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
TUESDAY, 17TH 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 FIVE
(Revised)

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THE PRESIDENT: At this stage we have decided to give the parties the opportunity to present submissions in respect of Ireland's request for provisional measures. Ireland has today and half of tomorrow. We will adjourn for one and a half days and then the United Kingdom will make its submissions. This morning, without further ado, I invite Ireland to commence its submissions.

MR BRADY: Thank you, Mr President, if I may start off, firstly, by saying that, unfortunately, I could not be here on Friday afternoon for your judgment. I am sure that you will understand that no discourtesy was intended by me, I can assure the Tribunal, by virtue of my absence. Other circumstances required me to exit from The Hague.

Secondly, I propose this morning, unlike last Tuesday, to give a very brief general introduction to our application. While I know that the word "brief" has been used by both sets of lawyers in a way that has an elastic meaning, I can give you a personal guarantee that I will finish in 15 to 20 minutes my opening. Hopefully, I will not strain the meaning of the word too far in that context.

What I hope to do is to give you, sirs, a general overview of the present application. I am handing in to each Member of the Tribunal a copy of my opening speech, which is no more than five pages long, and attached to it, sirs, as you will see, are the judgments of a number of the Members of the Court in Hamburg, of ITLOS, which outlined a number of principles of law, albeit they are of relevance only to the ITLOS jurisdiction, which has a different legal basis and has a different nature, but some of the comments on it I touch upon gently in the course of my opening. We are handing them in to you as a matter of convenience at this stage. I do not intend to refer extensively to them, certainly at this stage.

With that, sirs, I would ask you to go to the first divider of the booklet where you will find my opening speech on behalf of Ireland on this application for provisional measures.

In general, Ireland hopes that the Tribunal will establish a framework for real and meaningful consultation between the parties, guided by the principles of UNCLOS. We do, of course, accept the order and judgment of the Tribunal of 13 June 2003. Nevertheless, Ireland now finds itself in a situation where the issues it has definitively raised before the Tribunal may not be resolved for many years. This, in the view of Ireland, is unsatisfactory for everybody.

This delay in the ultimate resolution of the proceedings has been contributed to by the United Kingdom which did not raise the issues as a preliminary point before the Tribunal. The United Kingdom also failed to raise it before the European Court of Justice. This is a factor that this Tribunal can have regard to in the exercise of its jurisdiction.

I do, of course, not make the point that was referred to last week by Dr Plender that there is a right to be sued; that would be a rather exotic submission and I am not usually in the habit of making submissions that are exotic, but the fact of the omission to sue is relevant. I am sure Dr Plender would be delighted if we were inviting the United Kingdom to sue us time and time again, but I am sure he will understand the point I made in relation to this aspect. It is not that we invite ourselves to be sued, but it is the fact of the omission to commence litigation promptly before the European Court of Justice that could have resulted in a judgment dispositive of the competence issue that would have avoided the

problems and the legal quandary with which, sir, you have been confronted and gave rise to the conundrum of the potential for conflicting judgments which, as I understand paragraph 11 of your judgment, is an important factor in the decision that you made last week in terms of how to handle the substantive case. So I mention that en passant, and I am sure Dr Plender will forgive me for describing the submission as being somewhat exotic, but I am sure he knows well that I would not be making such a case.

At paragraph 1.03, the Preamble to UNCLOS recognises the conservation of the living resources of the seas and oceans, and the study, protection and preservation of the marine environment as objects of the Convention. In these proceedings, Ireland seeks to uphold these objectives. This Tribunal, constituted under the Convention, is charged with the grave responsibility of ensuring that these objectives are fulfilled and sustained.

I mention these matters at the outset of my address to emphasise the importance that Ireland attaches to these proceedings and, in the particular circumstances that have arisen, to this application.

When these proceedings commenced over eighteen months ago, it was anticipated that a full hearing would take place within a relatively short space of time. Our hopes in this regard were echoed in the judgment of Judge Mensah issued at the time of the original provisional measures application. In the events that happened, this did not prove to be possible.

The delay that has occurred, however, means that there is now a greater degree of urgency applicable to the matters in respect of which Ireland has advanced claims. The International Tribunal for the Law of the Sea declined to make an order preventing the United Kingdom from commissioning the MOX plant, and the United Kingdom proceeded to put the plant into operation. The period of time that was then anticipated to elapse before the Annex VII Tribunal was constituted was regarded as short. Greater delay occurred, and now further delay arises. This very fact of delay, together with the fact that liquid and aerial discharges are inevitably being produced during this period of delay gives this application a particular urgency and a context that is exceptional.

In the evidence before you, Ireland has made a strong case as to the effect of the discharges. There is substantively more evidence on effects and consequences before this Tribunal than there was before ITLOS (I refer to the evidence, for instance, of Dr Carmel Mothersill and Dr Brit Salbu). We have also emphasised to you the fact that the United Kingdom intends to continue the MOX plant discharges for up to 20 years. We have also emphasised the linkage between the operation of the MOX plant and THORP and have pointed out that there will be additional discharges from THORP as a result of the MOX plant operations. Whilst the United Kingdom defended the general case in these areas, it is submitted that for the purpose of the application Ireland has established a clear and substantial case. It has raised serious issues to be tried and addressed the prejudice that arises. Moreover, the jurisdiction of this Tribunal is different in its nature and extent than the jurisdiction exercised by ITLOS and is not subject to the same constraints.

In order to preserve the rights of Ireland under UNCLOS, this Tribunal ought to make further provisional orders between now and the ultimate hearing.

The Tribunal will be aware that the ITLOS Order contained provisions directing the parties to engage in co-operation. Ireland is unhappy with the outcome of that prescription which was framed in general terms. In the view of Ireland, the United Kingdom has not fully complied with that provision and that has been the effect of some of its conduct. For that and other reasons, we submit that this Tribunal should, when making its order in relation to further preliminary measures, be as specific as possible. A strong and specific order would, hopefully, reduce the scope for the United Kingdom to strategically conduct cooperation procedures in a manner that would defeat Ireland's and UNCLOS'□s aims. One must also be mindful of the characterisation of BNFL's safety record as being lamentable, as noted by Judge Székely in a trenchant and, indeed, if I may say so, fascinating judgment in ITLOS, when, sirs, as you come to determine the nature and extent of provisional measures.

The values of UNCLOS - cooperation, assessment of effects, prevention of pollution of the marine environment - must be upheld. They may not be suspended. While the hearing may be suspended, UNCLOS has not been suspended. Those values so eloquently set out in the Preamble to UNCLOS must, nevertheless, regulate the relationship between the States Parties. In the absence of further provisional measures, the United Kingdom will continue to release toxic pollutants - namely radionuclides - into a shared marine environment. The half life of these elements is so large that they will remain pollutants for tens of thousands of years. They will add to an existing store of plutonium and other noxious radionuclides. They cannot subsequently be removed from the environment. Their harm cannot be undone. It is irreversible. Money does not compensate for this harm.

One is not in a situation of transient damage, but rather of damage that in the context of man's life span is almost equivalent to damage for all time. Ireland does not understand how the United Kingdom can stand before this Tribunal and accept that it is causing this type of a permanent situation in the Irish Sea and yet be so relentless in its determination to continue with it. In these circumstances, the marine environment requires protection. Where can that protection be found? It can be found in the provisions of UNCLOS which has, as already stated, as one of its primary goals the protection of the world's oceans and seas. As also stated, you, sirs, as an Annex VII Tribunal, are called on to apply the UNCLOS provisions that in this case protect the Irish Sea.

Sirs, we did not precipitously rush to this Tribunal at 9.45 am on Monday with our application for further Provisional Measures. We wished to consider it carefully and present it in measured and appropriate terms. These terms, we believe, will provide the minimum protection which Ireland can reasonably expect from UNCLOS during the period of this suspension. These are terms which at the same time, we believe, can be complied with by the United Kingdom without any irreparable damage.

Sirs, I am sure that you are aware of the correspondence that has been exchanged furiously yesterday and, I think, in fairness and I suppose that it is a tribute to Mr Wood, at 11.30 pm on Friday night, but what is instructive about that correspondence is the degree to which it demonstrates a gap of appreciation of what the problem is and the very fact of the absence of consensus on interlocutory or Provisional Measures demonstrates one of the problems that we perceive with the previous order made by ITLOS.

It is, in our view, clear from the letters exchanged between Ireland and the United Kingdom over the last few days and the absence of consensus between the parties as to the way forward that both Ireland and the United Kingdom will benefit from orders from the Tribunal that prescribe, with certainty, the conduct required to ensure that the parties are aware of the extent of, for instance, the duty of cooperation. Clear and precise obligations will assist both States in complying with the Tribunal's orders and avoid misunderstandings or misinterpretations that will only guarantee further applications to the Tribunal.

You will see from our request that we seek to control discharges - with a view to preventing harm. You will note from paragraph A.1 that the Tribunal is requested to prevent MOX plant liquid discharges from the present time. There re some interesting facts that I now wish to adumbrate in this opening. It appears from the United Kingdom's Counter Memorial Volume VI, annex 32 Communication from BNFL to Ian Parker of the Environment Agency dated January 1997, that in 1997 it was estimated that the quantity of MOX plant liquid discharges per annum would be in the region of 107 cubic metres of liquid. This letter also stated that there would be some additional liquid discharges to the foul drain from toilets, washbasins and showers.

Trying to put this in practical context, having regard to the period of the suspension or the likely period of suspension, I then go on to observe that Ireland understands that these amounts represent the approximate quantity that could be held by three to four petrol tankers. If, as the United Kingdom suggests in the strongest possible terms throughout its case, that MOX plant discharges are absolutely harmless to man and the environment generally, then there is no reason why the United Kingdom should not be required to store this liquid waste on land in suitable containers or tankers of the type mentioned until these proceedings are ultimately heard. Accordingly, as its primary relief, Ireland asks the Tribunal to make an Order for Provisional Measures in the terms of A.1. If the United Kingdom objects to such an Order, it will be clear that the liquid discharges must be considerably more dangerous than has been represented by the United Kingdom in its submissions to date.

I now propose to bring you by way of overview through the remaining relief claimed. All the reliefs claimed will be addressed in detail, today by my colleague, Professor Lowe, and tomorrow morning by Professor Sands. In fact, Professor Sands may very well start this afternoon.

What I propose to do very briefly at this stage is to take you through the request for Provisional Measures. With your permission, I propose to go straight to page 2 where I set out the nature of the Provisional Measures which have been sought. At paragraph 9 of the Request for Further Provisional Measures of 16th June 2003, we deal with these measures in the context of different headings.

A) Discharges.

(i) The United Kingdom shall ensure that there are no liquid waste discharges from the MOX plant at Sellafield into the Irish Sea. And that is what I have just dealt with at the end of the general opening.

(ii) The United Kingdom shall ensure that annual aerial waste discharges of radionuclides from MOX, and annual aerial and liquid waste discharges of radionuclides from THORP, do not exceed 2002

levels.

B) Cooperation.

Note the following is on a confidential basis. By that I mean that any information that we receive on the basis of relief that we are seeking in this section will be treated in a confidential manner by Ireland.

(i)In the event of any proposal for additional reprocessing a THORP or manufacturing of MOX (by reference to existing binding contractual commitments), the United Kingdom will notify Ireland, provide Ireland with full information in relation to the proposal and consult with, and consider and respond to issues raised by, Ireland.

(ii) The United Kingdom will inform the Irish Government as soon as possible the precise date and time at which it is expected that any vessel carrying radioactive substances to and from the MOX or THORP plant or to a storage facility with the possibility of subsequent reprocessing or manufacture in THORP or MOX will arrive within Ireland's pollution response zone, SAR zone or within the Irish Sea, and shall inform Ireland on a daily basis as to the intended route and progress of such vessel.

(iii) The United Kingdom shall ensure that Ireland is promptly provided with

(a) monthly information as to the quantity (in becquerels) of specific radionuclide discharges in the form of liquid and aerial waste discharges arising from the MOX plant and separately from the THORP Plant, and the flow sheets relating to environmental discharges, liquid and aerial, referred to in paragraphs 118 and 124 of Mr Clark's first statement;

(b) monthly information as to the volume of wastes in the HAST tanks and the volume vitrified during the previous months.

I am sure, sirs, you are aware that what happens to the material stored in the HAST tanks is that it is, through another process, vitrified. It is a safer method of retaining the product.

(c) All research studies carried out are funded in whole or in part by or on behalf of the United Kingdom Government or any of its agencies or BNFL into the effect of liquid or aerial discharges, from the MOX or THORP plant, upon the Irish Sea, its environment or biota.

(d) Full details of any reportable accidents or incidents at the MOX or THORP plant or associated facilities, that will be the subject of a report to the United Kingdom's Health and Safety Executive (or any other public body with responsibility for health and safety at the Sellafield site).

(e) Access to, and the right of a facility to make a copy of Continued Operations Safety Reports (including the probabilistic Risk Assessments) and associated documents related to the Sellafield site.

(f) The results of reappraisals since 11th September 2001 of the risks to the MOX Plant and THORP Plant and associated facilities such as THE HAST tanks, and of the measures taken to counter any change since 11 September 2001 in the level of the perceived threat.

(iv) The United Kingdom shall cooperate and coordinate with Ireland in respect of emergency planning and preparedness in respect of risks arising out of reprocessing, MOX fuel manufacture and storage of radioactive materials, including providing Ireland with such information as is necessary to take appropriate response measures.

(v) The United Kingdom shall cooperate with Ireland in arranging trilateral liaison between the Irish Coastguard, BNFL/PNTL (PMTL is the ships) and the United Kingdom's Maritime and Coastguard Agency in respect of all shipments of radioactive materials to or from MOX and/or THORP Plant.

C) Assessment.

The United Kingdom shall ensure that no steps or decisions are taken or implemented which might preclude full effect being given to the results of any environmental assessment which the Tribunal may order to be carried out in accordance with Article 206 of UNCLOS in respect of the MOX plant and/or THORP.

Just pause there for a moment because that is a relief upon which the United Kingdom has commented in terms of it not being clear. I think that they have to some extent a reasonable point to make that, when one looks at the way in which it is worded, it is not necessarily instantly clear what it is that Ireland is driving at. We thought that we may have flagged it in one item of correspondence, but I will try to elucidate what it is that is at the heart of that requirement. It is this. Our concern is that, should this Tribunal, when it ultimately decides the case on the merits, direct, for instance, a further Article 206 environmental assessment, it may well be that, as a consequence of that, and perhaps in addition, technologies in relation to abatement, that the consequence of a further environmental assessment directed under Article 206 would be that additional facilities would be required to be installed, for instance, additional scrubbers may have to be added in in relation to the THORP or the MOX plant, for instance. What we are concerned about practically is that no steps would be taken on site, such as, for instance, by building an extension or constructing a new plant, that by virtue of its physical presence at a particular location on site would then preclude, for instance, the scrubber then being installed. What we are seeking to achieve is a situation whereby no irretrievable physical steps would be taken on site that would prevent meaningful effect being given to a subsequent environmental assessment. In other words, we do not want a building to be put up, the effect of which may very well be to prevent subsequent changes in methodology or subsequent alterations required in light of the assessment.

To some extent, it is difficult to be over prescriptive in terms of what can or cannot be done. Presumably, the United Kingdom, if subject to such an order, would certainly make contact with Ireland to indicate any future intentions that it may have that could touch upon the consequences and results arising from an Article 206 environmental assessment. That is to what that is directed, that nothing will change on the ground that would preempt any subsequent alterations as a result of the environmental assessment.

D) Other relief.

Further and other relief (ii) liberty to apply. By that phrase "liberty to apply", we mean that, if there are changes in circumstances between now and either the adjourned date or beyond that, the date on which the substantive hearing resumes, that Ireland, in those circumstances, would be able to come back to look for further relief. It is simply to clarify that this application is not the end of the road in terms of Provisional Measures. We reserve the right to come back if the circumstances alter after this

hearing. At this stage it would be conjecture on my part as to what circumstances could change, but we merely want to keep that option open. We are not saying that we will be back. We are simply flagging it as a legal route that may be available subject to changed circumstances.

I go on then to conclude. In support of its claim for Provisional Measures, Ireland relies upon the pleadings submission and pleadings already exchanged in this arbitration and the evidence therein contained. Ireland would also advance oral submission on the basis of the said pleadings, submissions, proceedings in evidence. The claims made by Ireland pursuant to its application are without prejudice to the substantive claims and reliefs made and sought by Ireland in the hearings which presently stand suspended. Again, I emphasise the import of that particular paragraph. While we are looking for reliefs at this stage, those reliefs are tailored to the nature of the application, ie that it is a Provisional Measures application. That is not to be taken in any way as a waiver of our claims in the substantive proceedings where the relief that we seek is more substantive and permanent in its effect. I suppose that it is what lawyers would like to call a rider protecting our position and making it clear that we are not waiving any other rights. I am sure that that is not going to be in controversy. I think that it is implicit in the nature of the exercise.

If I can, first of all, thank you for making yourselves available to hear this important aspect of Ireland's application. This application has arisen in terms of a accumulation of circumstances in terms of the issue of competence and it is circumstances that preceded the hearing commencing last week and has created a legal quandary which, sirs, you have dealt with in the way outlined in your judgment. Hence, the necessity for this application.

I am grateful to you, sirs, for making yourselves available to hear this application.

I now propose to invite Professor Vaughan Lowe and after that Professor Sands to make the substantial application. They will be making the application on behalf of Ireland. Thank you, sirs.

PROFESSOR LOWE: Thank you, Mr President, Members of the Tribunal. As the Attorney said, Ireland is making this application in response to the invitation issued by the Tribunal and it is seeking Provisional Measures for the preservation of its rights, which fall into three categories: environmental assessments, cooperation under UNCLOS, and the prevention of pollution under UNCLOS; and also for the distinct purpose now of safeguarding the integrity and the efficacy of the UNCLOS dispute settlement system. The tasks that I have this morning are to explain which rights precisely Ireland is invoking in this context, to explain why it is important that they be safeguarded and why Ireland thinks that those rights are in jeopardy, and to explain the precise nature of the problems that have impelled Ireland to seek Provisional Measures, so that the Provisional Measures could be drafted by this Tribunal in a way that is of the greatest assistance to both parties to the dispute.

At some points there will be confidential matters that I have to deal with, Mr President, and with your permission I will take those out and deal with them all at the end, for the convenience of everyone else in the room.

The Attorney has taken you through the Request for Provisional Measures and you will see that it falls into three main substantive blocks. First, block A deals with questions of discharges. That is

essentially an application for holding measures, measures that seek to preserve the status quo pending the delivery of the final judgment. Professor Sands will deal with that tomorrow.

The second block of measures, under B, deal with co-operation, and they are distinct from the holding measures in that what Ireland is actually seeking there is, in essence, simply the enforcement of existing Convention duties. It is not asking the Tribunal to go beyond what the Convention already obliges the United Kingdom to do. What it is asking the Tribunal to do is to spell out precisely the implications of those obligations which still exist under UNCLOS, because our basic problem is that there is a wide gap between the understanding of the United Kingdom and of Ireland as to what is required by those provisions, and there are present matters on which co-operation is necessary and will continue to be necessary before this dispute is finally resolved. I shall take you through those matters later on.

The third block deals with assessment and that, too, is a matter with which Mr Sands will deal later. The request for other relief, perhaps, calls for some explanation. Ireland has, as you will see, put in what is a modest statement of the Order that it wishes to have in terms of the actual prescribed measures. But since our major problem is over the manner in which co-operation is conducted, we consider that it would be very helpful if the Tribunal were able, in delivering its Order, to set out what it understands the principles of co-operation to be, and to give some guidance to the parties on how they should conduct relations between them. That kind of guidance does not really sit appropriately in the form of an Order at the end of the depositif or something of this kind, and in that sense it is a form of further relief or further assistance that we hope the Tribunal can give us in drafting this next step.

We have, of course, provisional measures currently in force under the ITLOS 3 December 2001 Order, but those are no longer adequate, for three reasons. First, as the Attorney said, those were prescribed in the expectation that this dispute would be swiftly resolved by an Annex VII tribunal. That was eighteen months ago, and now Ireland faces an even longer delay, out of its control, to allow the clarification of questions of community competence. While the ITLOS measures that were sought were a short term holding measure, the measures that we now seek are likely to form the basis of relations between the parties in the area covered by the dispute for some time to come.

The second reason that we have come back is that the December 2001 measures have not worked satisfactorily. The United Kingdom and Ireland seem to have very different conceptions of what is required by an order to co-operate. Indeed, as I said, much of our concern is not to have the Tribunal impose any new obligations on the United Kingdom but simply to spell out what its existing obligations are.

The third change, as the Attorney has also said, is that ITLOS had before it the benefit of only some half an hour or so of discussion which touched on scientific issues very briefly and very, very little in the way of supporting evidence. This Tribunal now has a much fuller scientific record and basis on which it can make its judgment.

But the key problem, in our submission, before the Tribunal is this: how can the Tribunal safeguard the rights of the respective parties in the face of a dispute as to what those rights actually are

and what those rights actually involve. To answer that question properly, it is going to be necessary for me to explain precisely what Ireland understands the scope of its rights to be as a matter of law, and how Ireland and the United Kingdom have differed in the past as to what those obligations entail.

Let me say a few words about the context of this application. Last Friday you determined, sir, that the Tribunal had prima facie jurisdiction and decided to suspend further hearings in the case on the ground that, as you put it, "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."

While neither party in these proceedings sought their suspension, we do appreciate that this Tribunal has taken (and rightly taken) a bold step to assist the parties in handling the dispute, and also in order to try to develop a proper relationship between the international institutions that now have competence in this area.

The elementary provisions governing the prescription of provisional measures were, of course, developed in the context of a single tribunal where that tribunal had control over its own timetable and would make provisional measures in order to preserve the rights of the parties while it proceeded about its business. UNCLOS Article 290, on which your jurisdiction is based, recognises that and provides for the provision of measures to safeguard the rights of the parties, and also adds to it a provision which deals with the problem of locus standi in relation to the pollution of the high seas and so on by saying that there is a right for this Tribunal to prescribe measures which are necessary to prevent serious harm to the marine environment.

