

**IN THE MATTER OF AN ARBITRATION**

**- before -**

**AN ARBITRAL TRIBUNAL CONSTITUTED UNDER ANNEX VII  
OF THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA**

**- between -**

**THE REPUBLIC OF MAURITIUS**

**- and -**

**THE UNITED KINGDOM OF GREAT BRITAIN  
AND NORTHERN IRELAND**

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**REASONED DECISION ON CHALLENGE**

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30 November 2011

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## **I. PROCEDURAL HISTORY**

### **A. Commencement of the Arbitration**

1. This challenge arises out of a dispute between the Republic of Mauritius (“Mauritius”) and the United Kingdom of Great Britain and Northern Ireland (the “United Kingdom” or the “UK”) under the 1982 United Nations Convention on the Law of the Sea (the “Convention”), to which Mauritius and the United Kingdom (together, the “Parties”) are party.
2. Mauritius is represented by its Agent, Mr. Dheerendra Kumar Dabee SC, Solicitor-General of Mauritius, and its Counsel, Sir Sydney Kentridge QC, Professor James Crawford SC, Professor Philippe Sands QC, Miss Alison Macdonald, and Mr. Andrew Loewenstein.
3. The United Kingdom is represented by its Agent, Mr. Christopher A. Whomersley, Deputy Legal Adviser at the Foreign and Commonwealth Office (the “FCO”), its Deputy Agent, Ms Susan Dickson, Legal Counsellor at the FCO, and its Counsel, Sir Michael Wood KCMG, Professor Alan Boyle, and Mr. Samuel Wordsworth.
4. By Notification and Statement of Claim dated 20 December 2010, Mauritius commenced arbitration proceedings against the United Kingdom pursuant to Article 287 of the Convention and in accordance with Article 1 of Annex VII of the Convention.

### **B. Constitution of the Tribunal**

5. The Members of the Tribunal were appointed in accordance with Article 3 of Annex VII of the Convention. By its Notification and Statement of Claim, Mauritius appointed Judge Rüdiger Wolfrum, a German national.
6. On 19 January 2011, in accordance with Article 3(c) of Annex VII of the Convention, the United Kingdom appointed Judge Sir Christopher Greenwood CMG QC, a British national.
7. On 21 February 2011, Mauritius requested that the President of the International Tribunal for the Law of the Sea (“ITLOS”) appoint the three remaining arbitrators pursuant to Article 3(e) of Annex VII of the Convention.
8. On 25 March 2011, the President of ITLOS appointed Judge James Kateka, a Tanzanian national, and Judge Albert Hoffmann, a South African national, as arbitrators, and Professor Ivan Shearer, an Australian national, as arbitrator and President of the Tribunal.

### **C. Commencement of the Challenge to Judge Greenwood**

9. On 2 May 2011, the Permanent Court of Arbitration (the “PCA”), acting as Registry in this case, transmitted to the Parties the Declarations of Acceptance and the Statements of Impartiality and Independence of the five arbitrators as well as a Disclosure Statement dated 27 April 2011 submitted by Judge Greenwood.
10. On 19 May 2011, Mauritius requested additional disclosure from Judge Greenwood (the “Request for Additional Disclosure”). Mauritius expressed concern at the “long-standing” and “close working” character of the relationship between Judge Greenwood and the Government of the United Kingdom and also at the fact that Judge Greenwood had advised the United Kingdom “on many of the most sensitive issues of international law and foreign policy”. Considering the “strategic importance for the United Kingdom” of the issues raised in the case brought before the Tribunal, Mauritius requested further disclosure from Judge Greenwood on:

- (i) his involvement with the United Kingdom on legal matters touching directly or indirectly on the island of Diego Garcia;
  - (ii) his involvement with the United Kingdom on the application of the European Convention on Human Rights (the “ECHR”) to the Chagos Archipelago or to the British overseas territories;
  - (iii) his intention to seek reelection to the International Court of Justice (the “ICJ”); and
  - (iv) his service on the Appointments Board for the new Legal Adviser to the FCO (the “Board”).
11. On 20 May 2011, Judge Greenwood submitted a Further Disclosure Statement in response to the Request for Additional Disclosure. After restating his independence and asserting that he would “approach the issues in this arbitration with complete impartiality”, Judge Greenwood answered the questions raised by Mauritius as follows:
- (i) he had never performed any legal work for the United Kingdom relating to the Chagos Islands including Diego Garcia;
  - (ii) he had never advised the United Kingdom on the application of the ECHR to the Chagos Archipelago or to the British overseas territories;
  - (iii) he had not yet formed any intention regarding reelection to the ICJ; and
  - (iv) the Board was chaired by a Civil Service Commissioner who was an independent office-holder, not in the full-time employment of the Crown. There were two other members of the Board, respectively from the FCO and the Government Legal Service. Judge Greenwood noted that he was asked to take part because he was “also independent of the Government”. Moreover, he accepted his appointment as member of the Board, in December 2010, before he was approached regarding the present dispute. Finally, the Board made its decision on the selection of the new legal adviser on 14 March 2011, after his appointment.

