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INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
TRIBUNAL INTERNATIONAL DU DROIT DE LA MER

2001

Public sitting

held on Monday, 19 November 2001, at 10.00 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.

PRESIDENT: Please be seated

CLERK OF THE TRIBUNAL: The International Tribunal for the Law of the Sea is now in session.

THE PRESIDENT: On 9 November 2001 a request for the prescription of provisional measures, pending the constitution of an arbitral tribunal to be established under Annex VII of the United Nations Convention on the Law of the Sea in the dispute concerning the MOX plant, located at Sellafield, Cumbria, international movements of radioactive materials, and the protection of the marine environment of the Irish Sea, was submitted to the Tribunal by Ireland against the United Kingdom under Article 290, paragraph 5, of the United Nations Convention on the Law of the Sea.

This public sitting is held to hear the parties present their arguments in the "MOX plant" case. I call on the Registrar to read out the submissions of Ireland as contained in its request.

THE REGISTRAR: The Applicant requests the Tribunal to prescribe the following provisional measures:

(1) "that the United Kingdom immediately suspend the authorisation of the MOX plant dated 3 October 2001, alternatively take such other measures as are necessary to prevent with immediate effect the operation of the MOX plant;

(2) that the United Kingdom immediately ensure that there are no movements into or out of the waters over which it has sovereignty or exercises sovereign rights of any radioactive substance or materials or wastes which are associated with the operation of, or activities preparatory to the operation of, the MOX plant;

(3) that the United Kingdom ensure that no action of any kind is taken which might aggravate, extend or render more difficult of solution the dispute submitted to the Annex VII Tribunal (Ireland hereby agreeing itself to act so as not to aggravate, extend or render more difficult of solution that dispute); and

(4) that the United Kingdom ensure that no action is taken which might prejudice the rights of Ireland in respect of the carrying out of any decision on the merits

(5) that the Annex VII Tribunal may render (Ireland likewise will take no action of that kind in relation to the United Kingdom).

THE PRESIDENT: On 9 November 2001 a copy of the request was transmitted to the Government of the United Kingdom. By order of 13 November 2001, 19 and 20 November 2001 were fixed as the dates for the hearing of the case. On 15 November 2001 the United Kingdom filed its written observations regarding the request of Ireland. I now call on the Registrar to read the submissions of the Government of the United Kingdom.

THE REGISTRAR: The Respondent requests the Tribunal to:

(1) reject Ireland's application for provisional measures;

(2) order Ireland to bear the United Kingdom's costs in these proceedings".

THE PRESIDENT: In accordance with the rules of the Tribunal, copies of the request and the written observations are being made accessible to the public as of today. The Tribunal notes the presence in court of Mr David O'Hagan, the Agent of Ireland, and Mr Michael Wood, Agent of the United Kingdom. I now call on the Agent of the Applicant to note the representation of Ireland.

MR O'HAGAN: Mr President, Mr Vice-President and distinguished members of the Tribunal, it is my privilege as the Agent of Ireland to open this presentation by introducing those representing Ireland. Before I do so, I also wish to acknowledge our counterparts representing the Government of the United Kingdom.

First, the Attorney-General of Ireland, Mr Michael McDowell, SC, will speak. As you will know, Mr President, the Attorney-General is the pre-eminent legal officer in Ireland and under the Irish Constitution is the legal adviser to government. He advises government departments and attends government meetings. He will provide an overview of the case setting out the reasons why Ireland attaches such great importance to the protection of the marine environment of the Irish Sea and its rights in relation to cooperation and environmental assessment. He will also outline the importance for the Law of the Sea Convention and this Tribunal in securing these objectives.

After the Attorney-General h as addressed the Tribunal, ,Mr Eoghan Fitzsimons, Member of the Irish Inner Bar, will provide an overview of the dispute and set out the essential factual background for the dispute before the Tribunal. The aim of Mr Fitzsimons' presentation will be to demonstrate the basis of Ireland's concerns about the proposed operation of the MOX plant and international movements of radioactive materials associated with the plant, and also the fact that these concerns are widely shared by other states.

Philippe Sands, Professor of International Law at the University of London, will then address the Tribunal. He will set out the rights which Ireland has under the 1982 Convention which, Ireland says, will be violated by the bringing into operation of the MOX plant and the consequential international movements of radioactive materials in and around the Irish Sea. He will assert that the United Kingdom's intended authorization of the MOX plant is prima facie contrary to Ireland's rights under the 1982 Convention. Those rights are substantive – Ireland's right not to be subject to further radioactive pollution of the Irish Sea – and procedural: the right to ensure that the United Kingdom carries out a suitable and up-to-date assessment of the environmental impacts of the MOX plant and international shipments, and the right to have the United Kingdom cooperate in taking steps to protect the Irish Sea.

Professor Vaughan Lowe, Chichele Professor of International Law at the University of Oxford will follow. He will assert that the Annex VII arbitral tribunal has prima facie jurisdiction and that the provisional measures Ireland is requesting are necessary by reason of the situation of urgency which exists, to protect Ireland's rights under the 1992 Convention and to prevent serious harm to the marine environment of the Irish Sea.

Mr President, Members of the Tribunal, with your permission I now pass to the Attorney-General of Ireland.

THE PRESIDENT: Before the honourable Attorney-General takes the floor, I now call on the Agent of the United Kingdom to introduce his delegation. I request the Agent of the Respondent to note the representation of the United Kingdom.

MR WOOD: Mr President, members of the Tribunal, I appear as agent for the United Kingdom in this case, the first case before the Tribunal to involve the United Kingdom. On a personal note, perhaps I may say that it is a privilege to be here before this Tribunal, which has a central role in the modern law of the sea. I have followed closely the establishment of the Tribunal at the Law of the Sea Conference, meetings of states parties and at the inauguration of this fine building.

Mr President, I shall limit myself at this stage to introducing the United Kingdom's team. We shall describe the structure of our statement at the beginning of that statement this afternoon. Our team is led by Lord Goldsmith, QC, the Attorney-General. He is assisted as counsel by Richard Plender, QC, Daniel Bethlehem and Samuel Wordsworth. Also on our team are Alistair McGlone and Sara Feijao, legal advisers at the Department for Environment, Food and Rural Affairs; Brian Oliver, an official in the same department, and Jonathan Cook, an official at the department of Trade and Industry. Finally, there are my three colleagues from the Foreign and Commonwealth Office: Olivier Richmond is secretary to our delegation; Jill Barrett, who is the Deputy Agent, and Douglas Wilson are both legal advisers at the Foreign and Commonwealth Office.

THE PRESIDENT: I now request the Attorney-General of Ireland to begin his statement.

MR O'HAGAN: Mr President, Mr Vice President, of the Tribunal, as Attorney General of Ireland it is an honour to appear before this Tribunal. This Request for Provisional Measures raises issues of international law which are central to the scheme of the 1982 United Nations Convention on the Law of the Sea, to which Ireland became a party on 21 June 1996. Ireland is, of course, fully committed to the entire package which the Convention provides for. It must be said, however, that as an island Nation our relationship to the sea is of great importance and we count on the fullest possible protection and preservation of the marine environment of the Irish Sea. Therefore, we attached great significance to Parts IX and XII of the Convention and have full confidence that this Tribunal will take all necessary steps to preserve our rights under the Convention pending the establishment of the arbitral tribunal which we called for on 25 October last.

Mr President, as a smaller State, Ireland naturally depends in the ultimate on the maintenance and vindication of its rights under international law. Larger and more powerful States may, perhaps, have greater leverage through persuasion, bargaining and the diplomatic process. This Tribunal, I ask to note, was adopted by the Irish people in a far less auspicious climate for international law in 1937 which commits Ireland unequivocally to the international rule of law. Article 29 of the Irish Constitution, which is frequently invoked before the Irish courts and is frequently relied upon by those courts to control the Irish State in general and the Irish Government in particular (sometimes in relation to maritime disputes such as in *ACT Shipping v Minister for Finance 1995 3 IR 406)* provides as follows: (1) Ireland affirms its devocation to the ideal of peace and friendly cooperation amongst nations founded on international justice and morality; (2) Ireland affirms its adherence to the principle of the pacific settlement of international law disputes by international law arbitration or judicial determination; (3) Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States.

That is the 1937 text of the Irish Constitution. As recently as 1998, the Irish people expressly amended the Constitution to provide that extra-territorial jurisdiction could only be exercised by the Irish State in accordance with generally accepted principles of international law.

If, as is the case, the Irish State is internally constitutionally bound to abide by those principles, I feel confident in saying to this Tribunal that we are as entitled as any, and in particular as larger more powerful States, to invoke and rely upon principles of international law and not to be brushed aside or ignored in the pursuit of dubious and quite artificial economic self-interest when our rights under international law are endangered or are violated.

Over the years the Government and the people of Ireland have become increasingly concerned about the radioactive pollution of the Irish Sea. My colleague, Mr Fitzsimons, will address this in more detail but for the Government which I serve, two incontrovertible facts are of particular significance. The first is that the Irish Sea is amongst the most radioactively polluted seas in the world. The second is that the main source of that radioactive pollution is the United Kingdom and that the overwhelming majority of that pollution comes from the Sellafield site on the coast of the Irish Sea where the MOX plant is intended to be brought into operation.

The Irish Government is gravely concerned about the proposed MOX plant and its implications, either direct or indirect, for the Irish Sea. If commissioned, it will contribute its own additional discharges and will intensify nuclear activities through the adjoining THORP plant next to the Irish Sea. These are activities for which Ireland, needless to say, derives no benefit, direct or indirect, but for which Ireland would undoubtedly carry the risk and pay the cost when its rights under international law are infringed.

In its Statement in Response the United Kingdom Government makes what we consider to be unsubstantiated assertions about the economic consequences to MOX's developer – BNFL, British Nuclear Fuels Limited – if you order Provisional Measures. We too could give you figures about the potential consequences to the Irish water-related tourist and fisheries industry from the MOX plant and from

Sellafield. But we do not believe that these figures are relevant for present purposes. In any event, the MOX plant is planned to last 20 years or perhaps more and we do not know exactly how long because the United Kingdom will not tell us. MOX will certainly contribute to the further contamination of the Irish Sea but the Irish Government do not know by how much or with what substances because again the United Kingdom will not share with us detailed information on those issues. MOX will lead to more international transports of radioactive substances but again we do not know how many or how frequently because the United Kingdom Government will not tell us. It will expose us to the risks of accidents, from the plant and from nuclear transports. We also believe that MOX will expose us to the even greater risk arising out of terrorist type attacks, a type of threat which the Director-General of the International Atomic Energy Agency now describes, and I quote his language, as a "clear and present danger". In due course Mr Fitzsimons will address these matters in greater detail.

Mr President, Members of the Tribunal, that is the background that made Ireland feel obliged to initiate international legal proceedings under the Convention. It is not a decision which we have taken lightly but since 1994 we have taken all possible reasonable steps to engage with the United Kingdom during the stages of the authorization of the proposed MOX plant at Sellafield. In that year, 1994, we submitted our detailed views on the Environmental Statement which was prepared by British Nuclear Fuels Limited in 1993. In that submission we set out our views on the manifest inadequacies of the 1993 Statement in terms of its substantive content. We received no response. Subsequently from 1999 we raised concerns about serious procedural infractions, namely the failure to review the Environmental Statement by reference to the many new factual and legal developments which had arisen since the Statement was prepared in 1993. That too received no response. Indeed I have to say such has been the pattern throughout the last eight years that we have received a positive response to none of our efforts to obtain information or assurances. For more than eight years it was not thought necessary to ask us to clarify or explain our position until the day before we initiated our Annex VII arbitration proceedings when the United Kingdom Government for the first time reacted substantively to any of our communications.