So my point is that ordinarily a tribunal would be prescribing provisional measures pending its own decisive ruling on the merits, but here that is not quite the position - although it is of course common ground between the parties that a ruling from the European Court is a possibility, not a certainty, and this Tribunal may itself have to decide this issue under its competence-competence at some point.

The basic position that we start from is more or less the same; it is the same to the extent that provisional measures have to be awarded here on the basis of a prima facie jurisdiction, and it is the same in the sense that this Tribunal may itself become the only Tribunal that is involved in this process.

But there is an additional factor. Where the delay in an UNCLOS Tribunal arises from a suspension of proceedings to await developments in some other Tribunal, over which UNCLOS Tribunals have no control, there is a real difficulty in holding together the integrity of the UNCLOS dispute settlement system. Now, that dispute settlement system is not bolted on to UNCLOS, it is not like the dispute settlement provisions that there were under the 1958 Conventions on the Law of the Sea: it is an integral part of the way that UNCLOS works and an integral part of the mechanism, and it is necessary that that mechanism: should work so that the system does not fall apart, it neither falls apart by bits of dispute being broken off and sent to various Tribunals scattered around the worlds, nor does it fall

apart by Tribunal after Tribunal entering some sort of holding pattern like aircraft over an airport waiting for the runway to clear so that they can eventually come in and deliver a ruling.

For that reason, Ireland submits that it is necessary for this Tribunal, in drafting its provisional measures, also to take account of what is necessary in order to make UNCLOS dispute settlement procedures work. That, in our submission, means that the provisional measures have to provide a solid basis for the implementation by the parties of their UNCLOS duties during the period before this Tribunal is able to render its final judgment. Even by December this year it is going to be two years since Ireland sought, as a matter of urgency, provisional measures from ITLOS, and this Tribunal plainly needs to consider how to avoid a situation in which any resistance by the United Kingdom to an order leads, in effect, to a suspension of the UNCLOS provisions whose application is in dispute between the parties.

Having made that point about the rather broader context than is normal for provisional measures I should say that Ireland is content to proceed at this stage on the basis of well-established principles governing the award of provisional measures. It is accepted that the essential aim is to preserve the respective rights of both parties and that measures cannot be ordered if they would, in effect, irreversibly determine the dispute in favour of one or other party; and it is accepted that the Tribunal may also indicate measures ~~proprio motu~~ and that it is not held within the bounds of what the parties might request; and it accepts too that there is at least a presumption against the prescription of provisional measures in any circumstance where monetary damages might be an appropriate remedy. And Ireland's application for provisional measures falls squarely both within those principles and within the case as it was set out and pleaded in its written pleadings.

Let me turn now to focus upon what it is that Ireland is after ultimately in this case and the aim that it has in trying to uphold its rights under UNCLOS: Ireland's claims on the merits relate both to deliberate pollution and to accidental pollution of the Irish Sea. First, Ireland says that the United Kingdom should not be deliberately pouring radioactive waste into the Irish Sea. That claim has a number of components, We say that the United Kingdom has not engaged in the assessment of the impact of its activities that is required by UNCLOS; that it has not required BNFL to employ the technology and waste management processes required by UNCLOS, and so on; and those pleadings are set out in our Memorial.

But, at the end of the day, the point is simple. The United Kingdom is deliberately using the Irish Sea as a receptacle for the radioactive waste that it chooses not to deal with in some other, perhaps more expensive, way: it is using the Irish Sea as a waste dump and Ireland says that it has no right to do so. The United Kingdom does not own the Irish Sea and it is not the only state that has rights and interests in it.

That point obviously addresses a real and actual breach of UNCLOS. In 2001 Ireland sought from the ITLOS, as a matter of urgency, provisional measures which would have suspended the commissioning of the MOX plant. It maintained then that the United Kingdom had no right to put the plant into operation before it had completed the processes, or at least before the Tribunal had ruled upon

its obligations in relation to the commissioning of the MOX plant. If this Tribunal's final award upholds Ireland's claim, then the plant will have been in operation since December 2001 unlawfully and the discharges resulting from it which have gone into the Irish Sea will themselves have been unlawful. That pollution is occurring now and the United Kingdom intends to carry on polluting the Irish Sea; indeed, it intends to increase the amount of pollution that is put into the Irish Sea.

Secondly, Ireland's claim relates also to the risk of unintended radioactive pollution of the Irish Sea on a potentially massive scale, dwarfing even the Chernobyl incident. That might arise from an accident at, or a deliberate attack upon, either the facilities at Sellafield - in particular the storage tanks in which the waste from THORP is kept - or upon the ships which are carrying the radioactive material to or from Sellafield. Ireland accepts, of course, that we are concerned here only with the shipments that concern the operation of the MOX and THORP plants.

In a sense, that point addresses what we might regard as a potential cause of pollution. But Ireland's case is that it also addresses a real and actual and present obligation under UNCLOS which is really and actually and presently being breached, and that is why we want the provisional measures on co-operation.

UNCLOS is concerned to avert marine pollution as far as possible, and with that aim it stipulates a range of obligations of assessment, of notification, of co-operation and of co-ordination, obligations which we have wrapped up in our submissions under the general heading of "co-operation". They are designed not only to ensure that the state whose activities are potentially the cause of pollution puts its own house in order and organises its activities in accordance with UNCLOS obligations, but also to enable other states which may be affected by the consequences of those activities to put their house in order and to adopt whatever precautionary, preventive measures they consider to be necessary in order to safeguard their interests. Those obligations require that other states be given the information and afforded the co-operation which is necessary for them to decide what measures they should take in order to make proper provision to safeguard their rights and interests.

If Ireland's submissions on this point are upheld on the merits ultimately, the Tribunal will also be finding, in our submission, that the United Kingdom has been failing to fulfil that continuing obligation to co-operate with Ireland and has thus disabled Ireland from planning its own response to the pollution and potential pollution arising from the MOX and THORP plants.

So the provisional measures that we are now seeking are directed at ensuring that Ireland suffers no irreversible injury and no irreversible deprivation of its rights during whatever period might elapse before this Tribunal finds itself in a position where it is able to determine the merits of the case.

As I said earlier, the measures fall into two broad blocks: those which are concerned with pollution of the Irish Sea primarily, under the heading of Discharges and Assessment (which to some extent overlap with the measures on co-operation) :Mr Sands will deal with those later. I shall deal with the questions of co-operation now.

In relation to co-operation, the main points of our submission are these. First, that there are duties of co-operation under UNCLOS that are part of an integrated and coherent convention structure

that is itself intended to minimise the risk of pollution.

Second, that there is a continuing duty under UNCLOS to co-operate; that it is an obligation of conduct and not an obligation of result.

Third, that the risk of pollution that we are facing in this case is one that is, for all practical purposes, wholly irreversible, certainly not compensable by any award of monetary damages.

Fourth, that for as long as the risk is unnecessarily increased by the failure to co-operate, that position of increased exposure to risk, disabling of Ireland from being able to plan its precautionary measures, is itself irreversible.

Fifth, that the United Kingdom can co-operate in accordance with its oblations under UNCLOS and that it can do so without any significant financial cost or even inconvenience to itself.

Sixth, that the United Kingdom can co-operate in accordance with its obligations under UNCLOS without any, or without any significant, risk to its own security or to its interests in commercial confidentiality.

The first of those points, the point that the duties with which we are concerned are part of this integrated system under UNCLOS which is designed to ensure the minimisation of the risk of marine pollution, is the point which most clearly goes not merely to the respective rights of the parties but also to the question of the integrity and the efficacy of UNCLOS as a Convention; and I have no doubt that all other states parties to UNCLOS will be watching very attentively the proceedings of this Tribunal to see how Part VX may be expected to operate in future in the face of what is, doubtless, a whole array of jurisdictional and other problems which will arise, given the multiplicity of Tribunals that exist.

For that reason, it may be helpful for me to begin by explaining a little more clearly what Ireland understands by this UNCLOS system and the implications that it has for the way in which this Tribunal might go about its work. Having done that, I shall then go on to explain what Ireland submits is the exact scope of its rights to co-operation and co-ordination under UNCLOS. It may seem inconceivable that the United Kingdom would seek to resist any order that directs it to be co-operative; but the problem, as I have said, is that Ireland and the United Kingdom do have different conceptions of what that actually requires in practice, and our purpose here this morning is the entirely practical purpose of trying to pin down precisely what we have a right to expect the United Kingdom to do by way of co-operation and what the United Kingdom is obliged to provide by way of co-operation. It may be that in some respects you tell us that we expect too much, in which case we will know and we will go away and conduct our relations accordingly. It may be that you will tell the United Kingdom that matters that in the past it has regarded itself as under no obligation to share with Ireland it is under an obligation to share with Ireland, and it too can then go away and adjust its relations with Ireland on that basis. It is this practical assistance that we are looking for.

I shall close my submissions by drawing the threads of these points together, by summarising our main concerns and by identifying the kind of principles which we submit must operate as between states parties to UNCLOS. Let me begin by addressing the function of the UNCLOS provisions on co-operation and co-ordination and thereby, I hope, putting in clear focus the nature of ireland's rights to co-

operation and co-ordination under UNCLOS.

SIR ARTHUR WATTS: I am sorry to interrupt, but perhaps this is a convenient moment, just before you start a new section, to ask a question or, rather, put a point to you. You are talking a lot about the United Kingdom's obligations to co-operate and Ireland's rights in this matter, but of course you will recall from the Tribunal's decision which it made known last week that one of the very questions on which there is some uncertainty and may only be resolved by the European Court of Justice is the very question of who has the rights and who has the obligations which arise under UNCLOS. I can understand the way in which you are presenting your argument, but of course the answer which this Tribunal must give to Ireland's requests must be consistent with that degree of uncertainty which the Tribunal itself has acknowledged. I do not know whether you would wish to comment on that now, or whether you would simply wish to bear it in mind as you are going through your exposition if what UNCLOS requires in the way of rights and obligations to co-operate.

PROFESSOR LOWE: Thank you, sir, I will deal with it now because it is one of the very points that we are trying to make. Our concern here is practical. I entirely take the point that you are making, but in our submission the point that you are making is, in a sense, a linguistic one. You are making the point, quite rightly, that it is not clear whether the rights to enforce these obligations, the competence to bring this action, rests with Ireland, whether the obligation to discharge these duties rests with the United Kingdom as a matter of law. But as a matter of fact, the actual actions that have to be taken to preserve the marine environment have to be taken by the United Kingdom and it does not matter whether it is the European Community that tells them that or whether it is Ireland or this Tribunal that tells them that. As the Attorney said earlier on, the provisions of UNCLOS cannot be suspended while this jurisdictional issue is sorted out. The provisions of UNCLOS which secure the protection of the marine environment have to be made to prevail in some way. We cannot simply say the United Kingdom is released from its obligations to safeguard the marine environment and, apparently, from all other obligations under UNCLOS while this issue is in the air. So our submission is that what we are seeking is an appropriately phrased measure which takes account of the jurisdictional problem but which recognises that the actual implementation of the obligations rests with the two parties that you have before you at the moment. It is we who will implement whatever rights and duties attach to whatever entity under UNCLOS, and in real world terms that is an issue that simply has to be dealt with.

SIR ARTHUR WATTS: Thank you. If I could just add to that, is it then your position that you acknowledge that of the two grounds on which provisional measures may be granted under Article 290, paragraph I, preservation of the respective rights of the parties and protection of the marine environment, it is really the latter which has to be at the heart of any measures that may be prescribed by this Tribunal since the former, preserving the respective rights of the parties, is somewhat in abeyance because of the decision which the Tribunal took last week?

PROFESSOR LOWE: No, I would not accept that, sir, and I would not accept it because it may well be at the end of the day - and in Ireland's submission it is - that when the matter is resolved the rights will turn out to be Ireland's rights, and if the Order does not take account of that and deprives Ireland of any ability to

rely on them in the interim period, our submission is that that deprivation is irreversible. And so we would locate it under both heads of Article 290: the safeguarding of the marine environment and the preservation of the respective rights of the parties.

Indeed, I would add the third submission that because of the situation in which this Tribunal finds itself, our submission would be that this Tribunal has an inherent right to order provisional measures and that it is entirely proper that it should take account of the need to preserve the UNCLOS system in some way. If the jurisdictional problems lead to the kind of conundrum that you outlined, where there may be, in juridical terms at least if not in practical terms, a suspension of the rights of various UNCLOS parties because of some doubt as to their competence under another Treaty, then we would submit that this Tribunal should take account of that and adopt provisional measures which overcome that problem in a practical way and which ensure that the purposes of UNCLOS are not undermined or suspended during the pendency of that question.

SIR ARTHUR WATTS: Thank you very much.

PROFESSOR CRAWFORD: Of course, in a sense, to talk about the respective rights of the parties as Article 291, paragraph 1 does is proleptic. By definition, in ordering provisional measures the Tribunal has not yet decided definitively what the rights are or whether they exist, so what a Tribunal in a provisional measures phase does, does not necessarily track - in fact, it probably ought not to track the final decision. It is a decision of a holding character to ensure that, if the rights of either party may be prejudiced in whatever may be the period concerned, the period now having been somewhat extended, those putative rights may be protected. In that sense, perhaps it is not quite right to say that the what the Tribunal is doing now is upholding the content of the substantive obligations of cooperation which exist under UNCLOS. It may be that the Tribunal is being guided by those obligations in working out what appropriate provisional measures are. If we form it in those terms, we avoid the apparent conundrum, in the context of provisional measures, of deciding on rights whose very existence is denied by the respondent.

PROFESSOR LOWE: I am obliged to you for that, sir. It is an elegant statement of the way in which we might overcome the juridical problem that might appear there, which will, doubtless, attract the attention of commentators. I was, I must say, simply trying to communicate the fact that what we are actually asking the United Kingdom to do is not anything that it is not already obliged to do under the Convention; but I accept completely your juridical gloss on that.

Let me then move to the question of the manner in which UNCLOS provisions on cooperation and coordination apply. I do so, as I say, to try to put into some focus Ireland's submissions.

I have already said that the UNCLOS Part XV procedures are not an optional protocol, as the comparable provisions were in 1958. They are not an ancillary obligation that is tagged on to the end of the Convention, grafted on to the substantive provisions in case a State should wish to use them. They are a central element of the UNCLOS regime. They spring from the recognition that there are three main constraints on the ability of States to act effectively to regulate marine pollution. The first is that States cannot act effectively in isolation if marine pollution is to be controlled. The second is that international

treaties, even when States conclude them, cannot effectively regulate every detail of the obligations that need to be imposed in order to safeguard the marine environment. The third is that, even those details that can be prescribed by treaties, have to change as time and technology and science move on and as abatement technology develops. So pollution in general terms has to be addressed within those constraints. The first obviously is addressed by encouraging States to conclude international agreements concerning pollution. The second by setting out the basic framework of rules and then leaving it to States to work out precisely how to deal with the particular circumstances that arise in fact. And the third by pegging some of the basic framework rules to standards such as "best available technology", "best possible means" and so on, thus building in a moving standard, a constantly developing standard, without the need for constant treaty amendment.

UNCLOS follows precisely that pattern. It is an international agreement in which States cooperate in tackling marine pollution. It sets out a basic framework of rules and then leaves it to States to work out precisely how to deal with the particular circumstances that arise in fact; and it pegs some of its basic standards to standards that are set in other instruments, by bodies such as the IMO. That is why, in our submission, Part XII of UNCLOS opens, as it does, in Article 192 and 193 with a clear affirmation of the sovereign rights of States to explore their natural resources sits alongside their duty to protect and preserve the marine environment. Indeed, as you will see, UNCLOS places the duty of protection and preservation of the marine environment in Article 192 before the assertion of the sovereign right of States to exploit their natural resources. Part XII then goes on by setting out the basic statement of the obligation of States regarding marine pollution. It does not do so in any detail. It does not say "you may discharge so many tonnes of oil" or "so many becquerels of radiation into the sea". It acknowledges, in effect, two facts. One, that the UN Conference could not possibly legislate and negotiate down to that level of detail, particularly as different sea areas have different characteristics. Secondly, that there are, in any event, other international bodies, such as the IMO, who are working at that degree of detail.

UNCLOS is not silent on the question of marine pollution, but the obligations that it lays down have a solid practical relationship with the pre-existing and continuing body of international regulations regarding marine pollution. UNCLOS sets out the basic principles, protect and preserve the marine environment in Article 192; take all measures necessary to prevent, reduce and control pollution (Article 194) and so on, knowing that this detailed matter is in the background. We referred last week to the helpful statement in the IMO document that Mr Bethlehem produced, which is in the UK folder at tab 12, where the IMO itself makes plain this relationship between the detailed rules and the UNCLOS framework.

UNCLOS Part XII starts by setting out these basic rules and then in section 2, it moves on to deal with the prerequisites for the effective fulfilment of these obligations. It does so by laying out the fundamental duties concerning international cooperation. That you will find in Articles 197 to 201, about which I will say more in a few moments.

It is easy to become so fixated on a text like UNCLOS that you read what it says and you do not

read what it does not say. You do not notice what is not there. UNCLOS could have moved on at this point to stipulate that, if pollution is caused, then the polluting State must be responsible for cleaning it up and for paying the costs of doing so. But UNCLOS does not adopt that approach. It does not take the view that marine pollution is something to be dealt with by imposing the risk and the responsibility for cleaning it up on the State that causes it. UNCLOS seeks to prevent pollution and not to establish a regime for cleaning it up afterwards. It is that aim of preventing pollution which we say is being jeopardised by the United Kingdom's failure to cooperate in this case.

UNCLOS achieves this purpose in a very carefully structured set of obligations. Part XII section 3 is concerned with technical assistance. That has the aim of equipping all States, no matter how developed they might be, how technologically scientifically advanced, to carry out their obligations to protect and preserve the marine environment. Section 4 then proceeds to ensure that States are forewarned of environmental risks by imposing duties of monitoring and environmental assessment. As one would expect, those assessments are to be shared with other States. That is the whole point of the cooperative regime. It enables States to anticipate marine pollution and to coordinate their policies and the measures that they take accordingly. Section 5 of Part XII then goes on to stipulate in broad terms what laws and regulations must be enacted and implemented by States and what measures must be taken in order to prevent, reduce and control pollution. Section 6 then goes on to deal with the enforcement of laws and regulations. The remaining sections set out various ancillary matters such as the mode in which enforcement is to take place, questions of sovereign immunity and so on.

The crucial point that Ireland is submitting is that this structure is built on the premise that the aim is to prevent pollution, and the aim is to be achieved by States cooperating and coordinating the measures that they take with that end in view.

It imposes a basic obligation upon States and it then requires them to take over the responsibility for taking all the precautions that are necessary in order to prevent marine pollution.

There is in the wording of chapter 17 of Agenda 21 at paragraph 17.115 - you will find it in Annex 82 of the Memorial, but since there is only about ten words there, I shall simply read it out - a statement that the “role of international cooperation is to support and supplement national efforts”. That is a very perceptive and important statement. What it is saying is that the duties of cooperation and coordination under UNCLOS are not additional burdens that are imposed upon State Parties: they are simply the only way that the State can actively pursue its own interests in preventing marine pollution. It is not that we are trying to force the United Kingdom to do something against its interests. We are simply trying to press through with the logic of the UNCLOS system, which makes coordination the way in which these aims are achieved.

The practical significance of that will become apparent shortly when I turn to some concrete examples. It is true, I suppose, that assessments and preventive measures and cooperation might be said not to be ends in themselves, but simply means to the achievement of the primary aim of protecting and preserving the marine environment. In one way that is what I have been arguing. But our submission is that there is very important limitation on that logic. The limitation is this. It is that States are not entitled

under UNCLOS to choose to disregard their obligations to cooperate and coordinate. They have no legal right under UNCLOS to take the view that they are willing to assume the risk that pollution might result. In our submission, a State is not entitled to do that. It is not entitled to say, "We regard the risks as being so minimal that we need not be troubled to cooperate. We regard the measures that we have taken to safeguard and prevent these risks as being so faultless that we are under no obligation to discuss them, to consult with other States that are interested in the adverse consequences that might result if they were to go wrong". In our view, States cannot do this. They cannot buy their way out of procedural obligations by undertaking to pay the costs of pollution and of cleaning up pollution if it results. The obligations are there and they cannot be avoided in that way. This point is of absolutely fundamental importance. It is of an importance that goes way beyond the limits of UNCLOS itself. As the Tribunal will know perfectly well, UNCLOS is by no means the only international convention that rests very heavily on duties of cooperation and consultation. Arms control treaties, treaties on environmental pollution, a whole range of other treaties use this basic system. If it is said to the parties to those treaties that in circumstances where they decide unilaterally that the circumstances are not such as to warrant coordination for which another State Party calls, then the whole logic of that approach to international relations is put in jeopardy.

This is probably the first international Tribunal since the Lac Lanoux Tribunal in which procedural obligations have arisen so squarely for decision. The award in this case, we have no doubt, will be scrutinised with immense attention by parties to all treaties that provide for cooperation and consultation and coordination in order to see what the limits of their obligations are.

We make four submissions. First, that the obligations of cooperation and coordination under UNCLOS must be given some real meaning, some real substance. They are not simply diplomatic curlicues added to the end of the Treaty for the sake of an appearance of friendliness and cordiality between the State Parties. They are not empty of meaning. They are a crucial part of the approach of UNCLOS to dealing with marine pollution.

Second, the duties of cooperation are independent of the scale of the risk that is involved. State Parties are not entitled to say, "Well, the risk in this case is fairly small so we will cooperate a little bit. The risk in this case is very big so we will cooperate a lot". Cooperation is cooperation. The scale of the risk goes to the question of what measures are necessary to deal with the risk. How it can be addressed. The duty to cooperate is an absolute one once the risk is established.