As a concluding remark, Judge Greenwood stated that “at no stage in the process of appointment” was he “party to, or aware of, any discussion either with the candidates or amongst the members of the board of anything relating to the present arbitration, the Chagos Islands more generally or the law of the sea”.

12. On 23 May 2011, Mauritius stated its intention to challenge the appointment of Judge Greenwood (the “Challenge”) on the basis that Judge Greenwood had acted for the United Kingdom within the past three years and that this relationship continued, as evidenced by his participation in the selection of the new legal adviser to the FCO after his appointment to the Tribunal. Mauritius thus considered his appointment to be incompatible with the principles of independence and impartiality. Mauritius indicated that it would submit detailed grounds at a later date.

#### **D. Challenge Procedure**

13. By letter to the Parties dated 30 May 2011, the PCA conveyed the Tribunal’s proposal regarding the procedure for deciding the Challenge. The Tribunal proposed (i) a schedule for submissions by the Parties and Judge Greenwood; (ii) that the decision on the Challenge would be made by a majority vote of the four other Members of the Tribunal; with the President of the Tribunal having a casting vote in the absence of a majority; and (iii) that, should there be no

agreement on the need for a hearing, the Tribunal would decide whether it wished to hold a hearing following receipt of the United Kingdom's Rejoinder.

14. By e-mail of 3 June 2011 and by letter of 8 June 2011, the United Kingdom and Mauritius respectively confirmed their agreement to the Tribunal's proposed procedure for deciding the Challenge. The exchange of written submissions then proceeded in accordance with the schedule thus agreed.
15. On 15 June 2011, Mauritius submitted its grounds for the Challenge (the "Memorial on Challenge").
16. On 13 July 2011, the United Kingdom submitted its Response.
17. On 20 July 2011, Judge Greenwood submitted his comments on the Parties' submissions ("Judge Greenwood's Comments").
18. By letter of 25 July 2011, the PCA, on behalf of the Tribunal, informed the Parties that, with respect to the Challenge, the Parties' written pleadings, the comments of Judge Greenwood, and any documentary material or evidence would remain confidential. Furthermore, should there be a hearing, the hearing would not be open to the public and any transcript would remain confidential.
19. On 1 August 2011, Mauritius submitted its Reply.
20. On 11 August 2011, the United Kingdom submitted its Rejoinder.
21. By letter of 19 August 2011, the PCA conveyed to the Parties the Tribunal's decision to hold a hearing on the Challenge in accordance with the schedule circulated to the Parties on a provisional basis by the PCA on 8 August 2011.
22. By letter dated 19 September 2011, Mauritius submitted a letter dated 16 September 2011 from Judge Thomas Mensah together with a "Statement of Explanation" attached thereto, and requested that the letter dated 16 September 2011 and attachment be introduced into the proceedings.
23. By letter of 22 September 2011, the PCA informed the Parties of the decision by the President of the Tribunal that Mauritius withhold its request and submit it at the hearing scheduled for 4 October 2011, where the United Kingdom would be given an opportunity to comment.
24. By e-mail sent on 22 September 2011, the United Kingdom requested that Mauritius obtain and disclose a copy of a document that appeared to be quoted by Judge Mensah in his Opinion attached as Annex 1 to the Reply of Mauritius dated 1 August 2011.
25. On 30 September 2011, in response to the United Kingdom's e-mail of 22 September 2011, Mauritius circulated a letter from Judge Mensah dated 30 September 2011 to which was attached a document headed "Tribunal Incompatible Activities, Discussions 28 to 31 October 1996". The letter explained that this document was a contemporaneous note made by Judge Mensah in 1996 of certain internal discussions that took place within ITLOS in 1996.