Separately, from 1997 onwards, we submitted our views on the inadequacy of the procedure whereby the United Kingdom Government sought to assess whether the MOX plant was justified. We were especially concerned at a proposal to write off the entire cost of construction of the MOX plant - which was £470 million – and to exclude that capital cost from the assessment of its economic viability or justification. We were also very concerned about the failure to take into account environmental costs such as the further pollution of the Irish Sea or the costs of transport. Our views elicited, yet again, no substantial response or else were ignored entirely. When it became apparent that the Government of the United Kingdom was unwilling to share information with the Government which I serve, we made requests under the international freedom of information laws and again the information was refused outright and, again, we contend without property explanation.

In 1999 we wrote to the United Kingdom setting out our concerns in considerable detail. In our letter of 23 December 1999 – nearly two years ago – we put the United Kingdom Government on notice that if it authorized the MOX plant it would be in

violation of the 1982 Convention and we reserved our right to bring proceedings. We pointed out at that time in particular the failure to review the Environmental Statement and secondly to take into account the material changes in international law which had occurred since 1993 including the entry into force of the Law of the Sea Convention, and also the United Kingdom's intervening commitments, which we say have legal force, to take steps to reduce concentrations of artificial radionuclides in the Irish Sea to "close to zero" by the year 2020.

Again, I regret to tell you, Mr President, those representations received no response. The record plainly shows that by December 1999 the United Kingdom Government was on notice that authorization of the MOX plant exposed it to the risk of these proceedings. All the correspondence has been provided to this Tribunal. The letters, we say, speak for themselves, Mr President. The United Kingdom chose to ignore our concerns.

We also made very clear our concerns about the United Kingdom's secrecy about the MOX plant. By 1999 we had still been provided with no information on material matters including the following: the number of shipments of spent fuel into the Irish Sea envisaged at the MOX plant; the quantity and types of discharges of radioactive wastes from the MOX plant into the Irish Sea; the number of years the MOX plant would operate for and the number of shipments transporting MOX fuel to Japan and to other countries.

Despite Ireland's repeated requests we have never been provided with that information. We have repeatedly asked for the information, which we assume to be included in the PA Consultants' Report and the Arthur D Little Report, without success. So in June of this year we brought proceedings under a arbitral tribunal, constituted under Article 32 of the OSPAR Convention to obtain some of that information. At the same time we invited the United Kingdom to give an undertaking that there would be no authorization of the MOX plant pending the outcome of the arbitration proceedings. Our expectation, Mr President, was that as a friendly Nation and State, our request would be complied with, but it came as a great surprise and disappointment when, within three months after we sought that confirmation, the United Kingdom refused to provide us with the assurance we sought or even to offer to engage us in discussions. With that refusal it became completely plain to see that the United Kingdom was essentially uninterested in our views and interests, was not willing to take them into account, saw no need for cooperation and was intent on authorizing the plant according to the environmental standards and legal conditions which applied in the early 1990s.

Mr President, by the time we received confirmation from the United Kingdom that it wished in effect to proceed to proceed to authorization, the terrible terrorist events of 11 September of this year had occurred. Mr President, I would be appearing before you today even if those terrible events had not occurred but against that tragic development we find it difficult to understand how the United Kingdom could proceed to authorize new international movements of MOX and radioactive materials, and to expose Ireland to new international risks without even the courtesy of discussing the details of these movements with Ireland. In our view that approach is hardly consistent with the precautionary principle and it is, we respectfully submit to this Tribunal, not consistent with the United Kingdom's obligations under the 1982

Convention. We were dismayed by the decision to proceed to the authorization of the MOX plant that was taken on 3rd October 2001, especially in the shadow of the events in New York and Washington and two days after we had assumed the Presidency of the UN Security Council. I feel bound to share with you the sense of disappointment the Irish Government felt at the discourtesy that such a decision should be taken two days before a scheduled meeting between the parties on procedural aspects of the OSPAR Convention.

What is this case about? First and foremost it is about protecting the Irish Sea from any further pollution by radioactive substances. For more than 40 years now the United Kingdom has authorized discharges of radioactive wastes into the Irish Sea and into the environment. As I said earlier, Mr President, it remains amongst the most radioactively contaminated seas in the world. However, the situation is changing, I have to acknowledge. The United Kingdom has recognised the urgent need to clean up the Irish Sea and has also recognised that it is no longer acceptable to use our share of semi-enclosed sea to dispose of nuclear waste. In 1992 the United Kingdom finally undertook to prohibit dumping from vessels of any radioactive wastes into the Irish Sea and in 1997, as I said, the United Kingdom Government refused to authorize the construction of a facility to assess the prospects for storage radioactive wastes in cavern type bunkers to be built under the Irish Sea.

Now that decision of 1997, Mr President, is very instructive indeed. In the mid-1990s, a company partly owned by British Nuclear Fuels Limited (which is called NIREX) proposed to construct a rock characterisation facility to examine the possibility of storing nuclear waste under the Irish Sea. Unlike the MOX plant, the NIREX proposal did not envisage direct radioactive discharges into the Irish Sea. Nevertheless, as you can imagine, Ireland was most concerned about the risk of discharges arising by accident or other act from such a facility. My office, the Attorney General's office, then instructed Professor Lauterpacht and Professor Sands to prepared detailed legal submissions and to attend, on behalf of Ireland, a Planning Inquiry which took place in Cumbria on the NIREX proposal. The Irish Government was much fortified by the robust decision of the Planning Inspector in 1996 to recommend to the Secretary of State that NIREX's planning application be rejected. It was rejected, and among other reasons, on account of the inadequacies of the Environmental Impact Statement and the failure to take into account the risk of harm to the Irish Sea from unintended discharges. I am sure I do not have to remind this Tribunal that these are two of Ireland's main concerns in relation to this present proposal, the MOX plant. The UK Planning Inspector's decision was upheld in March 1997 by the former UK Secretary of State for the Environment, Mr John Gummer MP. The planning application was rejected. In reaching his decision Mr Gummer stated that he agreed, and I quote, "that the people of Ireland have a legitimate interest in any proposal for a repository for radioactive waste near the Irish Sea coast" and he also said, "was acutely aware of the Government's obligations to other States which are set out in international obligations in respect of the sea and the environment more generally". I ask this Tribunal to compare that attitude demonstrated then in relation to that undersea storage proposal to the approach now being taken by the British Government.

Following the NIREX decision we naturally hoped and expected that the United Kingdom would, in future, take far greater account of what were described by them as

our "legitimate interests" and to do more to protect the valuable resource, the Irish Sea, which we share. The follow year, in 1998, we naturally welcomed the decision by the United Kingdom Government to accept the obligation to reduce concentrations of radioactive substances in the Irish Sea to "close to zero" by the year 2020. We welcomed a commitment which necessarily demands dramatic reductions of radioactive discharges into the Irish Sea. We say that against that undertaking, which we regard as internationally binding in law, made in 1998, the decision to authorize discharges from the MOX plant into the Irish Sea is simply flatly inconsistent with the 1982 Convention.

We also say that Ireland has rights under the 1982 Convention which would be violated by the authorization of the MOX plant. Professor Sands will develop and elaborate this aspect later on this morning. I want to underscore my Government's commitments to these rights. First and foremost we have the right not to be subject to further radioactive pollution. That right arises under Articles 192, 194, 207 and 212 of the 1982 Convention. We have the right to require the United Kingdom to respect fully its obligations to prevent pollution by radionuclides "to the fullest possible extent", taking "all necessary measures" and using "best practicable means". That right is violated by the authorized discharges from the MOX plant and this, of course, then carries with it the risk of releases resulting from accidents or terrorist acts.

I would also like to make clear that the authorization of MOX will support the continued operation of and more discharges from the THORP plant at the Sellafield site. These consequential discharges, the indirect effects of the MOX plant, have never been assessed in the context of the MOX authorization even though the UK Government has recognised the economic connection between MOX and THORP. The implications of the MOX project for the THORP plant are an important element of Ireland's concerns. In this regard we note the call – and this is of some significance we say – on 13 November of this year, in the shadow of these proceedings, by British Energy, a major nuclear power generator in the United Kingdom, who asked that reprocessing at Sellafield be brought to an end and instead the cheaper, and more environmentally benign option of long-term storage be used. You will find that submission at Annex 3, page 14 of our documentation. We welcome this contribution and the proposed approach, which would dramatically reduce discharges into the Irish Sea, if it were heeded.

Reducing such discharges is, in Ireland's eyes, our substantive right, and it is a matter of fundamental importance to everyone in Ireland. We also have equally important procedural rights. These are, firstly, the right to enjoy the cooperation of the United Kingdom and the coordination of our respective activities, and, secondly, the right to require the United Kingdom to carry out a proper environmental assessment of the impacts of the MOX plants.

The duty to cooperate is of fundamental importance. It is not merely some rhetorical politeness, some high-minded aspiration inserted for decoration in the Convention. Generally we enjoy good relations with the United Kingdom and we wish that to continue. We are also aware, and we are grateful to the other party for this, that in the conduct of these proceedings before the International Tribunal we have benefited from their cooperation, in these proceedings at any rate, to the fullest degree. That has meant sharing information, listening to each other's views, and modifying our

positions accordingly. We are deeply concerned that the same level of cooperation has not been extended to us in relation to the protection of the Irish Sea from the consequences, whether direct or indirect, of the MOX plant. As I say, cooperation is not a mere courtesy; it is an obligation under Articles 123 and 197 of the Convention. Even if the United Kingdom considers those provisions to be practically meaningless, we do not, and as a small state we attach great importance to the right to cooperation set forth in that Convention.

We say that the right to cooperation entitles us to expect that the United Kingdom will provide us with pertinent information, will respond to our reasonable requests for such information where it has not been forthcoming, and – and I stress this is of the utmost importance – will at least take into account our views in proceeding to make its decisions. The failure to provide information is abundantly clear, as is the refusal to respond to our requests. The United Kingdom Government has not even been willing to provide us with information on when the MOX plant will become operational and it has now more or less admitted, as appears from Secretary of State Beckett's letter of 24 October, that it has not really taken our interests into account either.

We attach equal importance to our rights under Article 206 of the Convention. We find it astonishing that the United Kingdom can claim in its response that Article 206 is not applicable to the MOX plant because there are no grounds for concern about its environmental effects. That claim underlines our concern that scant regard is being paid by the United Kingdom to the Convention, to our interests and to the environment of the Irish Sea.

Mr President, members of the Tribunal, this case concerns a dispute between Ireland and the United Kingdom relating to the interpretation and application of the 1982 Convention. It is, as I have said, about Ireland's rights to cooperation, environmental assessment and the prevention of pollution. It is also the fact that Article 293 of the Convention mandates this Tribunal to apply "other relevant rules of international law not incompatible with [the] Convention".

There is one other relevant rule of international law which we say is particularly relevant, and that is the precautionary principle. The precautionary principle is recognised as a rule of customary international law and is binding upon Ireland, just as it is on the United Kingdom. We welcome the fact that the United Kingdom does not challenge the customary international law status of the principle, but, unlike the United Kingdom, we say that that it is of singular importance for the provisional measures aspect of this case because it is applicable to the interpretation of each and every provision of the 1982 Convention upon which Ireland relies.

