be rejected by the European Court of Justice. The United Kingdom did not argue that its other EU law objections were such as wholly to preclude the jurisdiction of this Tribunal. However, the parties before us agreed in argument that, if this view were to be sustained, it would preclude the jurisdiction of the present Tribunal entirely, by virtue of Article 282 of the Convention. 9. To decide on the jurisdictional issues raised by the United Kingdom in relation to European Community law, this Tribunal would need to determine, *inter alia*, whether the European Community or its Member States have competence in respect of all or some of the matters raised by the provisions invoked in this case. In other words the Tribunal must decide if, and to what extent, the rights and obligations arising under the provisions are exercisable by the European Community or by its Member States.

10. It is clear that any decision of the European Court of Justice on the issues identified above will be decisive and binding as to the question of European Community law. At the same time, by virtue of Article 11 of Annex VII to the 1982 Convention, the decision of the Tribunal will also be

binding on Ireland and the United Kingdom as Parties to the dispute.

11. The Tribunal considers that a situation in which there might be two conflicting decisions on the same issues would not be helpful to the resolution of this international dispute. Nor would such a situation be in accord with the dictates of mutual respect and comity that should exist between judicial institutions deciding on rights and obligations as between States, and entrusted with the function of assisting States in the peaceful settlement of disputes that arise between them.

12. The Tribunal has, therefore, decided to suspend further proceedings in the case until not later than 1 December 2003. The Tribunal hopes that it will, at that time, have a clearer picture of the EC legal position. In this regard, the Tribunal urges the Parties to take the necessary steps to expedite the measures for the resolution of outstanding questions.

13. In the meantime, this Tribunal remains seised of the dispute. In the circumstances that now prevail, it is moreover willing to consider the possibility of prescribing provisional measures if either party considers that such measures are necessary in the circumstances to preserve the rights of the Parties or to prevent serious pollution of the marine environment. As Ireland has indicated that it will request the prescription of further provisional measures, the Parties will be given the opportunity during hearings next week to present their views on what, if any, provisional measures are appropriate and the conditions under which such measures may be prescribed. The hearings will commence on Tuesday 17 June and each party will be allocated one and a half days to make its submissions, with half a day for reply. Ireland will provide, as soon as possible and by no later than 5 pm on Monday 16 June, a written statement of the provisional measures it seeks.

14. An appropriate Order of the Tribunal will be issued subsequently, embodying the views as to prima facie jurisdiction which are set out above, and the eventual conclusions of the Tribunal on the Irish request for further provisional measures.

15. The Tribunal accordingly adjourns until 9.45 am on Tuesday next, when it will hear argument from Ireland on the content of any provisional measures that it seeks. The meeting is adjourned.

(Adjourned until Tuesday, 17th June 2003 at 9.45 am)