Third, that, if the UNCLOS scheme, based as it is on cooperation and coordination, is to have any chance of working satisfactorily, the obligations must be fulfilled. Awards of damages or declaratory judgments are not adequate substitutes for compliance. States have no right to ignore their procedural obligations and to offer subsequent remedies as an alternative.

Fourth, we submit that the order that Ireland is seeking in this case is an order that the United Kingdom is still under an obligation to comply with those UNCLOS provisions on coordination and cooperation pending the final determination of this dispute, even if it does dispute the scope of those matters and even if there is a doubt on the competence of Ireland and the United Kingdom to be bringing

these proceedings in the first place.

The fourth submission is probably the one that gets to the nub of the problem before the Tribunal. What are the parties to be ordered to do? How should the Tribunal safeguard the respective rights of the parties in the face of a dispute as to what those rights actually are? It is plainly not enough that we be ordered to cooperate. We have been under an order to cooperate since we became parties to UNCLOS ...

PROFESSOR CRAWFORD: Before we get to the question of what is the practical content of cooperation, can I take you back to something that you said, which was that these are substantial obligations, which are essential to the way in which UNCLOS is designed and a party cannot, in effect, say, "Well, because this is de minimis, therefore the obligation does not arise". If you look at Article 194, the obligation is to prevent, reduce and control pollution. Is not a party entitled to say, no doubt at its risk, that what we are doing is not pollution? I take your point that, if what they are doing is pollution within the definition of UNCLOS, then it may be that they are not entitled to say, "Well, we are polluting the environment, we are only doing it a little bit and, therefore, we do not have any significant obligation of cooperation", but is there not a threshold question whether the obligation of cooperation is triggered at all?

PROFESSOR LOWE: There are two responses to that, sir. The first is that Ireland has submitted that the deliberate discharge on an industrial scale of radioactive waste into the sea is incontrovertibly, on anyone's definition, within the scope of Article 1(4) of UNCLOS and amounts to pollution. We would answer the case, on that basis at least, simply on the obvious common-sense merits of the case. But there is also another answer to it. That is that the duty to cooperate - and I shall be taking you a little later, after our break, to Article 123 of UNCLOS - is a specific duty to cooperate. The duty is one which, in our submission, does not entitle a State unilaterally to take that view. Cooperation also extends to the appraisal of risk. If a State does take the view that it is minimal, then that will be its position in its negotiations and its discussion with the other State Party: but it cannot simply take that position by dicta and then say to the other party, "You are disentitled from pursuing consultation/negotiation procedures".

PROFESSOR CRAWFORD: You say the obligation of cooperation under Article 123 is more extensive than it is under Article 194.

PROFESSOR LOWE: Yes. I made the point that it was a question for the Tribunal now as to what to order the parties to do and I was starting to adumbrate our submission that it is not enough to order the parties to cooperate. That has been done both in UNCLOS and in the ITLOS Order and there is wide gap between us as to what we understand by that obligation. The United Kingdom has pointed to the many forums that already exist for cooperation, but Ireland takes the position that the contacts and exchanges of information between the United Kingdom and Ireland that have occurred in those forums regarding the development of the MOX plant have simply not met the level of cooperation that is required. It is not a shortage of mechanisms. It is the fact that they are not working properly. Of course, there are many bodies in which information in a certain amount is passed back and forth, often in conditions where it was explicitly said that it is given as a matter of grace and not as a matter of legal obligation. But Ireland considers that it has not been informed and consulted on developments concerning the MOX plant in the

manner that it has the right to expect and which the United Kingdom has an obligation to deliver, and also that Ireland's views and interests regarding activities arising from the MOX development have not been adequately taken into account by the United Kingdom. Similarly, it is not disputed on this side that Ireland has been able to respond to public consultations on nuclear matters organised by the United Kingdom in various rounds of planning applications. Indeed, Ireland has done so: but Ireland's case is that this is not adequate. UNCLOS requires Government-to-Government, State-to-State cooperation between the two States whose interests are engaged - in this case in the Irish Sea, and engaged in discharging their responsibilities regarding the protection of the marine environment. That, in our submission, requires more than that Ireland should queue up with every member of the British public to exercise its entitlement to make a submission in relation to a public inquiry. It requires active Government-to-Government coordination.

We are not yet up to 10.15, sir, but I am about to move on to a consideration of the UNCLOS articles, article by article. It may be that you would prefer to break now, or that you would like me to carry on and break in a few minutes.

THE PRESIDENT: I would like to get to a discrete point.

PROFESSOR LOWE: I think that this is probably a discrete point. Given Professor Crawford's questions about the relationship between Article 123 and the other UNCLOS articles, it may be sensible to break here.

THE PRESIDENT: Very well. Let us break now.

(**Short Adjournment**)

PROFESSOR LOWE: Thank you, President. Mr President, Members of the Tribunal, I was about to start the presentation of Ireland's submissions on the interpretation that Ireland attaches to the relevant provisions of UNCLOS, and it is convenient to start, not least in the light of Professor Crawford's question, with Article 123 of UNCLOS. The Irish Sea is a semi-enclosed body of water which consists entirely of the territorial seas and 200 mile zones of Ireland and the United Kingdom. It is a resource that is shared between Ireland and the United Kingdom and in which other States also have interest. What the United Kingdom, as one of the littoral States in the Irish Sea, does to exploit the capacities of that sea is a matter of very close interest to Ireland as the other littoral State and, as it were, the joint custodian of the Irish Sea.

As a matter of law, the Irish Sea is, indisputably, a semi-enclosed sea within the meaning of UNCLOS Article 122, and that brings it within Part IX of UNCLOS and makes it subject to the particular legal regime that is established for semi-enclosed seas in UNCLOS. The principles of that regime you will see set out in Article 123. There it says that "States bordering an enclosed or semi-enclosed sea should co-operate with each other in the exercise of their rights and in the performance of their duties under this Convention, and to this end they shall endeavour, directly or through appropriate regional organisation, (a) to co-ordinate the management, conservation, exploration and exploitation of the living resources of the sea; (b) to co-ordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment; (c) to co-ordinate their scientific research policies ; and (d) to invite other States as appropriate to co-operate with them in furtherance of

the provisions of the Article."

So Article 123 expressly imposes upon the Coastal States - Ireland and the United Kingdom - duties in respect of co-operation and co-ordination and, though it is not expressly stated in the Article, the States must plainly take into account the special characteristics of the semi-enclosed sea. There would otherwise be no point in having a separate part of the Convention which deals with semi-enclosed seas.

The United Kingdom's rejoinder in paragraph 7.3 accepts that the special characteristics of a semi-enclosed sea, as they put it, "may be relevant to an environmental impact assessment", but Ireland's submission is wider. It is that the characteristics are relevant, not maybe; and that they are relevant to the whole range of matters that are listed in Article 123 and, notably, to the obligations to co-operate with each other in the exercise of their rights and in the performance of their duties under this Convention, and to endeavour to co-ordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment.

PROFESSOR HAFNER: One question, in consequence of the question already raised by Professor Crawford, is it not so that Article 123 requires the existence of rights and duties or obligations which are established elsewhere in the Convention, and insofar does not establish an independent right or obligation, except those of co-operation if some rights and obligations are effective. If that is so, what are the rights and obligations which come here into the game of Article 123 in this context? Are these to be deprived from Part XII of the Convention, or are they other rights?

PROFESSOR LOWE: The rights in question, sir, are the rights under Articles 197, 192, 193, 194, 199 and 207 as far as the submission on this part of Ireland's case is concerned, although Ireland would also argue that there is an independent obligation of co-operation which arises directly under Article 123 itself, and I will explain in a few moments why we say that there is that independent obligation of co-operation.

As far as the special characteristics of the Irish Sea are concerned, those have been set out in Ireland's Memorial and they include the separation of the body of the Irish Sea physically from the main body of North Atlantic waters; the siting of the British nuclear facilities on the shores of the Irish Sea and the piping into it of the effluents from the British nuclear facilities at Sellafield which, as the Attorney has said, have an extremely long half-life; the pattern of water currents in the Irish Sea, including the Irish Sea gyre which tends to concentrate radioactive effluents within the Irish Sea and is quite different from the situation on, for example, an open ocean coast like the coast of West Africa where the oceanic currents can scour any pollutants right away from the coast very quickly; also, the narrowness of the Irish Sea and the proximity of the sea to Ireland's main centres of population and their proximity to the main passages which the nuclear transports take through the Irish Sea en route to Sellafield.

In setting out the provisions and the duties of co-operation and co-ordination, Article 123, in our submission, is really simply acknowledging a fact. It is not really prescribing a different legal rule. I think Charles De Visscher once referred to the International Law of the Continental Shelf as the cheminée through which facts were brought to a legal application that, essentially, the law was itself an

expression of legal fact.

In our view, this all follows from the fact that we have two States gathered around a very small sea and every action taken by one of those States that affects the sea necessarily engages the other, and it is a natural inference from that that there should be co-operation and co-ordination between them.

Not surprisingly, given that practical necessity, there is also substantial evidence supporting the existence of a customary international law duty of co-operation and co-ordination, and in its Memorial Ireland draws attention, in paragraph 8.56 through to 8.92, to some of the State practice that might be cited. I will not take you through that, but I will draw your attention specifically to section 601 of the 1987 Third Restatement of the Foreign Relations Law of the United States, which is significant for two reasons. One, it now goes back some years, fifteen or more years old, and so it is not representing the cutting edge of where State practice has reached; secondly, it was intended to be a statement of a customary law duty and was formulated after extensive consideration and negotiation between those who participated in the drafting over what weight State practice would bear.

Article 601 says, under the heading "State Obligations With Respect to environment of Other States and the Common Environment":

"A State is obligated to take such measures as may be necessary, to the extent practicable under the circumstances, to ensure that activities within its jurisdiction or control … conform to generally accepted international rules and standards for the prevention, reduction and control of injury to the environment of another State, or of areas beyond the limits of national jurisdiction."

It goes on to say in the comment, paragraph E, that under that provision that I have just read to you,

"... a State has an obligation to warn another State promptly of any situation that may cause significant pollution damage in the State."

If I can interject parenthetically, Ireland is, I hope, clear in its submission that radioactive pollution is inherently significant precisely because of its longevity - the fact that it does not dissipate, is not broken down in any way by the sea.

"A State has an obligation to warn another State promptly of any situation that may cause significant pollution damage in the State. A State also has an obligation to consult with another State if a proposed activity within its jurisdiction or control poses a substantial risk of significant injury to the environment of the other State, but it need not permit such consultations to delay the proposed activity unduly."

In the present case, however, Article 123 of UNCLOS on co-operation and co-ordination makes it unnecessary for Ireland to rely on customary international law, although we would submit that if we did need to do so then the Tribunal would be entitled and indeed bound, perhaps, to apply customary law in accordance with UNCLOS Article 293.

PROFESSOR CRAWFORD: Professor Lowe, playing the favouriteinternational lawyer's game of should and shall, do you draw any distinction between the first and second sentences of the chapeau of Article 123, the first sentence saying "should" and the second sentence saying "shall" or is that just a typographical

oddity?

PROFESSOR LOWE: It is very far from being a typographical oddity, sir, and it is a matter which we want to address head-on and which I was, happily, planning to turn to now,

PROFESSOR CRAWFORD: Then ignore my question.

PROFESSOR LOWE: Thank you. The United Kingdom has suggested in paragraph 7.3 of its Rejoinder that, as they put it, both parties agree that Article 123 is hortatory rather than mandatory, and the implication is that Ireland has no enforceable rights under that Article. But that over-simplifies the position in our view. Our submission is that the exhortation in Article 123 does have legal consequences.

First, there is the matter of co-ordination. Article 123 expressly obliges States to endeavour - and this is the "shall" clause in Article 123 - to co-ordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment. Ireland does not say that Article 123 imposes on Coastal States an obligation to achieve co-ordination in every case: there is no legal duty to reach agreement on measures or policies so that the maintenance of unco-ordinated measures or policies would itself be a breach of the Convention. But Article 123 does impose an obligation upon States to try, in good faith, to achieve the co-ordination of their measures and policies, and that we say is a legal obligation and a freestanding legal obligation under Article 123 itself. That is what the Article says, and the necessity for giving it effect can be seen if one asks what would have been the effect if UNCLOS had contained a provision stipulating that States do not have a duty to endeavour to co-ordinate the implementation of their rights and duties with respect to the marine environment. If UNCLOS did say there was no duty then States would be perfectly entitled to refuse to seek co-ordination of their policies with those of neighbouring States and, quite properly, refuse to pass on information to another State that that other State needed in order to co-ordinate its policy with the other. But UNCLOS does not say that States are under no duty. It says specifically the converse, it says that States are under a duty to endeavour to co-ordinate their policies.

To deal with the second limb that Professor Crawford raised, it deals also with co-operation, and it says that States bordering an enclosed or semi-enclosed sea should co-operate with each other in the exercise of their rights and the performance of their duties under the Convention. The duty of co-ordination is itself instrumental to that end.

Here a similar analysis applies. Legally, the position of States cannot be the same as it would be if UNCLOS had said that they were under no obligation, that they need not try to co-operate; but Ireland does accept that "should co-operate" does not mean the same as "shall co-operate" and in that sense it is hortatory rather than obligatory, unlike the duty to endeavour to co-ordinate.

But as we explained in the Memorial, we say that the hortatory provision has legal effect in three ways: the first way is that it influences the interpretation of other UNCLOS Articles, and this goes in part to the point which Professor Hafner raised: it latches on to the provisions in Article 197, 192 and so on, to preserve the marine environment, the duty under 199 to jointly develop and promote contingency plans for responding to pollution incidents in the marine environment; and because it is influencing the interpretation of what are, plainly, themselves legally binding provisions in other

UNCLOS Articles, it has the effect of modifying the application, the expectations in relation to the enforcement of those other Articles.

The analysis that we would put forward is simply this - it is nothing complicated and there is no juridical trick in it - if you ask what a State has to do in order to fulfil its legal duty under 192, to protect and preserve the marine environment, or its legal duty under 199 jointly to develop and promote contingency plans for dealing with pollution, then the substantive action that is necessary for each State is going to vary from case to case. What is necessary for one group of States or one pair of States will not necessarily be the same for another group of States; and in relation to States around a semi-enclosed sea, Article 123 makes plain that the substantive obligations and the way that they fulfil their legal obligations under other UNCLOS Articles has to be looked at in the context of this broad duty of co-operation and consultation. This, in return, requires that regard be had to the nature of the activity giving rise to the obligation to co-operate, to the characteristics of the sea in question and to the impact of that activity on that sea. So States must, accordingly, co-ordinate inter alia their management and pollution policies and take account of the particular characteristics of the sea area in question, when they are taking steps to protect and preserve the marine environment. So, the first point, Article 123, in the rather infelicitous and unhappy phrase, “informs” the interpretation of other UNCLOS Articles - but I can think of no better phrase to describe what it is doing in that context.

But it has effect in two other ways as well. The first is that Article 123 sets out an explicit, declared policy of co-operation and co-ordination. States parties to UNCLOS cannot simply decide to ignore the fact that an UNCLOS Article sets out a deliberate declared policy that there should be co-operation. In the Memorial, Ireland quoted in paragraph 8.31 the words of Professor Cheng, and he said, speaking there of the principle of good faith in international law, "The protection of good faith extends equally to the confidence and reliance that can reasonably be placed not only in agreements but also in communications or other conclusive acts from another State. If State A has knowingly led State B to believe that it will pursue a certain policy, and State B acts upon this belief, as soon as State A decides to change its policy - although it is at perfect liberty to do so - it is under a duty to inform State B of this proposed change. What the principle of good faith protects is the confidence that State B may reasonably place in State A."

Ireland says that this applies equally to Article 123. As far as the United Kingdom is concerned, when it chose to ratify UNCLOS it chose to assume and to sign up to the policy that is set out in Article 123 of co-operation and co-ordination. Ireland is entitled to rely on that. Ireland is entitled to assume that Britain will hold to that policy of co-operation and co-ordination until such time as it announces that it is changing that policy, if indeed it could properly do so in accordance with its UNCLOS obligations; and that, we say, flows from the application to Article 123 of the general customary law principle of good faith.

Our third point on Article 123 is this. It is that Article 123 itself is subject to the duty in UNCLOS Article 300 to fulfil in good faith the obligations assumed under this Convention. It says also that "States shall exercise the rights, jurisdiction and freedoms recognised in this Convention in a manner

which would not constitute an abuse of right." So Ireland submits, thirdly, that whether the obligations are hortatory or legally binding, the United Kingdom is obliged in good faith to fulfil them as far as they go by virtue of UNCLOS Article 300. That obligation under Article 300 operates itself in two distinct ways. It requires States to approach the hortatory duty in good faith, and it requires them to fulfil the legal obligation in Article 123, the "shall endeavour to coordinate", also in good faith. Again, we quoted a second passage from Professor Cheng in paragraph 837 of the Memorial. There we quoted Professor Cheng saying this,

"Good faith in the exercise of rights … means that a State's rights must be exercised in a manner compatible with its various obligations arising either from treaties or from the general law. It follows from this interdependence of rights and obligations that rights must be reasonably exercised. The reasonable and bona fide exercise of a right implies an exercise which is genuinely in pursuit of those interests which the right is destined to protect and which is not calculated to cause any unfair prejudice to the legitimate interests of another State whether those interests be secured by treaty or by general international law."

In sum, Ireland submits that it has rights and the United Kingdom has obligations under Article 123 directly and by virtue of its application to other UNCLOS provisions.

PROFESSOR HAFNER: Since you are coming to an end on the explanation of Article 123, I have one question for clarification. Are the duties under Article 123 triggered only by the existence of a semi-enclosed sea or by the existence of a semi-enclosed sea plus risk, for instance, to the marine environment in the semi-enclosed sea, so that the duty of prevention would come in?

PROFESSOR LOWE: They are triggered by the very existence of a semi-enclosed sea, because that is what Article 123 itself actually says. It says in its first opening sentence that they are obliged to cooperate in the exercise of their rights and duties. It does not tie down the rights and duties to any particular right or duty under the Convention. Indeed, it applies to the whole range of provisions: it is not simply to Part XII of the Convention. When it goes on to spell out the "shall endeavour" provision, it is similarly broad. It refers to the "shall endeavour to coordinate all their rights relating to the living resources of the sea and to the marine environment". Our submission is that it is triggered by the fact of the configuration of the sea and not by the nature of any specific obligation.

PROFESSOR HAFNER: The second sentence is introduced by "to this end", which links this "shall" sentence to the preceding "should" sentence; do the rights and the duties referred to in the first sentence have no particular meaning in this respect or does it mean that for the second sentence - the "shall" sentence - is contingent upon certain rights and obligations?

PROFESSOR LOWE: I hope that you will tell me, sir, if I have failed to understand the question properly, and that will be evident from my answer. Our submission is that the relationship between the two sentences is an essentially practical one. What the first sentence starts off by saying is that States bordering a semi-enclosed sea should cooperate with each other in the exercise of their right and in the performance of their duties under this Convention. That is, first, a provision that relates to the whole of UNCLOS, not just Part XII, and, secondly, it is triggered by the simple fact of the States bordering a semi-enclosed

sea. So it has nothing at all to do with the content of any of those UNCLOS rights. Article 123 then goes on to impose a stricter legally binding duty to endeavour to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment. In our view, what that is doing is recognising the particular importance of the marine environment and fishing resources in the semi-enclosed sea, again simply because of its configuration. The importance of matters on innocent passage, for instance, is not obviously greater in a semi-enclosed sea than it is in any other sea area, but the importance of environmental and living resource matters is obviously more important. That is why Article 123 goes on to impose a legally binding duty and why it renders that a part of the general obligation on literal States to cooperate.

Does that address the point which you raised?

PROFESSOR HAFNER: The question is, in fact, what is the purpose of this "to this end" in the introduction to the second sentence? This introductory part seems to limit the second sentence to the scope of the first sentence.

PROFESSOR LOWE: I can offer no assistance or position on the interpretation on the basis of the travaux preparatoires, because, so far as Ireland is aware, the travaux preparatoires do not indicate any particular significance to be given to those words. On its plain interpretation, it is simply establishing the link that the duty to coordinate is an essential element, and particularly important element, of the broader duty to cooperate.

Let me then turn to the question of the content of Article 123 in a little more detail. UNCLOS does not define the term "cooperation" or the term "coordination". The interpretation of those terms has to proceed in the normal manner in accordance with Vienna Convention criteria and so on - interpretation in good faith in accordance with the ordinary meaning to be given to the term of the Treaty in their context and in the light of the object and purpose of the Treaty.

In this case the terms have ordinary meanings and they conform to the meaning which is given to the terms in other contexts in similar treaties. Ireland has in its Memorial set out some examples of other treaties where duties of cooperation and coordination are set out. From that body of practice, in the Memorial we drew three essential components of the duties of cooperation and coordination.

First is the duty to inform; second is the duty to consult and third is the duty, referring to the second sentence of Article 123, to coordinate. I shall say a little about each of them in turn.

As far as the duty to inform is concerned, it is clear that no cooperation whatsoever is possible if States are unaware of what each other State is doing. Equally, no cooperation is possible if States inform each other only after the occurrence of a relevant development or even at a point where some kind of representation is impossible because of the shortness of time and shortness of notice that is being given. When I refer to "relevant developments" in that context, I mean developments to which the obligation of cooperation and coordination applies. That is in Article 123 terms a development which is "an exercise of their rights or the performance of their duties under UNCLOS". Those rights and duties include the duties to protect and preserve the marine environment under Articles 192, 193, 194, 197 and so on, and also exercises of rights, such as navigation. There is clearly in Article 123 an implied

limitation on duty to cooperate over matters that concern the semi-enclosed sea in question.