Precaution directs the decision-maker and in this case we respectfully submit it also directs this Tribunal to exercise prudence and caution in the face of uncertainty. We say that in this case it places the burden on the United Kingdom to demonstrate that no harm will arise from discharges and other consequences of the operation of the MOX plant, should it proceed. We say it cannot so demonstrate. We also say that the precautionary principle informs the conditions under which the Tribunal must approach the questions of urgency and *prima facie* jurisdiction. This case, we say, is

a classic example of the type of situation in which uncertainty mandates the invocation and granting of provisional measures.

It is appropriate to say what this dispute is not about. First it is not about normal industrial activity and tolerable and predictable non-nuclear pollution associated with such activity. As an industrialising country, Ireland is not anti-development. The dispute is about the consequences of the fabrication of plutonium oxide fuel, one of the most dangerous substances known to human kind. Secondly, this case is not about the generation of peaceful nuclear power. In deciding this case, you are not required, by Ireland at any rate, to address in any way the merits or demerits of peaceful nuclear power. Thirdly, this case is not about military activities in any sense. The MOX plant is being proposed for one purpose only and the only justification offered for it: to make money. It is claimed to be a one hundred per cent commercial activity. Its sole *raison d'être* is profit. So, in deciding this case, you are not being called upon to address any aspects of nuclear weaponry or of Britain's strategic security or defence policy.

Fourthly, it is a dispute only between Ireland and the United Kingdom in which the MOX plant is to operate and under whose jurisdiction and control the discharges are to be authorised. The dispute does not involve any other countries directly, and in particular not those countries whose utilities might or might not decide to make use of the MOX plant, should it proceed..

As an inter-state dispute, the developer and intended operator of the MOX plant is not party to the dispute or to these proceedings either. I refer to BNFL. So you are not required, I submit, to consider the impact of these proceedings upon that operator. Indeed, we say you ought not to do so because your function is to apply the law as set out in Article 290, paragraph 5, of the Convention.

Fifthly, we say that it is not your task at this time to decide on the merits, in particular whether the discharges from the MOX plant will or will not cause harm. That is a matter for the Annex VII tribunal. At this interlocutory point, we submit that the Tribunal's function is limited to deciding whether Ireland as rights under the Convention and whether those rights could or could not be preserved if the operation of the plant was now to proceed. Professor Sands will elaborate on this part of our case and Professor Lowe will, in due course, remind the Tribunal that the approach taken by Ireland is precisely the same as that proposed by the United Kingdom in its request of provisional measures in a 1973 dispute concerning fisheries protection. The United Kingdom's approach in that case was accepted by the International Court of Justice. Now that it finds itself on the receiving end of such a request, its approach seems to have changed.

The task for this Tribunal we say is to apply the rule of law, to determine whether Ireland has rights under the 1982 Convention and whether those rights would be violated by the commencement of the operation of the MOX plant in present circumstances and in advance of the determination of the Irish claim on the merits. We say that it is self-evident that our rights will be irreparably harmed if the plant goes into operation on 20 December, without having been subject to a proper environmental assessment and without our informed views – and I stress the phrase "our informed views", those views put forward by Ireland on the basis of receiving

the information to which we are entitled under international law – being taken into account in that process.

Any direct or indirect discharges of radioactive substances into the Irish Sea pending the constitution of the arbitral tribunal cannot be consistent with the preservation of our rights. The rights lost by the early operation of the plant with such consequences could not be restored by this Tribunal or by the arbitral tribunal if a finding is made in our favour in respect of the rights we claim.

There are two other conditions which must be satisfied for you to prescribe provisional measures. You must be satisfied that the Annex VII tribunal will have *prima facie* jurisdiction and that there exists a situation of urgency. In our submission, both conditions are amply satisfied, and Professor Lowe will make our submissions to you on those issues in due course.

In that regard, I want to point out at this stage that the plant has been idle for more than five years. Over that period, the United Kingdom has had more than two years' notice of our concern under the 1982 Convention, and of the right we expressly reserved as early as July 1999 to commence these proceedings. Ireland is committed to proceeding expeditiously in the Annex VII proceedings. There is no reason why they cannot be completed quickly. We welcome the United Kingdom's early appointment of an arbitrator. We are committed to the rapid appointment of the other three arbitrators. If you prescribe the provisional measures that we have requested, then the United Kingdom will be free to make an application, even to the arbitral tribunal, to reconsider them. We invited the United Kingdom to desist from organising the operation of the plant until the arbitral tribunal had been constituted, which could have been as early as January 2002 but they refused. In these circumstances, we had no option but to file this request with this Tribunal, since the commissioning of the plan would immediately and irreversibly erode our rights under the 1982 Convention. We respectfully submit that the United Kingdom loses nothing by waiting to ensure that the fullest possible and legally due respect is maintained for both parties' rights under the 1982 Convention.

May I conclude with this point? The United Kingdom has said that we have erred in initiating proceedings under the 1982 Convention and that we ought not to have brought this application to you. It is one of the features of the modern international legal order that states now have available to them a range of procedures and institutions to protect their rights. Ireland is entitled to choose amongst those procedures. There is nothing inconsistent about using one procedure to protect rights relating to access of information and other procedures to protect rights relating to the protection of the marine environment, to cooperation or to environmental assessment. This is all the more so when, as in this case, we have acted transparently and openly throughout and when we have given ample notice to the United Kingdom about the rights we consider to have been endangered by their actions and of our intention to initiate legal proceedings. The United Kingdom Government cannot claim to have been surprised by any of our actions, including those which have led to us being before you today.

Mr President, Members of the Tribunal, this concludes my introductory statement and overview. I respectfully ask the Tribunal now to call on Mr Eoghan Fitzsimons, Senior Counsel, my colleagues, to continue Ireland's presentation.

THE PRESIDENT: Than you, Mr Attorney General.

MR FITZSIMONS: Mr President, Mr Vice President, members of the Tribunal, it is an honour to appear before you to present submissions on behalf of Ireland on this application.

As has already been indicated, it is my task to outline to you the facts and history of this dispute. These are set out in some detail in the Request for Provisional Measures. In my submission, I propose to draw your attention to and emphasise aspects of the facts that are directly relevant to the submissions that will follow. As I proceed, I would also propose to comment as appropriate upon references to the facts contained in the United Kingdom reply to the Request for Provisional Measures.

I wish to emphasise at the outset that Ireland, in making this application, has sought to confine the material placed before you to what is necessary at this stage of the process.

In dealing with the facts, I will discuss firstly the MOX plant itself. I then propose to deal with the consequences, potential and otherwise, of permitting the MOX plant to commence operation. I will finish by talking you briefly through the history of the dispute for the purpose of demonstrating the reliance of the United Kingdom on an inadequate and outdated Environmental Statement and outdated environmental standards to support its decision to open the MOX plant.

The history of the dispute will also indicate the attitude of the United Kingdom Government to the concerns of Ireland which, in our submission, most regrettably, has fallen far short of what would be appropriate in the circumstances. In the latter context Ireland will of course be submitting that the United Kingdom has failed in duties owed by it to Ireland under the Law of the Sea Convention regarding matters relating to the marine environment.

The British Government has engaged in nuclear activities at a site at Sellafield on the west coast of England since the 1950s. Our request for provisional measures, at

paragraph 5, referred to the site as being in the north-east of England and I would wish to correct this error. The site at Sellafield is on the west coast of England, on the sea shore. It is directly across the Irish Sea from Ireland. At its nearest point it is some 112 miles from the Irish coast.

In the early years the activities at the site were carried on by a state agency and were directly related to nuclear weapons. Since in or about 1971, they have been carried on by a company incorporated under civil law known as British Nuclear Fuels Limited. This company is wholly owned by the British Government. It aspires to operate on a commercial profit-making basis. We may well hear a lot about BNFL from the United Kingdom. The Attorney-General has stressed, and I would like to stress again, that although BNFL is the operator of the proposed MOX plant, it is not a party to this dispute. The parties are the United Kingdom and Ireland. It is their rights on which you will rule.

Since it entered the picture British Nuclear Fuels has engaged in a wide range of nuclear activities. These have included the reprocessing of spent nuclear power reactor fuel elements and the production of MOX fuel. In 1993 a pilot MOX demonstration facility was opened at Sellafield. It produced small quantities of MOX fuel each year (about 8 tonnes annually) until 1999 when MOX production was suspended. It was shut down as a result of a falsification scandal at the plant. It was discovered at the time that recording of measurements, some of which had safety implications for MOX fuel destined for overseas customers, were being falsified by staff. An enquiry by the United Kingdom NII at the time established that systematic failure over some three years had allowed this to happen. As we understand the position, the facility has not yet reopened and there are no plans to reopen it.

Moving on from the plant itself, it would probably be helpful to focus on the word "MOX". What does it mean? The term "MOX" signifies mixed oxide fuel. This fuel is a mix of plutonium oxide and uranium oxide. It is suitable for use in nuclear power reactors. In this regard it is important to note that no nuclear reactor in the United Kingdom currently uses MOX fuel. There are some 30 nuclear power reactors in the United Kingdom. If, therefore, the MOX plant is permitted to commence operations the MOX fuel produced by it will be exported, primarily by sea.

As already stated, a number of different types of nuclear activity are carried out at the Sellafield site. One of these is particularly relevant to the issues that arise. In 1994 a plant known as the Thermal Oxide Reprocessing Plant began operating at Sellafield. This plant is commonly known as the THORP plant and I will describe it as such in these submissions. The THORP plant is a reprocessing plant and operates as such at the present time. It reprocesses spent or waste nuclear power reactor fuel elements on a commercial basis. The THORP plant is to play a key role in the process leading to the production of MOX fuel at the MOX plant.

The process by which it is intended to produce MOX fuel at the proposed MOX plant can be described in simple terms as follows: spent nuclear fuel containing plutonium, unused uranium and fission products is to be transported to Sellafield, mostly by sea. British Nuclear Fuels operates a number of ships including an ordinary roll on/roll off cargo ship purchased second-hand on 20 July last for this purpose. When the spent nuclear fuel arrives it will be reprocessed at the THORP plant. The object of

reprocessing is to recover from the spent nuclear fuel the plutonium and uranium that remains in it. This is achieved by firstly chopping up the spent fuel and then by dissolving it in boiling concentrated nitric acid, essentially in what can be described as an acid bath. By this process and associated processes the different elements in the spent fuel, including the remaining plutonium and unused uranium, are separated. They are then recovered for future use.

If the MOX plant is permitted to commence operation, the plutonium and uranium recovered from reprocessing at the THORP plant will be transferred to the MOX plant from the THORP plant to enable MOX fuel to be manufactured. In the MOX plant the plutonium, in the form of plutonium oxide, and the uranium, in the form of uranium oxide, will be mixed. A dry lubricant and conditioner will be added. The result of this process will be the product known as MOX fuel. MOX fuel, when manufactured, is produced in pellet form to dimensions and characteristics specified by the customer. The pellets are stored on site. When required by the customer they are placed in new fuel rods. The rods are then assembled into fuel assemblies suitable for use in the customer's nuclear power reactors. When so prepared the MOX fuel will be transported away from Sellafield to the overseas customer, again mainly by sea. An illustration of one of these assemblies can be found at page 29 of Annex 1 to Ireland's request for provisional measures. This may all sound rather complex. This automated MOX production process is technically unprecedented. It is to be controlled by complex software which has never been used before.

At this stage I wish to show the Tribunal what a MOX pellet looks like. I will show it on the screen beside a 1 Deutschemark coin. (**Pellet and coin shown on screen**). As you will see, it is a tiny object, smaller than the coin. A MOX pellet of this size would contain 0.4 grams of plutonium. If this plutonium was released and evenly distributed it could kill 5,000 people. In case the Tribunal is concerned, I would mention that the pellet shown is not made of MOX fuel and contains no plutonium.

