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2001

Public sitting

held on Tuesday, 20 November 2001, at 9.30 a.m.,

at the International Tribunal for the Law of the Sea, Hamburg,

President P. Chandrasekhara Rao presiding

The MOX Plant Case

(Request for provisional measures)

(Ireland v. *United Kingdom)*

Verbatim Record

Uncorrected
Non-corrigé

Present:	President	P. Chandrasekhara Rao
	Vice-President	L. Dolliver M. Nelson
	Judges	Hugo Caminos
		Vicente Marotta Rangel
		Alexander Yankov
		Soji Yamamoto
		Anatoli Lazarevich Kolodkin
		Choon-Ho Park
		Paul Bamela Engo
		Thomas A. Mensah
		Joseph Akl
		David Anderson
		Budislav Vukas
		Rüdiger Wolfrum
		Tullio Treves
		Mohamed Mouldi Marsit
		Gudmundur Eiriksson
		Tafsir Malick Ndiaye
		José Luis Jesus
		Guangjian Xu
	Judge *ad hoc*	Alberto Székely
	Registrar	Philippe Gautier

Ireland represented by:

Mr. David J. O'Hagan, Chief State Solicitor,

as Agent;

Ms. Christina Loughlin,

as Co-Agent;

and

Mr. Michael McDowell SC, Attorney General,
Mr. Eoghan Fitzsimons SC, Member of the Irish Bar,
Mr. Philippe Sands, Member of the Bar of England and Wales, Professor of International Law, University of London, United Kingdom,
Mr. Vaughan Lowe, Member of the Bar of England and Wales, Chichele Professor of International Law, University of Oxford, United Kingdom,

as Counsel and Advocates;

Ms. Caitlín Ní Fhlaitheartaigh, Advisory Counsel, Office of the Attorney General,
Mr. Edmund Carroll, Advisory Counsel, Office of the Attorney General,
Ms. Anjolie Singh, Member of the Indian Bar, India,
Ms. Alison Macdonald, Member of the Bar of England and Wales, Fellow, All Souls' College, Oxford, United Kingdom,
Ms. Anne O'Connell, Solicitor in the Chief State Solicitor's Office,

as Counsel;

Mr. Joe Jacob T.D., Minister of State for Public Enterprise,
Mr. Martin Brennan, Director General Energy, Department of Public Enterprise,
Ms. Renee Dempsey, Principal Officer, Department of Public Enterprise,
Mr. Frank Maughan, Administrative Officer, Department of Public Enterprise,
Mr. Anthony Colgan, Radiological Protection Institute of Ireland,
Ms. Barbara Rafferty, Radiological Protection Institute of Ireland,
Mr. Frank Barnaby, Consultant,
Ms. Sinéad McSweeney, Adviser to the Attorney General,

as Advisers;

the United Kingdom represented by:

Mr. Michael Wood, CMG, Legal Adviser, Foreign and Commonwealth Office,

as Agent:

Ms. Jill Barrett, Foreign and Commonwealth Office,

as Deputy Agent;

and

Lord Goldsmith QC, Attorney General,
Mr. Richard Plender QC,
Mr. Daniel Bethlehem,
Mr. Samuel Wordsworth,

as Counsel;

Mr. Jonathan Cook,
Ms. Sara Feijao,
Mr. Alistair McGlone,
Mr. Brian Oliver,
Mr. Douglas Wilson,

a*s Advisers.*

CLERK OF THE TRIBUNAL: All rise, veuillez-vous lever.

LORD GOLDSMITH: Mr President, Members of the Tribunal. I concluded my presentation yesterday looking at the Environment Agency's consideration of the issue of radioactive discharge from the MOX plant. The passage I was looking at is up on your screens at the moment and it says, "It may be noted that the assessed dose due to gaseous and liquid discharges from the MOX plant is less than one millionth of that due to natural background radiation".

What does Ireland say in the face of this? Ireland has four main points: first, it says that the Sellafield site as a whole has a harmful impact on the Irish Sea; second it says that there is a poor record of safety and compliance with regulatory requirements at Sellafield; third, it says that the operation of the MOX plant will inevitably lead to discharges of radioactive substances into the marine environment; and, fourth, it says that the MOX fuel manufacturer is vulnerable to accidents.

May I address those four points in turn? First, the allegation as to the discharge from the Sellafield sites as a whole. Now here Ireland aims at a different and, it hopes, an easier target than the MOX plant and yesterday it focused in particular on the THORP plant. There are two responses to this. First, this is the MOX plant case. That is its name. This name reflects the dispute that Ireland relies on in its provisional measures. This is not the THORP plant case. Ireland seeks no provisional measures in relation to the THORP plant. There are no allegations about the THORP plant before the Annex VII Tribunal. How then could this Tribunal possibly order provisional measures on the basis of allegations of harm from the THORP plant.

It is said that Ireland must somehow have protection for its rights in this respect even though it has not made a claim in respect of them. Secondly, and the Tribunal should not make this response which deals, in our view, conclusively with the point for any defensiveness on the part of the United Kingdom because Ireland's allegations of yesterday are not merely, as I have just submitted, irrelevant. They are also, we say, misconceived.

We will just explore a little further the allegations. Ireland says that discharges from Sellafield increased significantly in the 1970s. It is difficult not to ask – so what? This Provisional Measures Request is being made in 2001 and discharges from Sellafield have reduced very significantly indeed since the 1970s. discharges of the principal radionuclides are now less than 1% of their peak values in the 1970s; a 99% reduction since the 1970s. That is a reference to a statement by the European Commission on 23 October 1997.

Then it says, and I quote from the Statement of Case, "many independent scientific assessments" have concluded that as a result of radioactive pollution from Sellafield the Irish Sea is amongst the most radioactively polluted seas in the world. In fact, Ireland only referred to one assessment. That is the report – the WISE Report – commissioned by the European Parliament's Panel for Scientific and Technical Office (STOA). As I said yesterday, that report commissioned by the European Parliament has now been elevated into a report of the European Parliament. That was the way it was described yesterday but it is not a European Parliament report. It

is a report, apparently leaked to the press, that has been widely criticised as unscientific. It has led, according to those reports, the Chairman of the very Committee, STOA, to say that the behaviour of WISE has not been "in line with the long standing tradition of STOA which always endeavoured to associate its work with the highest scientific and ethical standards". You have that and I leave you to look at it in Annex 16 to our written observations.

Yesterday the United Kingdom was criticised for relying solely on a newspaper article to respond to this report. Of course, we do not just respond to a newspaper article. Our principal response is to refer to the publication of Ireland's own relevant domestic body, a body called the Radiological Protection Institute of Ireland. It was referred to yesterday by my friends from Ireland. We have at Annex 15 to our Written Response its annual report for 1999. What it says in the words of its Chairman is that it is, "an independent and authoritative source of information and guidance on all issues relating to the protection of the public from hazards associated with ionising radiation, whether the origin of the radiation is the nuclear industry" or others. That is at page 20, paragraph 2 of the report.

The annual report deals specifically with the impact of radioactive discharges from the Sellafield site on the Irish critical group. You will remember the critical group is those most vulnerable, most affected, by these issues. It is said there that the dose to this group is less than 2 millionths of a sievert, which is to be compared to the European limit of 1 thousandth of a sievert. Although the official line in the report is, "radiation doses to Irish people resulting from the Sellafield discharges are clearly objectionable", I interpolate that is an understandable political point. I have made that point before but the conclusion of the Institute is nonetheless clear, "they do not pose a significant health risk to people living in Ireland" and that is in the report at Annex 15, a clear statement.

I turn to Ireland's second main point. This is allegedly poor regulatory compliance at Sellafield. The focus here has been on the data falsification incident that I have already referred to concerning the MOX demonstration facility. I would like to make five points in response: first, this Tribunal should rest assured that the United Kingdom has taken this incident extremely seriously. A full investigation has been carried out by the United Kingdom Health and Safety Executive. You have its report at Annex 8 to our observations. Certain personnel who were working at the MOX demonstration facility were dismissed.

Secondly, that the Tribunal should see the incident in context. What happened was that false data was given relating to the diameter measurements of MOX pellets that had been specified by a potential customer. So the incident had everything to do with the issue of compliance with that customer's specific requirements, and plainly it was quite wrong not to, but it had nothing to do with safety or the environment. There were no safety or environmental issues despite what was said yesterday. I would invite you to look at Annex 8 to our response, paragraphs 89 and 90. I will just interpolate one sentence from paragraph 89, "NII [that is the relevant Inspectorate] is satisfied that the fuel manufactured in MDF will safe in use in spite of incomplete quality assurance records caused by the falsification of some data by process workers in the facility". It is there for you to see.

The third point is that the incident happened at the MOX demonstration facility. That is a different plant in a different building to the MOX plant we are talking about. The important point is that the MOX plant uses an automated procedure which would preclude similar incidents.

The fourth point is that Ireland is simply wrong to say in its Statement of Case that all the recommendations of the Health and Safety Executive have not been complied with. They have. This is confirmed in a report of the United Kingdom's Nuclear Installations Inspectorate dated 22 February 2001, which is at Annex 17 to our Written Response. I think, and it appears, that Ireland has now dropped that point.

In substance, I dealt yesterday with Ireland's third point. I remind myself that that point was that there would be inevitable discharges of radioactive substances into the marine environment. The allegation has no meaning. Ireland says nothing to challenge the figures on radioactive discharges which I already took the Tribunal yesterday and which show that the discharges are infinitesimally small. Ireland has had eight years to query these figures or develop some argument as to how such tiny discharges could cause serious harm to the environment of the Irish Sea. It has done neither.

Ireland's fourth point was the risk of accident in the manufacture of MOX fuel. That is comprehensively dealt with once one has examined the United Kingdom's general data submitted by the United Kingdom under Article 37 of the Euratom Treaty and the European Commission's resulting Opinion. Again I interpolate you will recall that opinion dealt specifically with accident as well as normal operation.

It is as if the European commission's Opinion did not exist. It is as if this Opinion did not specifically address this issue and conclude that in accident conditions, "the doses likely to be received by the population in other Member States would not be significant from the health point of view".

In all what Ireland did yesterday was to raise a spectre of danger and threat, no scientific analysis, no scientific data, no scientific opinion is brought into play to support this spectre. The Tribunal, we would suggest, will look at this spectre in the harsh light of precise information on radiological impact that has been in the public domain for eight years and it will see, in our submission Ireland's case for what it is.