#### **E. Hearing**

26. A hearing was held on 4 October 2011 at the Peace Palace in The Hague. Present at the hearing were:

Tribunal: Professor Ivan Shearer  
Judge Albert Hoffmann  
Judge James Kateka  
Judge Rüdiger Wolfrum

Claimant: Mr. Dheerendra Kumar Dabee SC  
Sir Sydney Kentridge QC  
Professor James Crawford SC  
Professor Philippe Sands QC  
Mr. Andrew Loewenstein  
Miss Alison Macdonald  
Mr. Suresh Chundre Seeballuck  
His Excellency Dr Jaya Nyamrajsingh Meetarbhan  
Ms. Shiu Ching Young Kim Fat  
Mr. Remi Reichhold

Respondent: Mr. Christopher A. Whomersley  
Ms. Susan Dickson  
Professor Alan Boyle  
Sir Michael Wood KCMG  
Mr. Samuel Wordsworth

Registrar: Mr. Brooks W. Daly

27. At the hearing, Mauritius sought confirmation whether there was any objection to the introduction into the record of the letters from Judge Mensah dated 16 and 30 September 2011 and their attachments. The United Kingdom confirmed that it had no objection to the introduction of those documents.
28. Each Party then presented arguments on the Challenge and answered questions from the four Members of the Tribunal.
29. At the conclusion of the hearing, the Tribunal proposed that it first deliver its decision on the Challenge without reasons, and that a reasoned decision be issued in due course thereafter. The Parties agreed to the Tribunal's proposal.
30. A *verbatim* transcript of the hearing was prepared and was made available during the hearing to the Parties and the four Members of the Tribunal by real-time electronic display. Electronic

copies of the transcript were distributed to the Parties and the four Members of the Tribunal after the hearing. On 14 October 2011, amended copies of the transcript, reflecting editorial amendments made by request of the Parties, were distributed to the Parties and to the four Members of the Tribunal by e-mail.

## **II. FACTUAL BACKGROUND**

### **A. The Dispute between the Parties**

31. The Chagos Archipelago, also known as the Chagos Islands, is a group of atolls in the Indian Ocean, the largest of which is Diego Garcia. The islands forming the Chagos Archipelago are administered by the United Kingdom as the British Indian Ocean Territory (the “BIOT”).
32. On 1 April 2010, the United Kingdom issued a decision by which it established a Marine Protected Area (the “MPA”) around the Chagos Archipelago, in which fishing and other activities are prohibited. The MPA extends to a distance of 200 nautical miles from the Chagos Archipelago and thus covers an area of more than half a million square kilometres. Mauritius contends that the establishment of the MPA violates the Convention and other rules of international law not incompatible with the Convention and seeks to obtain an authoritative and legally binding declaration regarding the legality of the MPA.

### **B. Judge Sir Christopher Greenwood CMG QC**

33. Judge Sir Christopher Greenwood CMG QC was elected to the ICJ in February 2009. Prior to his appointment to the Court, Judge Greenwood had taught and lectured in international law at the University of Cambridge from 1976 to 1996 and as Professor of International Law at the London School of Economics and Political Science from 1996 to 2009.
34. From 1978, Judge Greenwood also practised as a barrister at the Bar of England and Wales (the “English Bar”), where he specialized in the field of public international law, appearing as counsel or expert witness before numerous international courts and tribunals and as counsel before the English courts. In the course of his practice at the English Bar, Judge Greenwood acted as counsel both on behalf of and against the United Kingdom, and advised or represented approximately twenty States other than the United Kingdom.

### **C. Selection of the Legal Adviser to the FCO**

35. On 11 February 2011, the Government of the United Kingdom advertised the post of Legal Adviser to the FCO. The Board<sup>1</sup> was formed for the assessment of the candidates and was chaired by Miss Elizabeth Watkins, a Civil Service Commissioner. Judge Greenwood was appointed to the Board in December 2010. The other members of the Board were Mr. Simon Fraser, the Permanent Undersecretary at the FCO, and Mr. Paul Jenkins, the Treasury Solicitor and head of the Government Legal Service.
36. The Board met to consider applications on 7 March 2011 and again to interview candidates for the post on 14 March 2011. After the interviews, on the same day, it assessed the candidates and placed them in order of merit by unanimous decision. After that point, Judge Greenwood’s involvement with the Board ceased.
37. The recommendation of the Board was formally communicated by letter from the Chair of the Board to the Permanent Undersecretary of the FCO. Thereafter, the appointment of the Legal

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<sup>1</sup> See paras. 10-11 above.