I turn to the consequences of operating the MOX plant. What will be the consequences if the MOX plant is permitted to commence operation? As already stated, the Sellafield site has operated since the 1950s. since that time it has discharged, and continues to discharge, directly by pipes, nuclear waste into the Irish sea. Since that time it has discharged and continues to discharge, in the form of gases and particles, nuclear waste into the atmosphere. Quantities of these discharges find their way into the Irish Sea given its proximity to Sellafield. These are accepted facts and are not in dispute. The marine environment of the Irish Sea is, therefore, doubly damaged by Sellafield nuclear waste. It is argued by the United Kingdom that the amounts of nuclear waste discharges arising from routine operations are acceptable.

It is quite clear from the material relied upon by the United Kingdom to support its argument in this regard that the source of it is British Nuclear Fuels. British Nuclear Fuels, as a commercial entity, has a financial interest in the outcome of this request by Ireland. The data relied upon by Ireland comes from independent sources and, it is submitted, should be preferred. I shall deal with the data issues in a little more detail later.

However, anything I say about levels of discharges should be considered in the light of what Mr Sands will say about the duty to protect the marine environment. As he

will explain, this is emphatically not a dispute about whether the discharges from the MOX plant will be large, medium or small. It is about Ireland's rights. This provisional phase is absolutely not the time to be distracted by scientific arguments which we say do not need to be adjudicated upon at this time one way or the other.

What is remarkable about the data and factual argument advanced by the United Kingdom is what it does not address or contain. It ignores, first, the irreversible nature of the damage caused by any form of nuclear contamination. Secondly, and critically, it takes no account of the cumulative effect of repeated discharges. Thirdly, and perhaps most importantly of all, it ignores the fact that cumulative deposits of discharged nuclear waste in the form of radionuclides remain contaminated and a danger to human life and the marine environment for hundreds, if not thousands, of years. Fourthly, it takes no account of the fact that the Irish Sea is a semi-closed sea from which pollution is less readily swept away than it would be from an open ocean coast.

These unfortunate and unique features of nuclear contamination remove all validity from any argument which seeks to maintain that nuclear waste discharges in small quantities result in a level of damage which somehow or another is tolerable and which has to be accepted by those affected.

A recent report dated August 2001 commissioned by the European Parliament under its Scientific and Technological Option Assessment Programme, advised that marine discharges from Sellafield had led to significant concentrations of radionuclides in foodstuffs, sediments and biota. This is confirmatory of the findings of the United Kingdom Ministry responsible for the monitoring of radioactivity in the Irish Sea. The report addresses the topic of risk assessment where radiation is concerned and engages in a case study of Sellafield. I shall refer to it as the European Parliament report.

The report contains details of the adverse effect on marine life, particularly shellfish, from Sellafield discharges. The report further states that the deposition of plutonium within 20 kilometres of Sellafield attributable to aerial emissions has been estimated at 16-280 GBq (billion becuerels), that is two or three times plutonium fallout from all atmospheric nuclear weapons testing. It also estimated that over 40,000 TBq (trillion becquerels) of caesium-137, 113,000 TBq of beta emitters and 1,600 of alpha emitters have been discharged into the Irish Sea since the inception of reprocessing at Sellafield.

These statistics mean that between 250 and 500 kilograms of plutonium from Sellafield is now absorbed on sediments on the bed of the Irish Sea. This would be enough for between 40 and 80 nuclear weapons. It can be mentioned also that this same report indicates that the consequences for human health and the environment of an accidental release from one only of the 21 tanks storing liquid high level radioactive waste at Sellafield would be about 4 times greater than the consequences of the Chernobyl accident of 1986. Such a release could also take place as a result of a terrorist or other attack. A summary of the European Parliament report is to be found at pages 50 and the following pages of the second annex to the request for provisional measures.

The United Kingdom in its submission seeks to dismiss this report by relying on a single newspaper article taking issue with it. A reading of the article makes it clear that the content of the article could not be relied upon by the Tribunal. It is astonishing that it is offered as evidence. Notwithstanding the fact that the United Kingdom has at its disposal an enormous amount of nuclear expertise, no attempt is made to dispute the scientific findings or detail in the report. It can be reasonably inferred that the United Kingdom experts, including those at British Nuclear Fuels, are not prepared to dispute the findings of this reputable scientific study. As well be evident from a reading of the summary of the European Parliament report, the irreversible, cumulative and extremely long-term effects of Sellafield marine nuclear contamination are very serious indeed.

The United Kingdom makes much of the allegedly low level of discharges from the MOX plant. However, it is important to note that this assertion applies only to the normal operation of the plant. It takes no account of the possibility of accident, attack, or malfunctioning of the highly experimental software which is supposed to control the process. The United Kingdom also makes much of the fact that the human unreliability and systemic failings brought to light by the MOX falsification scandal could not happen in the new automated plant.

We say that this is simply substituting one risk for another. On this topic, we also note that the United Kingdom assumes that the existence of a rule or regulation means that BNFL will comply with it. Some telling examples of BNFL's poor record of compliance with regulations are set out at Annex 2 page 65 and the following pages of the UK reply. The United Kingdom tries to confine the issue of non-compliance to the falsification scandal. However, at pages 66 and 67 of Annex 2 of our request, we give details of other prosecutions by the Health and Safety Executive for a range of failures as well as reports that the Nuclear Installations Inspectorate has been forced to threaten closure of the reprocessing operation due to excessive levels of waste. Further, it is technically feasible to avoid discharging radioactivity from the MOX plant into the sea and air. Almost all of the radioactivity could be removed form the liquid stream and aerial discharges and stored at Sellafield along with other radioactive waste. Alternatively, the radioactive effluents could be stored. Generally, this is not done because of the cost.

The adverse effects on the marine environment of the Irish Sea which I have detailed result from existing activities at Sellafield. However, the critical question that arises on this application is that of whether the MOX plant, if permitted to operate, has the potential to produce an increase in these adverse effects. You do not have to decide this issue on this application in that any decision you make will not be a decision on the merits. Once the potential for serious harm exists within the meaning of the Law of the Sea Convention – Mr Sands will develop the legal submissions on this point – that will be an issue.

We say that any increase in the adverse effects already produced and being produced by Sellafield would constitute serious harm. There is no need in this context to spell out the danger and risk to human life which arises from nuclear contamination. Ireland makes the case that it will have such an effect.

We say that the operation of the MOX plant by definition will result in an increase and expansion of activities at Sellafield involving critically and of necessity an increased use of the THORP plant with a consequential increase in discharges into the Irish Sea and the atmosphere. In pursuing its policy to open the MOX plant with relentless determination, the British Government appears to have taken the same line as that taken by it with regard to the other activities at Sellafield about which Ireland has been protesting since the 1950s. the argument is, as mentioned earlier, that whilst there is damage this is tolerable and must be accepted by those adversely affected by it. This is a terrible and indeed frightening, argument for a government to rely upon to support a commercial activity which is technically unnecessary.

In its submission, the United Kingdom seeks to make the case that existing stocks of plutonium will be used at the MOX plant. The suggestion is that this, somehow or other, will reduce discharges emanating, directly or indirectly, from the MOX plant operation in the short term at least. However, reprocessing at the THORP plant is an ongoing process. If existing stocks of plutonium are used in the MOX plant at the outset, they will be replaced by newly recovered plutonium from the waste being reprocessed on an ongoing basis at THORP. The United Kingdom's argument on this point is, therefore, quite clearly flawed.

The United Kingdom argues that the operation of the MOX plant will not affect the level of discharges from Sellafield. However, on the facts the position is clearly otherwise. Firstly, the operation of the MOX plant itself will give rise to the production of contaminated radioactive solid waste which, where not discharged, will be stored at Sellafield.

Secondly, the operation of the MOX plant will give rise to a greater amount of reprocessing at the THORP plant with consequential increase in the production of waste from that plant. As I have already said, the materials to make MOX are obtained by getting spent nuclear fuel and reprocessing it at THORP. The two plants are inextricably linked, and it is disingenuous to suggest otherwise. As a result of the increased reprocessing activity as well as the increase in waste production, the discharges into the Irish Sea and the atmosphere are likely to be increased. This issue has not been addressed by the United Kingdom in its submission.

Thirdly, the operation of the MOX plant will strengthen the basis for reprocessing activities at the THORP plant at Sellafield and, most likely, expand the volume and prolong the lifespan of these activities as well as the resulting discharges. Norway in a letter to the United Kingdom of 8 October 2001 made this point. This letter is in our Annex 2.

Fourthly, the operation of the MOX plant will result in an increase of shipping in the Irish Sea, firstly carrying increased amounts of spent nuclear fuel to Sellafield and, secondly, transporting MOX fuel back to customers. The potential hazards to the marine environment, whether resulting from accident or otherwise, from such increased shipping activity do not have to be spelt out. By way of illustration of shipping use a reference to likely shipments to Japan may be helpful. The transportation of the MOX fuel prepared at Sellafield to Japan and possibly to other States is expected to take place largely on dedicated civil (i.e. non-military) freighters. The potential routes are set out at the map at Annex 2, page 99 of our Request. The

three possible routes for transport to and from Japan involve travel (i) via the Cape of Good Hope and the south-west Pacific; (ii) via Cape Horn; (iii) through the Caribbean Sea and via the Panama Canal. Each shipment will pass close to Ireland. If the MOX plant proceeds to plan, then about 30 tonnes of plutonium reprocessed from previously contracted Japanese irradiated fuel will probably be incorporated into MOX fuel assemblies. Thirty tonnes of plutonium could produce 600 tonnes of MOX fuel or 12000 typical LWR assemblies. Assuming that the Japanese plutonium is returned to Japan in MOX fuel, it will involve a minimum of 40 shipments, if fully loaded, and many more if only partly loaded.

Fifthly, the operation of the MOX plant will lead to an increase in the amount of nuclear waste stored at Sellafield with all the risks that this entails. The events of the 11 September last have brought these risks sharply into focus as the risk of terrorist attack is ever present. Incidentally, I would mention that Ireland has not been informed of, and therefore not aware of, any measures taken by the United Kingdom to establish an adequate security regime at Sellafield. Certainly no missiles have been placed around the perimeter of the plant in an effort to protect it from air attack as at Cap de La Hague in France. To this day anyone can walk along the beach adjacent to the Sellafield site.

To move on, reference should also be made to the reliance by the United Kingdom on Commission opinion of 25 February 1997 made under Article 37 of the Euratom Treaty. This contention is made by the United Kingdom notwithstanding its argument that the Tribunal has no jurisdiction. The opinion is almost five years old and was presumably based upon older data submitted by British Nuclear Fuels. Ireland contests this opinion. Ireland also points out that the Directive under which this Opinion issued does not relate to the marine environment.

For all of these reasons it is submitted that the case made by the United Kingdom to the effect that the MOX plant will have no effect on the marine environment does not stand up to scrutiny.

Before finishing this brief discussion of the facts I would like to return to shipping and marine issues.

The question of shipments to and from Sellafield is a most important one where the marine environment is concerned. Many countries, parties to the Law of the Sea Convention, not just Ireland, have made it clear to the United Kingdom that they will not accept such vessels in waters adjacent to their coasts. Does the United Kingdom suggest that the concerns of these countries are not valid? Does the United Kingdom suggest that these countries are wrong in being concerned about the marine environment? Details of the steps taken by countries other than Ireland in relation to Sellafield shipments are given at paragraphs 33 to 38 of our Request for Provisional Measures. We say that it is inconceivable that these countries have taken these steps without serious consideration.