In our submission, it is not necessary for the purposes of this hearing to determine the exact range of obligations that are covered by Article 123. Ireland submits that whatever the scope of those arrangements the development of the MOX plant most certainly falls within it. That is an industrial development which involves the deliberate and planned discharge of nuclear wastes into the Irish Sea and the use of a semi-enclosed sea as a receptacle for that waste. It also involves the inevitable use of the Irish Sea as a receptacle for some part of the atmospheric wastes that will be discharged as a result of the MOX development. If a development of that kind is not to be subject to the duty of cooperation and coordination under Article 123, it is extremely difficult to think of any other development which might ever be said to be subject to that duty.

As I have said, the Irish view is that a State cannot escape the duty to inform other literal States of its proposed development by taking the view that other States have nothing to fear from the development. Of course, if the proposed development in the MOX plant truly has no impact upon the semi-enclosed sea, there would be no duty to inform the other States of that development. But the State's own determination of that question cannot be determinative and other States are entitled to say that they are concerned by the development and that that development is subject to the UNCLOS duties, including those under Article 123. And, if there is a persisting disagreement between the States on that matter, it can be referred for determination under the UNCLOS dispute settlement procedures. On one view, this is exactly what we are doing here at the moment.

We accept that the duty to inform must be realistic. It cannot require that every separate step taken by one State must be reported to every other coastal State. One has to be reasonable and practical about this. But for the duty to have any practical utility, the basic requirement must be that the information is given in a timely manner and in sufficient detail for the other State to be able to assess the impact of the proposed development upon its own interests and to determine how its own policies and measures can be coordinated with the proposed development or measures and then to respond to the State that is proposing to take that development in time for that other State to have the opportunity to adjust its measures or adjust the development accordingly.

The Article 123 duty also applies to the performance by States of other duties regarding the protection and preservation of the marine environment, particularly to questions of assessments. I will leave those matters aside because Professor Sands will be dealing with those later on.

Let me turn to the duty to consult. Cooperation is not a one-way street. It is not enough to inform another State of a proposed development. The views of the other State must be ascertained and attention must be paid to their responses. That was made clear by the Tribunal in the Lac Lanoux case in a very well-known passage with which I will not trouble you now, which is reproduced in the Irish Memorial in paragraph 8.79. That is what the consultation aspect of the obligation of cooperation and coordination requires.

As far as the duty to coordinate is concerned, that is specifically imposed by Article 123, imposed as a duty to endeavour directly or through an appropriate regional organisation to coordinate the

implementation of their rights and duties with respect to the protection and preservation of the marine environment.

Ireland has submitted in its Memorial in paragraph 8.88 onwards that there are two essential components of this duty to coordination under Article 123. First, the duty to inform other States of proposed measures and, second, the duty not to adopt unilateral measures or practices whose effect would be to undermine the measures or practices adopted by other literal States. The importance of these two components of the duty of coordination becomes clear when practical examples are considered.

Let me take, for instance, the hypothetical case of a PNTL ship which is carrying radioactive material to Sellafield for processing into MOX fuel. Let us suppose that the ship is attacked and boarded at night in the middle of the Irish Sea. Let us suppose that the Irish authorities quickly become aware of the incident and wish to intervene quickly and covertly. If Ireland's defence forces send out armed Irish personnel to board this ship at night in order to restore control over it to the captain, the first problem that they have is that they risk, in the absence of some prior coordination with the captain and PNTL, the possibility of the Irish personnel being mistaken for components of the terrorist gang. There is no big legal point on this. It is simple common sense and practical attention to detail..

Supposing that the United Kingdom also sends a response unit out to the vessel, there is a danger that we will end up in a farcical situation with the Irish and the British forces unaware of what each other is doing, unaware even of who the people in black anoraks and hoods are, and shooting at each other. There is a simple, practical and obvious need for coordination of these matters. It is this kind of practical detail that Article 123 is dealing with. It is no answer for the United Kingdom to turn around, as it has said repeatedly, and say that Ireland need not intervene in these matters and can leave these matters in the hands of the United Kingdom. It may be that the British forces are unable to reach the ship as quickly as Irish forces. Any kind of accident or unforeseen circumstance may prevent the British forces from reaching the ship in reasonable time. In any event, Ireland has got both an interest and a legal right and legal obligation in relation to incidents of that kind at sea. If there is a hijacking of a nuclear cargo in waters that are off Irish coasts in Irish territorial waters or in which Ireland has responsibilities under the IMO Search and Rescue Convention (to which the United Kingdom is also party and where it has agreed to give Ireland responsibility for a search and rescue zone) to which I will be taking you later, or if Ireland simply becomes aware of a call for help from the captain of the ship, Ireland cannot sit by and do nothing. Ireland has a legal responsibility to respond to incidents of that kind and the way to deal with it is not by turning away from Ireland's responsibility but by the simple practical matter of coordinating the manner in which it will respond to incidents of that kind with the United Kingdom.

Let me turn now, sir, to questions of other UNCLOS obligations which Professor Hafner raised earlier. Ireland's case on cooperation could, I suppose, almost rest on Article 123 alone; but it is far from being the only UNCLOS provision that imposes a duty of cooperation or coordination in explicit terms. Those other provisions are set out in the Memorial in chapter 8, but it may be helpful for me just to say a

little bit about them here. I shall begin with Article 197, which is the specific UNCLOS provision concerning cooperation.

The general duty to cooperate in relation to the protection and preservation of the marine environment is set out in that Article, which reads as follows:

"States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organisations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention for the protection and preservation of the marine environment, taking into account characteristic regional features".

It is the view of the United Kingdom, which Ireland accepts, that Article 197 stipulates that State Parties must cooperate in order to formulate and elaborate international rules, standards and recommended practices and procedures. As a duty under UNCLOS, that obligation must be read in the light of Article 123, as Article 123 itself says. To this extent, the parties are in agreement. But there is disagreement over the extent of these obligations.

The United Kingdom seems to suggest in paragraph 7.10 of its Rejoinder that the duty to cooperate on a regional basis cannot contemplate bilateral cooperation. It also considers that the duty of cooperation under Article 197, as they put it in paragraph 7.8 of the Rejoinder, is not concerned with the implementation of rules, standards, practices and procedures. On both those points, Ireland disagrees.

On the first point, Ireland submits that, if the region in question is a region that only has two States, for example the Gulf of Maine or much of the Arctic, then those two States are still bound by the duty to cooperate under Article 197 for the protection and preservation of the marine environment, taking into account the characteristic regional features. In Ireland's view, the Irish Sea is such a region and Article 197 applies to it. It is as simple as that.

On the second point, Ireland submits that the duty of cooperation in Article 197 cannot be discharged simply by adopting on paper measures that are patently inadequate to protect and preserve the marine environment. Nor can it be discharged by discussions between the two States that are confined to the wording of texts on the preservation of the marine environment. The adequacy of measures cannot be considered and cannot be determined without looking at the manner in which those measures are going to be applied. We made this point in the Reply. In paragraph 7.47 of the Reply we said this,

"It must, in principle, be possible for a pollution measure to be so inadequate that it fails to fulfil the duties upon UNCLOS State Parties to protect and preserve the marine environment … The adequacy and appropriateness of any proposed pollution measure cannot be properly evaluated without regard to the manner in which it is to be implemented. For example, the adequacy of a law requiring discharges of pollutants to be kept within the limits of authorisations set by the coastal State, if it is known how the authorised discharge levels are calculated and how they are to be monitored and enforced". That cannot be determined without knowing how the coastal State intends to monitor and enforce those duties and how to set the standards. So Ireland's submission is that, under Article 197, it is necessary for discussions with the United Kingdom to concern the manner in which the United Kingdom proposes to implement any internationally agreed rules, standards, practices and procedures for the

protection of the Irish Sea.

Let us take another example. In the case of shipments of plutonium through the Irish Sea. Ireland's case is that it is not enough for the United Kingdom to say that it has complied with IAEA standards in respect of the construction of PNTL ships and the carriage of nuclear cargoes. Cooperation requires more than that. I gave the example a few moments ago of the boarding of a PNTL vessel at night. It is evident that the adequacy of the British policy of complying with IAEA resolutions or whatever needs consideration of how the United Kingdom is going to react to incidents of that kind. States need to get into detailed discussion in order to fulfil that duty.

Well, this is a conclusion that could be reached on the basis of common sense, which is a good point to stop, I think.

PROFESSOR CRAWFORD: I was not trying to stop you just at that point, Professor Lowe.

There is something odd about Article 197, to use your language, in what it does not say, because it does not say, in formulating, elaborating and implementing international rules, and it would have been easy to do so. The emphasis seems to be on the legislative process or, at least, the legislative process together with some detail as to how the rules are to be given effect, but not on the actual process of implementation. What do you draw from the absence of the words "and implementing" in Article 197?

PROFESSOR LOWE: What we draw is what Article 123 provides, in a way. What we draw from it is the fact that Article 197 is a provision which is dealing with all the seas of the world. In some areas, it is not going to be appropriate to require coastal States to cooperate with that degree of attention to detail; but, as Article 123 makes plain, in the case of semi-enclosed seas, because of the proximity of the States and because of the inter-connectiveness of their interests and activities, it is necessary. This is a very good example of the point that Professor Hafner raised, where Article 123 is actually bearing upon the proper interpretation of Article 197.

Let me then simply summarise the point on Article 197 by saying that, in effect, it reinforces Article 123 and does so by imposing a duty of cooperation in the formulation of procedures for the protection and preservation of the marine environment and that it extends, in Ireland's submission, to cooperation at the level of detailed planning that would enable effective practical measures to be taken to address the particular problems of the Irish Sea.

Let me now move, and move more swiftly, to the other provisions of UNCLOS which we say are relevant. I will go through them in order.

I will start with Article 192 of UNCLOS. That sets out the general duty to protect and preserve the marine environment. Read with Article 123, it directs the United Kingdom not to decide unilaterally upon the measures that it may consider adequate and appropriate to protect the sea that it shares with Ireland. It directs the United Kingdom rather to cooperate with Ireland in the performance of the Article 192 duty in the context of the Irish Sea.

Article 193 expresses another consequence of that. It provides that States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with

their duty to protect and preserve the marine environment. Again, read with Article 123, it leads to the conclusion that the United Kingdom should cooperate with Ireland in the exercise of this right in so far as it affects the environment of the Irish Sea. Put bluntly, it means that Article 193 establishes that Ireland has a legal interest in developments at Sellafield in so far as they affect the Irish Sea, and that the United Kingdom must recognise that.

Article 194 sets out in its first paragraph the broad obligation of States to "take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities". That paragraph continues with more specific obligations. It says that States shall endeavour to harmonise their policies in this connection. This is a "shall" clause, a legal obligation not an exhortation. The duty to endeavour to harmonise must imply a duty to inform and consult upon proposed measures, otherwise there is no possibility of harmonisation. Ireland understands harmonisation in this context to mean essentially the same as cooperation. Moreover, there is nothing in Article 194, paragraph 1, to suggest that the measures covered by the duties are merely prescriptive - Professor Crawford's point in relation to the earlier article. On the contrary, it is quite clear in Article 194 that they are not, because Article 194, paragraph 1 refers not to a duty to “adopt” measures, but to a duty to “take … all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment”. The “taking”, rather than the “prescribing” of measures (which is a term which, on a quick word search threw up 30 occurrences in UNCLOS) or “adopting” measures (a term which UNCLOS uses 94 times) is not accidental, and the direction here is to take all measures and not simply to enact legislation.

Furthermore, Article 194, paragraph 3 stipulates quite clearly that the measures shall include "measures for preventing accidents and dealing with emergencies" and it is, quite plainly, practical measures - planning for orderly responses to incidents and accidents - that are envisaged there. Consequently, their harmonisation must envisage practical co-operation in planning for the implementation of those measures.

Moreover, if we plough on through Article 194, paragraph 4 provides that in taking measures to prevent, reduce or control pollution of the marine environment, States shall refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights and in pursuance of their duties in conformity with this Convention, and it is evident also from this that other States have to be notified and, if they raise concerns, consulted over measures of that kind - otherwise there is no way of avoiding the kind of unjustifiable interference that Article 194, paragraph 4 provides (and that too, you will notice, is another "shall" clause there); and it is plain also, just to finish the point, that the reference to interference in paragraph 4 is quite clearly directed at the actual implementation of measures and not simply at legislative steps.

For example, if the United Kingdom ---

PROFESSOR HAFNER: I apologise, this is only a point of clarification, since you are now dealing with Article

194, we have in particular two paragraphs which are rather important in their distinction, namely paragraph 1 and paragraph 2. What I would be interested to know is: In your view is this case rather of paragraph 1 or paragraph 2? You know the distinction between the two paragraphs?

PROFESSOR LOWE: I recognise a distinction between them, but I would be grateful, sir, if you would spell out the distinction you have in mind.

PROFESSOR HAFNER: Paragraph 1 imposes an obligation on each State to protect the marine environment, paragraph 2 imposes an obligation on every State to "ensure that activities under their jurisdiction and control are so conducted so as not to cause damage or pollution to other States and the environment."

This was a major distinction which was made during the Law of the Sea Conference, and it entails different consequences. Therefore, it would be quite interesting to know what is, in your view, the basis of your presentation here. Is it rather paragraph 1 or paragraph 2?

PROFESSOR LOWE: That is a helpful question, chairman, because it allows me to make a point that may not have been made sufficiently clearly in the pleadings so far, and it is that Ireland's interests are not confined to the pollution which results to Ireland's own waters. Ireland is not simply making submissions that the United Kingdom is obliged not to pollute the Irish territorial sea. Ireland's submission is that under the semi-enclosed seas provisions of UNCLOS it has a wider interest in the environment of the Irish Sea as such, and as much interest in what is going at the end of the pipe that is spewing out the radioactive waste off Sellafield on the British side of the sea as it has in the Irish side itself. As far as Article 194 is concerned, therefore, it is resting on both of those provisions. To the extent that it has an interest in its own particular waters it is relying on one paragraph, but to the extent that it has, as it asserts it does have, a legal interest in the entire environment of the Irish Sea, it rests on the more general provision 2, so we are running on both paragraphs.

PROFESSOR HAFNER: Thank you, that is very helpful.

PROFESSOR CRAWFORD: Just while we are on the relationship between those two paragraphs, the second part of paragraph 2 says "States shall take all measures necessary to ensure [relatively strong language] that pollution arising from activities under their jurisdiction or control does not spread beyond the areas where they have sovereign rights in accordance with this Convention."

What inferences do you draw, both positive and negative, from that part of paragraph 2?

PROFESSOR LOWE: I assume you mean positive and negative in the sense of their impact on Ireland's case?

PROFESSOR CRAWFORD: I do mean that, yes.

PROFESSOR LOWE: In terms of the positive impact it is a very clear indication that there is an interest not merely in the seas which belong to a State itself, that even if the United Kingdom were in a position to say that this is something which does not spread over to Irish territorial sea, the fact that the pollution is out in initially British territorial waters and then spreads beyond British territorial waters, indeed out of the entire Irish Sea and into the other areas of the world, engages an obligation on the part of the United Kingdom to do something to prevent that activity. That is the nature of the thing. Put in very crude terms, if States are able to keep their rubbish in their own backyard then they may be able to do so; if they are putting their rubbish not in their own backyard but in the alleyway that divides two houses, from

which it is spread out into the street, then they have got a problem because other people are not obliged to put up with that kind of behaviour. So the positive implication is a very clear indication that the activities which are going on are of much wider interest than the narrow focus on the State's territorial sea. I should say that this is a provision which I know Mr Sands is going to come to later on, dealing specifically with the pollution obligations under the Convention as well.

PROFESSOR CRAWFORD: So he can deal with the negative points.

PROFESSOR LOWE: He can deal with the negative. I am sure we are both obliged, sir.

Article 199 of UNCLOS is concerned with situations where, as it puts it, a State becomes aware of cases in which the marine environment is in imminent danger of being damaged or has been damaged by pollution. It is another example, incidentally, of the distinction which UNCLOS draws between pollution and damage. It stipulates that in such cases, States in the area affected, in accordance with their capabilities and the competent international organisation, "Shall co-operate to the extent possible in eliminating the effects of pollution and preventing or minimising the damage."

That obligation clearly goes to the question of the respective roles of the United Kingdom and of Ireland in the event of an incident at sea involving one of the nuclear transports, but it also applies in two other contexts: it is not limited to maritime casualties, indeed the case of casualties is specifically dealt with in UNCLOS Article 211. It imposes a general obligation which is equally applicable to discharges from the Sellafield site.

Secondly, Article 199 proceeds to stipulate that to this end States shall jointly develop and promote contingency plans for responding to pollution incidents in the marine environment. That is not hortatory, it is a “shall” obligation, a legal duty, and the legal duty is not to wait until there is an imminent danger, until there is an incident on one of these ships, but to have plans in place so that if an imminent danger does arise the States are able to co-operate and deal with it. Again, we say that that duty to jointly develop and promote contingency plans necessarily implies that there must be a sharing of information and consultation.

Article 207 deals with pollution from land-based sources and it is plainly applicable to discharges from the MOX plant and from THORP, and from Sellafield in general into the Irish Sea. It obliges States to endeavour to harmonise their policies in this connection at the appropriate regional level. Ireland submits that the performance of that duty is, according to Article 123, subject to the obligations of co-operation and co-ordination under Article 123.

We submit that even if there is a case for addressing some aspects of actual and potential pollution from nuclear power on a global scale, and for handling some other matters on a pan-European scale or a pan-European Union scale, there are other matters that must be handled on the Irish Sea level. The European Union extends from Finland to Greece and from Portugal across to the other side; it is going to include Poland, Rumania, Malta, other States. The idea that all co-operation over these measures has to be handled on this pan-Continental scale is simply impractical and undesirable. For some measures that will be entirely appropriate; for other measures of detailed practical implementation

a smaller scale is appropriate, and Ireland's case is that there is a significant part of the co-operation which we are seeking in this case which can only sensibly be handled as a local matter within the semi-enclosed Irish Sea.

It is a conclusion dictated by common sense and practicality, and it is also what Article 207 appears to intend. The duties regarding the drafting of rules and standards at global or regional levels are set out, not in Article 207(3) but in Article 207 (4) and, unlike Article 207 (5) and other "regional" provisions it refers not to the harmonisation of policies at the global or regional level, it refers to the harmonisation of policies at the "appropriate regional level". We say that the appropriate regional level in this case is the level of the Irish Sea.

These are provisions which, again, Professor Sands is going to deal with later on in so far as they affect pollution, and I will leave him to develop those points further.

I have been through the UNCLOS Articles and these are the provisions on which we rely, and I am now moving to a stage in my presentation where I want to address practical matters and practical experience in order to show the Tribunal how the interpretations of Ireland and the United Kingdom of obligations under these Articles differ, and the kinds of problems that have arisen in giving effect to these obligations. The purpose in doing that is to assist the Tribunal in addressing the mischief, as it were, at which the provisional measures order will be aimed.

I would like to start off by looking at the question of the existing mechanisms for co-operation, partly because the United Kingdom suggests that the existence of these mechanisms is in itself an adequate answer to the obligation that they have to co-operate and consult with Ireland, and partly because they provide specific instances of the kind that I have just mentioned. Of course, our basic point is very simple: It is that Ireland considers that the United Kingdom has not fulfilled these duties in the past and it fears that the United Kingdom, on its interpretation of UNCLOS, will not fulfil them in the manner that Ireland considers they should be fulfilled in the future.

We are in a difficulty here, as is anyone who is complaining of non-co-operation, because to say that one is not receiving co-operation is to complain not of actions but of attitude. Ireland is faced with the need to try to demonstrate that despite the profusion of these mechanisms the basic disposition of the United Kingdom is not co-operative in the sense that we say UNCLOS requires.

We have to do this because any other approach would elevate form above substance. This Tribunal, in our submission, cannot say that the mere existence of bodies for co-operation is enough; if that were the case any treaty requiring consultation could have its duties implemented by the creation of an utterly ineffectual committee or joint commission. If that were to happen, if the Tribunal were not to investigate the substance of co-operation, to go behind the paper trail of the semblance of co-operation which States may erect, it would have two consequences, in our view. The first is that it would release States from any substantial duty of good faith and say it is enough under this Convention, and presumably under other conventions, that States should create a paper trail, and if they do that then they are off the hook as far as co-operation is concerned.

Secondly, it would mean that if there is to be a more substantial obligation of co-operation, the

international community is going to have to find some other term to describe it - it is going to have to find some way of saying that when the Treaty says States could co-operate we mean that they should really co-operate and not simply go through the motions.

Let me start off by saying that the Irish case is being made out on the basis of two bodies of evidence, really. The first is the documentary record of the dealings between the parties, from which a sensitive and attentive reading can infer at least something of the circumstances in which the correspondence took place, and I shall take you through some of that correspondence shortly.

The second element is the very fact that this application is being made. In general, States try to avoid litigating each other, and the Attorney-General has made plain that Ireland is not in the business of bringing legal actions against other States. But Ireland has decided in this case that there is simply no practical alternative to trying, through this application for provisional measures, to pin down exactly what it is that the United Kingdom is obliged to do. For years now Ireland has watched the United Kingdom pipe its radioactive waste into the Irish Sea, at times at levels of pollution which even the British Government now reckons are totally unacceptable; and the MOX development, basically, was the straw that broke the camel's back. Ireland has said this has been going on too long and something has to change.

It is convenient to start this exposition by going to the United Kingdom's Rejoinder. The Tribunal will recall that Ireland set out its complaints concerning co-operation and co-ordination in pages 162 to 197 of its Memorial. The United Kingdom responded in its Counter-Memorial, first examining the UNCLOS provisions and then leading its factual rebuttal with an account of eleven existing mechanisms for co-operation and co-ordination. That response in itself illustrates part of Ireland's case. It is that the United Kingdom focuses on mechanisms; it is as if the establishment of a committee means that the duty to co-operate can be ticked off as completed. Committees can be enumerated and listed; their establishment fits neatly into an approach that is based on the paper trail and on the recording and monitoring of data: but that is no more an answer to the complaint of a failure of co-operation than it is an answer to complaints about an inadequate transport system to point to a profusion of railway stations. The fact is they do not work.