I turn to the second question. Will harmful radioactive material make its way into the Irish Sea? There will be no harmful discharges from the MOX plant but will harmful radioactive materials nonetheless somehow makes its way into the Irish Sea? Ireland has a second string to its bow. It says there are significant risks involved in the transport by sea of radioactive materials to and from the MOX plant. Actually it has got a third string because it says there is a security risk, terrorists and so forth.

Let me turn to the first of those. Ireland addresses the issue of transport as if there were no regulatory bodies setting appropriate standards or as if the United Kingdom were content to let MOX fuel be transported without implementing such standards. The true picture is that there are the IAEA Regulations for the safe transport of radioactive material. Ireland is, after all, a member of the IAEA and is involved in the establishment of these regulations. There is the IMO's International Code for the

Safe Carriage of Packaged Irradiated Nuclear Fuel, Plutonium and High Level Radioactive Waste On Board Ships. That is the INF Code I referred to yesterday and this became mandatory on 1st January of this year.

BNFL's transportation of nuclear fuel – and we will insist on this – complies with all applicable international and national safety and security standards. That is expressly noted by the Secretaries of State in paragraph 30 of their Decision of 3 October.

Does the United Kingdom have, despite all of that, to address an argument to the effect that, although the relevant standards have been developed by long-established international organisations, somehow they are inadequate? Ireland says nothing as clear as that, but let me deal head-on with that in case there is a lurking issues there.

A major five-year research project has been carried out by a joint IAEA, IMO and UNEP working group between 1995 and 1999. Their report on the "Severity, probability and risk of accidents during marine maritime transport of radioactive material" was published in July this year. Extracts are at Annex 7 to our written response. The Tribunal is respectfully invited particularly to read the concluding remarks in section 9 of that report. They are now up upon the screen.

The major research project considered severe maritime accidents, in particular ship collisions and ship fires. It estimated the likelihood failure in a severe accident situation of the flasks for highly radioactive materials, that is the so-called Type B flask, built in accordance with the IAEA regulations. It found, and I quote, that the risks of transporting highly radioactive material in Type B packages are "very small". I invite the Tribunal to take a very close look at this report. You will see that particular quotation at the end highlighted on that page.

Surely Ireland's allegation of risk must be seen in the context of this regulatory background and the extensive study on the point? The risks of accidents during maritime transport of radioactive material have been extensively studied. The risk has been shown to be very small. Ireland's allegations of the "complete failure to assess the consequences of transport accidents" must also be considered in the light of the existence of this joint IAEA, IMO and UNEP working group report.

I have three further comments that must be made on Ireland's allegations on these points.

First, the issue on transportation is in fact not as broad, in any event, as Ireland would have the Tribunal think. It has been seen that it divides the issue into (i) transport of nuclear materials to the MOX plant, and (ii) transport of MOX fuel away from the MOX plant. But there will in fact be no transport of radioactive materials to the MOX plant. The plutonium dioxide used in the manufacture of MOX fuel will be sourced from plutonium stored at Sellafield.

Second, if the MOX plant were not to be commissioned, plutonium belonging to overseas customers that was already in separated form at Sellafield would still have to be transported back to customers or taken to a third country for manufacture into

MOX fuel or for some other form of treatment. So transport of nuclear materials in some form is inevitable, irrespective of the operation of the MOX plant.

Third, there is of course a history of safety. In over 30 years of transporting radioactive materials by all forms of transport, BNFL has had no case of a release of radioactivity. You will see that referred to in paragraph 69 of the Secretary of State's decision letter.

MOX fuel for lightwater reactors has been transported safety in Europe since 1966. That is in the Environmental Statement, paragraph 5.53, Annex 6.

In terms of transportation of spent nuclear fuel by sea, some 8,000 tons have been transported over a distance of approximately 4.5 million miles over a 30-year period. In over 160 transports of nuclear materials from Japan to Europe in the same period, in no case has there been a single incident involving the release of radioactivity.

I would only add to this the urgency point that I looked at yesterday. There will be no shipments until the summer of 2002. So Ireland's allegations of risk from transportation have no basis and demonstrate no urgency.

What then for the third string in Ireland's bow, which is the alleged security risks? This can be dealt with in quite short order.

The Tribunal is again confronted by a spectre of danger not anything approaching a real risk of serious harm to the Irish Sea. Again, it is as if there was no regulatory framework. It is as if the United Kingdom were indifferent to these issues. The threat of an attack on civil nuclear facilities of course engages the concern of us all. The merest possibility of it is, of course, disturbing. Ireland points to various public statements made by a number of states concerning measures that they have taken in recent weeks to safeguard against such an attack: air exclusion zones, the placement of ground-to-air missiles around such facilities, and heightened states of alertness. Ireland says that the United Kingdom has not been prepared to discuss with Ireland, even on a confidential basis, what measures it has taken to safeguard against such an attack. We were even accused yesterday of discourtesy. I have to respond to this.

Ireland has not particularised its concerns in this area. There are various facets of security around, including patrols at the Sellafield site, measures taken to safeguard transport, (land, sea and air) the security of the wider territory and airspace around Sellafield, and other similar sites. There are other domestic initiatives to combat terrorism and broader global initiatives to address such matters as proliferation. To interpolate, I hope, Mr President, you and members of the Tribunal will not hesitate to recognise the great concern that the United Kingdom has demonstrated since 11 September in dealing with all of these risks.

Given the acute sensitivity of these matters, the security measures, it is not the policy of the United Kingdom Government to engage in discussion on such issues without cause. Ireland ought, at least, to be identifying issues with which it has particular concern.

The United Kingdom of course takes its responsibilities in this field extremely seriously. Major centres of population in the United Kingdom are a good deal closer to Sellafield than those in Ireland. It is a little provocative, if I may say so, for Ireland to suggest that because the United Kingdom has not chosen to initiate confidential discussions with Ireland on this matter, the United Kingdom is somehow lax about it.

Let me simply say this. The existence of a potential terrorist threat, both in terms of seizure of nuclear materials with a view to later use and direct attack of nuclear materials with a view to causing destruction of assets and radioactive release have been known to the United Kingdom, and have been the object of security measures for many years. The Tribunal should note that the security issues, including the events of 11 September, are specifically dealt with and addressed in the decision of 3 October.

Let me once again refer to the applicable regulatory framework with respect to the security of nuclear material, both on site and in transportation. The IAEA has published guidance notes on the physical protection of nuclear material and nuclear facilities. Security arrangements have been put in place in respect of both the Sellafield site and future transportation of MOX fuel, and are consistent with the IAEA guidelines. The protection of the Sellafield site, including the MOX plant, is kept under regular review by the Office for Civil Nuclear Security and the Health and Safety Executive. The measures of protection have been reviewed in the light of 11 September. The advice of the Office for Civil Nuclear Security is that the manufacture of MOX fuel presents negligible security risks. This advice has been reviewed since 11 September. The advice of the Office for Civil Nuclear Security is also that the transport of MOX fuel presents negligible security risks. This advice has been reviewed since 11 September.

The precautions to prevent theft or sabotage of MOX fuel during transport comply with all relevant international obligations and recommendations and are amply robust to cope with any credible threat. You will see this in the Secretary of State's decision letter fully dealt with.

Finally in this context, I should also emphasise specifically that the existence and operation of the MOX plant does not increase the security risk of the Sellafield site. I interpolate: you will recall, that there are other facilities there already. Ireland here is challenging the commission of the MOX plant and the MOX plant is not itself a source of special risk.

It follows that the second question that I have posed, "will harmful radioactive material make its way into the Irish Sea?", is also answered with a resounding negative, neither as a result of transports, nor as a result of security risks.

I turn, if I may, to the question of harm to BNFL. What I have been saying so far is the factual basis on which Ireland seeks to beguile this Tribunal into ordering the exceptional remedy of provisional measures. It is a factual basis that has no more substance than a few millionths of a microsievert. That is only half the story. It is not just that the operation of the MOX plant is not going to cause serious harm, or even any harm at all to Ireland or the Irish Sea; it is that the Order of Provisional Measures would cause real harm to the United Kingdom. This is the fourth and final

issue I want to examine. It is the forgotten issue in so far as Ireland's written submissions are concerned.**

If the United Kingdom were restrained from authorising the operation of the MOX plant, in advance of any finding that such operation entailed an infringement of rights pertaining to Ireland, real injury would be sustained. I can be quite clear. I am talking about really serious financial injury. The capital expenditure to date has been £470 million. Its operation has already been delayed. Provisional measures in the form requested by Ireland would be likely to result in the loss of commercial business for the MOX plant amounting to approximately £10 million as a minimum. There is then the prospect of further losses of business valued at several tens of millions of pounds. The maintenance of the MOX plant in a state of operational readiness will also carry a further cost of approximately £385,000 per week. There will also be a cost to BNFL's competitive position by continuing delay and risks as a result.

But financial harm is not the only part of the risk to the United Kingdom. Real injury would be sustained, not only by the employees of BNFL and by others in West Cumbria and further afield whose livelihoods depend on this venture, but also by BNFL itself.

These details are set out at paragraph 72 to 93 of our written response. Time is short now. I do invite the Tribunal to examine these paragraphs with considerable care because surely the Tribunal will want to weigh Ireland's unsupported assertions and its speculations of risk that go against the grain of the hard statistics of the United Kingdom's General Data under Article 37 and the European Commission's Opinion against the risk of real harm to the United Kingdom and its subjects.

Mr President, that completes the factual analysis. With your permission, I would like to make a slight change in our cast for presentation. The next section of our submissions relates to legal issues, the conditions for Exceptional Measures. Rather than my delivering this, I would ask you to invite Mr Daniel Bethlehem of Cambridge and of Counsel to address that issue.

THE PRESIDENT: Thank you. Mr Bethlehem?

MR BETHLEHEM: Mr President, Members of the Tribunal, it is an honour for me to appear before you today representing the United Kingdom in this matter. You have heard something of the facts of the case. In our contention, the facts speak for themselves. Ireland has not adduced any evidence in support of its claim of an imminent risk of harm. It has not respected the requirement in Article 283(1) of UNCLOS to enter into an exchange of views. In our contention, the Tribunal can decide the matter simply on the basis of the quite palpable absence of any evidential support for the claim developed by Ireland. Mr Lowe referred you yesterday to the Provisional Measures Order of the International Court of Justice in the *Great Belt* case, with a view to distinguishing the circumstances of that case from the present one. Let me take you back to that case.