On another note, the Tribunal may be interested to hear of an agreement which had existed for a number of hears between Ireland's competent authority, the Radiological Protection Institute of Ireland and the UK's Nuclear Installations Inspectorate. This agreement provided for the mutual exchange of information on nuclear matters

between the two parties. Prior to being renewed in January 2001, the process of signature of the agreement was introduced by the Foreign and Commonwealth Office of the United Kingdom. To date the renewal of this agreement has not been approved by that Ministry; a further example of failure to cooperate.

Finally, leaving aside the question of shipping, brief mention can be made of Irish fishing and other interests. As already stated, the east coast of Ireland is just over 100 miles from Sellafield. Along the coastline southwards from Northern Ireland there are about 50 significant communities in villages, towns and cities, including Dublin, the capital. About 1.5 million, out of a total population of 3.8 million, live on the east coast and this level increases in holiday periods. The sea is very much part of the lives of these people both for recreational and commercial purposes. There are over 20 coastal sites, including marine environments, that are established by Ireland as special areas of conservation under the European Union Habits Directive. There is a large fishing fleet operating from a number of ports on the coast such as Clogher Head, Carlingford, Howth and Arklow. The fleet fishes in the Irish Sea and, from time to time, some boats would find themselves in the sea area near Sellafield. This east coast population and the marine environment which it is entitled to enjoy is potentially at risk, sooner or later, from the MOX plant if it is permitted to operate. This risk results from the irreversible, cumulative and long-term effects that Sellafield discharges will have on the Irish Sea arising from the operation of the MOX plant.

(Short Recess)

MR FITZSIMONS: To assist the Tribunal we have put on the screen the map which is in our annex showing Ireland and England. I am sure everybody probably knows where the two countries are but that map is in the annex. Sellafield is marked on it and you can see how it is across the sea from the east coast of Ireland.

I now move to the history of the dispute. The story of the MOX plant commenced in the early 1990s when British Nuclear Fuels sought authorization to construct the plant. In connection with this application, the company published in October 1993 an Environmental Statement on the proposed MOX plant. This was an obligatory step in the authorization process. This Environmental Statement is at page 33 of Annex 1 to Ireland's Request for Provisional Measures. It should be emphasized that this is the only Environmental Statement to have been prepared in connection with the MOX plant. The United Kingdom relies upon it even though it is now eight years old and can no longer be regarded as a current statement of environmental needs and requirements. In particular it does not address at all the effect that the proposed MOX plant will have on the marine environment. This is perhaps not surprising as the United Kingdom at the time had not yet acceded to the Law of the Sea Convention. The Environmental Statement does not, therefore, address matters relating to the marine environment or indeed that might be regarded as flowing from obligations undertaken by it under the provisions of the Convention. Notwithstanding this fact, the United Kingdom has not asked for the preparation of an up to date Environmental Statement which could have regard to these matters as well as current, instead of 1993, standards. It is submitted that there is only one inference that can be drawn from the determined reliance of the British Government on the 1993 Environment Statement, namely that it considers that a new Environment Statement would not be favourable to its plans for the MOX plant. The United Kingdom asserts that Ireland is

not saying that the Statement is wrong that we somehow accept its conclusions. This is absurd. We have set out in great detail our view on the many serious inadequacies of the Statement. Mr Sands will deal in greater detail with these inadequacies.

In the hope that by availing of local procedures within the United Kingdom a result could be achieved, particularly since there was, and continues to be, a considerable amount of local opposition within the United Kingdom to the project. Ireland then involved itself over a number of years in relevant local inquiries and consultations. In 1994 Ireland made a submission to the Local Authority considering the authorization application. This submission asserted that the Environment Statement and the assessment to which the proposed MOX plant had been subjected were inadequate. Permission for the construction of the plant was, however, given and construction of it was completed in 1996.

In November 1996, British Nuclear Fuels submitted applications to the United Kingdom Environment Agency for variations to the gaseous and liquid disposal authorizations from the Sellafield site including in respect of emissions from the proposed operation of the MOX plant. At this point the question of whether the operation of the plant could be economically justified became an issue. Between February 1997 and July 2001 there occurred a series of what were described as public consultations overseen by the United Kingdom Environment Agency. The focus of these consultations was the question of whether the operation of the plant could be economically justified. The United Kingdom makes a virtue of the length of time over which the consultations were conducted. However, the consultation process took so long because of procedural problems on the part of the United Kingdom: for example, in 1998 the United Kingdom decided that too much information had been omitted from the public version of a report obtained on the economics of the MOX process. This necessitated another round of consultations. The result of this process was a decision in favour of British Nuclear Fuels. It was decided that the operation of the plant was economically justified. However, importantly, the United Kingdom refused to release into the public domain all of the material upon which it based its decision, citing grounds of commercial confidentiality. This failure is the subject matter of separate proceedings instituted by Ireland on 15th June 2001 under the OSPAR Convention. The Attorney General has told you of Ireland's reasons for bringing those proceedings.

On 9 February 2001 it had been intimated to the United Kingdom that Ireland considered that a dispute had arisen under the provisions of that Convention arising from the actions of the United Kingdom in continuing to withhold the information in question.

As will be evident from the withholding of information controversy, Ireland has not even been permitted to properly make its case in the internal arena of the United Kingdom. This is no way to treat a friendly neighbour.

During the process of public consultations that I mentioned, the Irish Minister dealing with the matter wrote to his British counterpart on 23 December 1999. This is an important letter and I specifically draw the attention of the Tribunal to it. It is to be found at page 87 of the first annex to our Request for Provisional Measures. This letter went into some detail in making Ireland's case at the time, particularly in

relation to the 1993 Environmental Statement relied upon by the British Government. No less than five international instruments were identified in this letter, including the Law of the Sea Convention. These international instruments had created binding international legal obligations for the United Kingdom relating to the marine environment and nuclear discharges subsequent to the preparation of the 1993 Environmental Statement. The obligations created were spelt out in some detail. The case was made that these instruments and the obligations created by them had – quite obviously – not been taken into account in the 1993 statement. The letter requested the United Kingdom to carry out a new environmental impact assessment procedure taking into account the requirements of the instruments referred to. It requested that the MOX plant not be put into operation until the new assessment procedure was carried out. An acknowledgement dated 9 March 2000 was received to this letter which did not address any of the issues raised. The acknowledgement is to be found at page 12 in Annex 2 to the Request for Provisional Measures.

On any reading of the Irish Minister's letter of 23 December 1999, the points made therein were substantial ones, which warranted very serious consideration. Instead, the letter and its contents have effectively and pointedly been ignored by the British Government. It may be that the United Kingdom calculated that Ireland would not ever take action of the type that it has now taken under the 1982 Convention. It may be that it thought that, since Ireland had sought to resolve the matter to date by engaging in consultations on the domestic front in the United Kingdom, it would ultimately be submissive to any action taken. Whatever the position is in this regard, it is clear that Ireland, which throughout this dispute has sought to behave like a friendly neighbour, has not received equivalent treatment from the United Kingdom. Instead, the United Kingdom has sought to impose its will and relentless to push through what it perceived to be in its own commercial interests to the detriment of Ireland and the marine environment of the Irish Sea. In this context, the point can be made that it is clear from the United Kingdom submission that its only concerns are commercial ones. How, after eight years without the MOX plant, have these concerns suddenly become urgent? It is suggested that if the MOX plant does not open immediately, British Nuclear Fuels will lose customers. These are customers who have waited for years; they will surely be prepared to wait a few months longer? Where the suggested losses are concerned, the amounts are small in the context of overall Sellafield operations.

This attitude of the United Kingdom has unfortunately continued up to the present time.

On 3 October 2001, two days after Ireland took over the presidency of the UN Security Council, and at a time of great international tension, the United Kingdom announced that the operation of the MOX plant was authorized. Further, the decision was taken two days before the United Kingdom and Ireland were due to meet to discuss the Ospar proceedings. You can imagine the dismay felt by the Irish Government at this discourtesy. The timing of the decision is one more example of the United Kingdom's unwillingness to listen to any Irish representations on the matter. The Decision specifically states that it has sought the views of organizations and individuals. There is no reference to the views of Ireland or the interests of Ireland. The Irish Minister wrote to his British counterpart on 16 and 18 October 2001. Both letters were replied to, with a reply dated 24 October 2001 being received

to the second one. This letter from the British Minister of 24 October 2001 is at Annex 9 to the Request for Provisional Measures. I ask you to look at this letter. We will show it on the screen (**Plate 1**)

As will be seen from the text of this letter, the British Minster states, and I quote: "It is in fact the case that the authorization procedure for the MOX plant has not yet been completed." I draw your attention to the date of the letter.

I now ask you to look at another letter, which is to be found at page 28 of Annex 2 to the Request for Provisional Measures of 9 November 2001. We will show that on the screen. (**Plate 2**) This is a letter from a law firm, Freshfields Bruckhaus Deringer, dated 17 October 2001, addressed to Friends of the Earth Ltd. Friends of the Earth Ltd., together with Greenpeace, have instituted judicial review proceedings in the United Kingdom courts challenging, on administrative law grounds, the decision of 3 October authorizing the operation of the MOX plant. As it happens, the High Court in London refused their application on 15 November 2001 and that decision has been appealed. However, the law firm responsible for the letter was acting for British Nuclear Fuels in those proceedings.

As can be seen from page 2 of the letter, it was copied to two United Kingdom Departments of State, including that of the Minister responsible for the letter of 24 October 2001 (the previous letter shown). The Minister was a named respondent in the proceedings. I wish to draw your attention to the fifth paragraph of the letter which states as follows: "Following the decision of the Secretaries of State of 3 October 2001, BNFL commenced, with the consent of the Nuclear Installations Inspectorate, the initial states of plutonium commissioning which it expects to complete on or around 15 November 2001. These involve the transfer of sealed plutonium containing materials into SMP in order to calibrate radiation monitoring equipment and test shielding. These initial stages are part of a commissioning programme which will lead to the opening of a plutonium can" – and this is the important phrase – "scheduled to take place on or around 23 November 2001, allowing plutonium to be fed into the process as a prerequisite to the manufacture of MOX fuel. The cost and complexities involved in reversing the commissioning of SMP will be very significantly increased, once the plutonium can has been opened and plutonium introduced into the plant processes." The reference to SMP is a reference to the MOX plant.

As will be evident from this letter, it appears that the United Kingdom knew on 17 October that the MOX plant was to commence operation on 23 November 2001, and that in fact preliminary steps to this end had at that time been taken. It is, therefore, most regrettable that on 24 October 2001 the United Kingdom, by its Minister's letter, informed Ireland that the authorization process for the MOX plant had not yet been completed. Clearly this statement was not in accordance with the facts. It is submitted that the only inference to be drawn is that the letter of 24 October 2001 was intended to influence Ireland towards delaying its recourse under the 1982 Convention so as to make this application impossible before the commencement of the operation of the MOX plant. This is extraordinary behaviour towards a neighbour state, which has acted with good faith at all times.

To finish in this context, I would mention that we understand that, since the exchange of letter discussed, the United Kingdom has decided to defer the date for commencement of operations at the MOX plant from 23 November 2001 to 20 December 2001.