On the question of existing mechanisms, paragraph 787 of the Reply onwards, Ireland took each of the eleven mechanisms one by one and it identified its concerns. The United Kingdom Rejoinder then responded to this case by case statement of its specific concerns by Ireland like this. It said:

"It appears from the Reply that Ireland accepts the account given by the United Kingdom of co-operation through bi-lateral contacts, co-operation through the British Irish Council, co-operation between the HSE and the RPII [Health and Safety Executive and Radiological Protection Institution of Ireland] co-operation between the RPII and the NRPB, co-operation through the Food Standards Agency and co-operation in preparing a draft agreement on early notification. In the remaining four instances, Ireland now argues that the co-operation has not reached the standard to which Ireland considers itself entitled, but it fails to establish a factual basis for that complaint."

What Ireland's reply actually said was this. On bilateral contacts it said, in paragraphs 788 to 790, that "Ireland … maintains … that as a sovereign state, which, like the United Kingdom, has rights and duties concerning cooperation and coordination under the UNCLOS, Ireland is entitled to entreatment that goes some way beyond that accorded by the United Kingdom's central and local government to every individual citizen or resident (and perhaps also to any non-resident who troubles to write in response to public consultations). The relationship in government to government cooperation is not the same as the relationship of a government to its citizens and residents. There is, for example, sensitive information that can be shared confidentially with another government that cannot be appropriately publicly disclosed. Plans for anti-terrorist operations are a good example. There is information that may properly be refused to, say, an interested student seeking help with a school project that cannot properly be withheld from a foreign State and the reluctance of the United Kingdom to recognise and act upon this distinction is a central element of Ireland's complaint in this case. Beyond noting Ireland's eligibility to respond to public consultations in the United Kingdom, the Counter Memorial makes out no further case that bilateral consultations have functioned in a manner such as to fulfil the United Kingdom's duties of cooperation and coordination under UNCLOS." That is Ireland's "acceptance" in the eyes of the British that this system is working.

On cooperation between the British-Irish Council, through the British-Irish Council, Ireland's reply had been "The British-Irish Council … is an integral part of the confidence-building process following the Good Friday Agreement and the peace process in Northern Ireland. The policy and practice in the BIC is to emphasise and give priority to issues of mutual concern in which it is possible to achieve progress through cooperation and consensus. All participants are anxious to avoid conflict and issues involving significant disagreement are avoided. The BIC is therefore not a forum appropriate for pursuing fundamental differences between the parties, such as the question of the MOX plant."

On cooperation between the HSE and the RPII, Ireland had said that "the relationship is confined by the United Kingdom within limits that prevent Ireland having access to information that Ireland considers necessary for its nuclear preparedness planning. One example is the refusal of access to information concerning the risk associated with High-Level Waste Tanks. Moreover, these are technical agencies; and they are not an adequate substitute for proper inter-governmental cooperation. On the RPII/NRPB cooperation, we said that we welcome 'the scientific cooperation … It is, however, not relevant to the question of the discharge by the United Kingdom of its obligations of cooperation and consultation with Ireland in the context of this case."

The pattern is the same all the way through. It is a depressing pattern, because the United Kingdom seemed to read even these specific statements in our pleadings as an indication that we regarded this level of cooperation as satisfactory as a fulfilment of its duties under the UNCLOS. It is depressing, if not surprising, that the United Kingdom thinks that Ireland agrees with its characterisation of its case concerning the state of cooperation between the two States. It sometimes seems as if the United Kingdom simply does not see what Ireland is complaining about.

As far as the remaining mechanisms are concerned, the picture is much the same. I will not

take you through them now, because it would simply delay us.

At this point, President, I would have brought in a confidential matter which I shall refer to opaquely as confidential matter one. I shall deal with confidential matter one and confidential matter two at the close of this submission so as not to require people to go in and out of the room.

As far as the UK-Ireland Contact Group is concerned, that is a matter where Ireland's position is set out in paragraphs 132 to 139 of its memorial, which you will find in the confidential folder. Again, I make simply the point that the United Kingdom fails to address the specific points that Ireland has made there. British-Irish Parliamentary Body. It is not an inter-governmental body. It is a meeting of Parliamentarians of all parties. As Ireland has made clear, it does not regard it as an appropriate body for UNCLOS exchanges and cooperation, although it does share many of the concerns that that body has made known concerning the development in the MOX plant.

The draft Coastguard Agreement is a matter that I should come to because it raises issues of detail. There is a draft of the Coastguard Agreement which is going around and it arises from concerns that the Irish Coastguard simply does not know of the arrival of PNTL ships until their arrival in Irish waters is imminent, literally within hours, and a very few hours, of their arrival.

The complaint was made in paragraph 7.104 of Ireland's reply of this failure of notification. The United Kingdom's response was that Ireland was notified of the shipment on 1st July 2001 and thereafter informed of the progress of the vessel in a chain of information ending with notification of the Irish Coastguard. Well, we have to say that that is not quite how the matter appeared to us. Ireland was, indeed, in a position where it was given some information right at the very beginning, but, as regards the information, no further information was given to Ireland until the point at which the ship was about to enter Irish waters.

Ireland became aware of the route and the progress of the PNTL ship not by any communications from the United Kingdom but by looking at Green Peace's website. It simply defies belief that inter-State cooperation under a legal obligation in a convention should be dependent upon one of the parties checking out newspaper reports, websites and television news in order to obtain information as basic and fundamental to its needs as the time of arrival of a ship in its own waters. I shall come back to this matter a little later.

Let me now leave that and turn to a slightly different body of things, some of the illustrative episodes that have arisen in this context. There is one that I will take you through before we break for lunch. There are a number of episodes which over the last two or three years have epitomised in Ireland's view the uncooperative nature of the United Kingdom. The question of cooperation over the MOX/THORP development in general, over maritime transport, over the protection of the marine environment and so on. First, I would like to take you to the question of the MOX/THORP development in general terms and take you through some of the correspondence.

Ireland raised the question of the MOX project with the United Kingdom in July 1993. You will find the initial letter in tab 16 of the Judges' folder, and I will indicate clearly when I would suggest that there is a letter worth turning to. Later that year the United Kingdom replied saying that the matter

was to go to a public inquiry organised by the local council. Then in October 1993 the MOX environmental statement was published. It had in Ireland's view glaring deficiencies, such as the lack of detail and data necessary to identify and assess the main effects which that project was likely to have on the Irish Sea and the fact that it made no reference to the impact of the foreseeable and, indeed, intended additional discharges from THORP that the MOX project entailed. Ireland wrote to the United Kingdom expressing its concerns in November 1993, and you will find that letter at tab 28 of the Judges' folder. No response was received from the United Kingdom.

We move on through then to 1997 when the process of making out the economic justification for the MOX plant began. In April of that year, Ireland made a formal submission to the first round of consultations, referring inter alia, to its concerns over discharges into the Irish Sea, the risks surrounding international transport of radioactive materials and the inadequacies of the case made out for the MOX plant. You will find that at tab 29.

It was followed by a further Irish submission in March 1998, spelling out similar concerns. That is at tab 30.

Later in 1998 the Irish Minister, Mr Jacob, wrote to the British Minister, Mr Meacher, expressing concerns about the radioactive discharges, the Sintra strategy and the Sellafield discharge authorisations. The latter issue arose when Ireland saw reports - not by direct communication from the United Kingdom, I might add - that BNFL had asked for variations in its discharge limits. Mr Jacob then put forward in that letter, which is tab 31, some specific proposals including the option of storage of the liquid waste in tanks while abatement technology was developed and the reduction of discharges of technetium-99 to levels which were regarded as more acceptable. The letters there at tab 31 and 32 are in the folder and those are letters which I would suggest that the Tribunal might wish to read later on.

Mr Meacher's response was dated 2nd December 1998 and it appears as tab 33. That is worth turning to. You will see in response to the detailed suggestions that the Irish Minister put forward, Mr Meacher wrote,

"Thank you for your letter of 23rd October regarding the applications by BNFL to vary the radioactive discharge authorisations for the Sellafield site and to allow the MOX plant at Sellafield to come into operation. As you know, the Environment Agency have recently completed their consideration of the applications and have forwarded their draft determinations to my department and MAFF. Requests for the applications to be called in for the Secretary of State's own determination are under consideration. I can assure you that in deciding whether to exercise the statutory powers of calling your views and, indeed, all representations on the issue are being carefully [considered]."

The next stage was on July 30th 1999. Ireland wrote a further detailed 8-page letter to the United Kingdom (Tab 34). That was in response to the June 1999 consultation on MOX and it rehearsed Ireland's concerns, referring in particular to the question of the MOX/THORP link, to emissions and transport risks, and specifically reserving Ireland's rights to invoke procedures and substantive requirements under, inter alia, UNCLOS and OSPAR. You will see the UNCLOS reservation at the foot of page 7 of that letter at tab 34. I would invite the Tribunal to look at that later, too.

The United Kingdom replied (tab 35) on 22nd October and the Minister said,

"I have personally noted the points you raise in your letter. However, I am sure that you will appreciate that, because of the quasi-judicial nature of my role, it would not be appropriate for me to respond to each of the issues raised while we are coming to a decision. When the decision is announced, we shall at the same time issue a document setting out our reasons in full and I will ensure that a copy is sent directly to you."

Well, the United Kingdom was a party to UNCLOS by this date and it was bound to engage, in good faith, in cooperation and consultation with Ireland over developments affecting the Irish Sea. The Minister's quasi-judicial role mentioned in the letter, which is the role he plays in adjudicating upon planning appeals, is an absolutely textbook example of a State invoking the provisions of its own law as a reason for a failure to comply with its international obligations. In response to an 8-page detailed letter from Ireland, the Minister writes back and says, 'My hands are bound. You will read the decision when everybody else reads the decision when we publish the document.'

Ireland followed up with a further letter on 18th November 1999, which is at tab 36, renewing the request which had been made by them for a full copy of the PA report and the United Kingdom replied in December refusing to supply the report on the grounds of commercial confidentiality.

PROFESSOR CRAWFORD: The criticism that you make of the letter of 22nd October 1999, obviously I am not necessarily saying what the respondent will say about that, but could you say, well, in a certain sense, Ireland had entered into the British domestic procedure through the channel through which it had made its objections, it had not made them, for example, by diplomatic note or via the Foreign Office, and that, therefore, in a sense, it had taken on board the constraints of the internal British procedure for approval? Is that a tenable position?

PROFESSOR LOWE: I would submit that it is not a tenable position at all. The position was that Ireland was given an opportunity, which it took, to respond to the consultation; but it set out in detail its concerns and made it plain that those concerns were not concerns confined by United Kingdom law and by the terms of the planning application, but extended out to the UNCLOS provisions and to those of other treaties. It might be said that, in addressing the matter to that particular Minister, Ireland could - perhaps should - have been aware that he was under certain constraints in what he could say. There are other Ministers in the British Government, there are other ways of responding to letters of that kind, and, when Ireland sets out detailed substantive concerns on the proposed development, it is simply not enough to say that one person is unable to answer them.

I got as far in the saga as the next letter, which is the letter of 23rd December 1999, which is one of the key letters in the case. It is at Tab 22. This is a letter that is out of the planning process. It is a direct letter from one Government to another. It is six pages long and it refers to three matters: implications for the MOX plant of the Japanese suspension of MOX imports following the detection by Japan of the falsification of MOX documentation by BNFL; secondly, the failure to remedy the inadequacies of the MOX environmental impact statement, despite the fact that in the intervening six years the United Kingdom had become a party to a number of new international obligations (Ireland

referred to five of them, including UNCLOS and Sintra) and, thirdly, the incompatibility with the United Kingdom's international legal obligations of the proposal to authorise discharges from the MOX plant into the marine environment. The reference in the letter to UNCLOS was specific. It is referred to specifically, and you will see it on page 131, tab 22, as it is headed at the top in this folder. Within tab 22 at page 131 it refers specifically to a number of UNCLOS provisions which Ireland said were engaged by this matter: Articles 192 to 194, 206 and 207. The letter sought confirmation that the MOX plant would not be authorised to operate before these matters were resolved.

On February 17th, 2000 the United Kingdom wrote to Mr Jacob, the Irish Minister, who had written that letter, and the letter made no reference to earlier six-page letter, but simply announced the imminent publication of three reports by the Health and Safety Executive and advised that any further information or reports could be obtained from the HSE. The letter in which Britain actually replied to the letter of 23rd December was received by Ireland on 21st March 2000. That you will find at tab 39 of the Judges' folder. That response to the six pages of Ireland's detailed December letter, and perhaps also to the further eight pages of the letter sent in July the previous year, which was not otherwise answered, came from Mr Meacher, and it read as follows:

"Dear Joe, Thank you for your further letter of 23rd December to the Deputy Prime Minister about the Sellafield MOX plant. I am very sorry you have not received an earlier reply. While I am, of course, grateful to you for your further views and comments, I am sure you understand why I cannot address these points in detail whilst we are still in the process of coming to a final decision on the full operation of the plant. I am also sure that you appreciate that the implications of the data falsification incident at Sellafield MOX demonstration facility will have some bearing on our decision. Whatever our final decision, we do plan to publish a decision document which will explain our reasons in full. I will ensure that you are sent a copy immediately it is published".

Fourteen pages of detailed submissions given to the United Kingdom dealing with this question and the reply comes back, "I cannot go into detail. We will let you know the result when we decide it".

Ireland could be forgiven, perhaps, for thinking that it as banging its head against a brick wall. It set out its concern at length and in detail and the response is simply that the matter cannot be discussed. This is an illustration of a difference between what we understand cooperation to be and what the United Kingdom appears to understand cooperation to be.

The saga went on. There were some exchanges between officials renewing the request for sight of the PA report and asking for copies of certain documents that Ireland had seen referred to in the *Financial Times,* and Mr Meacher replied at tab 41,

"Dear Joe, I am sorry that you have not had a reply to your letter of 9th February seeking information from the PA report on the justification for the proposed MOX facility at Sellafield. As I explained to your colleague Noel Dempsey I am still considering this matter, but I hope to be able to provide you with a substantive reply short."

No reply came. Subsequently, there is a similar round of correspondence over the AD Little report. Ireland had set out requests for those; it did not get them back.

Matters reached a head in October, and I will not take you through all the intervening letters.

On Thursday, 18th October, Mrs Beckett, the Secretary of State for Environment, Food and Rural Affairs, wrote to Ireland to say that "the Irish Government has, of course, been consulted throughout the process leading to the decision on justification of the manufacture of MOX fuel. As you know, our Environment Agency has concluded that the radiological detriments associated with the manufacturing of MOX fuel would be very small and any effects on wildlife would be negligible. We took this into account when we concluded the manufacture of MOX fuel is justified. Nevertheless, the United Kingdom in anxious to exchange views on the points that you raise in your letter as soon as possible. In order to do so meaningfully, we need to understand why the Irish Government considers the UK to be in breach of the provisions and principles identified in your letter. We will be pleaded to exchange views with you on alleged breaches of the UK's obligations with respect to the environment."

Ireland replied on Tuesday, 23rd October, saying that, "in the light of the imminent operation of the MOX plant and Ireland's need to act expeditiously to take appropriate steps to prevent such operation, a meeting for the purpose of exchanging views is unlikely to achieve a provisional settlement unless the United Kingdom was to indicate a willingness to consider the immediate suspension of the authorisation of the MOX plant and a halt to related international transports as called for in my letter of 16th October. In the absence of such indication, Ireland reserve its right to institute proceedings before appropriate international courts or tribunals without further notice. If such an indication was forthcoming, my department would be pleased to offer to host an exchange of views in Dublin later this week."

We are here in a situation where Ireland has learnt that the button is about to be pressed which will commission the MOX plant and it is simply saying, "Hold on. There are legal obligations here that have not been fulfilled, there are legal complaints. Hold it while we sort this out. If you are prepared to hold it while we have these negotiations, come to Dublin, we will talk". Mrs Beckett's reply did not refer to Ireland's offer. The Irish reply is tab 48. Mrs Beckett's reply is tab 49.

Mrs Beckett's reply is simply to say that Ireland's position remains unclear and that, although the United Kingdom is anxious to exchange views, "in order to do so, we need you to explain why you consider any breaches to the various instruments to which you refer to have occurred …I regret to say that your letter … simply lists alleged breaches" and did not throw any light on the reasoning of the Irish Gov.

At this point Ireland had learned, again not from the British Government, that it was intended to commission the plant on 23rd November 2001, which was a matter of days away. In that context, Mr Jacob wrote that, after five years of attempts to exchange views on its concerns with no success whatever, and after an offer to make a joint submission with the United Kingdom to an UNCLOS Tribunal, he was, in effect, in despair. Five days later he wrote again, on 30th October. He wrote again in November, and eventually Ireland had to proceed with the case on the basis of a unilateral application that had been made to UNCLOS.

That I put forward (and it is a good point to stop, I think, Mr President) as an example of what

Ireland considers to be inadequate cooperation. If the Tribunal tells Ireland that this is a fulfilment of the duty to cooperate under UNCLOS and that it can expect no better, Ireland will go away and will adjust its expectations on the basis of that ruling. In our submission, it is not adequate and it amounts to a measure which amply points to the need for further instructions in the form of Provisional Measures from this Tribunal.

THE PRESIDENT: Thank you very much. I think we will break here for lunch and we will resume at two o'clock.

MR BRADY: Before you rise, I would just mentioned that, as you probably observed, I had to go in and out of the room on a couple of occasions, unfortunately I have to return to Dublin, so, again, at the risk of appearing discourteous, I am sure that you will excuse my absence for some days.

THE PRESIDENT: We certainly do understand. The meeting is adjourned.

(**Luncheon Adjournment)**

PROFESSOR LOWE: Thank you, Mr President, Members of the Tribunal. Before we broke for lunch I was starting to go through the illustrative episodes which Ireland says exemplify the kind of difficulty that we have had over co-operation, and I dealt with the question of the communications between the two Governments over the MOX/THORP development. I am now picking up at what is the second sheet of the outline of my submissions to look at the question of co-operation over maritime transports.

Ireland has two main concerns in relation to maritime transports. The first is the possibility of a risk upon or an attempt to interfere with the PNTL vessel in Irish waters, and the second is the possibility of an accident or incident involving some other vessel in Irish waters. It is well known that the arrival of a nuclear ship through the Irish Sea is often greeted by protest flotillas. Large numbers of people go out in small boats and mob the arriving nuclear ship, and the possibility of an accident there involving one of these other ships is a very real one and one which Ireland has to take into account as part of its general responsibilities as coastguard and under the search and rescue provisions. So its focus is a dual question here and it arises directly from the shipments into the Irish Sea. Regardless of when the next shipment might be into the Irish Sea, Ireland wishes to have in place a proper procedure for dealing with both of those categories of risk.

Its concerns regarding the risks of an attack upon or an attempt to interfere with a PNTL vessel arise from three main sources: its responsibilities under the 1979 International Convention on Maritime Search and Rescue, its responsibilities as a coastal State under UNCLOS, including that under UNCLOS Article 98, paragraph 2, which obliges States to maintain effective search and rescue services and, third, its responsibilities as a sovereign State for the welfare of its citizens and its residents. I will say a little about each of those in turn.

First the 1979 International Convention on Maritime Search and Rescue, which is set out in the Annex to the reply at page 109 of Volume 3, Part 1 of the Reply. The terms of the Convention are not crucial and it is the general description of it that I am going to, so there is no need to turn it up. Under that Convention as it currently stands (it was amended in 1998) Ireland is under a legal obligation to

"participate in the development of search and rescue services to ensure that assistance is rendered to any person in distress at sea. On receiving information that any person is or appears to be in distress at sea, the responsible authorities of that party shall take urgent steps to ensure that the necessary assistance is provided." That appears in Article 2, paragraph 1 (1), as amended.

Ireland's duties in the search and rescue zone that is allocated to it by agreement between the State's parties under the SAR Convention are expressed in clear and peremptory terms: Ireland must provide assistance if it is aware of any person being in distress in its SAR region. Article 2, paragraph 1(1) says: "Parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found."

Chapter 3 of the Convention goes on to spell out the basic principles of co-ordination that the parties must implement. In paragraph 3 (1)(ii) it says that "Parties shall co-ordinate their search and rescue organisations and should, whenever necessary, co-ordinate search and rescue operations with those of neighbouring States."

There are, under this Convention, many agreements that have been made by pairs of adjacent neighbouring States in order to co-operate between them. For example, there is an agreement between France and South Africa which sets out the modalities of that co-operation by providing for prompt exchange of SAR information concerning distress, by assisting each other with the implementation of SAR missions, providing for reciprocal use of facilities and conducting periodic exercises on SAR matters under the Convention and exchanging useful operational and procedural documents in order to promote mutual understanding and common procedures. That is the kind of co-operation that Ireland is looking for in this case.

In the case of actual distress under the SAR Convention it goes rather further. It says - paragraph 3(1) again - "Unless otherwise agreed between the States concerned, a party should authorise, subject to applicable national laws, rules and regulations, immediate entry into or over its territorial sea or territory of rescue units of other parties solely for the purpose of searching for the position of maritime casualties and rescuing the survivors of such casualties. In such cases, search and rescue operations shall, as far as practicable, be co-ordinated by the appropriate rescue co-ordination centre of the party which has authorised entry, or such other party as being designated by that party," It goes on to provide for the making of agreements of this kind.

The way that it is working there is saying that there is primary responsibility within one party, and if another goes over the waters or territory of that party in order to engage in an SAR mission then it is to be co-ordinated by the State in whose waters it takes place.

Ireland's submission is perfectly simple, and you will find this set out in the Reply in plate 2 on page 90 of the Reply. You will see that the Irish zone for this purpose, its search and rescue region, goes out to the south and west of Ireland in the area through which PNTL ships may well travel. The short point is that there is a plain need for co-operation in the event that PNTL ships do go through that region in order to ensure that Ireland and the United Kingdom can each fulfil their duties under the SAR

Convention satisfactorily.