The Court there refused to order provisional measures. Mr Lowe sought to narrow the grounds of this refusal. In doing so, he adopted the line of the unsuccessful applicant in that case. Finland there argued that the court was not entitled to form

a view of the merits of the case when considering whether provisional measures were necessary. Ireland did the same thing yesterday. The International Court clearly would have none of that. In rejecting the provisional measures request, the court noted in response to various claims advanced by Finland:

> "Whereas, however, evidence has not been adduced [by Finland] of any invitations to tender for drill ships and oil rigs which would require passage out of the Baltic before 1994, nor has it been shown that the decline in orders to the Finnish shipyards for the construction of drill ships and oil rigs is attributable to the existence of the Great Belt project; whereas accordingly proof of the damage has not been supplied".

There is no ambiguity in this. Finland failed to adduce any evidence in support of its claim. The court had no hesitation in taking account of this element. The absence of such evidence was central to the court's reasoning in rejecting the provisional measures request. So it should be here. The facts – or, I should say, the absence of facts – speak for themselves.

The United Kingdom's case does not, however, rest on an appreciation of the facts alone, and the almost shocking failings of the Irish case in this regard given the scope of the measures that Ireland is asking from the Tribunal. The United Kingdom's case rests firmly on the law as well. This is a Tribunal of law. We are engaged in a procedure that is bound on all sides by legal principle. The law must be applied. The Attorney General of Ireland opened Ireland's case yesterday by appealing to the law. The United Kingdom endorses this approach; but not, with respect, to some flexible notion of the law on provisional measures that would see this Tribunal lay down a charter for applicants wishing to make life difficult for those with whom they take issue, even if their claims have no substance. There should be precaution, of course, but not in circumstances in which an applicant has failed even to adduce evidence of uncertainty, let alone evidence of a real risk of imminent and serious harm.

However one looks at it, provisional measures are an exceptional form of relief before this Tribunal, before the International Court of Justice, before the European Court of Justice and before other courts and tribunals. Mr Sands would have the Tribunal rewrite the law on provisional measures in a way that would turn such measures into a self-standing procedure of substantive redress. He says that such measures are necessary to preserve Ireland's rights in this process. He omits to say that the United Kingdom has rights here too. The question in issue is whether this Tribunal ought to prescribe provisional measures to restrain the United Kingdom from undertaking conduct within its own jurisdiction in circumstances in which it has satisfied itself that such conduct does not violate its international obligations. This is the issue. Are there good, solid grounds that warrant the Tribunal prescribing measures restraining the United Kingdom in the exercise of its rights? On the evidence presented to you, we cannot see how you could possibly reach that conclusion.

Mr President, Members of the Tribunal, you heard something yesterday of the law relevant to provisional measures from Mr Sands and Mr Lowe. It was, of course, self-serving but that was to be expected. We ought to redress the imbalance.

Mr Plender will shortly address the application of the law to the facts of this case. My task is to provide a foundation for those remarks by giving you something of a road map through the principles relevant to provisional measures. There are three broad points to address. First, provisional measures are discretionary. Secondly, provisional measures are exceptional. Thirdly, three conditions must be satisfied before the Tribunal can exercise its discretion: first, questions of *prima facie* jurisdiction must be resolved; secondly, it must be shown that the urgency of the situation requires such measures and thirdly, the substantive requirements of paragraph 1 of Article 290 must be satisfied; namely, it must be shown that there is a risk of irreparable prejudice to Ireland's rights or of serious harm to the marine environment. I will deal with each of those in turn.

I turn first to the issue of discretion. The point is simply made. Provisional measures are discretionary. I do not mean that the Tribunal can act without being satisfied that the procedural and substantive conditions relevant to the prescription of provisional measures have been met. Even if these conditions have been met, the Tribunal is not compelled to prescribe such measures. It has a discretion to do so. If support is needed for the proposition, the point emerges clearly from the language of Article 290, which emphasizes that the court or tribunal seized of the matter may prescribe provisional measures. Perhaps I may be permitted to cite a Member of the Tribunal in further illustration of the point. Judge Eiriksson, although not writing in his judicial capacity, observed as follows:

> "… even in a case where it concludes that all the jurisdictional, procedural and substantive requirements for the prescription, modification or revocation of provisional measures have been complied with, the Tribunal may nonetheless decide not to act."

He goes on to state:

> "… it may not be necessary for the Tribunal to specify that it is declining to take requested actions under a general right to exercise its discretion. There may, however, be cases where it may choose to so indicate; for instance, to emphasise its judicial role or to prevent a misuse of process."

The discretionary character of provisional measures – to act in a manner which it considers is appropriate in the circumstances – implies that the Tribunal has a responsibility to consider the rights and interests of both parties, rather than of the applicant alone. This point, indeed, is reinforced by the substantive criteria in Article 290(1), which emphasizes that it is the respective rights of the parties that must be considered. The point is important. We heard much of Ireland's rights yesterday; not so much of the rights of the United Kingdom. But what the Tribunal is being asked to do is to restrain the United Kingdom in the exercise of its rights. The Tribunal should only exercise its discretion to this effect if on the evidence it is necessary for it to do so. On the evidence presented, we cannot see how the Tribunal could reach such a conclusion.

I turn next to the exceptional character of provisional measures. This, too, is uncontroversial. The Attorney General made the point yesterday by reference to the comments of Jerzy Sztucki writing on the subject of provisional measures in the

Hague Court. The point has been made in respect of provisional measures under Article 290 of UNCLOS as well. I hesitate to refer again to the non-judicial writings of a Member of the Tribunal, but the point is made cogently by Judge Wolfrum in the volume that has recently appeared containing contributions by a number of Members of the Tribunal.

The explanation for the exceptional character of provisional measures is to be found in what the court or tribunal seized of the matter is asked to do. Is it open to the court or tribunal by way of provisional measures, in the words of Judge Shahabuddeen of the International Court of Justice, "to restrain a state from doing what it claims it has a right to do without having heard it in defence of that right"? The power to prescribe provisional measures is an exception to the normal rules relating to burden of proof. It should only be exercised in circumstances in which there are exceptional and compelling reasons for doing so. It is not simply a procedure for freezing the position of the parties pending a final decision on the matter. The question is whether there are compelling grounds for restraining a respondent in the exercise of its rights before a decision on the merits. The presumption is against such measures of restraint. Any other approach would see provisional measures elevated to a self-standing remedy. Applicants would be persuaded to initiate proceedings simply so that provisional measures could be requested, much in the way that Ireland appears to be doing in this case. This cannot be right.

The exceptional character of provisional measures requires that a tribunal seized of the matter has special regard to the evidence put before it in support of that request. A basic foundation of evidence must be adduced in support of its claim. The order of the International Court of Justice in the *Great Belt* case, to which I referred a moment ago, endorses the proposition. If this were not so, an exceptional procedure of pre-emptive restraint would simply become an exercise in endorsing the untested claims of an applicant – claims that would, as in this case, favour hyperbole and hypothesis rather than the sober presentation of an imminent and real risk of serious harm.

The *Great Belt* case apart, the requirement of evidence finds wider support. Notwithstanding the attempts by Mr Sands yesterday to downplay the approach of the International Court in the 1973 *Nuclear Tests* cases, the extent of the documentary material provided to that court by Australia at the provisional measures phase was considerable. Let me highlight their content. First, six substantive reports of the United Nations Scientific Committee on the Effects of Radiation were annexed. These addressed the extent, effect and mechanics of radioactive contamination from atmospheric nuclear testing. Secondly, Australia also pointed to a report of an Advisory Committee on the Biological Effects of Ionising Radiation published by the National Academy of Sciences of the United States. Thirdly – and perhaps most importantly – during the period of the French weapons testing, Australia conducted a detailed fall-out monitoring programme. The results were annexed to the pleadings. Many aspects were addressed explicitly in argument. Fourthly, a report on the subject of the effect of the French weapons testing on the atmosphere and water proximate to Australia was prepared by the Australian Academy of Sciences and passed to the French Government.

Mr President, Members of the Tribunal, nothing even approaching material of this kind has been presented to you by Ireland in this case. You are asked to take Ireland's allegations of harm entirely on trust. This cannot be a sound basis on which to prescribe provisional measures. I do not want to labour this point. I would recall, though, that this Tribunal was also presented with a good deal of scientific evidence in support of the provisional measures requested in the *Southern Bluefin Tuna* case. It is explicitly referred to on the face of the order. Furthermore, there was no dispute between the parties in this case that the state of bluefin tuna stocks was, to quote the order of the Tribunal, "a cause for serious biological concern". Once again, you are presented with no comparable evidence in this case. The United Kingdom firmly contents Ireland's unsubstantiated allegations of harm. This cannot be a sound basis on which to order provisional measures restraining the United Kingdom in the exercise of its rights.

I turn now to the procedural and substantive conditions that Ireland must satisfy if it is to sustain its request for provisional measures. There are three elements: jurisdiction, urgency and the substantive conditions of irreparable prejudice to the rights of Ireland or serious harm to the marine environment.

The question of jurisdiction can be dealt with briefly at this stage. Mr Plender will deal with it shortly at greater length. Two points may be made. First, the procedure under Article 290(5) of UNCLOS is an unusual procedure. It is unusual because the Tribunal – this Tribunal – which is being asked to prescribe provisional measures is not the tribunal that is seized of the merits of the case. Nor is it the tribunal which has ultimate competence in respect of provisional measures. Both of these elements rest with the Annex VII Tribunal. The point is simply this: provisional measures pursuant to Article 290(5) are doubly exceptional in character. The relief sought is exceptional. The Tribunal seized of the request – this Tribunal – is exercising a competence which hinges on an assessment of the jurisdiction of the Tribunal which will be seized on the merits. Its competence, furthermore, only subsists pending the constitution of the Annex VII Tribunal.

Mr President, I do not for a moment suggest that the competence or authority of this Tribunal in respect of provisional measures requested under Article 290(5) is irregular. It is not. It is laid down in the Convention. I t is an important safeguard against irreparable prejudice but it is, nonetheless, an important procedure. In our submission it is a procedure which should be exercised with particular caution.

Secondly, as Article 290(5) makes clear, before it can prescribe provisional measures, this Tribunal must consider that *prima facie* the Annex VII Tribunal will have jurisdiction on the merits of the case. This is uncontroversial and is accepted by both parties. We fundamentally disagree with Ireland, however, on whether *prima facie* jurisdiction is evident. By reference principally to Articles 282 and 283 of UNCLOS we say that jurisdiction is lacking. Ireland contests the point. You heard Ireland on the matter yesterday. Mr Plender will develop our arguments on this point shortly.

Next is the requirement of urgency. Ireland yesterday accepted the threefold test set out in paragraphs 142-152 of the UK's written response that this was the appropriate assessment of the issue. There is, therefore, agreement between the parties that

what must be shown is the following. First, that a specified event will cause prejudice of some significant order to the rights of the parties or serious harm to the marine environment. This is described in our pleadings as a "critical event". Ireland accepts this description.