Even more astonishing is the assertion in this letter that the United Kingdom could not understand the position of Ireland. The implication is that Ireland has never told the United Kingdom what its concerns are. The implication is that if only Ireland could make itself clear, the United Kingdom would be sympathetic. This is absurd. You have seen the correspondence. Ireland has made its views on the MOX plant and the Law of Sea Convention violations known for over two years. The letter of 24 October made it clear that the United Kingdom was making no attempt to engage with those views. Ireland is said to be uncooperative for instituting proceedings soon after the letter. It is said that we refused to participate in an exchange of views. The history of contacts and the correspondence clearly demonstrates that this is not the case. You, the Tribunal, will make up your minds about this. We say that Ireland had set out its views and that any more talk, in the circumstances, was clearly futile. A deadlock had been reached, as Mr Lowe will explain.

We ask the Tribunal to take account of the conduct of the United Kingdom in relation to this matter in considering whether or not it is appropriate in all the circumstances to grant the orders sought. If its strategy had worked, the MOX plant would have been operating by the time Ireland was in a position to make this application. The status quo would therefore have been quite different from what it is at present and Ireland's position could have been seriously prejudiced. We submit that it can be inferred from this conduct that the United Kingdom considers that it is seriously exposed to injunctive orders of the type that Irelands seeks.

Mr President, there is one other point which needs to be addressed briefly. The United Kingdom has inserted a correction to paragraph 190. I am sorry to say that it still does not accurately reflect what happened that day. The correct situation is that both parties agreed that that was neither the time nor the place to discuss Ireland's claim under the Law of the Sea Convention.

That concludes my submissions and Mr Sands will now follow. Thank you.

MR SANDS: Mr President, Vice-President, Members of the Tribunal, it is a pleasure to appear once again before you, but this time in your permanent home. It is also a privilege to appear in this case on behalf of Ireland, which raises issues of great importance for the Law of the Sea Convention and for international law generally.

Mr Fitzsimons has addressed the facts of this case and I am now going to turn to the law. The parties are separated by a wide gulf on the key issues and they have very different conceptions of what cooperation and community mean in the context of the International Law of the Sea. It is perhaps inevitable that, with their very different historical backgrounds, the United Kingdom and Ireland would approach the issues from different perspectives. For Ireland, this case at the stage of the proceedings is only about the preservation of its rights. We are not asking you in any way to deal with the underlying merits, but merely to maintain the present situation pending any decision by the Annex VII tribunal, which could be constituted, as has been said, very

shortly. The United Kingdom, on the other hand, has expended a great deal of effort on material that goes to the merits, and in particular the adverse effects of the MOX plant, which they claim to be minuscule, and almost nothing on the question of Ireland's rights under the 1982 Convention. We say you cannot now address the merits and you have no need to take a view one way or another on the barrage of statistics that the United Kingdom relies upon, and which, as has been said, has been produced mostly by BNFL.

What the United Kingdom does say about Ireland's claimed rights under the 1982 Convention is either that they are not engaged at all in relation to the substantive obligations to protect the environment, or that they are meaningless in relation to their practical effects of cooperation, or that they simply do not apply, as in relation to environmental assessment. That dismissive approach is entirely consistent with the United Kingdom's attitude to Ireland over the past years. You will find not a single reference to the 1982 Convention in any of the United Kingdom correspondence prior to the initiation of these proceedings or in any decision or draft decision of the Government of the United Kingdom or of its regulatory authorities in relation to the MOX plant at any stage over eight years. The Law of the Sea and the protection of the marine environment had been entirely absent from the decision-making process, and this is in spite of Ireland's consistent efforts since the summer of 1999 to bring them to the attention of the United Kingdom.

The United Kingdom boldly claims that Ireland has no rights that are engaged by the MOX plant's authorization, and that, even if they do have rights, they can be fully preserved and given effect after the plant has been commissioned on 10 December. We disagree on both counts. Ireland's position is that both parties have rights under the Convention and both sets of rights are entitled to be fully preserved pending the work of the Annex VII tribunal. For present purposes, Ireland's rights fall into three categories: (1) the right to ensure that the Irish Sea will not be subject to additional radioactive pollution; (2) the right to have the United Kingdom cause to be prepared a proper and up-to-date and complete environmental impact assessment on the MOX plant and on associated international movements of nuclear material; and (3) to have the United Kingdom cooperate with Ireland on the protection of the semi-enclosed Irish Sea and to coordinate in the promotion of activities. Each of these rights is fully engaged by the commissioning of the MOX plant. Each right will be violated if the plant is commissioned on 20 December and, if that commissioning occurs, the exercise of each right will be irretrievably prejudiced on Ireland's behalf.

The approach we have taken to the preservation of our rights should be one that is abundantly familiar to the United Kingdom. It is the same approach – absolutely identical – to that adopted by the United Kingdom in the 1972 proceedings concerning fisheries jurisdiction cases and we have very often relied on precisely the same language. Mr Lowe will say more about that in due course.

Let me begin with the first of Ireland's rights, the right to ensure that the Irish Sea, of which you have already heard a considerable amount, will not be subject to further radioactive pollution. That right arises under Articles 192, 194, 207 and 212 of the 1982 Convention. For present purposes, I am going to focus only on Article 194, but our argument is equally applicable to these other provisions which will be elaborated at the Merits stage.

With the coming into force for the United Kingdom of the 1982 Convention – on 25 July 1997 – Article 194 imposed a number of very specific obligations on the United Kingdom. The first obligation in paragraph (1) is to "take all measures consistent with [the 1982] Convention… necessarily to prevent, reduce and control pollution of the marine environment from any source", and to that end the United Kingdom has an obligation to use "the best practicable means" at its disposal.

The second obligation under Article 194(2) has two distinct elements. The United Kingdom is required to "take all measures necessary to ensure" firstly that "activities under [its] jurisdiction or control are so conducted as not to cause damage by pollution to [Ireland] and [its] environment", and, secondly, to ensure "that pollution arising from … activities under its jurisdiction or control does not spread beyond the areas where [it] exercises sovereign rights …". The third obligation under Article 914 is to take measures "designed to minimize to the fullest possible extent … the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources… or through the atmosphere".

Mr President, radionuclides are harmful, noxious and persistent. Their introduction into the marine environment, in any amount, constitutes pollution within the meaning of Article 1(4) of the 1982 Convention. That surely cannot be in dispute. As Mr Fitzsimons has shown, radionuclides will be deliberately discharged from the MOX plant into the Irish Sea and they will be deliberately released into the atmosphere and they will then reach the marine environment of the Irish Sea. They will reach Ireland. Moreover, additional discharges of radionuclides will also be made into the Irish Sea from the THORP plant as a direct result of the commissioning and operation of the MOX plant, as Mr Fitzsimons has explained. I should say again that we do not know in what quantities because that information has not been made available by the United Kingdom and has never been subject to environmental assessment.

Beyond these two sources, there are of course potentially other releases from the MOX plant and from international movements by sea in the Irish Sea, firstly by reason of accident and, secondly, regrettably, by reason of terrorist acts. We say that deliberate discharges of radionuclides are contrary to these three sets of obligations under Article 194 the other provisions that I have also mentioned. The United Kingdom has failed to prevent, reduce and control pollution by best practical means. It will cause pollution to reach Ireland. That is not in dispute. Given the existence of alternatives to the discharges into the Irish Sea and the atmosphere, for example by land-based storage, supported by British Energy, it has failed in its obligation to minimise to the fullest possible extent, the release of harmful and persistent substances.

The United Kingdom says that the discharges are minimal and no harm is caused. That may have been right in 1982 when the Law of the Sea Convention was adopted, but our understanding of the impacts of radiation on the environment and on human health have changed and new technologies have emerged to reduce or eliminate entirely releases into the marine environment. The law evolves to take into account these changes. What may have been internationally lawful in 1982 may not be lawful in 1993. What may have been lawful in 1993 may not be lawful in 2001. As the

International Court of Justice put it in the *Gabcikovo-Nagymaros* case, "What might have been a correct application of the law in 1989 or 1991 … could be a miscarriage of justice in 1997."

The United Kingdom has indeed taken political decisions accepting more stringent international obligations. At this point it suffices to mention just two examples. The first is the obligation not to promote or allow the storage of any radioactive waste near the marine environment, unless the United Kingdom can demonstrate that such storage or disposal poses no unacceptable risk to Ireland, in accordance with the precautionary principle. I put in parenthesis that the United Kingdom has said that precaution is not relevant to the MOX plant. The United Kingdom accepted that obligation, together with 173 other states, at the Rio Conference on Environment and Development in the summer of 1992. In the summer of 1998, to much domestic fanfare, the United Kingdom, through Mr John Prescott, then Secretary of State, undertook the obligation to ensure that its discharges, emissions and losses of radioactive substances would be reduced to levels where concentrations in the Irish sea were "close to zero" by 2020. That is concentrations, not discharges.

We say that these and other obligations are directly and immediately relevant to the interpretation of Article 194 of the 1982 Convention, which requires the United Kingdom not to authorise any new activities which would or which could lead to any increase in concentrations of radionuclides in the Irish Sea. We say that obligation can only be met by phasing out all existing discharges, by prohibiting new discharges and by avoiding activities on the coast of the Irish Sea which could lead to releases by reason of accident or other act, including act of terrorism. This is the position set forth in our letter of 23 December 1999, which you can read for yourselves. We have been absolutely consistent ever since that date.

The content and extent of the obligations set forth in Article 194, and in particular 194(3)(a), have changed with time. They have evolved. That obligation is obviously not static one. It means that the authorization of activities must always take into account current standards not past standards. The ICJ has recognised this; the European Court of Justice has recognised this. It is common sense. The authorization of the MOX plant on 3 October 2001 by reference to an outdated and incomplete 1993 Environmental Statement, or by reference to the discharge authorizations granted to BNFL in 1996, or by reference to a 1997 opinion of the European Commission, which I should say does not address the marine environment at all (it is concerned only with human health) is inappropriate and we say it is unlawful by reference to the obligations in Article 194 of the 1982 Convention and the other obligations to which we have drawn the United Kingdom's attention.

The United Kingdom has not put before this Tribunal a shred of evidence to indicate that it took into account any international environmental standards which have arisen since the mid-1990s. Indeed, it is most instructive to read that in the decision of October 1998 the United Kingdom's Environment Agency expressly noted at our Annex 1, page 164, that the question of discharges from the MOX plant raised international issues, which it was not in a position to address. On the evidence before this Tribunal, those issues have never been addressed by the United Kingdom.

When we raised this important point in 1999, the United Kingdom did not respond

and did not ask for more information. It has still not responded. There is nothing in the written response filed last week which addresses this point that has been made by Ireland. We have no view from the United Kingdom on its position as to the obligation to apply evolving and increasingly stringent environmental obligations in relation to the pollution of the Irish Sea. Those obligations, as we say, arise under the 1982 Convention. They have evolved under the 1982 Convention. They make it abundantly clear, we say, that 1993 standards are inappropriate for 2001 decisions. That is a very simple point.

It is easy to see why the United Kingdom finds itself in considerable difficult on this point because all the key decisions, with the exception o economic justification, were taken expressly by reference to the standards of 1993 or 1996. By that date, the plant had been assessed for its environmental impacts, inadequately we say. Its intended discharges had been authorised on outdated environmental standards, we say. Of course, it had been built. But then the consultation process on justification ran into difficulty, on the grounds that the United Kingdom had not, according to its own internal national laws, released sufficient information to the public, so more information was made available and the consultation was slowed down. Then of course in 1999 the data falsification scandal erupted. Years passed but the new standards, the more stringent obligations under Article 194, were never taken into account and they have not been applied, and there is no evidence before you that they have been applied, or even taken into account.