Ireland has similar obligations under Article 98, paragraph 2 of UNCLOS. That stipulates that: "Every Coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements, co-operate with neighbouring States for this purpose."

That is really underlying, as a matter of general UNCLOS law, the co-operative obligations that exist in particular detail in the SAR Convention. Furthermore, Ireland, at least within its territorial waters, has a plain legal duty under general customary international law to discharge the responsibilities of a Coastal State in relation to preserving life at sea. That has its clearest explanation in a footnote, in fact in a separate opinion of Judge Fitzmaurice in the Fisheries Jurisdiction case, which we have set out as tab 54 of the judge's folder, where he refers to the fact that States cannot choose whether or not to have a territorial sea because they have duties in the waters off their coast, and they are under a legal obligation to maintain, for example, rescue services there.

Finally, as I have said, Ireland has the responsibilities of any sovereign State to look after the welfare of its citizens and residents, and that requires that it takes some precautionary measures to deal with incidents at sea.

It may also be observed that under the IMO's Oil Pollution Preparedness Response and Co-Operation Convention of 1990, Ireland has duties to respond to oil pollution threats in an extensive zone off its coasts. That zone is illustrated in the Memorial at plate 9, which appears at the back of the Memorial. In fact plate 9, which is this one, shows both the Irish Pollution Response Zone in yellow, a very extensive area going out to the west of Ireland, and in the boundary drawn by the red lines the Irish SAR zone. It is a superimposition of those two on that particular plate. That Convention is limited to oil pollution, but as the United Kingdom's Maritime and Coastguard Agency stated in its Guidelines for Ports on Contingency Planning for Marine Pollution Preparedness and Response - we take no point from the fact that the UK document omits the reference to co-operation in its title - it is said that "It may also be sensible for contingency plans to deal with other kinds of pollution than oil from ships, if there is a significant risk in a particular locality", and Ireland accepts the sense of that proposition. That is why we have thought in the provisional measures application that it is right that we should fix the notification of transports by reference to Ireland's SAR and pollution zones. It makes sense because that is what those zones are for, and it also makes sense because it disengages the question of prior notification from the 200 mile limit and the EEZ, and it avoids any implication or possible fear that a suggestion that States might be obliged to give notifications when ships enter into 200 mile zones might be seen as a claim that this in inherent in EEZ jurisdiction. So that is the explanation for the change in the wording of the provisional measures application.

We have mentioned a number of times today that Ireland's practical concerns have two main focuses in this context: the risk of an attack on a PNTL ship and the risk of an accident or incident involving some other vessel in Ireland's waters. That has to be seen against the background of the material resources which Ireland has at its disposal for these purposes. The Irish Naval Service has no

more than eight vessels, of which only one can carry a helicopter, and even that one does not carry the helicopter at all times. If those vessels respond to search and rescue calls, as required by international law, then they are in a position to do so. But they are normally tasked with surveillance and patrol of Ireland's 200-mile zone and they are not permanently on standby for search and rescue missions as such. The need for planning for the deployment of these vessels is obvious. They have got other tasks in Irish waters, they have to make foreign voyages, they have to undergo maintenance and repair and, with relatively small number of vessels at its disposal, it is important that Ireland be in a position to schedule their deployment. And for that scheduling it is important that Ireland know when it should be expecting the arrival of a PNTL ship and a protest flotilla within its waters. It is also obvious that the basic information that Ireland needs includes some indication of the number of voyages that can be expected within a particular planning period and an indication of the progress of ships towards its zone. This, Ireland says, is the minimum of what it needs in terms of information from the United Kingdom to enable it to plan properly to discharge its, Ireland's, international responsibilities for the safety of life at sea within its own area, and Ireland also submits that, as a matter of UNCLOS law, because of the duties of cooperation and coordination, Ireland is entitled to that information.

Ireland's duties are current and continuing; and just as Ireland plainly has a legal duty now to prepare itself to discharge those duties in future, in practice, and Ireland has a duty now not to wait until an emergency arises in order to try to create some system of procedure for responding to it, so the United Kingdom is under an obligation to provide the information that is needed by Ireland now and on a continuing basis for that planning to be prepared.

It is simply not satisfactory that Ireland was notified of the imminent arrival of a nuclear cargo last autumn only an hour or two before the ship actually appeared. Ireland must also say that it seems pointless withholding the information. Anybody who was able to hire a small aircraft could have flown over the ships for virtually the whole of their voyage from Japan and marked their location at every stage. Why this information could not be passed to Ireland by the United Kingdom is something for which Ireland has no explanation whatever.

At this stage, Mr President, I would have interposed confidential matter, that I will hold back to the end.

SIR ARTHUR WATTS: I wonder if I could ask a couple of questions just to enable the Tribunal to focus on the scale of the problem that you have been addressing. If I can take you back to plate 2 in Ireland's reply, the one that is opposite page 90, that purports to show the route taken by two vessels, MV PACIFIC PINTAIL and MV PACIFIC TEAL. Can you give me an idea how many such passages of vessels there have been each year for, say, the last five years? I do not know whether this is possible for you to do, but it would help to get, perhaps, some idea of the scale of the problem. That is the first question. The second question is this. If you look at the plate, it shows with a dotted green line the route taken by those two ships. It is really a question whether that is typical of the route taken always by ships on this kind of journey or whether it was specific to those two, but other ships might have taken some other route. But more than that, whereas the dotted green line shows that these two ships went to the west of

the Irish SAR Zone limit for a little part of its way, is there any navigational reason for that? Could the vessels from a navigational point of view just as easily have travelled to the east of that line, in other words, to have kept out of the Irish SAR zone?

PROFESSOR LOWE: There are three points that you have raised. So far as the scale of the problem is concerned, that bears upon another difficulty which Ireland has had, which is obtaining the information on the number of transports. Aspects of that have fallen within an area that it has been decided should be confidential and, with your permission, I will deal with that later on. As far as the route is concerned, that is a practical question. I will make enquiries as to whether there are details of past routes that have occurred. As far as the third point is concerned, whether there is any reason why the route should not go to the east of that line, again I will make enquiries to see if there is, but, in any event, I would make the point that Ireland's submission is that its interests actually extend over the shipping activities throughout the whole of the Irish Sea and it has as much of an interest in the security issue and in cooperation over that issue, if it goes east as it does if it comes west.

SIR ARTHUR WATTS: Thank you very much.

PROFESSOR HAFNER: I would like a factual explanation concerning the route of the ships. It is not very clear from the maps whether the ships enter the territorial sea of Ireland and the exclusive economic zone or fisheries zone. My assumption is, if I compare the different tables, that they are not entering the territorial sea, but an exclusive fisheries zone or an exclusive economic zone.

PROFESSOR LOWE: That is absolutely correct. To the best of our knowledge, that particular voyage did not enter Irish territorial waters, but it certainly entered Ireland's fisheries zone.

Let me then turn briefly to the question of cooperation over the preservation of the marine environment and the communication of information. I shall do this briefly because Professor Sands will be taking the Tribunal through this later on. I should say that the intention is that I should conclude my presentation some time around the coffee break this afternoon and Professor Sands will then go on for about an hour after that.

As far as the cooperation over the preservation of the marine environment is concerned, the substance of it will be dealt with by Professor Sands and I will confine myself to one point. That is the point that is mentioned in response to Sir Arthur Watts' question. It is that this is a semi-enclosed sea within UNCLOS Part IX, so, quite apart from the general UNCLOS provision on pollution which applies to all coastal States under the Convention, there are specific obligations that apply to States which border semi-enclosed seas. The seas are different because they are confined, pollution is kept within them; because, in the nature of things, there is a tight link between the communities that surround them, and this is recognised in un itself by the creation of Part IX as a distinct part dealing with semi-enclosed seas. It is difficult to understand the suggestion in paragraph 7.6 of the United Kingdom's Rejoinder that UNCLOS does not set out a distinct legal regime for semi-enclosed seas, given that UNCLOS does precisely that: it sets out the principles for semi-enclosed seas in a separate and distinct part of the Convention; and because that is a recognition of the fact of the interdependence between the littoral States, it is not at all surprising that UNCLOS should reject the one size fits all approach to these

things. The particular exigencies of cooperation over pollution in semi-enclosed seas are quite different from those which might apply on the West Coast of Africa or Latin America or somewhere of that sort.

That said, I will move to the last of the headings, the question of cooperation of the communication of information. This heading, I suppose, might be said to be the soil in which the other complaints of non-cooperation are rooted. It is because the United Kingdom takes actions that directly affects Ireland's rights and interests without informing Ireland and on the basis of data and analyses that are not disclosed to Ireland that these problems arise. The point is raised here because of our desire that the Tribunal should spell out in its award the need for clarity and timeliness in communications between the two States. I do not want to repeat what is already set out in detail in the written pleadings. I do want to recall very briefly one or two of the instances where there has been a breakdown in communication between the two.

The first and in many ways the most startling is the incident over the Article 37 Opinion for the reopening of the MOX demonstration facility. There is an incident which occurred after the ITLOS Order was put in place, in a case where Ireland had raised the whole question of the MOX development in an international tribunal, saying that its rights had been violated in the manner in which that development had taken place. Yet Ireland learned of that reopening of the MOX demonstration facility not from the United Kingdom, but just by reading through the pages of the Official Journal of the European Community. It may be a small instance, but it is of significant interest that something as directly related to the heart of this case and as plainly within the terms of the order for cooperation from the ITLOS, it was never disclosed by the United Kingdom at all. You will see in the Judges' folder at tab 55 the response that was given by the United Kingdom when Ireland raised this matter. In fact, at tab 55 you will see the Article 37 Opinion and the rest of the correspondence that goes with it.

The first two sheets set out the European's Commission's Article 37 Opinion, which is what alerted Ireland to the incident. The next two sheets, which are headed 69 and 70 at the top of the page, raise with the United Kingdom the question as to why Dublin was not told of this. Then the last two pages contain the United Kingdom's reply. The reply is significant. There is an enclosure of the documents that were sent off to the European Community and then the United Kingdom make three points. Number one, the United Kingdom Government does not consider that an Article 37 submission was necessary in respect of the MDF. This is another illustration of the same point again. We have no doubt that the United Kingdom did take that view, but cooperation requires more than that the United Kingdom simply announce that in its view there was no need to tell Ireland of this development. The second paragraph deals with typographical errors. The third paragraph says that the data in the European Community instrument suggests that MDF will operate as a support facility for at least three years and the letter confirms that the period of three years is, in fact, an upper estimate. There is no word in the letter as to why there was not information passed over by the United Kingdom to Ireland under the terms of the ITLOS Order. There was no recognition of the fact that Ireland might have had an interest in this that was engaged by that Order.

The second incident is the one to which I have taken you before lunch, the series of letters, and

in particular the letters of July and December ...

PROFESSOR CRAWFORD: I hate to interrupt your second incident, but I would like to go back to the first point. You say of the letter from Mr Wilson of 19th February 2003 that it is typical of non-cooperation, because the UK had, and you accepted that it had, a certain view about the MDF, which is conveyed there. What in your submission should the United Kingdom have done?

PROFESSOR LOWE: The United Kingdom should have acknowledged in that letter at least that it was unfortunate that the information had not been given to Ireland in advance. There should have been an acknowledgement that this is precisely the kind of information which, under UNCLOS in general and under the ITLOS Order in particular, should be transmitted to Ireland as a latter of course in pursuance of the obligations of cooperation.

With regard to the second and third examples that I give, the first was the exchange of the letters which led up to the authorisation of the MOX plant, which I took you through before lunch, and the other one is one which concerns the question of shipments of materials through the Irish Sea. That I will go into in camera a little later. These are all examples of what Ireland regards as an unnecessary opacity in the communications from the United Kingdom. It is not that the United Kingdom ever states anything that is actually incorrect, necessarily. It is simply that there is a reluctance to give straightforward answers to questions and to pass on information as a matter of course. This, in our submission, falls below the standards of cooperation and coordination required by UNCLOS.

Dr Plender is fond of closing his speeches on this matter by referring to Sherlock Holmes and I must say that it has a very particular resonance with the Irish side in this matter. Ireland has for years now been in a position where it has had to track down scraps of information by watching television, reading newspapers, reading other people's pleadings in British courts and watching people's websites, and, quite frankly, it is fed up with playing the role of a detective in this matter. What it is looking for is active cooperation from the United Kingdom; and Ireland submits that it is entitled to it.

If I can close this open part of the presentation, it is thought that it might be helpful if we sum up the concerns that Ireland has by referring to the kind of principles of cooperation which ought, in our view, to apply in relations between States under UNCLOS.

It would not be appropriate, perhaps, to have these set out in the terms of an order, but, if the Tribunal were able to make some reference to principles of this kind in the order that it drafts up in the perambulatory paragraphs, it could be a great help to the parties. The principles we have listed on the little three-page outline. That I have got, and I shall run through them quickly now.

The first is that there is a duty to give notification of projected actions that can be foreseen to have an impact upon the exercise by the other State - Ireland or the United Kingdom - of its rights and duties under UNCLOS or upon the protection and preservation of the marine environment of any part of the Irish Sea. Secondly, that duty of notification applies whenever the planned action can be foreseen to have a significant impact, even if the State that is proposing to take the action takes the view that the harmful effects of any action will be minimal, acceptable or outweighed by the beneficial consequences of the action that it proposes to take. Thirdly, that, when States are cooperating, notification should be

given in sufficient detail to permit the other State to make its own assessment of the likely impact of all the foreseeable effects of the development. Fourthly, that notification shall be given as early as possible and must be given in time to allow the other State to make a considered response before a final decision on the projected action is taken. Fifthly, the responses that are made by the other State should be received and considered in good faith, both in the specific context of the duty of cooperation imposed by UNCLOS upon State Parties, in particular State Parties around semi-enclosed seas, and also in the context of any wider consultation regarding the proposed development, such as the domestic concerns with public inquiries. Sixthly, that submissions made by another State, if they are not accepted by the State to which they are given, should not simply be rejected or put to one side, but they should be discussed in good faith between the two States. There should be some engagement in the process of consultation between them. Seventhly, that the duty of cooperation under UNCLOS falls equally upon all States and that there is no priority established for any particular State or any particular use of the seas which would diminish its obligation in relation to any of them. Eighthly, that the duty to cooperate does not give any State the right of veto over proposed actions by other States - Ireland is not claiming this in respect of any British activities - but reasoned objections to the proposed action may require the amendment, postponement or abandonment of the plan. Next, in case of emergency, it may be necessary for States to proceed to act without prior notification and consultation. This we accept, but, in such a case, it should notify and consult with the other State as soon as possible. Last, specific items of information may be withheld from other governments when the actual disclosure of that information to that government would be contrary to the essential security interests of that State.

At this point, President, I would wish to go into the confidential matter that we have before the Tribunal, but before I do so it would be right, I think, for me to give my conclusions which will ordinarily follow that as a conclusion here so that it will be on the public record. The concluding remarks tie in with everything that has been said so far with the actual measures that have been sought.

Professor Sands is going to address the measures that are sought under the heading "The discharges and assessment". As far as cooperation is concerned, the need for information regarding transports and the terrorist threat will, I hope, be evident from my earlier submission. Requests for orders regarding information on other matters and developments at the Sellafield plant is based upon Ireland's need to be kept informed of developments that affect those plants. As is well known in Ireland at least, the Irish Government takes various precautions against the risks of radiation sickness. It has distributed iodine tablets. It makes the kind of emergency plans that all States make for dealing with civil emergencies. The scale of the preparedness of hospitals and emergency forces, the distributions of drugs and things of this kind are fine tuned to correspond with the level of risk which Ireland considers to exist from the Sellafield activities and from MOX and THORP in particular. So, in order to be able to maintain that planning, Ireland needs to be informed of developments which affect the level of risk at the THORP and MOX plants. Such an order should not be necessary, but I am afraid that the experience of the Article 37 Opinion on MDF suggests that it probably is.

The need for information about the material in the HAST tanks and so on is necessary to enable

Ireland to calculate the extent of the risk from those facilities. The same is true regarding information on research studies that have been undertaken in connection with the MOX and THORP operations. Ireland is not a nuclear state. It does not have a large scientific and industrial establishment geared up to research into and the evaluation of nuclear issues. The RPII has a very high level of expertise and a very high level of ability to analyse the data that it obtains directly by its own researches and that it obtains from other sources; but Ireland, like all non-nuclear states, is heavily dependent upon the cooperation of nuclear states themselves in making their information available to it in order to allow domestic planing to take place.

That, sir, I think is the right place at which I should stop and ask, with your permission, if we might go in camera.

THE PRESIDENT: Yes. That means would all those who are not here in the definition of being members of the legal teams, please withdraw now.

(**Please see separate transcript for closed session**)

THE PRESIDENT: Yes, Professor Sands, you may proceed now.

PROFESSOR SANDS: Thank you, Mr President. I will deal over the remaining part of this afternoon and tomorrow morning - and I will do my best to finish before the scheduled time - on two matters in respect of which Ireland requests provisional measures: firstly, in relation to the question of environmental assessment and, secondly, in relation to the prevention of pollution. What I will do is identify, firstly, what are Ireland's rights under UNCLOS and, secondly, the manner in which they might be prejudiced without the prescription of further provisional measures and, thirdly, why we say the prejudice of these rights would be irreparable, particularly in the form of money damages. I will conclude with an indication of the precise measures which Ireland seeks.

I hope to go on for about an hour for the rest of this afternoon. I will not be able to finish environmental assessment today, so I will get to a point, with your permission, that may be a suitable point to suggest a break, finish off environmental assessment tomorrow and then conclude with pollution.

We hope that by now, with the written pleadings and the materials, the Tribunal has all the material that it needs before it which is necessary to understand UNCLOS and the relevant rules of general international law, the general international legal context, in which this part of the application is made, both assessment and pollution.

As Professor Lowe sought to explain, Part XII of UNCLOS affirms the importance of environmental protection and it establishes both substantive protections and procedural rights to give effect to such protections, including the right to participate in effective co-operation. Those fall within the general obligation of States under Article 192 to protect and preserve the marine environment, and Article 194 - I shall come back to it in light of the questions that were asked - defines the general obligations to prevent pollution of the marine environment, and Article 196, which we have not touched on, may merit passing reference because it underscores the 1982 conventions, recognition of the particular risks posed by the use of hazardous technologies. It is also, I think, worth referring to Article

23 of the Convention, which is the point in the Convention which recognises that nuclear substances are "inherently dangerous and noxious" and which requires ships carrying such substances "to observe special precautionary measures established for such ships by international agreements". So UNCLOS itself recognises that when we are dealing with radioactive substances, special caution is required.

I think UNCLOS also falls to be seen in the context of a historic, a well-established historic concern about radioactive pollution, going back to the earliest days of the united Nations general Assembly and subsequently. One might make mention of the United Nations Scientific Committee on the Effects of Atomic Radiation to the 1963 Nuclear Test Ban Treaty prohibiting atmospheric tests, the preamble of which makes it very clear that central to the concerns were radioactive contamination and fallout from such tests and then closer to home, the 1974 Paris Convention for the Prevention of Pollution from Land-Based Sources, Article 5 of which establishes particular limitations and protections in relation to radioactive sources.

But even after UNCLOS, international rules and practices and recommendations have, increasingly, pointed to constraints on the right of a State to engage in nuclear activity and the conditions under which such activity may be engaged in, and I just want to mention in passing just four examples to give a sense of the context in which these issues are to be addressed.

Firstly, at tab 2 of your judge's folder today you will find relevant extracts from Agenda 21, adopted by consensus at the 1992 UN Conference on Environment and Development. You will find at the top of page 40 - I am sorry, you do not have page 39 so I cannot read to you the introduction - I draw to your attention two points. Firstly, the second paragraph down, paragraph (d) - that must be paragraph 22.4(d) - should engage in "proper planning, including environmental impact assessment where appropriate, of safe and environmentally sound management of radioactive waste, including emergency procedures, storage, transportation and disposal, prior to and after activities that generate such waste." So a recognition of the international community's commitment to take certain steps in relation to activities of this kind.

A little bit further down, paragraph 22.5 - and I would like to draw your attention to 22.5 (c) - "States, in co-operation with relevant international organisations, where appropriate should ... (c) not promote or allow the storage or disposal of high level, intermediate level and low lever radioactive wastes near the marine environment, unless they determine that scientific evidence, consistent with the applicable internationally agreed principles and guidelines, shows that such storage or disposal poses no unacceptable risk to people and the marine environment, or does not interfere with other legitimate uses of the sea, making, in the process of consideration, appropriate use of the concept of the precautionary approach."

We rely on that simply to illustrate the recognition of the international community of a degree of concern about radioactive substances being, if you like, utilised or stored near the marine environment, for the obvious reason that discharges into the marine environment are considered to be particularly harmful and difficult to control.

The following year, in 1993, the parties to the London Dumping Convention of 1972 adopted a

prohibition on the dumping of all radioactive wastes at sea and the United Kingdom participated in the acceptance of that commitment. To explain the significance of that for the purposes of these proceedings it establishes in law the point that if one were to take even a cupful of the discharges from the MOX plant, put them on board a vessel, take the vessel out into the Irish Sea, it would not be permissible to discharge that cup into the Irish Sea, there is a complete prohibition in relation to that type of activity by the 1993 Prohibition.

Around that time also the adoption of the 1992 OSPAR Convention, of which you have heard considerable amounts, and I would refer you there simply to Annex II, Article 3, paragraph 3. It may be worth having a look at that, it is at tab 3. On the second page, at page 423, about halfway down, since we have just had a discussion about co-operation and Article 197, it is worth noting there the preambular paragraph which says: "Recalling the relevant provisions of Customary International Law reflected in Part 12 of UNCLOS and, in particular, Article 197 on global and regional co-operation for the protection and preservation of the marine environment, so the connection between that Convention and UNCLOS is established, and then over the page you have got there Annex II, Article 3, paragraph 3(a), "The dumping of low and intermediate level radioactive substances including waste is prohibited." Then following on from that you have got an exception which is capable of being invoked by the United Kingdom and France; both the United Kingdom and France have subsequently renounced the right to make use of that exception, so they have accepted that prohibition which, of course, does not deal with land-based sources, it deals with dumping by vessels at sea.