Secondly, there must be a real risk of harm occurring as a result of this critical event. In other words, the risk of harm occurring must not be merely hypothetical or remote. Again, Ireland accepts this element, although it disputes our conception of "harm" conflating this element of the urgency test with the substantive conditions relevant to provisional measures in paragraph 1 of Article 290. I will return to this issue shortly.

Thirdly, the risk of the critical event occurring must satisfy the temporal conditions in Article 290(5); namely, there must be a real risk of the critical event occurring before the Annex VII Tribunal is itself able to act. Once again, Ireland accepts this element of the urgency test.

Without trespassing into Mr Plender's submissions, let me simply identify where the parties differ on these key elements and draw out one or two aspects of the law on which we disagree. The basic disagreement between the parties is that whereas Ireland says that all of the elements of the test are me tin this case, we disagree. Ireland says that the critical event is the commissioning of the MOX plant. We dispute this. The commissioning of the MOX plant will not itself result in any prejudice to Ireland or any significant order or at all. Neither will it set in motion a process that is in any way irreversible. Mr Plender will deal with each of these elements fully.

If the commissioning of the MOX plant does not satisfy the requirement of a critical event, then neither can it satisfy the temporal requirement of Article 290(5), namely, that there must be a real risk of the critical event occurring before the Annex VII Tribunal is itself able to consider a request for provisional measures.

The element to which Mr Lowe directed most attention was the second rung of the test; namely, that there must be a real risk of harm occurring in consequence of the critical event. Mr Lowe suggested in particular that the United Kingdom was advancing, "a novel and very limited notion of harm". Let me deal with that point.

In his comments on the question of the real risk of harm, Mr Lowe was conflating two elements that, although related, should be kept distinct. The first is the question of the threshold of the risk of harm occurring as a result of a critical event. The second is the harm that is integral to the substantive conditions in paragraph 1 of Article 290; namely, harm of some substantial order to the rights of Ireland or serious harm to the marine environment. Although linked, these are separate issues. The issue in respect of urgency is not the meaning of the substantive condition in Article 290(1) but what is the appropriate threshold of the risk of harm occurring.

We contend that the appropriate threshold is a real risk of harm occurring. It cannot be simply the suggestion that harm might occur. The risk that harm will occur must be more than merely hypothetical or remote. Mr Lowe did not address this element, perhaps understandably. It is rather central and quite problematic for Ireland's case. Ireland's allegations of harm, however they define the term, have not been

substantiated. It is entirely hypothetical. Ireland has not shown that there is a real risk of harm occurring.

In summary, on the requirement of urgency, our contention is that Ireland has not satisfied this requirement. It has not shown urgency. The commissioning of the MOX plant does not constitute a critical event. Ireland has not shown that there is a real risk of harm occurring pending the constitution of the Annex VII Tribunal or before that Tribunal will itself be able to act.

Mr President, Members of the Tribunal, I turn finally to the substantive conditions relevant to provisional measures set out in Article 290(1); namely, that provisional measures must be necessary to preserve the respective rights of the parties or to prevent serious harm to the marine environment. We heard something on this yesterday from both Mr Sands and Mr Lowe. I shall respond to them both in turn.

In essence, Mr Sands suggested that by reference to the precautionary principle and evolving standards of international law relating to the environment, the substantive requirements of Article 290(1) ought to be interpreted flexibly. By reference to the 1973 *Nuclear Tests* cases, the question for the Tribunal, he suggested, was whether you could,

> "exclude the possibility that damage to Ireland might be shown to be caused by the deposit on Ireland's territory of radioactive fall-out resulting from the operation of the MOX plant and associated international movements and to be irreparable."

With the greatest of respect, Ireland cannot here ride on the coat tails of the applicants in the 1973 *Nuclear Tests* cases. As I have already said, a good deal of material was adduced by the applicants in those earlier cases. Nothing is adduced by way of evidence here. All we are told here is that there is some unspecified risk of pollution. No evidence is provided in support of the assertion. The risk is not quantified. Possible repercussions are not mooted. There is nothing. Of course, Ireland would characterise the question as one of whether the possibility of damage can be excluded. Ireland would have us prove a negative. There are all sorts of possibilities that cannot be excluded. The point is that the United Kingdom has undertaken a protracted and detailed assessment of these risks and concluded that they are infinitesimally small. We have adduced that evidence. There is nothing on Ireland's side of the equation.

There is another point made by Mr Sands that warrants comment. He said that "radionuclides are harmful, noxious and persistent"; language no doubt calculated to satisfy the test set out in paragraph 156 of our written response relating to the phrase "serious harm to the marine environment". He then went on to say that there will be discharges of radionuclides from the MOX plant. Finally, he said that while the United Kingdom's statement that these discharges would be minimal and cause no harm might have been correct in 1982, it is not correct when assessed in the light of present day environmental standards.

There is something of a *non sequitur* here. As the Attorney General addressed, discharges from the MOX plant will be infinitesimally small. They would not have

caused harm in 1982; they will not cause harm now. The key point is that liquid and gaseous discharges from the MOX plant are assessed by reference to current standards. That was the essence of the Attorney General's detailed review of the facts. The legality of emissions is assessed by reference to current European and national legislation. As the Attorney General pointed out, emissions from the MOX plant are assessed by reference to current standards at a fraction of a thousandth of one per cent of applicable limits. The evolutionary standard that Ireland urges the Tribunal to adopt does not get it anywhere.

There is one final point to make in response to Mr Sands' submission. Ireland says that it would be curious indeed for this Tribunal to adopt a less precautionary approach than did the International Court of Justice in 1973 in the *Nuclear Tests* cases. The spectre painted is of the Tribunal setting the clock back on the important developments in the field of international environmental law. But this is not the case at all. I return to the point. Ireland has provided no support other than allegation and hyperbole as a basis for its request for provisional measures. If precaution is to operate, there must be a risk. Not only has Ireland provided no evidence of risk; it has not even established as opposed to merely alleged, that there is even uncertainty.

I turn now to the arguments by Mr Lowe. Whereas Mr Sands focused on what was said to be the factual dimension of the risk of harm, Mr Lowe addressed the substantive conditions in Article 290(1) by reference to the law. He argued, as I have said, that the United Kingdom has put forward a novel and limited notion of harm. His object, in contrast, was to broaden that notion. How did he do this? He first studiously avoided addressing the meaning of the two elements in Article 290(1), the respective rights of the parties and serious harm to the marine environment.

The points made were simply directed towards some generic concept of harm. By reference to the text, that would seem to be a little too imprecise. The question is how the phrase "to preserve the respective rights of the parties" in Article 290(1) is to be interpreted and how the phrase "to prevent serious harm to the marine environment", elsewhere in the same provision, is to be interpreted. This is not an exercise focused on some generic notion of harm.

By reference to his generic notion, Mr Lowe then developed three broad points. First, he referred to a series of Hague Court cases which were said to contain a range of tests of harm. Second, he settled beguilingly on a formula advanced in the argument in the *Fisheries Jurisdiction* case, namely that the parties should refrain from actions capable of prejudicing the execution of the court's ultimate decision. Third, it was said that "procedural rights are rights" and that they too require protection. Let me make two brief points in response.

First, the Hague Court cases. Mr Lowe is correct, of course, that a number of different formulae have been adopted in the Orders of the Permanent and the International Court over a period of 80 years. In cases of hostilities and armed action that have resulted in deaths – such as in the *Nicaragua* case or the case of *Cameroon v Nigeria* – the Court has ordered the parties to refrain from doing anything that would aggravate the dispute. These cases are not in any way analogous to the present case. In other cases of armed action – such as the case of

the *Democratic Republic of the Congo v Uganda* - the Court has also ordered the parties to refrain from such armed action as would prejudice the rights of the other party in respect of whatever judgement might be given on the merits. These circumstances too are not in any way analogous to the present case. There is, however, one phrase that recurs repeatedly in all of the recent Orders of the International Court in this area. Interpreting the phrase, "to preserve their respective rights of either party" in Article 41 of the Court's Statute, the provision on which the corresponding phrase in Article 290(1) of UNCLOS was based, interpreting that phrase, the Court has repeatedly used the language of "irreparable prejudice". The absence of irreparable prejudice was the basis for the Court's rejection of the request for provisional measures in the recent *Arrest Warrant* case. It was the basis for provisional measures in the *LaGrand* case, in the *Breard* case, in the *Cameroon v Nigeria* case, in the *Genocide Convention* case and others. The list goes on. This language has become the central pivot of Provisional Measures Orders of the International Court.

Second, it is evident that the language of irreparable prejudice to the rights of a party connote some form of irreparable harm to that party. One explanation for this is to be found in an observation by Judge Wolfrum in his recent note on provisional measures that I referred to a moment ago. As the point is addressed succinctly, I hope you will forgive me if I read out the relevant passage and it is as follows:

> "The notion of 'preservation of rights', as used in Article 290 of UNCLOS or Article 41 of the Statute of the ICJ, may lead to some misinterpretation. Rights cannot, or at least only in rare cases, be destroyed. Rights are either violated or infringed and they continue to exist in spite of their violation. Taking the term 'preservation of rights' literally would, in consequence, limit the prescription of provisional measures to exceptional cases. On the other hand, a reading of the term 'preservation of rights' as 'infringements of rights' would widen the application of provisional measures in an unacceptable way. In particular, it would make it nearly impossible that a provisional measure would not anticipate the final decision of the Court."

That the phrase, irreparable prejudice to the rights of the parties refers to the possibility of irreparable harm being caused to that party is apparent from the recent *Arrest Warrant* order of the International Court. As is addressed in our *Written Statement* in that case the Democratic Republic of the Congo challenged the legality of a Belgian arrest warrant naming the Congolese Foreign Minister. In the midst of the provisional measures proceedings, the Minister was moved to another portfolio. He became the Minister of Education. The arrest warrant, however, remained in place as did a real risk of arrest. The Congo maintained its claim that any arrest warrant would violate its sovereign immunity. The Court, however, refused to order provisional measures on the ground that no risk if irreparable prejudice to the Congo's rights had been shown. This decision is only explicable if the notion of a risk of irreparable prejudice to the rights of a party is construed to mean a risk of irreparable harm being caused to that party. As Mr Plender will address, Ireland cannot show any risk of irreparable harm.

Mr President, two very brief concluding comments are warranted. First, Article 290(1) requires consideration to be given to the respective rights of the parties.

I return to a point I have already made. The United Kingdom has rights here too. The United Kingdom is entitled to act in exercise of its sovereign rights within its own jurisdiction as it sees fit save to the extent that such action would violate its international obligations. This case is not simply about preserving an alleged right of Ireland. It is about not presumptively, and without evidence, violating the United Kingdom rights.