The United Kingdom's pleading are completely silent on this point. The approach reflects, I am sorry to say, a congenital attitude. Whenever Ireland raises a legitimate concern, the United Kingdom ignores it. But ignoring Ireland's rights under Article 194 and the other Law of the Sea Convention articles will not dissolve them away. They cannot be wished away. Ireland has the right to insist that the United Kingdom honours its obligations to prevent harm to the marine environment to reduce concentrations of radionuclides in the Irish Sea. These international obligations may be inconvenient and they may place limits on the activities of the United Kingdom and its commercial operators, but they must be taken into account because they are binding under the 1982 Convention. These obligations, we say, give rise to our correlative rights, which can only be preserved if you prescribe the provisional measures we have requested.

After 20 December 2001 there will be discharges from the MOX plant into the Irish Sea which would not otherwise have occurred. It is as simple as that. As Mr Fitzsimons explained, the MOX activities will also increase discharges from THORP. Many of these discharges will have a half life of thousands of years. They will be in the environment for generations. Their effects will prevail for thousands of years. Their effects are, to all intents and purposes, irreversible since they cannot be removed from the Irish Sea once they are in it. That sea comprises in half the Irish fishery zone.

The introduction into the marine environment cannot be compensated monetarily. If you cannot exclude the possibility, which we say you cannot, that the arbitral tribunal might find in favour of our claim, there are compelling grounds for prescribing provisional measures. That is because the test in Article 290 does not require you to

establish, as the United Kingdom claims, that there will be irreversible physical damage to Ireland on a massive scale. All you have to do is to satisfy yourselves that Ireland has rights under Articles 192, 194, 207 and 212 and that they would be irreversibly eroded.

As Judge Laing put it, in supporting the order of this Tribunal in the Southern Blue Fin Tuna cases, "that 'grave standard'", irreversible massive harm, "is inapt for application in the wide and varied range of cases that pursuant to UNCLOS are likely to come before this Tribunal." On a personal note, perhaps I may say I am sorry that Judge Laing is not with us. In that separate opinion, Judge Laing also addressed the precautionary principle, which the United Kingdom says is not applicable to this case, although we noted that it did not dispute our characterisation of the principle as one established in customary law.

We say that precaution does apply in this case. We say that there are numerous international instruments going back to the late 1980s and early 1990s – which we set out in our statement of case – which the United Kingdom and Ireland both accepted, which recognise that if precaution is to apply anywhere and in relation to any types of activities, it must be in relation to radionuclides and the protection of the marine environment. Our statement of case addresses this in detail. For present purposes, it is sufficient to say that prudence and caution are common sense requirements when dealing with ultra-hazardous substances and activities. In this case prudence and caution militate decisively in favour of provisional measures.

The United Kingdom has gone to great lengths to demonstrate that Ireland has not provided any evidence to show environmental harm. We say that there will be harm. The European Parliament's report, which was referred to earlier, demonstrates that. On that basis, you are entitled to prescribe provisional measures under Article 290, to "prevent serious harm to the marine environment". But we do not have to reach even that threshold. We say that we do not have to establish harm of that degree to obtain provisional measures, since irreparable harm to our rights is sufficient. Mr Lowe will say more about this in due course.

The United Kingdom states in its pleading that unlike Australia and New Zealand in the nuclear tests cases before the International Court of Justice, we have not brought any evidence to bear. It is worth looking at the pleadings, in that case. The International Court's order in the provisional measures phase is extremely pertinent to these proceedings. I am sorry to say that the UK makes a highly selective use of the material before that court. That court had before it virtually no evidence on the impacts of French tests, but mostly material of a general character of the potential dangers of the various levels of radiation including low levels, to human health. At that time, in the early 1970s, the real dangers were not known, either to environment or human health.

The court did not say that it required proof of harm at the provisional measures phase. In applying what was in effect a precautionary approach, the court said that at that phase it was sufficient to observe that the information submitted to the court, which was mainly general reports of the United Nations Scientific Committee on the Effects of Atomic Radiation between 1958 and 1972,

"did not exclude the possibility that damage to New Zealand might be shown to be caused by the deposit on New Zealand territory of radioactive fall-out resulting from such tests and to be irreparable".

That is a burden of shift on to that side of the room. It would be curious, indeed, for this Tribunal in 2001 to adopt a less precautionary approach than the International Court adopted more than a quarter of a century ago.

If you ask yourself precisely the same question that the International Court of Justice asked itself, "can you 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", the answer has to be "no", on the evidence that has been put forward by both sides.

In the nuclear tests cases, the International Court of Justice rejected France's views, which had been raised outside the court room, that nuclear tests had never involved any health dangers to the populations of Australia and New Zealand and that the concerns which had been expressed, "could not be based on anything other than conjecture". The conjecture to which France was referring was exactly the same type of conjecture at that referred to by our friends on the United Kingdom's side. The United Kingdom's argument is the same today as that of France in the early 1970s. It was rejected then and we say that it should be rejected now.

Since the 1973 order of the International Court of Justice there have been great changes in the state of international law. The protection of the environment has emerged as a central foundation of the international legal order and part of the corpus of customary law. It would be amazing for this Tribunal to take a more restrictive approach than that which pertained in 1973 when the protection of the environment was only emerging in the international legal order. Now that it is well-established, and recognised as such by this Tribunal, by the Appellate Body of the World Trade Organisation, by human rights bodies around the world and by the International Court, that the threshold for obtaining provisional measures should, if anything, be lower today than it was then. Like the distant consequences of radioactive fall-out from French nuclear tests, there is no possibility that the rights lost by the contamination produced by the MOX plant after 20 December could be fully restored in the event of an award by the Annex VII Tribunal in Ireland's favour in the proceedings on the merits.

On this ground alone -- deliberate and authorized discharges, without having had regard to recent environmental standards – we say provisional measures are justified until such time as the Annex VII Tribunal can address the matter. There is then the additional risk from accident. We have heard about – you have had evidence on – accident, whether at the MOX plant or international transports. Then there are the dangers posed by terrorist attacks – you have seen the material in the evidence – in which the Director-General of the International Atomic Energy Agency, an institution which has always been cautious and prudent and is not known to be anti-nuclear in any way, characterised the current situation as one of, "a clear and present danger" of attacks on nuclear facilities. These merely serve to provide further support for our claim.

I turn to the second right, which Ireland claims is the right to have the United Kingdom cause to be prepared a proper, complete and up-to-date assessment of the environmental impact of the MOX plant and associated international movements of plutonium and other radioactive substances. This right arises under Article 206 of the 1982 Convention. Article 206 provides:

> *"When states have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment they shall, as far as practicable, assess the potential effects on the marine environment."*

We say that Article 206 of the Convention creates an obligation on the United Kingdom and that Ireland has the right to enforce that obligation. In our statement of case we addressed this right in considerable detail. It is at paragraphs 82 to 94 of our request. Our claim is that the United Kingdom has breached its obligations under Article 206 in the following four ways. First, it has failed to assess properly and fully the potential effects of the operation of the MOX plant on the Irish Sea, including the additional discharges from THORP. Secondly, it has failed to assess all the potential effects on the Irish Sea of international movements of radioactive materials being transported to or from the MOX plant; they have never been assessed. Thirdly, it has failed to revisit the 1993 Environmental Statement by reference to the evolving environmental obligations set forth in Article 194 and the other provisions of the Law of the Sea Convention, to which I have referred. Fourthly, it has failed to assess the risk of potential effects by terrorist acts or acts. At the very least one could say that between 11 September and 3 October is a remarkably short period of time to properly assess the consequences of the events on that terrible day.

At this stage of the proceedings you do not have to decide on the merits of Ireland's claim under Article 206. You have to satisfy yourself of only two points: first, that Ireland, indeed, has rights under Article 206 in the sense that the provision is pertinent to the operation of the MOX plant and associated international movements of radioactive materials; and secondly, that the erosion of those rights which would occur after 20 December could not be restored if the arbitral tribunal was to find in favour of Ireland.

In its pleading, the United Kingdom has evidently again recognised the difficulty that it faces. The United Kingdom states that Article 206 does not apply because "the United Kingdom does not have reasonable grounds for believing that the operation of the MOX plant may cause substantial pollution or significant and harmful changes to the marine environment". That is a direct quote from their reply at paragraph 220. I have to say that that is one of the most surprising legal arguments I have ever come across. It reflects a complete disregard for the efforts of the drafters of the Convention. I find it almost impossible to know how to respond because if the MOX plant is not subject to Article 206, it is difficult to imagine anything anywhere in the world, which is subject to that provision.

We say that Article 206 does apply, and that it requires an assessment of all the impacts of the plant from all the activities and associated activities which it

engenders. The Environmental Statement of 1993 is in your bundle at Annex 1, page 33 of our materials. You can read it for yourselves. The United Kingdom states:

> *"An Environmental Statement was prepared … it is nowhere said that the Environmental Statement is wrong".*

Although there is no dispute as to the first point – an environmental statement or something called an "environmental statement" was prepared, there is a dispute on the second point. It is true that we do not say that the Environmental Statement is wrong, but environmental statements are never right or wrong; they are complete or incomplete; adequate or inadequate; up-to-date or out of date. This one is incomplete, inadequate and out of date. I can provide you with a long list of omissions of the matters which we say it should have addressed but did not. The omissions are set out in the correspondence. You can read them for yourselves in the 1999 letters, particularly of 23 December 1999.

To give you a sense of the inadequacies of the 1993 Statement, it is worth comparing that with the Environmental Statement for the NIREX project, which the Attorney referred to earlier today. You will recall that that project was rejected by an earlier United Kingdom Government, in part on the grounds of the inadequacy of the Environmental Statement. The Environmental Statement for that project, which envisaged no discharges to the marine environment in any way and no international movements, ran to some 300 pages. We made a copy available to the United Kingdom late last night or early this morning and we have made a copy available to the Tribunal this morning. That is the Environmental Statement for the NIREX plant, with no discharges and no transport. It ran to more than 300 pages.

The Environmental Statement for the MOX plant with 43 pages, lots of photographs and a few maps, is double spaced. Make up your minds by reading both of the Statements. It is abundantly clear to us that the MOX Environmental Statement, which contains no assessment of the effects of the maritime transports, no assessment of impacts on the marine environment in Ireland nor, indeed, in the United Kingdom, and no assessment of the impacts on Irish fisheries is inadequate. I could go on and on.

The fault lines with the United Kingdom's argument on Article 206 also go on and on. Ireland set out its considered and detailed views in the letter of 23 December 1999. We raised then a serious concern, which again the United Kingdom has never addressed; namely that it was proposing to authorise MOX without having taken into account any of the evolving obligations under the 1982 Convention under Article 194 and other provisions which had come into force for the United Kingdom in 1997. In that letter, Ireland called upon the United Kingdom to carry out a new environmental impact assessment procedure taking into account the requirements of the 1982 Convention and various other conventions. You cannot be much clearer than that.

Ireland also sought confirmation that "the operation of the proposed MOX plant will not be authorized before such a revised environmental impact assessment procedure has been carried out." In that letter, Ireland also expressly reserved its right to bring Part XV proceedings under the Convention in the event that the United Kingdom did not carry out those acts. That was nearly two years ago. The United Kingdom did not

respond. It did not respond in 1999, 2000 or even in 2001. The decision of 3 October 2001 simply does not address the issue of the question of whether it is appropriate to authorize a nuclear facility on the basis of an Environmental Statement which is eight years old.

The first time that the United Kingdom addressed that argument finally was last Wednesday at paragraph 172 of its written response. If nothing else, these proceedings will have enlightened us all on the United Kingdom's views on the merits of authorizing new projects by reference to old assessments, but no. It still does not want to address the point. I shall read out in full the totality of the United Kingdom's response to our arguments over the past two years on this point:

> *"The Annex VII Tribunal could have no jurisdiction in this matter".*

That is all it has to say on that argument. So sure is the United Kingdom of its own position of the irrelevance of Artivcle 206 of the 1982 Convention that it does not even feel the need to bother to address the merits of Ireland's claimed rights under that provision.