PROFESSOR CRAWFORD: As a matter of general interest, what is the policy justification for drawing a distinction between dumping at sea and disposal in the sea from land-based sources? I am well aware that the distinction is drawn in various contexts, but is there a policy basis for it?

PROFESSOR SANDS: Sir, I think one must assume that the quantities that are likely to be dumped by vessels may be of an amount which means that in practice that would not impose constraints on economic or industrial activity. When one talks about land-based sources, you are dealing with projects such as the site at Sellafield, and beyond that we would say that the levels of radiation are essentially the same, and one would have to compare precisely the two sets of provisions. I am going to come back to that issue, in fact, when we come to the definition of pollution.

PROFESSOR CRAWFORD: Yes, and also to the question of discharges more generally, because if distinctions have been drawn - obviously radiation is radiation - it may be relevant to the interpretation of UNCLOS.

PROFESSOR SANDS: Indeed, and we would say it is relevant to the interpretation of UNCLOS and the position that has been put by Ireland in the pleadings is not that there is an equivalent prohibition as such in relation to land-based sources. We recognise that distinction, and that distinction of course has certain implications.

Over the page at tab 4, since reference has been made to it, it is probably worth drawing the Tribunal's attention to precisely what is said at the Sintra Ministerial Declaration. If you go to page 464,

at the bottom you see there the Declaration of the States who are parties to OSPAR acting, in a sense, alongside OSPAR through this Ministerial Declaration. At the bottom it says, "Radioactive substances. We welcome the announcement by the French and United Kingdom Governments that they wish to give up their possible future exemption from the ban on the dumping of low-level and intermediate-level radioactive wastes." That is the point that I made earlier. "We agree, in addition, to prevent pollution of the maritime area from ionising radiation through progressive and substantial reductions of discharges, emissions and losses of radioactive substances, with the ultimate aim of concentrations in the environment near at ground values for naturally occurring radioactive substances and close to zero for artificial radioactive substances. In achieving this objective, the following issues should, inter alia, be taken into account. Legitimate uses of the sea, technical feasibility, radiological impacts to man and biota". Then it goes down little further and directs the Commission to continue to reduce radioactive discharges from nuclear installations to the marine environments by applying BAT (best available techniques)".

There are a couple of comments on this Declaration because it does form a part of Ireland's case. It signals the United Kingdom and Ireland, amongst other States, to move away from focusing on doses to humans and towards concentrations in the marine environment, as the indicator of what is or is not permissible.

The second point is that it commits all parties to progressive and substantial reductions of discharges. That we take to be a serious commitment. Then it sets a target date, as you see over the page, at 465, "We shall ensure that discharges, emissions and losses of radioactive substances are reduced by the year 2020 to levels where the additional concentrations in the marine environment above historic levels resulting from such discharges, emissions and losses are close to zero".

That is also part of Ireland's case and tomorrow morning I will come to the material which demonstrates that, contrary to that commitment, the United Kingdom is, in fact, engaged on a path of increasing discharges over the next 20 plus years from Sellafield and that the large majority of those increases arise from or are scheduled to arise from or in relation to the THORP plant, and that the nub of Ireland's case here is that the THORP plant would not be able to obtain new reprocessing contracts without the existence of the MOX plant. In other words, there is a direct link, we say, between the proposed discharge increases of the United Kingdom over the next 20 years, contrary to this commitment, which is built off the back of the authorisation and operation of the MOX plant and that the MOX and THORP plants are completely interconnected in this very important way. I shall come back to that tomorrow.

That is by way of background in terms of the context of a commitment to proceeding cautiously and prudently in relation to discharges of radioactive materials and in relation to important commitments which States have undertaken.

I turn now to my second point, which is the proposition that Ireland makes that radioactive discharges from the MOX and THORP plants are pollution within the meaning of UNCLOS.

There can be no question that the authorisation and operation of the MOX plant will lead to

discharges of radioactive substance into the Irish Sea, intended and planned discharges, from MOX and also from the production of what we have referred to as feedstock, the plutonium dioxide that goes into the MOX plant to manufacture MOX fuel. Contrary to the position that it adopted at the ITLOS hearing, the United Kingdom now argues that such discharges do not constitute pollution within the meaning of the 1982 Convention and, in particular, Article 1(1)(iv). A great deal of effort has gone into the written pleadings on this point and you will find at our reply, paragraphs 2.41 to 2.56 a very detailed response.

For today's purposes, our submission is that the Tribunal cannot, prima facie, accept that planned discharges into the Irish Sea on an industrial scale of these radioactive substances are entirely excluded from Part XII of UNCLOS, because that is, in effect, what the United Kingdom is arguing. If these discharges or the risk of accidental discharges arising from accident or terrorist attack are excluded from the definition of pollution, then, argue the United Kingdom, none of the constraints under Part XII apply to this activity at all, and it is a central part of the United Kingdom's argument.

We make four points in response to the United Kingdom's argument on pollution beyond the simple point that it is wholly counterintuitive to suggest discharge of radioactive substances does not fall within the definition of pollution.

The first point that we make is that by reference to the definition, it is plain that it is not limited to human health considerations. The definition of pollution extends to potential likely harm to other resources, to marine life and it includes amenity and it does not require a showing of actual harm. Likely to call deleterious effects is sufficient. We say that that is a precautionary definition and a precautionary approach which the United Kingdom has failed to engage with.

Our second point is that, even on its own case, by reference to risks to human health, its argument is unsustainable. The United Kingdom's National Radiological Protection Board has accepted "even the lowest dose of ionising radiation has a chance of causing cancer". That is a 2003 statement and you will find that at paragraph 2.48 of our Reply. It is confirmed by a recent memorandum signalling a change of approach by the ICRP, the principal international organisation, responsible for setting radiological protection standards. You will find that at tab 5 of the Judges' folder. If you go, in particular, to page 139, you will have one extract - and I shall come back to more tomorrow - about half way down, the paragraph beginning, "At present there are no internationally agreed criteria or policies that explicitly address protection of the environment from ionising radiation, although many international agreements and statutes call for protection against pollution generally, including radiation. The current system of protection has indirectly provided protection for the human habitat. The lack of a technical basis for assessment criteria or standards that have been endorsed at an international level makes it difficult to determine or demonstrate whether or not the environment is adequately protected from potential impacts of radiation under different circumstances. The Commission's decision to develop an explicit framework will support and provide transparency to the decision-making process." That is an indication, we say, of a high degree of uncertainty here, in particular as to low levels of radiation. But the simple point is that, even the lowest dose of ionising radiation, according to the NRPB, has a chance of causing cancer. That is sufficient to bring any amount of radionuclides into the definition of

pollution.

Our third point, and this comes to a matter that was addressed in Professor Lowe's discussion, is the United Kingdom ignores a clear distinction that UNCLOS draws between, on the one hand, pollution and, on the other hand, damage caused by pollution. You find that, in particular at Article 194, which was addressed earlier. I think that it comes to Professor Hafner's question at Article 194, paragraph 2. In fact, Article 192, paragraph 2, establishes two distinct obligations. Firstly, to take all measures necessary to ensure that activities are so conducted as not to cause damage by pollution and, secondly, to take all measures necessary to ensure that pollution arising from incidents or activities under their jurisdiction or control do not spread beyond the areas where they exercise sovereign rights in accordance with this Convention. There is a clear recognition in the Convention that you can have pollution which causes damage and pollution which causes no damage, you can have prohibited pollution and you can have pollution which is not necessarily prohibited. That distinction is recognised in the academic literature.

PROFESSOR CRAWFORD: It is clear from Article 194 (I speak for myself, of course) but also from the definition of pollution in Article 1 that you could have pollution which did not cause actual damage. My understanding of the United Kingdom's case is that, while that is true, it does not mean that any introduction of any material which in certain quantities could cause damage is pollution. There is a threshold implicit in the definition of pollution in Article 1, such that one must be able to say that this is hazardous to human health and, therefore, de minimis quantities, even of plutonium, because, on the best available scientific information, you cannot say that this will cause any problem at all will not reach the threshold for pollution in Article 1. There could be a threshold in Article 1 and there is a higher threshold in Article 194.

PROFESSOR SANDS: Ireland's position is that the discharge of any quantities of radioactive substances falls within the definition of pollution. That does not necessarily mean that all such pollution is prohibited by the Convention, nor does it mean that all pollution would necessarily cause damage. The United Kingdom's position, as I understand it, is not to run the de minimis argument and I suspect that that may have something to do with the fact that, under the London Dumping Convention, guidelines have been adopted in relation to what are considered to be de minimis standards of pollution which are not subject to the constraints of that prohibition. Plainly, the MOX discharges and the THORP discharges, separately or together, do not fall in that de minimis standard. As I understand it, the UK argument is not that they are de minimis, but that the introduction of this quantity and type of radioactive material into the Irish Sea, having regard in particular to dispersal, is not caught by the definition.

PROFESSOR CRAWFORD: It does not constitute pollution?

PROFESSOR SANDS: It does not constitute pollution. We do not accept that, because we say that it is unclear where the pollution may end up. It is there, as the Attorney made clear, there for tens of thousands of years and the possibility cannot be excluded that it will at some point end up ingested by a human or by a lobster or by a fish - we do not know. There is evidence, of course, before the Tribunal on that point.

SIR ARTHUR WATTS: Thank you. I was just focusing on the phrase in the definition of pollution of the marine

environment, “which results or is likely to result”. “Likely to result in” seems, to me, anyway, to be something more than just that it cannot be excluded at some long distance future time that it might. There has to be a degree of likelihood, does there not?

PROFESSOR SANDS: We would say that, in relation to radioactive substances, that degree of likelihood is always satisfied, because not only can one not exclude the possibility that it would happen, but there is a fair probability that it will happen. It is likely that it will happen, although we do not know where or when or in what circumstances precisely. On our submission, any discharge of any radioactive substance is caught and is likely. Even the United Kingdom's arguments, as I will come to show in due course, in relation to the draft decision of the Environment Agency of 1998, do not say that there will be no impacts at all on the marine environment. It says that they are likely to be negligible. That, in our submission, is sufficient to bring it within this definition.

SIR ARTHUR WATTS: Can I go on then to what seemed to me to be the critical words in the rest of the definition? It has got to “likely to result in” and then such deleterious effects as “harm”, “hazards”, “hindrance”, “impairment” and “reduction”. Are all those words absolute so that even de minimis harms, hindrances, etc are caught or is there not a, so to speak, qualitative element in those terms as well?

PROFESSOR SANDS: We would say that in relation to radioactive contamination that the ingestion by lobsters or the contamination of seaweed, even at the lowest levels, constitutes harm sufficient to bring it within this definition. That is the position that we have adopted and it is the position that we have applied.

If I can give the fourth point that we make in relation to pollution, that flows, we say, from the language of Article 194, paragraph 3. The introductory chapeau says that the measures taken pursuant to this part shall deal with all sources of pollution of the marine environment. These measures shall include, inter alia, those designed to minimise to the fullest possible extent (a) the release of toxic, harmful and noxious substances, especially those which are persistent, from land-based sources or through the atmosphere or by dumping. If you go on and look at subparagraphs (b) (c) and (d), the activities concerned are introduced by the words "pollution from vessels", "pollution from installations", "pollutions from other activities". In other words, on a reading of 194(3)(a), it appears to have been the intention of the drafters of UNCLOS to adopt the position that any toxic, harmful or noxious substances are considered to be pollutants and fall within the chapeau of Article 194(3). There are no words of limitation. It does not say "the release of polluting toxic, harmful or noxious substances". We think that on that basis alone it is fairly clear and there is no dispute between the parties that radionuclides in any quantity fall within the definition of toxic, harmful or noxious substances. Indeed, that is the position in English law.

Our fifth point is that the UK argument is entirely inconsistent with international practice. The OSPAR Convention makes it clear that all radioactive discharges constitute the discharge of pollutants, although not necessarily all prohibited, and the London Dumping Convention similarly treats the quantities that come from MOX as pollutants within the definition of that convention and we would say that it would be illogical for there to be two different definitions of pollution in relation to two different

instruments, when, in fact, what those two instruments seek to do by the distinction is to distinguish between permitted pollution and impermissible pollution, but the same substances for both Conventions are treated as pollutions.

We would also say that it would be curious in the extreme, since the definition of pollution in UNCLOS is one which reflects the definition, we say and academic authority says, is customary international law, but, if the discharge of this amount of radioactive substance does not constitute a pollutant, then States would be free to discharge these amounts into the atmosphere and elsewhere without the constraints, for example, of international conventions on trans-boundary air pollution which adopts the same definition or in relation to the protection of the Great Lakes between the United States and Canada, where such radionuclides in any quantities are treated as pollutants and even in relation to, for example, atmospheric nuclear testing. If the United Kingdom is right, then at least that argument might lie. If the obligation is not to cause pollution and if we are talking about de minimis discharges, then there would be no polluting limitation on the right to engage in that sort of activity. Our concern beyond this case is what the implications of a definition as adopted by the United Kingdom would do for international practice more generally and exclude from the constraints of international law these types of activities.

PROFESSOR CRAWFORD: To follow up on the point that you made about Article 294, paragraph 3, you point out that the word "pollution" was used in (b) (c) and (d) and, of course, used in the chapeau. Is there any indication in the travaux that the non-use of the word "pollution" in paragraph (a) was intended to be more restrictive or more prohibitive of releases, because it is obviously deliberate that they say "the release of toxic, harmful or noxious substances, especially those which are persistent", rather than saying "pollution from land-based sources"? In changing the language, what was the intent of the draftsman?

PROFESSOR SANDS: There is not anything in the travail that we have been able to find and, with the assistance of Professor Cheng, we have engaged in a fairly exhaustive search and it is not clear what the intent of the drafters was by reference to any of the early negotiating texts. We have certainly looked and we have not been able to identify anything.

If I can move on to my third point for this afternoon, and I turn now to the subject of environmental assessment. Our third point is in simple terms that Ireland has a right to expect the United Kingdom to conduct a proper and complete environmental assessment in relation to the operation of the MOX plant and that such an assessment should consider both direct and indirect aspects and cumulative effects.

The language of Article 206 of UNCLOS is as follows. "When States have reasonable grounds for believing the planned activities under the jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate the results of such assessments in the manner provided by Article 205". Just an important point to make is that Article 206 is linked to Article 205 in this way, " and, effectively, thus requires that the results of the assessment are to be shared to all States" is the language of Article 205. Assessment is also a very central part of

cooperation, as Professor Lowe made clear earlier this afternoon.

In summary, and I shall come back to deal with these points in detail, Ireland's argument is as follows.

1. The operation of the MOX plant was a planned activity as at August 1997 when UNCLOS came into force for the United Kingdom and was an activity of the type envisaged and covered by Article 206.

2. The United Kingdom cannot complain that it did not have reasonable grounds for believing that the MOX plant might cause substantial pollution of the marine environment and was, therefore, not subject to Article 206.

3. In order to meet pollution prevention requirements, Article 206 imposes the requirement to assess all the potential environmental effects of the MOX plant, direct and indirect and cumulative in particular." Point 4: "The United Kingdom has failed to meet these requirements."

When it was adopted, Article 206 was something of a lonely and path-breaking figure in international law. It has subsequently been followed by rather fuller and more complete developments on the law of environmental assessment at the international level. But, equally, it is the case, as at this time, that environmental assessment has entered the international legal lexicon, and there is now significant international jurisprudence on the obligation to carry out an environmental assessment. The European Court of Justice and the European Court of Human Rights have both had occasion to deal with environmental assessment, and the International Court of Justice has had two occasions to deal with the question of the requirement to carry out an environmental assessment, and I am conscious that there are a number of members of the bench who have participated in some of the relevant cases, so it is with some trepidation that I mention these in passing.

The very first case in which the International Court of Justice had occasion to consider the issue was the 1995 Order of the International Court of Justice in relation to New Zealand's request for an examination of the situation. The Court itself did not address environmental impact assessment in express terms, although the dissenting opinion of Judge Weeramantry did, and you find that at tab 6. I do not propose to take you to it, sufficient to say that his conclusion, as of 1995, was that:

"It is clear that on an issue of the magnitude of that which brings New Zealand before this court, the principle of environmental impact assessment would prima facie be applicable in terms of the current state of international environmental law ..." and he refers to the very same types of instruments that Ireland has referred to in this context.

France in that case did not adopt the position that it was not required to carry out an environmental impact assessment, it adopted the position that it had carried out an environmental impact assessment, and that it was consistent with relevant domestic and applicable international standards, and of course that was an activity which, as proposed to occur, was intended to result in zero discharges into the marine environment. So there was a contrast adopted in the position taken by France in 1995 with that taken by the United Kingdom before this Tribunal.

The Issue came back to the International Court of Justice a couple of years later, and I think it is

worth going to that judgment, it is at tab 7 of the folder. In particular, at the second page of that tab, there is the paragraph of the court's judgment which deals with environmental assessment, although it does not actually call it environmental assessment, and I think it is worth having a look briefly at paragraph 140, in particular and not least because Ireland drew this paragraph to the United Kingdom's attention as early as December 1999 in one of the letters which Professor Lowe drew to your attention. The United Kingdom did not then respond and, in fact, it was not until its Counter-Memorial in January of this year that the United Kingdom defined its position on the implications of paragraph 140.

The significant element, I think, of this paragraph is set forth in the second section onwards. "In order to evaluate the environmental risks, current standards must be taken into consideration. This is not only allowed by the wording of Articles 15 and 19, but even prescribed. To the extent that these Articles impose a continuing and thus necessarily evolving obligation on the parties to maintain the quality of the water of the Danube and to protect nature. The court is mindful that in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of the type of damage.

Then at the bottom: "For the purposes of the present case, this means that the parties together should look afresh at the effects on the environment of the operation of the Gap Chekhovka Power Plant; in particular, they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side arms. The parties together should look afresh at the effects on the environment".

That, effectively, is text which indicates the view of the court that some sort of assessment needs to be engaged in.

That language is, perhaps, illuminated by the separate opinion of Vice-President Weeramantry, who was in the majority in that judgment and who, one assumes, must have had a hand in certainly supporting the language of paragraph 140. Over the page you will find at page 16 at the top right hand corner the extract from Judge Weeramantry's separate opinion where he, two-thirds of the way down that passage says,

"I wish in this opinion to clarify further the scope and extent of the environmental impact principle, in the sense that environmental impact assessment means not merely an assessment prior to the commencement of the project, but a continuing assessment and evaluation as long as the project is in operation. This follows from the fact that EIA is a dynamic principle and is not confined to a pre-project evaluation of possible environmental consequences. As long as a project of some magnitude is in operation, EIA must continue for evert such project can have unexpected consequences and considerations of prudence would point to the need for continuing monitoring." He then goes on also to talk about the obligation to apply current standards.

This passage, together with paragraph 140 of the judgment, in a sense underlies a large part of Ireland's case, namely its assertion that the United Kingdom, by carrying out an environmental assessment in 1993, which we say was inadequate, doing nothing to revisit that assessment of any

material character in the next eight years, and then authorising the project in 2001 on the basis of an out of date, incomplete assessment has erred in law. Specifically, Ireland says, the United Kingdom on no occasion had regard through its environmental assessment of the implications of the project for the new norms and standards which had emerged in the intervening eight years, including UNCLOS, which of course came into force in 1997.

PROFESSOR CRAWFORD: Professor Sands, obviously Gabeikovo was a merits judgment and this is a provisional measures application. Clearly, there was a problem in that case as to what you do once something has been done, apparently irreversibly, even if there may have been deficiencies or even manifest deficiencies in assessment before it was done. Our concern is how to protect the rights of Ireland in a, let us hope, relatively short but in any event finite period before a judgment on the merits, and there is some problem here. One can see it in the context of co-operation where co-operative measures are the sorts of things which Tribunals will often order in the context of provisional measures, but we cannot anticipate a judgment on the merits which we may not have jurisdiction to give, so how do we relate the assessment part of the claim to any remedy that we could properly give you in the context of provisional measures? I know you are coming to this, but I look forward to it.

PROFESSOR SANDS: I am very grateful for the question and

I will briefly address it now, but I of course was planning to come back and deal with it. You will see from the content of Ireland's request for further provisional measures that Ireland is not inviting this Tribunal to order that any sort of assessment be carried out, we quite accept that at this stage of the proceedings that is not something this Tribunal can do.

We are conscious, however, that the next phase may be rather short or rather long, we do not know how long it will be, and the object of our request is to avoid the situation in which steps could be taken which would, in due course, preclude the possibility of any assessment this Tribunal orders being given appropriate or full effect or consideration.

Let me illustrate that. I was coming to that tomorrow morning, but I can illustrate it straightaway. One of the issues which is at the heart of these proceedings - and we note that the United Kingdom in its letter of 11.30 pm on Friday night indicated a willingness to engage in issues relating to future THORP contracts - we want to avoid a situation in which, at some point in the foreseeable future, new THORP contracts are entered into which would effectively trump or pre-empt the outcome of a future assessment order. For example, if this Tribunal were to order than an assessment was to be carried out, and that assessment was to indicate that particular forms of abatement technology were possible, or that alternative discharge scenarios were possible, we would not want it to be said that the results of such an assessment, filled in to the policy considerations, could not be given effect because new contracts had been adopted to give effect to further THORP reprocessing to produce feed stock for MOX. The United Kingdom thus far has not been willing to say that it will subject such contracts to any form of environment assessment; it has had ten years of requests from Ireland to engage in an assessment, it has not done so. We have to assume that it is not willing to look holistically at the project and consider those assessments. So the object of this request is simply to preserve Ireland's rights in the

event that an order was adopted which might have implications for new contracts which were adopted between now and the time of such an award.