Finally, as regards the prevention of serious harm to the marine environment, I note simply that that Ireland did not address the meaning of its phrase in its oral submissions. The issue is addressed in paragraphs 156 and 157 of our Written Response. If Ireland is to sustain its claim under this heading, it must adduce a basic foundation of evidence to show the harm alleged would be (1) substantial; (2) enduring; (3) incapable of easy rectification. It has not done so.

Mr President, that brings me to the end of my submissions. Mr Plender will now address Ireland's case more specifically by reference to these elements of law. Mr President, Members of the Tribunal, let me simply thank you for the attention with which you have listened to these pleadings. Thank you.

Mr PLENDER: Mr President, Members of the Tribunal. Addressing the General Assembly of the United Nations one year ago, Mr President, you stated "the establishment of new tribunals in recent years is…a positive development since such bodies fulfil complementary needs". Precisely so. It is because international tribunals fulfil complementary needs that each one must be scrupulous to respect the jurisdiction of the others. The point was underscored by Judge Treves in his article in the *New York University Journal of International Law and Politics* in 1999. He pointed out that the dangers of conflicting judgements are "particularly acute because international courts and tribunals are growing in number within an international system that has no unified judiciary".

This Tribunal must be particularly vigilant to respect the jurisdiction of other courts and tribunals when requested to grant interim relief under Article 290(5). That is so because you are at risk of being victims of your own success. You have exceptional powers to prescribe provisional measures; and you have established a reputation for the speed with which you can deal with applications for such relief. This creates a danger of forum shopping. States have an inducement artificially to bring disputes before an Annex VII tribunal in order to obtain provisional measures here, when the subject of their dispute ought properly to be brought elsewhere.

The draftsmen of the Law of the Sea Convention were determined that States Parties should not bring their disputes to Part XV fora to gain tactical advantage when they had agreed that such disputes would be adjudicated elsewhere. They stated in Article 282, "if the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a…regional…agreement or otherwise, that such dispute shall at the request of any party to the dispute be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties…otherwise agree". Judge Treves observed, in the article to which I have referred, that the purpose of this provision is precisely to avoid the situation in which

the Tribunal now finds iitself. In his words, “Article 282 is a mechanism that precludes forum-shopping and overlapping litisprudence”.

Two features of Article 282 deserve particular emphasis. The first is its mandatory character. Where States have established alternative binding arrangements their disputes shall be submitted to the alternative procedure. The mandatory terms of Article 282 are matched by those of the OSPAR Convention and the Treaties establishing the European Communities. Article 32 of the OSPAR Convention states that disputes concerning the interpretation or application of the Convention shall be submitted to arbitration under the conditions laid down. The Treaties establishing the European Community and Euratom both provide in identical terms as follows: “Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein”.

The second aspect of Article 282 that deserves emphasis is that it refers to disputes “concerning the interpretation or application of this Convention”. Relying on the words of the Annex VII tribunal in the *Southern Bluefin Tuna* case, Mr Lowe contended that the dispute concerning the MOX plant is one concerning the Law of the Sea Convention and not the OSPAR Convention or the Treaties establishing the European Communities. What the Annex VII tribunal actually said in that case, at paragraph 52, is that a dispute can concern more than one treaty. In such an event, it said, it is appropriate to identify the convention to which the real dispute can be said reasonably to relate. The Annex VII tribunal was very clear on the point. At paragraph 49 it stated that in order to address the appropriate forum it is necessary to isolate the most acute events of the dispute or the main elements of the claim.

If we were to apply to this case the principles laid down in the award of the Annex VII tribunal in the *Bluefin Tuna* case, as Mr Lowe urges the Tribunal to do, then there could be no question of the Annex VII tribunal in this case assuming jurisdiction. In these proceedings, Ireland puts it case on the basis of three claims: first, that the United Kingdom failed to cooperate with Ireland; second, that we failed to prevent damage to the marine environment of the Irish Sea; and, third, that we failed to protect the marine environment of that sea. The most acute elements of these issues, or in other words the main elements of the claim, are governed by the OSPAR Convention. This contains, particularly in Articles 2, 3, 6 and 9 and in Annex I, specific provisions that do not merely reflect the UNCLOS rules on which Ireland relies but express the obligations arising from those provisions in more express terms. For that reason the real dispute between the Parties can be said reasonably to relate to the OSPAR Convention.

It is no answer to say – *pace* Mr Lowe – that Ireland has chosen to invoke the OSPAR Convention in relation only to the failure to supply information. Neither the Law of the Sea Convention nor the OSPAR Convention permits parties to make a choice of the forum according to their perceived interest. Even if Ireland had not invoked the OSPAR Convention at all in relation to the present dispute, Ireland would be under an obligation to apply the procedures of the OSPAR Convention to that dispute. That follows from the terms of the OSPAR Convention to which I have referred. The fact that Ireland had actually chosen to invoke the OSPAR Convention in relation to the part of the dispute which it judges most to its advantage to submit to

the means provided for by that Treaty merely illustrates the impropriety of simultaneous proceedings before the OSPAR tribunal and an Annex VII tribunal.

But it is not necessary for this Tribunal to rely on the award of the Annex VII tribunal in the *Southern Bluefin Tuna* case, and the United Kingdom does not invite the Tribunal to do so. In the present case, the fact is not merely that the real dispute between Ireland and the United Kingdom can be said reasonably to relate to the OSPAR Convention. Rather, Ireland has failed, and continues to fail even to this late stage in these proceedings, to identify a single element in its claim that is not governed by the OSPAR Convention or by the European Community Treaties.

In these proceedings Ireland first puts its case on the basis of Article 197 of the Law of the Sea Convention. This provides, "States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules…consistent with this Convention, for the protection and preservation of the marine environment". Ireland alleges, at paragraph 33 of its Statement of Case, that the United Kingdom acted in breach of that provision by failing to reply adequately to Ireland's request for information; by withholding that information; by failing to supply a fresh Environmental Statement; and by failing to suspend authorization of the MOX plant pending the outcome of the OSPAR proceedings.

I will deal with those points in turn. The allegations that the United Kingdom failed to reply adequately to the requests for information, and withheld certain information, amount to a claim that the United Kingdom acted in breach of Article 9 of the OSPAR Convention. Indeed, they are the subject of the present proceedings actually instituted by Ireland under the OSPAR Convention and in relation to Article 9. That allegation is not converted into a dispute under Article 197 of the Law of the Sea Convention by reason of the mere fact that Ireland cites that provision of the Law of the Sea Convention. Article 197, it will be recalled, provides for cooperation between States Parties in formulating rules, standards and practices. Either the United Kingdom discharged its duty to formulate common rules about the supply of information by concluding Article 9 of the OSPAR Convention, or it did not. If it discharged its duty under Article 197 of the Law of the Sea Convention by formulating Article 9 of the OSPAR Convention then there is nothing left of Ireland's claim that there was any breach of Article 197. But assuming in Ireland's favour that Article 197 requires more than cooperation in the formulation of rules and extends also to the observance of the rules so formulated, then any dispute as to whether the United Kingdom has observed the rules so formulated is a matter governed by the OSPAR Convention. That is why not only is Ireland bound to refer that complaint to the OSPAR tribunal if it cannot be settled otherwise, it has actually done so.

I turn next to the complaint about failing to suspend authorization of the MOX plant pending the outcome of the OSPAR proceedings. Here once again Article 197 adds nothing to the OSPAR Convention relevant to Ireland's case. The OSPAR Convention contains provisions for the tribunals established thereunder to grant interim relief. Either the United Kingdom discharged its obligation, if it had one, under Article 197 of the Law of the Sea Convention by formulating the rules of the OSPAR Convention governing provisional relief or it did not. If it did, then there is

nothing left of Ireland's case that there was a breach of Article 197. If it did not, then this is precisely a matter to be governed by the OSPAR Convention.

I invite the Tribunal here to examine Ireland's case with a little bit of care and, if I may say so, some common sense. Here we have a State, Ireland, which has invoked the OSPAR Convention in its dispute with the United Kingdom. The OSPAR Convention gives the OSPAR tribunal power to afford interim relief. Ireland does not take the view that it is for the OSPAR tribunal to determine whether interim relief shall be granted pending the outcome of the proceedings before that very OSPAR tribunal. Ireland contends that the appropriate tribunal to determine whether the United Kingdom ought to suspend authorization of the MOX plant pending the outcome of the proceedings before the OSPAR tribunal is an Annex VII tribunal. On the basis of that Convention, Ireland then submits that it is for this Tribunal to prescribe interim measures pending the constitution of the Annex VII tribunal to enquire into the very matter that this Tribunal is asked to determine upon by way of provisional measures. It would be difficult to conceive a clearer case of the advantageous misuse of this Tribunal's jurisdiction.

I turn now to Ireland's complaint that the United Kingdom failed to prepare a second Environmental Statement. This is not, in my submission, a matter governed by the OSPAR Convention but by European Community law. Indeed, in the correspondence on this point prior to 16 October this year, Ireland made it clear that it relied on European Community law and particularly Council Directive 85/337. It is neither necessary nor appropriate for this Tribunal even to consider the submission now advanced by Ireland that the United Kingdom was bound by Article 197 of the OSPAR Convention to make a fresh Environmental Statement.

Assuming, in Ireland's favour, that Article 197 of the Convention requires States Parties to formulate common rules about environmental statements, then the United Kingdom either fulfilled that duty through the European Community or it did not. If it fulfilled that duty through the European Community there is nothing left of Ireland's case on the point. But assuming further, in Ireland's favour, that Article 197 requires States Parties to comply with the rules so formulated then it must be for the Court of Justice of the European Communities to determine whether the United Kingdom has done so. That is so because the Member States of the Community have expressly agreed that disputes between them concerning obligations undertaken pursuant to the Treaties shall be submitted to the means of settlement for which the founding treaties made provision.

Indeed, as regards European Community law, the United Kingdom has made a larger and more important point, to which Ireland has made no answer at all. It is important that this Tribunal should not lose sight of it. The European Community is a party to the United Nations Convention on the Law of the Sea. Since Member States are also parties, the Convention is, for the Community, a mixed agreement. It is, therefore, important to ascertain in respect of each and every obligation under the Convention whether competence lies in the Member State or in the Community. When ratifying the Convention the Community made the declaration contained in Annex 18 to the Annexes to the United Kingdom. This is now shown on the projector. It is contained at Annex 18 and will merit a little study. As it shows,

Part XII of the Convention governing the protection of the marine environment is a matter on which the Community has extensive competence.