The United Kingdom's position might be comprehensible if Ireland's view could be said to be novel and not based on law. However, there is ample authority for the proposition that states have an obligation to authorize on the basis of an up-to-date environmental statement which takes into account current standards. The International Court of Justice was abundantly clear on this point in its judgement in 1997 in the Gabcikovo-Nagymaros case in dicta which goes not to the rules pertinent to the parties to that dispute, but related to general international law, including the Law of the Sea Convention. It stated:

> *"In order to evaluate the environmental risks current standards must be taken into consideration. … The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often-irreversible charcter of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage. Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – of the pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments in the last two decades."*

I now emphasize:

> *"Such new norms have to be taken into consideration and such new standards given proper weight, not only when States contemplate new activities, but also when continuing with activities begun in the past."*

We say that that dicta is right on point. It relates to the position under general international law and is widely supported by commentators and states. Ireland respectfully submits that Article 206 equally requires the application of new norms

and standards, and that the authorization of the MOX plant and international movements must incorporate an assessment by reference to the environmental standards of 2001, not the environmental standards of 1993. That has not happened and to its credit the United Kingdom has not even tried to argue that it has.

On the United Kingdom's own evidence, the assessment of the effects of the plant were carried out by reference to standards of 1993 and 1996 and nothing subsequently. Those standards did not incorporate the evolving norms of the 1982 Convention, in particular Article 194 (3)(a). We say that until the impacts of the MOX plant are assessed by reference to that legally-binding obligation, it cannot be authorized lawfully under the 1982 Convention. In carrying out that assessment by reference to that standard, account must necessarily be taken of the cumulative effects of the MOX discharges and any accidental releases which are over and beyond those already authorized from other facilities, including consequential discharges from the THORP plant. This, too, has not happened and there is no proposal to make it happen.

It is self-evident that any assessment carried out pursuant to Article 206 must necessarily be carried out, completed and shared with neighbouring states before the authorization of the plant. If it is completed after the commissioning of the plant, its conclusions plainly cannot be applied to the design and operatoin of the plant. That is self-evident. So, any conclusion that discharges from the MOX plant should be lowered or, as we say, eliminated altogether to take into account the United Kingdom's obligations under the 1982 Convention could not be implemented and the loss of Ireland's rights would be irreversible. That is why we say our rights under Article 206 can only be protected by prescribing the provisional measures we have requested.

If the plant becomes operational before the Annex VII Tribunal is constituted, before it has given its award and the Tribunal finds in favour of Ireland's claims under Article 206, there will be no possibility that the loss of Ireland's right to a proper and complete prior environmental impact assessment could be restored. It is gone for ever.

The third set of rights which Ireland claims is the right to have the United Kingdom cooperate with it and coordinate the implementation of rights and duties with respect to the protection of the marine environment. That right arises on the basis of two provisions: Articles 123 and 197 of the 1982 Convention. Article 123 is one of two articles in Part IX of the Convention entitled, "Enclosed or Semi-Enclosed Seas". You will have seen from the map how semi-enclosed, or nearly enclosed, is the Irish Sea. Article 197 is in Part XII of the Convention. In our statement of case we address these rights in considerable detail at paragraphs 56 to 81.

Ireland attaches particular significance to the rights in relation to cooperation and coordination, which we consider impose real duties and obligations on the United Kingdom. It is for that reason that we thought to address it methodically and systematically. In our address and in our statement of case we explain that in our view, for present purposes, the right of cooperation and cooperation had three essential elements. The first element was our right to be notified about the essential details of the MOX plant and international movements. The second, is our right to have the United Kingdom respond in a timely and substantive fashion to our

reasonable request for information and assistance. The third is our right to have our rights and interests taken into account in any actions which the United Kingdom may take which may have adverse implications for the Irish Sea. Having set out the elements of the rights to cooperate and coordinate, we then provided some illustrative examples of the way in which the United Kingdom had, we say, manifestly failed to fulfil its obligations under Articles 123 and 197.

In our pleading we sought to set out the basic principle with care. The Attorney has already mentioned that Ireland is a small island state. We attach particular importance to the obligations of cooperation and coordination. Their purpose, particularly in Part IX of the Convention, underscores the vital importance with the drafters of the Convention evidently attached to cooperation and to the avoidance of conflict amongst neighbours of semi-enclosed seas.

What does the United Kingdom say in response? It says very little and in a most peculiar order. The impression one has from reading its statement in response is that cooperation was really treated as an afterthought. The United Kingdom does not address the provisions of the 1982 Convention, which we would have thought would be the very starting point for any discussion, until paragraph 218 of its reply. That paragraph repays a careful reading. Three points can be made in relation to that paragraph.

The first point is that it is said that the matters of which Ireland complains are essentially limited to the withholding of information on grounds of commercial confidentiality. I have just explained, and we have explained during the course of the morning, that access to information is but one of the elements of cooperation. Inevitably, the more important requirement, to take account of Ireland's interests, is not mentioned by the United Kingdom in its response or indeed anywhere else. It is a matter of some concern that the United Kingdom fails to acknowledge that cooperation entails taking into account the interests of one's neighbours. There is no response to our reference in the *Lac Lanoux* arbitration, the award of which affirmed that in the course of discussions, each state has an obligation,

> "*to take into consideration in reasonable manner the interests of the [other]*".

Nor does the United Kingdom have anything to say about the International Court's conclusion that states engaged in activities which may be harmful to the marine environment have an obligation to give "due recognition" to, and "take account of", the rights of other states. These latter dicta are ones with which the United Kingdom should be very familiar since the International Court addressed the point to the United Kingdom in respect of its treatment of Iceland, another of its smaller island neighbours. Nor does the United Kingdom address Principle 19 of the Rio Declaration, to which it and 173 other states gave their unconditional support and which emphasizes the importance in these respects of transboundary cooperation.

The second point in relation to paragraph 219 is that the United Kingdom says that the cooperation requirements set forth in Article 197 have been entirely satisfied by the United Kingdom's participation in the OSPAR Convention and in the European Community and Euratom Directives, and by its generously having allowed Ireland to participate in its domestic consultations on economic justification. We say

that cooperation means more than becoming party to an international instrument or three. The notion that Ireland, as one of the 9,000 "organizations and individuals" – that is the term used – in the decision of 3 October 2001, which participated in the consultations on MOX justification, has extinguished its entitlement as a state party to the Law of the Sea Convention to invoke cooperation rights under Article 197 is a startling claim. The argument is patronizing and has no merit.

My third point is that the United Kingdom says that the obligation to cooperate under Article 123 adds nothing beyond the requirement of Article 197. That is plainly incorrect. It is not merely that Article 123 specifies additional duties of coordination among littoral States. The very fact that Enclosed and Semi-Enclosed Seas are given a whole separate Part on their own under the Convention indicates that they are the subject of distinct rights and duties. But the United Kingdom does not actually feel the need to refer to the language of Article 123. If you look at it, as I know many of you know well, it is not the same language as Article 197. It says expressly that States bordering a semi-enclosed sea (Ireland and the United Kingdom) must "coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment". It is an additional to coordinate, not found in Article 197. We say that coordination can only occur if there is listening, if there is sharing, and if there is taking into account. It is akin to the concept of *voisinage*. The evidence before you shows that the United Kingdom has not listened, has not shared, and has not taken into account Ireland's views. It cannot have been said to be a cooperative neighbour on this issue at least.

It is apparent that the United Kingdom sees no great substance in the duty to cooperate. In fact they say, rather disparagingly, that it is a right which is only "essentially procedural in nature". Even if that is correct, we say there is no rule in international law which says that procedural rights are entitled to any less respect than substantive rights. In fact, there is very much to suggest that where the substantive obligations have any degree of ambiguity in their content – which in our view is not the case here – then procedural rights become even more important. This point has been made very powerfully by many commentators, including on various occasions Professor and now Judge Rosalyn Higgins.

In the case of a contentious project such as this, cooperation is self-evidently terribly important. The United Kingdom makes no effort to engage with Ireland's submissions. The record shows that it has not cooperated. Mr Fitzsimons has taken you through the most important correspondence which paints a consistently depressing picture, at least from our perspective: Ireland presents reasoned arguments or requests. They are ignored or they are met with holding responses or there are delays, further delays or there are bland assertions. Nowhere in the correspondence will you find a single example of the United Kingdom engaging with any of our substantive arguments; at no point.

To illustrate the absence of cooperation, I think it is appropriate to consider one or two examples. The letter of 23 December 1999, which I have already referred to in relation to the issue of environmental assessment is especially instructive. I think if there is one letter worth reading it is that letter, nearly two years old. In that letter Ireland expressed unambiguous concerns about the impact of discharges and releases from the MOX plant into the marine environment having regard to obligations which

the United Kingdom had accepted under the Law of the Sea Convention which had entered into force for the United Kingdom shortly before then and norms which were incorporated into the Law of the Sea Convention, in particular the obligation to reduce concentrations of artificial radioactive substances in the Irish Sea to "close to zero" by 2020. We referred in that also to the precautionary principle. Ireland sought the views of the United Kingdom Government on this point. We asked, "Can you please tell us as to the basis upon which the proposed authorization of discharges from the MOX plant into the marine environment would 'meet all international standards and legal requirements'? The Irish Government further seeks confirmation that no authorization will be granted or put into effect pending resolution of these matters".

We say that request is crystal clear. It is totally unambiguous and that we are entitled, in the context of the duty to cooperate under Articles 123 and 197, to an explanation as to how the United Kingdom can, on the one hand, fulfil its obligations to reduce concentrations of radionuclides and, on the other hand, subsequently authorize new radioactive discharges into the Irish Sea. Now it may well be that there is a perfectly simple explanation but an explanation there must be and an explanation Ireland is entitled to have. The United Kingdom cannot simply ignore us when we raise the matter but that is what the United Kingdom has done. It waits more than ten weeks and then it responds by the letter of 9 March 2000. What does the letter say? It really does not say very much. You will find it up on the screen. It states that "[w]hatever our final decision, we do plan to publish a decision document which will explain our reasons in full. I will ensure that you are sent a copy immediately it is published". There was no further communication after that.

What it did receive nearly two years after the request had been made, during which time we had persisted in our attempts to prise information out of the United Kingdom Government, was the decision document of 3 October 2001. That, to all intents and purposes, is the response to our request of 23 December 1999. It does not anywhere address Ireland's question or its concern as set out in that letter. We invite the United Kingdom, through its Agent, to direct Ireland and the Tribunal, to the paragraph in the decision of 3 October 2001 where the United Kingdom responds to the question and the concern that I have just identified raised in the letter of 23 December 1999, as it said it would do. You will find no mention of Ireland in the decision of 3 October 2001. You will find no mention of Ireland's concerns, unlike the NIREX process in the document of the decision of 3 October 2001. That stands in very stark contrast to the careful approach taken by Secretary of State Gummer in the NIREX Inquiry. Here Ireland becomes, rather anonymously, one of the 9,000 or more consultees to the domestic process. We are simply an organization or an individual. You get a flavour of the rationale of the United Kingdom Reply in these proceedings: they say, to paraphrase, that by allowing us to participate in their consultations they have fulfilled their duty to cooperate and that is sufficient. With the greatest of respect, that is not what the duty of cooperation implies.

(Luncheon Recess)