That is one illustration, there are other examples that I shall come back to tomorrow, but that is Ireland's concern. We would not wish it to be said at some point in the future that we cannot give effect to an assessment because it would have huge financial implications because of new contracts that we have or we are about to obtain. That is the concern that Ireland has in this regard.

In relation to international jurisprudence we have also put in other examples, including ICSID of environmental assessment having if you like crystallised at the international legal level and attained a certain status.

The arguments on environmental assessment are set out in very great detail in chapter 7 of our Memorial and chapter 6 of our Reply, and at chapter 7 of our Memorial at paragraph 7.5 we summarised what we said was the United Kingdom's obligation in the following terms:

"The United Kingdom should identify all possible environmental consequences for the Irish Sea arising from the authorisation of the MOX plant, including indirect environmental consequences which would not occur but for the authorisation of the MOX plant, and to assess those consequences by reference to its environmental obligations at the date of the authorisation, October 2001." That is our effort to crystallise what the obligation was.

That process of environmental assessment comprises two stages. The first stage is to identify the potential effects of such activities on the marine environment and the second stage is an assessment of those potential effects, and potential effects, we say, must mean at least all intended and reasonably foreseeable effects. In the context of the authorisation of the operation of the MOX plant, the identification stage encompasses potential effects from four different sources of activity: first, the MOX plant itself, and that is in fact all that has been assessed by the United Kingdom. Secondly, the intensification of the use of and extension of the life of THORP, which arises as a result of the operation of the MOX plant - new contracts for reprocessing which would not have been obtained but for MOX. Thirdly, the storage and disposal of additional wastes produced as a result of the operation of the MOX plant and additional activities of THORP. Fourth, the risks posed by international transports related to the MOX plant of nuclear materials to and from the Sellafield site.

The parties are not in agreement as to what the object of an environmental assessment is. In Ireland's view its object is to assist in the achievement of the Convention's commitment to the protection and preservation of the marine environment. It is not limited to information gathering, as the United Kingdom argues. The information is to be obtained to assist the State and its decision-makers meet its UNCLOS obligations to protect and preserve the marine environment, and it also serves the purpose of appraising other parties, other States parties, of the potential effects of the planned activities which are the subject of an Article 206 assessment.

Article 206 does not itself specify the manner in which the assessment is to be carried out or the content of an assessment. That is to be gleaned from various international instruments which coalesce in the proposition that the object of an environmental assessment is not merely to gather information, it is

also to be used to inform the decision-making process in order that the State's obligations - domestic, regional, global - can be given full effect. You get a flavour of that, for example, at tab 9 of the judge's folder from the UNEP Goals and Principles of Environmental Impact Assessment. These were adopted in 1987, I do not think they are contentious between the parties and, on the top of the second page, page 5 at the top, it says: "Goals. To establish that before decisions are taken by the competent authority or authorities to undertake or to authorise activities that are likely to significantly affect the environment, the environmental effects of those activities should be taken in to account."

In other words, it is to assist the persons who are taking the decisions, authorising the activity. That is the object and we say that that object goes a long way to determining what the assessment ought actually to include and what it ought to achieve. If the decision-maker is not in a position to know what all the consequences are going to be as a result of an environmental assessment, the environmental assessment exercise has failed, and we say that is what has happened here because on the basis of the assessment that was carried out the decision-maker, the two Secretaries of State, acting in October 2001, were not in a position to know what all the consequences were, and that object and purpose of environmental assessment is non-contentious, it is included in the Espoo Convention of 1991, in the EC Directive of 1985, in Agenda 21, in various paragraphs in chapter 17 and also in the 2001 IRC draft Articles on the prevention of trans-boundary harm from hazardous activities. In our view it is not contentious what the assessment purpose is for.

The object and purpose of assessment therefore directs the developer and the authorising authority towards answering the question what should the assessment contain at a very minimum. Article 206 does not in terms answer that question. That does not mean, however, as the United Kingdom argues at paragraph 5.15 of its Counter-Memorial, that there is no suggestion in Article 206 that the assessment has to be done in a particular way. An Article 206 assessment should be carried out, we say, so as to ensure that its object and purposes may be achieved, having regard to its context and, in particular here with Article 206, its relationship to the substantive obligations to protect the marine environment.

There are many other international instruments which provide guidance as to what the minimum requirements are, These instruments are relevant also, we say, because they give an indication of what measures are practicable within the meaning of Article 206. It is not Ireland's position that the instruments that I have already referred to are somehow incorporated into Article 206; i hope by now that that is clear, we are simply saying these instruments provide an indication of what is recognised to be the basic minimum requirement of an environmental assessment, and one can glean from these international instruments common principles. The relevant instruments which we have looked at are the 1987 UNEP Principles, the 1985 EC Directive, the 1991 Espoo Convention, the 1994 IEA Convention on Nuclear Safety and the 1997 IEA Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management. Those minimum requirements are also reflected in English law, in particular in the Town and Country Planning, Assessment of Environmental Effects Regulations 1988, part of which you will find at tab 13 of your folder.

In paragraph 7.25 of our Memorial we identified what the minimum requirements were and they are as follows. First, a description of the proposed activity; second, a description of the potentially affected environment; third, a description of practicable and reasonable alternatives, including the no action alternative; fourth, an assessment of the likely or potential environmental impacts of the proposed activity and alternatives, including direct, indirect, cumulative, short term and long term effects; fifth, an identification of measures available to prevent, mitigate, minimise or offset adverse environmental impacts; sixth, an indication of gaps in knowledge and uncertainties; seventh, an indication of predictive methods and underlying assumptions; eighth, an outline for the monitoring and management of programmes and any plans for post-project analysis; ninth, an indication of whether the environment of any other state is likely to be affected by the proposed activity or alternatives; and tenth, a non-technical summary.

Those ten points appear in each of the international instruments that we have referred you to, and I would add to it the latest World Bank Operational Directive, 4.01. Those are, we say, the minimum content which the United Kingdom was bound to ensure as having been included in the assessment that was carried out in the period 1993 to 2001.

Against that background, I turn now to the fourth head of these submissions, the United Kingdom's environmental assessment, and the assessment by the United Kingdom was carried out over an extended period between 1993 and 2001.

SIR ARTHUR WATTS: I am sorry to interrupt but you did get to a sort of break in your enumeration of points and there is a question that I would like to put to you. You have been discussing the environmental assessment arrangements and I think you said five minutes or so ago that one of your central concerns was the possibility of further THORP work being done. I can understand that as being one of your concerns, but in the context with which we are concerned here, namely Provisional Measures, not merits, but Provisional Measures, you will recall that in the United Kingdom's letter of just a few days ago, 13th June - it was Mr Wood's letter to Mr O'Hagan - in the third paragraph there are certain assurances about the THORP contracts. I wonder - can I emphasise, for the purposes of Provisional Measures - why it is that those assurances are not adequate to meet your concerns.

PROFESSOR SANDS: I would make two points at this stage and, if I may, come back tomorrow morning. The first point is that the language of the United Kingdom's text is very carefully drafted. As we have learned, all United Kingdom text is very carefully drafted. I do not want to suggest that some of it is not. I would prefer to take you tomorrow morning, when we come to it, to a passage in the United Kingdom White Paper on the future of nuclear activity and the nuclear legacy and decommissioning, which is pertinent to this language, and which indicates, I think, the sort of areas in which there may be gaps with which Ireland has certain concerns. The second point, I was proposing to deal with expressly, but I think, rather than take you now to this other document that I was coming to in due course, I would prefer to come to that tomorrow morning.

SIR ARTHUR WATTS: Thank you, I will be patient.

PROFESSOR SANDS: If we turn now to the actual assessment that was carried out, and this took place in six

stages, between 1993 and December 2001. Step one, if one might call it that, was the production of the 1993 Environmental Statement. You will find relevant parts o the 1993 Statement at tab 16 of your Judges' folder. It is a document that was described by the United Kingdom's Minister at the time as being remarkably concise for a project of this nature. It runs to about 51 pages and in due course I will take you to another document for another MOX plant under consideration in the United States which provides, we say, a helpful point of comparison.

The Environmental Statement was prepared in connection with BNFL's application to Copeland Borough Council. The application to the Council was limited to the construction of the MOX plant. It did not concern an application for permission to operate the MOX plant. You will find that at the very first page of that Statement, right at the top, page 5 has prepared this Environmental Statement in connection with an application to Copeland Borough Council for consent to build a facility for the manufacture of mixed oxide fuel".

The application to build the MOX plant was submitted prior to the granting of an operating licence for the THORP plant, which at that time, in 1993, was under consideration. The THORP plant predated environmental impact assessment requirements under English law and so there has never been any environmental statement prepared in relation to the THORP plant and it has never been subject of any sort of environmental assessment within the meaning of Article 206 of UNCLOS.

A number of points emerge from this document. Over the page, at page 9, you will see under the heading "Plant Description and Construction", "The plant will be designed to have an operational life of at least 20 years." Then moving three pages along to page 18, down at the bottom, you will see, "SMP will have a production capacity of 120 tonnes per year and will clearly have the potential for both home and overseas sales." In other words, the Environmental Statement is assuming a production volume of no less than 2,400 tonnes of MOX fuel. That, we say, is what should be the subject of the assessment.

Going back to page 9, right at the top of the page, the first paragraph, "When SMP is operational, the primary source of this feed material will be the new thermal oxide reprocessing plant". In other words, the entirety of the feedstock for 2,400 tonnes of MOX fuel is to come from THORP.

Then at page 14, down at the bottom, you will see in the final sentence at the bottom, "This Environmental Statement does not form part of the formal applications which BNFL will make to the NII for agreement to the commencement of the various stages of the project". In other words, this is just for construction and not for operation. That is a separate phase.

I am not going to have time to take you through all of the relevant provisions, I just want to give you an indication of what is missing by reference to three or four little elements.

Chapter 3 of the Statement deals with site selection and, amongst the factors which are mentioned in identifying a suitable site, is the need for a nuclear site which minimises the transport requirements for raw nuclear materials. That is paragraph 3.1. The Statement then goes on to state that much of the plutonium dioxide that will be used in the manufacture of MOX fuels is either in store or will originate at Sellafield. That is paragraph 3.3. No mention is made of the need or intention to

transport large amounts of spent nuclear fuel from Germany and Japan or, indeed, any other countries.

At paragraph 5.17, page 37, right at the end, we do have some information on transports. There will be approximately four or five deliveries each month of processed materials, including uranium dioxide powder. Then at the bottom of that paragraph it says that staff movements will generate approximately 120 car journeys per day, but the document is entirely silent on the question that Sir Arthur put to Professor Lowe, how many transports will there be of raw material to THORP or reprocessing and how many transports of MOX fuel will there be. It is completely omitted from the Environmental Statement.

Chapter 4 of the document deals with what is called the proposed development. It makes it clear that the standard that is to be applied is that the risk posed by the facility should be as low as reasonably practicable. We mention that simply to indicate that it is a standard which differs from that found in Article 194, minimisation to the fullest possible extent.

In relation to liquid effluence, it is said that the MOX fabrication process is an essentially dry process and that there will be approximately 107 cubic metres of liquid effluence rising. That is at paragraph 4.37 of the text. No mention is made anywhere in the document of possible alternatives, for example, storage of these quantities or transformation into some other form which does not require dispersal into the marine environment.

Paragraph 4.41 deals with what are called gaseous effluence. It is worth having a look at that. Higher categories of ventilation extract from active areas of the plant will pass through high-efficiency filters which will greatly reduce the discharge of any solid articulate material. The highest categories are filtered. Extract will be discharged via the existing THORP stack, with others discharged at THORP roof level. Discharges will include very small quantities of gaseous decomposition products, nitrogen, carbon dioxide and water vapour, of the process additives. There is no explanation at all of the radioactive materials that are included; there is no explanation at all of the radioactive content of the gaseous discharges.

Then chapter 5 deals with what is called assessment of environmental effects. There are three pages on employment, two and a half pages on traffic by road, nothing on transport by sea, one page on noise pollution, three and a half pages on landscape and visual, one page on soil, one page with water but not including the marine environment, one page with air and climate, page and a half on flora and fauna and nothing about the marine environment. It is completely silent about the Irish Sea. It is simply not mentioned anywhere in the text.

Ireland wrote, accordingly, to express its concern about the quality of this Statement. This is a year after the United Kingdom has undertaken a commitment at the UN Conference on Environmental Development about locating these types of facilities next to the marine environment.

Step two in the process was that the local council asked for some supplementary material to be provided in relation to gaps in the 1993 Statement, parts of which you have just looked at. BNFL supplied additional material in 1994, on 17th January 1994 and on 4th February 1994. Those are set out at tab 17 of the Judges' folder. That is the totality of the material and it is worth reading with

considerable care and attention, but I am not going to have a chance, given the time available, to take you through it. I just want to take you to one passage at page 15 of that text. That page sets out the physical inter-connections between THORP and SMP, which is the MOX plant, and right at the bottom it says, "Of course, in addition to the above facilities and services, SMP will receive as a process feed packaged plutonium oxide from THORP via a dedicated transfer corridor. However, other than in this one respect, there will be no change to any of THORP's operations. Discharges arising from the operation of THORP will be unaffected".

Pause for a moment. They are proposing to produce 2,400 tonnes of MOX fuel, all of which is to be manufactured off the back of plutonium dioxide sourced from THORP, but, it says, discharges arising from the operation of THORP will be unaffected. It is on the basis of that passage, if you go now to page 5, that you get the recommendation of the Council, at paragraph 3.7, at the bottom, "I would, however, advise Members that they are not required to consider the environmental effects of the operation of THORP itself except in so far as these effects could be said to be the effect of [I think this is MOX]. In practice, THORP will operate with the same environmental effects with or without MOX." In other words, the 2,400 tonnes is completely excluded from the equation. That was the basis upon which Copeland Borough Council authorised the construction of the project, but, significantly, if you go to page 8 of that document, paragraph 10.1, you will see that it says that the building shall not be brought into use until notification in writing has been given to the local planning authority of the receipt of all such authorisations or licences, as may be required under the Radioactive Substances Act 1960 or the Nuclear Installations Act 1965, in respect of the use of the building for the manufacture of MOX fuel." The Radioactive Substances Act 1960 has now been replaced by the 1993 Act and this is, effectively, saying that we are not authorising operation, that is for other agencies. But the key point of this document is that they have excluded THORP entirely from consideration. This is the moment at which we say that the United Kingdom fell into error, because this environmental statement, in fact, was subsequently relied upon by the Environment Agency in 1998 and by the decision of the Ministers in 2001. That was the basis upon which they were able to exclude entirely the environmental consequences of producing plutonium dioxide sufficient to manufacture 2,400 tonnes of MOX fuel.

Just to explain why that is pertinent, and this comes back to Sir Arthur's question, at the present moment baseload contracts and post-baseload contracts - ie contracts obtained for THORP reprocessing - only cover 31 per cent approximately of that 2,400 tonne amount. So as near as 70 per cent of future contracts are required to keep MOX to the schedule of what was authorised. I will come back to the significance of that in due course.

The other point that I would make briefly about this additional supplementary material is that it does not deal with transports, it does not deal with the marine environment and it does not deal with any of the other issues with which Ireland was and remains extremely concerned.

The next step in the process, step three, is the 1997 Euratom Opinion. You will find that at tab 18. This is the equivalent to the Opinion that Professor Lowe discussed previously in relation to the MDF plant. For the operation of these types of facility, you need to get an opinion from the European

Commission. The United Kingdom has treated this as part of its environmental assessment. The information provided to the European Commission was essentially the same as that contained in the 1993 Environmental Statement. The conclusion at the bottom is to be read very carefully.

"The Commission is of the opinion that the implementation of the plan for the disposal of radioactive waste arising from the operation of the BNFL SMP, both in normal operation and in the event of an accident at the magnitude considered in the general data" - and the key words - "is not liable to result in radioactive contamination significant from the point of view of health of the water, soil or airspace of another Member State." The simple point that we make is that this is not a determination that it will have no environmental impact. It is a determination that it will have no health-related impacts and it is a central part of Ireland's case. There is a distinction between the two.

Step four is the Environment Agency's 1998 proposed decision.

SIR ARTHUR WATTS: It is not quite the way I read the text, "is not liable to result in radioactive contamination significant from the point of view of health or significant from the point of view of the water, soil or airspace of another Member State." Is that not the correct reading? It is not just health, is it?

PROFESSOR SANDS: Sir, it is, indeed, just health, because Euratom does not have competence to deal with environmental contamination. Under Article 36 of Euratom, the sole basis upon which Euratom can exercise competence is in relation to health matters not in relation to environmental matters. What it has done is it has considered what the discharges from the MOX plant will be into the environment and then looked at what the impact of such discharges are likely to be on human health. It is not expressing a view of the impact of those discharges on the quality of the receiving environment. It is not, in fact, competent to do that. You can have an explanation. By way of background, there is in the bundle of material a very lengthy Opinion of Advocate General Jacobs in the Nuclear Safety Case before the European Court of Justice, which explains the limited competence which Euratom has. I can quite, sir, that on a reading it is not altogether clear that that is what is intended, but if one, we would say, takes the language and also looks at the legal basis for the adoption of that opinion, it is limited to human health.

THE PRESIDENT: Professor Sands, is it not possible that even though they may not have had the competence to say what they appear to be saying, they actually said so? Because I think Sir Arthur Watts' point is very valid: it appears that the correct reading is from the point of view of health and from the point of view of the water, soil and air, etc. So if you say that they do not have the mandate to say so, it does not follow, therefore, that they did not actually say so.

PROFESSOR SANDS: We would hope that they did not do it if they did not have the mandate to do it; we do not know them to have claimed to have done it, and their practice has been very consistent in looking only at human health impacts by reference to exposures to doses of humans and nothing more than that. They are not expressing a view on the impact on the receiving environment as such of discharges.

PROFESSOR CRAWFORD: A possible reading of the passage which might have been clearer would be: "Not liable to result in radioactive contamination of the water, soil or air space of another Member State which is significant from the point of view of health." That is your ---

PROFESSOR SANDS: That is our reading of it. The Euratom Commission, when it is acting as such, simply does not

have competence over contamination of the environment, that is not within their mandate.

PROFESSOR CRAWFORD: That may be right, but the question is what they actually said, and that is at least an arguable construction of what they actually said.

PROFESSOR SANDS: The reading, sir, that you have just given is our reading of that language.

PROFESSOR CRAWFORD: And therefore arguable, Professor Sands?

PROFESSOR SANDS: The next step, and I will just deal with it very briefly so that I can finish at an appropriate point, it can be dealt with expeditiously, step 4 is the Environment Agency's 1998 draft decision justifying the operation of the MOX plant - you have extracts from that at tab 19. That decision is, essentially, based on, similarly, the production of 120 tonnes of MOX fuel from foreign-owned plutonium going through THORP; no reference to impacts on the marine environment, no reference to discharges other than those arising directly from the MOX plant, no reference to environmental consequences of THORP or of radioactive wastes, or of international transports, no reference to the Irish Sea. That decision, of course, postdates the entry into force for the United Kingdom of UNCLOS, no reference to UNCLOS in that draft decision.

We then move on to the Ministers' decision of October 2001, that is parts of it set out at tab 20. It was not based on any new environmental assessment, it relies on the Environmental Agency's proposed 1998 Decision which of course itself relies on the matters provided pursuant to the 1993 Environmental Statement. The Decision of the Ministers is similarly silent as to impacts on the marine environment, addresses only MOX discharges, does not address THORP, does not address radioactive wastes, does not address international transports and by now, notwithstanding Ireland's efforts since 1998 and 1999, to draw to the United Kingdom's attention the requirements of UNCLOS, no reference is made to UNCLOS anywhere in the Decision.

Then the final stage of the decision-making process, step six, is the HSE's Consent Decision of 19th December 2001. The text of this was not originally included in the UK Counter-Memorial; following a request from Ireland a copy was provided on 14th February 2003. It too does not indicate that any further assessment of the environmental consequences of the MOX plant was carried out. Ireland sought copies of documents referred to in this authorisation and that documentation was refused by the United Kingdom, and you will see the correspondence in relation to that at tab 21.

Sir, that is the totality of the environmental assessment carried out by the United Kingdom, and to conclude today I would make the following points. The assessment was carried out over an extended period, 1993 to 2001. The assessment was under way when UNCLOS came into force for the parties. The assessment was based entirely on the 1993 Environmental Statement, supplemented by modest additional material in 1994 but never substantively updated thereafter. The assessment took no account of the requirements of UNCLOS or other applicable international rules and standards, for example the Sintra Declaration which directs the United Kingdom consider impacts on concentrations of radionuclides. The assessment was not based on updated material, the assessment was based exclusively on the limited impacts from the MOX plant and it excluded all other impacts - additional activity at THORP, additional wastes arising, including for the HAST tanks, and implications of additional international transports. It also failed, obviously, to deal with questions of risk associated with terrorist

incident because it was entirely prepared before the events of September 11 2001. Indeed, the Tribunal will have noted that the authorisation, after several years of delay, was adopted within three weeks of that event.

Finally, and most significantly from Ireland's perspective, there is nothing anywhere in the assessment that indicates that any consideration was ever given by the United Kingdom to the cumulative impacts of this project, MOX and THORP and transports and waste storage, for the level of radionuclides in the Irish Sea or for the levels of protection from pollution to which the Irish Sea, we say, was entitled under the 1982 Convention.

Tomorrow morning, with your permission, sir, I will return specifically to deal with the question of the United Kingdom's failure to meet the requirements of Article 206 and the point raised by Sir Arthur's question, why we think it would assist both the parties to have some guidance from the Tribunal even at this stage on the need to avoid measures or actions in the coming months or years which might make a future complete environmental assessment difficult to implement. That is what we are looking for. Thank you very much.

THE PRESIDENT: Thank you very much. We will adjourn now and resume tomorrow at 9.45.

(Adjourned to 9.45 am on Wednesday, 18 June 2003).