Under the Treaty establishing the European Community, and under that establishing the European Atomic Energy Committee (Euratom), a Member State which considers that another Member State has failed to fulfil "an obligation under this Treaty" may bring the matter before the Court of Justice. It is well established in Community law that the words, "an obligation under this Treaty" – and now I quote the Court of Justice - "cover all rules of Community law binding on Member States including international treaties concluded by the Community". That principle was established 20 years ago in the judgement of the European Court of Justice in *Hauptzollamt Mainz v Kupferberg*. Indeed, the Court of Justice of the European Communities has had occasion to examine the Law of the Sea Convention on a number of occasions.

Ireland's second main submission is that the United Kingdom failed to assess the potential impact of its activities on the marine environment, contrary to Article 206 of the Law of the Sea Convention. This provides for States Parties to assess the potential effects of their activities "where they have reasonable grounds for believing that planned activities under their jurisdiction may cause substantial pollution or significant changes to the marine environment". As the Tribunal now knows the United Kingdom concluded that there are no reasonable grounds for believing that the MOX plant will cause substantial pollution or significant changes to the marine environment. The matter has been examined by the European Communities, whose Opinion on this point is at Annex 3 to the United Kingdom's Written Response. The Commission concluded that "the plan for the disposal of radioactive waste arising from the operation of the BNFL Sellafield Mixed Oxide Fuel Plant, both in normal operation and in the event of an accident of the magnitude considered in the general data, is not likely to result in radioactive contamination, significant from the point of view of health, of the water, soil or airspace of another Member State". Ireland could have challenged that Opinion before the Court of Justice of the European Communities. It did not do so. This is emphatically not the forum in which to question an Opinion of the European Communities, if indeed Ireland now does wish to call that Opinion into question, despite the fact that it appears until yesterday to have accepted it for the last eight years.

Lastly, Ireland relies on an amalgam of provisions in the Law of the Sea Convention, including Article 192, which provides that "States have the obligation to protect and preserve the marine environment", and Article 194,which deals with measures to prevent, reduce and control pollution, together with the precautionary principle.

(**Short recess**)

MR PLENDER: Members of the Tribunal, before the adjournment I was dealing with the last of the Irish submissions which relies upon an amalgam of provisions of the Law of the Sea Convention, including Article 192 which states that "States have an obligation to protect and preserve the marine environment", and Article 194 which deals with measures to prevent, reduce and control pollution.

The OSPAR Convention applies to the north-east Atlantic and elaborates these very provisions. Indeed, the precautionary principle, which is not expressly articulated in those provisions of the Law of the Sea Convention, finds its expression in Article 1(2) of the OSPAR Convention. The United Kingdom does not engage in debate with Ireland on whether the precautionary principle is a principle of customary international law. The answer, I suppose, must depend on what exactly you mean by "the precautionary principle". The expression tends to be used in a variety of senses. The term is given particular meaning by Article 2(2)(a) of the OSPAR Convention. The obligation to respect the principle so defined arises from the OSPAR Convention and any disputes in respect of that obligation must be resolved by the means prescribed by that Convention in Article 32.

Why then has Ireland instituted these proceedings for provisional measures under the Law of the Sea Convention instead of pursuing its case in the OSPAR Tribunal or the Court of Justice of the European Communities?

To find the answer to that question, one has to look at the history of the dispute. Ireland does not disguise the fact that its objection is not to the MOX plant alone. It seizes on the MOX plant as part of a wider campaign against the Sellafield site generally. In its submission dated 4 April 1997, which will now be put on the projector, to one of the inquiries into the MOX plan, reproduced at Annex 13 to the United Kingdom's written response, the Irish Government states that it has "longstanding objections to existing nuclear operations at the Sellafield site and opposes any extension to those operations, such as the proposed MOX site". Ireland repeated that statement later, as the Tribunal will see contained in Annex 14 of our observations. Although in these two submissions the Irish Government added that it also had concerns about radioactive discharges into the Irish Sea, it expressly acknowledged that, in the Irish Government's words quoted at Annex 13, these were "likely to be small".

As Lord Goldsmith demonstrated yesterday, the correspondence between the two governments contained until recently remarkably little mention of the Law of the Sea Convention. It is notable that in these proceedings Ireland relies upon a series of its own letters referring not to the Law of the Sea Convention but to provisions of European Community law and the OSPAR Convention. References were made to the Law of the Sea Convention twice in 1999 but in both cases the context was a claim that an environmental statement made pursuant to Community law should be brought up to date.

It appears that Ireland has chosen to come to this Tribunal because it finds that your powers or speed suit its purposes better than the tribunal entrusted with the task of resolving aspects of the dispute. If so, Ireland has engaged in precisely the sort of conduct that the draftsmen of the Law of the Sea Convention meant to avoid when concluding the text of Article 282. Members of the Tribunal will recall that this provides that where parties have agreed that such disputes relating to the interpretation or application of the Convention shall be submitted to an alternative procedure, it is the latter procedure that must be applied.

There is a second reason why the Annex VII Tribunal will have no jurisdiction. For that reason also this Tribunal should not grant interim relief. Paragraph 283 of the

Law of the Sea Convention provides that, “Where a dispute should arise between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed to exchange views regarding its settlement by negotiation or other peaceful means”. Once again, the wording is mandatory: the parties shall proceed to an exchange of views.

Contrary to Ireland’s assertion, it is crystal clear that there has not been an exchange of views such as is required by Article 283. The United Kingdom requested such an exchange. Ireland refused. Ireland pleads that it has written to the United Kingdom on numerous occasions and has received either inadequate or no responses. This appears to be a reference to letters requesting the public disclosure of information, which was withheld from the public versions of the reports following public consultations on the economic case for the MOX plant. That correspondence did not amount to an exchange of views on what Ireland now characterises as the dispute arising under the Law of the Sea Convention. As Lord Goldsmith demonstrated yesterday, the letters made little reference to the Law of the Sea Convention save that of 23 December 1999. Indeed, Ireland relies upon the perceived inadequacy of the United Kingdom’s response as constituting a breach of the Law of the Sea Convention. It is not easy to see how the same correspondence could be at one and the same time a breach of the Convention and an exchange of views regarding settlement of a dispute arising from such a breach.

In drawing attention to Ireland’s failure to comply with Article 283 of the Convention, I do not take a point of empty form. At least an exchange of views might have disabused the Irish Government of some misapprehensions of fact. Had he waited for a reply, Mr Jacob would have learned that there was no need for his demand that the United Kingdom should halt shipments to and from the MOX plant because there are not going to be any such shipments, at least until next summer. The United Kingdom would have learned the precise nature of Ireland’s submissions on the Law of the Sea Convention and could have responded to them.

If the Annex VII Tribunal were to assume jurisdiction in respect of a dispute which has not been the subject of an exchange of views, it would act contrary to Article 283 of the Convention. It would also act contrary to a wider principle. The duty to seek settlement of disputes by negotiation is one to which reference has been made in various international fora including the International Court of Justice in the *North Sea Continental Shelf* case and the Arbitral Tribunal on German External Debts. The function of international adjudication is to resolve disputes which cannot be settled by negotiation. The States Parties did not intend that this Tribunal, or tribunals established pursuant Annex VII, should assume jurisdiction where one party to the dispute declines to exchange views, giving as its reason that it does not expect the outcome to be equal to its ambitions.

I now turn to a second central point in this case: urgency. Ireland has simply failed to demonstrate that there is urgency such as to warrant prescribing provisional measures.

Few propositions are more elementary than the rule whereby provisional measures are to be prescribed only when this is necessary for reasons of urgency. This principle finds its expression in Article 290(5) of the Law of the Sea Convention. This

provides that this Tribunal may prescribe provisional measures if it is satisfied that the tribunal to be established under Annex VII will have jurisdiction and that the urgency of the situation so requires.

The same principle is expressed in Article 89(4) of the Tribunal's *Rules* which provide that a request for provisional measures under Article 290 (5) must indicate *inter alia* the urgency of the situation". In the *Southern Bluefin Tuna* case this Tribunal expressly acknowledged the applicant's obligation to satisfy it that there was urgency such as to warrant provisional measures.

The first paragraph of Article 290 of the Convention provides that provisional measures may be prescribed pending the final decision. Paragraph 6 adds that the parties to the dispute shall comply promptly with any provisional measures prescribed under the article. The language emphasises the urgency of the situation. It presupposes imminent harm. In this respect the provisions applying to the Law of the Sea Convention are similar to those that apply in the International Court of Justice. The requirement of substantive urgency is also established in international law more generally. In the *Great Belt* case, to which Mr Lowe referred yesterday, the Court stated:

> "provisional measures under Article 41 of the Statute are indicated pending the final decision of the Court on the merits of the case, and are therefore only justified if there is urgency in the sense that action prejudicial to the right of either party is likely to be taken before such final decision is given".

At paragraphs 142 to 152 of our written response we set out our reasons for maintaining that urgency has three elements. First, the event that the provisional measures aspire to prevent must be "critical". It must be of a sufficient order of gravity to warrant restraining a state from exercising its rights in advance of any determination that such exercise amounts to the interference with the rights of another state. Second, there must be a real risk of the occurrence of the event that the provisional measures aspire to prevent. That does not, of course, mean a probability that it will occur, but it must be more than conjecture. Third, the risk must be of the occurrence of the event before the tribunal to determine the dispute is itself able to take action. All three conditions must be fulfilled.

I consider the first the rule that what is foreseen must be a critical event, one of sufficient gravity. In the *Southern Bluefin Tuna* case this tribunal was able to detect a critical event. It concluded; "the stock of southern bluefin tuna is severely depleted and is at its historical lowest levels and that this is a cause for serious biological concern". There was before the Tribunal real evidence of the depletion of the stock to levels from which it might not recover in the period before the Annex VII Tribunal could take action. On the other hand, as Mr Bethlehem has just pointed out, in the *Arrest Warrant* case the International Court of Justice declined to order provisional measures restraining the extradition of a Congolese minister, since the threatened act was not of a sufficient order of gravity.

In the course of his speech yesterday, Mr Lowe identified what he saw as the critical event. It is the plutonium commissioning of a plant, the uranium commissioning of which has already taken place. The critical event for Ireland is not a terrorist act, it is

not a catastrophe, it is not an act of pollution: it is the plutonium commissioning of a plant which has already been subjected to uranium commissioning.

It is however impossible to find in this anything that is critical. Ireland has now abandoned its claim that commissioning would be irreversible. It is not. It is merely expensive, and not expensive for Ireland but expensive for somebody else. How would Ireland be deprived of its rights by the commissioning of the plant? Mr Lowe argues that if this were to happen, Ireland would be deprived of its right to be consulted or to require a further Environmental Statement. I leave aside the fact that it has been consulted repeatedly and exhaustively over a period of years. I ignore the fact that the Environmental Statement was prescribed by Community law, which does not impose an obligation for a further one. Even on Ireland's premises, it is impossible to see how it is deprived of any right irreversibly by the commissioning of the plant. The tribunal properly seized of the matter will, at the full hearing on the merits, be able to grant such relief as is appropriate to the rights of the parties. That relief could amount to an order that the plant shall be decommissioned.

It is by now clear that the commissioning of the plant will have no significant effects on human health, even of the group most likely to be affected by it. It is not only the Commission of the European Communities that reports that the discharges will be "negligible from the health point of view". Ireland's own Radiological Protection Institute confirms that this is the case. The Tribunal has heard repeatedly from Irish advocates the assertion that there will be radiation from the MOX plant. We have not heard much from them about the scale. Let me inject a little realist into the subject. The dose of radiation received by each member of the Irish team in flying to this Tribunal from Dublin would be about 2500 times the dose received from the MOX plan by a member of the critical group in the course of a whole year.

The commissioning of the plant cannot amount to a "critical event" by reason of radiation; nor can it by reason of shipping. There is not going to be any shipping associated with the MOX plan pending the constitution of the Annex VII Tribunal.

Ireland warns of the risk of a marine casualty and produces correspondence from Caribbean governments and from a Congressman in the United States expressing concern about the marine transportation of plutonium. There was reference to this yesterday. Its relevant is remote. None of this deals with the MOX plant. It deals with the international transportation of reprocessed nuclear materials that will continue whether the MOX plant is commissioned or not. Indeed, the MOX plant has some advantages in respect of security. Mr Justice Collins referred to these in this judgement of 15 November, to be found in Annex 15 to the United Kingdom's written response. Lord Goldsmith referred to this yesterday. I repeat that the Judge concluded:

> "The manufacture of MOX enables the reclaimed plutonium to be recycled. This has the advantage of reducing the amount of stored plutonium and saving the use of fresh uranium so that the environmental hazards of mining new uranium can be reduced. In addition, it avoids the need to transport plutonium back to customers for reprocessing in a third country. MOX fuel in the form of what are known as ceramic pellets is said to be less attractive to

terrorists and safer than plutonium (which is transported in the form of plutonium oxide powder)."

Both Mr Fitzsimons and Mr Sands referred to what they called a report from the European Parliament. Mr Fitzsimons characterised the body that produced the report as "high reputable". It is in fact a report by one Mycle Schneider, working for a body called the World Information Service on Energy, known by its acronym as WISE. It is not specifically concerned with the MOX plant. It is concerned with nuclear reprocessing plants at Sellafield land La Hague generally. The report is not from the European Parliament. Indeed, the Chairman of the Committee of the European Parliament that commissioned it had some harsh criticisms to make of it. It was not published by the Parliament. It was leaked.

Mr Fitzsimons criticised us yesterday for relying on a report in the Irish press derived from a press release from the Commission. Very well, I take the Court directly to the Commission's press release, which has this morning been added to the annexes submitted by the United Kingdom to the registry. It will now be shown on the projector. (**Shown**) As may be seen, Members of the European Parliament expressed concerns about the objectivity of that report by an independent contractor and the responsible parliamentary committee expressed regret that the organisation that produced it should see fit to break its contract by leaking to the press the document on which Ireland now relies. Indeed, we understand that there is some consideration given to the issuance of proceedings by the European Parliament against this body and there are press reports of that matter.

We hear of the group called WISE elsewhere in Ireland's submissions. At page 94 of the annexes to Ireland's Statement of Case, which I do not take the Tribunal to at the moment, there is a rather sensational newspaper article about Royal Air Force jets responding to a hoax call at Sellafield. In your own time members of the Tribunal will see in that report that a spokesman from WISE, professing no military experience or knowledge of military matters, is ready with a comment to the press expressing surprise at the United Kingdom has not stationed missiles there.

Mr Fitzsimons expressed some indignation that we should question the WISE report. We prefer to rely upon the reports of bodies which we characterise as reputable, including particularly the Irish Government's own RPII and the Commission of the European Communities. These have indeed looked at the matter carefully and objectively and the Commission has concluded that radiation from the MOX plant will be insignificant from the point of view of public health and the Irish Institute has concluded that radiation from Sellafield is not such as to present dangers to health in Ireland.

I can deal relatively briefly with the remaining data on which Ireland relies for the presentation of its case. It refers to the data falsification at the MOX demonstration facility, an episode which did not affect safety and which, incidentally, BNFL itself drew to the attention of the regulatory authorities when it was discovered. Lord Goldsmith has dealt with this.

On the basis of this and such other reports of the Health and Safety Executive as Ireland has been able to discover dealing with any regulatory breach or mishap at

Sellafield, Ireland makes the general assertion that there is a pattern of regulatory failures in the company. The insinuation appears to be that an accident at the MOX plant is more likely to occur than would otherwise be the case. What the reports show is that nuclear sites in the United Kingdom are subject to close regulatory control. What they do not show is that there is a risk to Ireland; still less is there reason to fear adverse effects in the period pending the constitution of the Annex VII Tribunal on 6 February next at the very latest. Evidence of a real risk of the occurrence of a critical event before that date is not just weak, it is absent. There is no basis on which the Tribunal can properly conclude that provisional measures are justified by the urgency of the situation pending the establishment of the Annex VII Tribunal.

I now reach my third and final point. The Tribunal cannot be satisfied that the first paragraph of Article 290 is satisfied. The jurisdiction to prescribe provisional measures comes into play only where an applicant can satisfy one of the two conditions laid down in that paragraph. Either such conditions must be justified to preserve the respective rights of the parties or they must be justified to prevent serious harm to the marine environment.

In the case of the first of these, the preservation of the rights of the parties, Mr Bethlehem has demonstrated that the burden on an applicant is heavier than Ireland would have the Tribunal believe. An applicant has to show that it would suffer irreparable prejudice. That must be so, for when both parties are asserting rights and a tribunal has not yet been placed in a position in which it can adjudicate upon those rights, it can only proceed on the premise that an asserted right will be sufficiently preserved when any infringement of it, which has neither occurred nor been established as a matter of law, could be rectified at a trial on the merits. That is what Mr Bethlehem meant when he spoke of “duelling rights”.

What are the rights claimed by Ireland, violation of which is liable to cause Ireland to suffer irreparable prejudice? Mr Sands says that there are three: the right to ensure that the Irish Sea will not be subject to what he calls “further radioactive pollution”; the right to have the United Kingdom prepare a second environmental statement and the right to have the United Kingdom cooperate with Ireland on the protection of the Irish Sea.

The first of these, which Mr Sands calls the right to ensure that the Irish Sea will not be subject to further radioactive pollution, is so similar to the prevention of serious harm to the marine environment that it amounts in essence to the same thing. Nevertheless, I address Mr Sands’ submissions on their merits, such as they are. His submission is that the introduction into the environment of any radionuclides is unlawful. In making that statement he is confronted with the uncomfortable fact that the Commission has found, as is the case, that the scale of any radiation from the MOX plant would be infinitesimal. To this his response is,

> “Our understanding of the impact of radiation on the environment and on human health has changed”.

The suggestion appears to be that radiation on a scale described in the Commission’s opinion is now considered by some reputable scientific opinion to be

noxious to human health. This Tribunal has literally no scientific evidence, indeed, no evidence, to that effect at all. The proposition is simply wrong. It is plainly not the case. Members of the Tribunal will recall that there are parts of the United Kingdom in which doses of radiation every nine seconds are equal to that emitted to the critical group in one year from the MOX plant. These are healthy areas of the country.

Far from producing evidence, Ireland has not produced so much as a claim, even from the wildest and most unreliable of pseudo-scientists, to suggest that the emissions from the MOX plant will be harmful to human health. That being the case, Mr Sands turns away from the MOX plant and concentrates on the THORP plant. The United Kingdom does not accept his submissions on the THORP plant but I shall not deal with them in detail. This case is not about the THORP plant; it is about the MOX plant. Still less is it about how the THORP plant might develop over coming years.

The remaining rights that Mr Sands asserts on Ireland's behalf are those that we describe as procedural: the right to have the United Kingdom prepare a second environmental statement and the right to have the United Kingdom cooperate with Ireland on the protection of the Irish Sea. He cannot show that these failures, assuming that they existed, would cause irreparable prejudice to Ireland. The assertion is made that there could be no remedy, but the assertion is nowhere explained. If the Annex VII Tribunal should find that the United Kingdom ought to have made a second environmental statement, why could that defect not be rectified? The United Kingdom could cure the defect. If curing the defect was not sufficient to protect Ireland from the consequences of the defect, it would be for the Tribunal, properly seized of the matter, at the appropriate juncture to decide what remedy would be appropriate. The submission appears to have been drafted on the false premise that decommissioning is irreversible. There is nothing irremediable about the alleged violation of procedural rights invoked by the applicant.

I can now omit to deal with the preservation of the marine environment from serious harm because I have addressed the point when dealing with the analogous right asserted by Ireland. As repeated enquiries have found, and as Lord Goldsmith demonstrated comprehensively, there is no evidence to show that the Irish Sea is likely to suffer anything approaching serious harm in consequence of the authorization of the MOX plant.

Hitherto, I have been dealing with Ireland's rights. However, as Mr Bethlehem observed, the Tribunal must consider also those of the United Kingdom, which have received scant attention from the Irish side. If the Tribunal were to make the order that Ireland claims, it would, in the words of Lord Goldsmith, cause a potential loss of hundreds of millions of pounds. At the extreme, it would threaten the long-term viability of the MOX plant.

In our written observations we drew attention to the fact that Ireland has not offered to indemnify the United Kingdom against these losses if the Annex VII Tribunal should ultimately find that its claims are without merit. Ireland has had time to consider the matter. Yet, to this point there has been no offer of any indemnity. Ireland's position appears to be that the Tribunal should make an award liable to

cause financial losses on a catastrophic scale, greater than those which to my recollection have ever been caused by any international tribunal, and that nothing should be done to protect the United Kingdom against those losses in the event that the Irish application should fail.

In view of the common law rule, common to our countries, whereby applicants for injunctions are required to give undertakings as a matter of routine, Ireland's present position is breathtaking. Indeed, specific provisions in relation to provisional measures are now standard in international rules governing arbitrations between states and commercial arbitrations. It may be noted that the Iran-US Claims Tribunal required an applicant to defray costs to the other party in interim protection.

The Attorney General for Ireland sought to sweep away this little problem by saying that BNFL are not a party to these proceedings. This Tribunal will require no lesson from me on the *Mavrommatis* principle: a state has the right to secure, in the person of its nationals, respect for the rules of international law. Indeed, this is familiar territory to the Tribunal. I laboured it with the Tribunal in the *Saiga* case not so long ago. At the international level, the protection of the interests of a British company is a right possessed by the United Kingdom. The interests of BNFL are not to be ignored on the basis that the Government of the United Kingdom, which is, incidentally, the owner of the company, is the person appearing before this international tribunal.

The only other response given by Ireland is that the sums were small in relation to total expenditure, or that the United Kingdom has not yet produced evidence of losses that have yet to materialize. As for the size of the losses, I echo once more the words of Lord Goldsmith. We are speaking not of millions of pounds but of tens and possibly hundreds of millions of pounds. The size is not small, not even by the broadest stretch of the English language. As regards the probability of the losses being sustained, the United Kingdom has gone as far as it believes that it prudently can without disclosing the current stage of sensitive negotiations between BNFL and its customers. The risk of losses to BNFL is a real risk. Nor is this the only risk. There is the risk of loss of employment in an area of high unemployment, and there is the foregoing of the security advantages identified in the judgment of Mr Justice Collins.

I conclude by stating that the Annex VII Tribunal does not have jurisdiction in respect of Ireland's complaints. Rather, jurisdiction is vested in the OSPAR Tribunal and in the European Court of Justice. Furthermore, Ireland has failed to exchange views as required by Article 283 of the Convention. In any event, there is no urgency such as to warrant the prescription of provisional measures and no evidence to support Ireland's claims that provisional measures are required for the protection of its rights or the preservation of the marine environment from serious harm. For good measure, it would be wrong to prescribe such measures, since this would leave out of account the important and immediate interests of the United Kingdom.

The Attorney General, Lord Goldsmith, will now conclude the United Kingdom's submissions.

THE PRESIDENT: Thank you. The Attorney General has the floor.

LORD GOLDSMITH: Mr President, Members of the Tribunal, perhaps I may make some concluding remarks. First, I express appreciation to the United Kingdom team. Although the bulk of the oral presentation has fallen to Mr Plender, Mr Bethelehem and me, the work done has been very much a team effort. Mr Wordsworth of counsel contributed enormously, as has the agent and his staff and colleagues from the departments.

This has been a great task. As you will appreciate, there were only six days between the delivery of the written application and the filing of our own written observations. It has been no easy task. As you will know, it is our submission that we should not have been put under that pressure, but I wanted to express appreciation to those involved for having done it. I would also like to express appreciation to you, Mr President, and all Members of the Tribunal, for convening the Tribunal at such short notice and for listening so patiently to our submissions. We also thank the Registrar and his staff for the administrative arrangements made. I say this now because, sadly, I am not able to stay this afternoon and would not want to leave without expressing the United Kingdom's appreciation in that way.

We know that there is more hard work for you to do as you examine further the materials and the issues raised before reaching your decision. While that work will, we know, be significant, we on behalf of the United Kingdom would respectfully suggest, now that the issues have been exposed, that the decision will not be a difficult one. I should like to summarize why that should be so, drawing together the threads of the arguments you have heard. In doing so I shall take the liberty of identifying at least some of the most important documents which we believe will demonstrate the justice of our case.

First, we have submitted that provisional measures are an exceptional form of relief, not lightly or liberally to be granted. There has been much talk of the rights of Ireland, but the United Kingdom has rights too. They are not to be prevented from exercising those rights, save on good and compelling grounds, and if the conditions in which the United Kingdom conferred jurisdiction on any international tribunal are fully and strictly satisfied.

Mr Bethlehem has demonstrated the four conditions which must be satisfied before provisional measures can be granted: first, that the Annex VII Tribunal has *prima facie* jurisdiction to address the merits of the case; secondly that the urgency of the situation requires the granting of provisional measures pending the constitution of the Annex VII Tribunal; thirdly that the conditions in Article 290 are complied with, and fourthly, even if all those conditions are satisfied, the Tribunal considers in its discretion that it is right to grant the order.

As this Tribunal is in the unusual position of being able to act in place of the Annex VII Tribunal, as has been pointed out, there is the particular consideration that it should be shown that urgency requires you to act instead of waiting the short time before the Tribunal which will be seized of the merits can decide whether it believes that provisional measures should be granted or whether it should allow the matter to proceed instead to a full hearing. That tribunal will have, for example, the opportunity to decide whether it should move to an expedited hearing where

disputed questions of fact should be more thoroughly examined. That is not an option you have.

Next, Mr Plender has developed our arguments that each of those conditions has not been fulfilled. It is sufficient for our purposes that Ireland has not persuaded you of any one of these. The burden must be on Ireland because it is the applicant asserting the right to have such measures in its favour. It has to satisfy all of the conditions.

I shall not repeat Mr Plender's submissions, which have so recently been made. I stress that there is no irreversible step being taken by commissioning. It can be reversed, although it will be expensive. I stress that there is no urgency. In particular, the state of the MOX plant's programme is such that there will be no transports before the summer of next year. By that time the Annex VII Tribunal will long since have been constituted; indeed, it might even have been able finally to determine some of the issues, if not more.

It is extraordinary that, given what Ireland says now, it did not seize the Annex VII Tribunal a long time ago; for example, early in the year 2000, when it says that its one and only specific complaint – the letter of 23 December 1999 – was rejected by the United Kingdom in March 2000. Why did it not seize an Annex VII Tribunal then, or why did it not seize the European Court of Justice even earlier when in 1997 the European Commission gave its opinion? Had they done so, the Tribunal or court concerned would have had time fully to investigate the facts and Ireland would not have been able to make a virtue, as it now seeks to do, of the absent time to investigate the facts.

Those considerations alone would be sufficient for us to say with confidence that the request for provisional measures should be rejected. But there is more. At bottom, Ireland is saying two things: that MOX will be harmful and that it had the right to be consulted and its views taken into account. That is what it comes down to. But surely the history and the facts show three things very clearly. First, they show that Ireland has been fully consulted and has taken the opportunity to speak over eight years of rigorous process of investigation, during the five public consultations and a review of this application. It is true that in the end its point of view has not been shared by the United Kingdom, but no duty to cooperate or consult requires that it should.

The truth is that Ireland would never have been satisfied unless the United Kingdom had refused authorization for MOX, simply because as it has frankly made clear, it has always been against all parts of Sellafield. The merits of its complaints of lack of cooperation, we say, amount to nothing. Whether Ireland should have seen some of the information withheld from the public on the grounds of commercial confidentiality – iknc identally, a ground permitted by the agreement between Ireland and the United Kingdom and recorded in the OSPAR agreement – is for the OSPAR Tribunal to determine.

However, in any event, the information that Ireland was then seeking that was kept out by reasons of commercial confidentiality, we say related to the economic case for the MOX plant, not the safety issues. We were very surprised to hear it suggested

that information about the radiation discharges had not been disclosed. I have shown you the publicly-available documents: the environment assessment; the proposed decision of the Environment Agency and the Article 37 application.

The second point that is clear is that the rigorous process of review by the bodies charged with the responsibility of investigating the safety has concluded that the interests of Ireland are entirely safeguarded. I dealt with that at length yesterday. I will not repeat it, but perhaps I may simply remind the Tribunal of the conclusions of the European Commission, which are at Annex 3 to our written observations: (**Shown on screen**)

> "In conclusion, 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 Sellafield Mixed Oxide Fuel Plant, both in normal operation and in the event of an accident of the magnitude considered in the general data, is not liable to result in radioactive contamination, significant from the point of view of health, of the water, soil or airspace of another Member State."

I turn secondly to the conclusions of the Environment Agency. Its proposed decision is at Annex 5. I showed you one extract yesterday. Later, I shall invite you to look at paragraph 22 from the Executive. Now on screen is paragraph A3.14. (**Shown on screen**) That paragraph states that:

> "the assessed dose due to gaseous and liquid discharges from the MOX plant is less than one millionth of that due to natural background radiation."

Thirdly, I remind you of the detailed consideration by the Secretaries of State of all the issues, including security issues after 11 September. That is at Annex 4. On the screen is paragraph 28 of the decision letter. (**Shown on screen**) I shall read the relevant part:

> "Security risks to nuclear and other installations are kept under review. The Office for Civil Nuclear Security … which regulates security within the civil nuclear industry, has taken account of the terrorist attacks which took place in America on 11 September and continues to be satisfied that the security arrangements to be applied by BNFL will provide effective security once the SMP starts to operate."

Finally, all operations and transports will be conducted in accordance with the latest international standards at the least.

The third fact to which I refer is that those conclusions are demonstrably right. I shall not repeat the analysis I gave yesterday. However, the key point surely is that the exposures are a tiny fraction of permitted standards. The highest figure for the United Kingdom is one hundred thousandth of the UK standard, and the figure for the Irish is one-fiftieth of that. As Mr Plender has pointed out, there are many times more exposure in an airplane flight. It is no use Ireland talking about contemporary standards. The radiological discharges have not changed. The standards we have referred to are the up-to-date standards.

Fourthly, Ireland has ignored those figures and that data, although it has had years to prove it wrong. Instead, it refers to different figures and the position about fuel reprocessing. That is not the point. MOX is a dry process and does not produce liquid discharges in the way other processes might. But even so, in relation to those other activities, irrelevant though they are, Ireland ignores the evidence; for example, that of its own radiological institute. That is at Annex 15 to our observations. The key finding is that discharges from Sellafield "do not pose a significant health risk to people living in Ireland".

On these facts there is absolutely no justification to put the United Kingdom and BNFL to the certainty of some significant loss and the real risk of much greater loss through further delay.

I suggested yesterday that I felt some dismay and perhaps disappointment about the Irish application, and that the Irish scheme was a strategy to use the advantages of a preliminary measures application to try to block MOX, having failed to persuade the United Kingdom to agree to its point of view, relying on the absence, so it says, of the need to prove the irreparable harm and the injurious effect of MOX.

In the light of the evidence, the Tribunal may have found that suggestion compelling. Others might say that strategies are understandable and that nobody should be blamed for trying. I do not want to fall out with our good Irish friends because they have used a strategy. However, either way there is no good reason for granting this ill-founded application. Mr President, Members of the Tribunal, the United Kingdom respectfully urges you to reject it.

THE PRESIDENT: Thank you. The hearing is adjourned until 1515 hrs.

(**Luncheon Adjournment**)