Adviser was made by the FCO, on the decision of the Permanent Secretary. In accordance with usual practice for appointment to this post, the Permanent Secretary followed the recommendation of the Board. The person thus appointed was Mr. Iain Macleod.

38. As the principal legal adviser to the FCO, the Legal Adviser has overall responsibility for all the work of the FCO legal advisers including their work on the conduct of this dispute, but is not involved with the arbitration on a day-to-day basis. Overall responsibility for the conduct of the present arbitration by the United Kingdom rests with the UK Attorney General.

### III. POSITIONS OF THE PARTIES

#### A. Standard to be Applied

##### 1. *Mauritius's Position*

39. Mauritius submits that Judge Greenwood's long, close and continuing relationship with the Government of the United Kingdom is "incompatible with the necessary objective of appearance of independence".<sup>2</sup> In order to ascertain what the obligation of independence and impartiality entails, Mauritius relies on Article 293(1) of the Convention which provides that the Tribunal must apply other rules of international law not incompatible with the Convention.<sup>3</sup>
40. Mauritius contends that the requirement of independence and impartiality of arbitrators in international arbitration is reflected in international arbitration rules and statutes, such as Article 10 of the PCA's Optional Rules for Arbitrating Disputes Between Two States, Article 12(1) of the United Nations Commission on International Trade Law Arbitration Rules 2010 (the "UNCITRAL Rules"), Article 57 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"),<sup>4</sup> as well as Article 12 of the UNCITRAL Model Law of 1985.<sup>5</sup> Mauritius further argues that, under the Burgh House Principles on the Independence of the International Judiciary, and the 2011 Resolution of the *Institut de Droit International* on the Position of the International Judge, this requirement is a principle of international law of general application applying to, *inter alia*, international arbitration proceedings<sup>6</sup> including arbitrations under Annex VII of the Convention.<sup>7</sup>
41. Mauritius emphasizes that the practice of tribunals is to assess the obligation of arbitral impartiality and independence by reference to an objective standard.<sup>8</sup> That standard is whether circumstances give rise to justifiable doubts as to the arbitrator's impartiality or independence from the perspective of a reasonable and informed person (the "Appearance of Bias Standard").<sup>9</sup> In this respect, Mauritius relies on the Statements of Professor George Bermann,<sup>10</sup> and Professor Abimbola A. Olowofoyeku,<sup>11</sup> and on the following decisions on challenge: *Vito G.*

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<sup>2</sup> Memorial on Challenge, para. 5.

<sup>3</sup> Transcript, pp. 33-34.

<sup>4</sup> Memorial on Challenge, para. 25.

<sup>5</sup> Transcript, pp. 38-39.

<sup>6</sup> Memorial on Challenge, paras. 26, 27; Transcript, pp. 43-44.

<sup>7</sup> Memorial on Challenge, para. 27.

<sup>8</sup> Memorial on Challenge, para. 28.

<sup>9</sup> Memorial on Challenge, para. 41.

<sup>10</sup> Memorial on Challenge, para. 28, citing the Statement of Professor George Bermann, Annex 2, para. 12.

<sup>11</sup> Memorial on Challenge, para. 29, citing the Statement of Professor Abimbola A. Olowofoyeku, Annex 3, para. 76.

*Gallo v. Government of Canada*<sup>12</sup> under the UNCITRAL Rules; *National Grid P.L.C. v. Argentine Republic* under the Challenge Division of the London Court of International Arbitration;<sup>13</sup> *Suez and Others v. Argentine Republic* under the Arbitration Rules of ICSID and the UNCITRAL Rules;<sup>14</sup> and the ICSID cases of *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*<sup>15</sup> and *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*.<sup>16</sup>

42. Mauritius argues that the practice of courts is also to assess the obligation of impartiality and independence by reference to the Appearance of Bias Standard. Mauritius refers to cases from various jurisdictions in support of its claim: *Porter v. Magill*,<sup>17</sup> *De Cubber v. Belgium*,<sup>18</sup> *Webb and Hay v. The Queen*,<sup>19</sup> *Johnson v. Johnson*,<sup>20</sup> *BTR Industries South Africa (Pty) Ltd. and Others v. Metal and Allied Workers' Union and Another*,<sup>21</sup> *Liljeberg v. Health Services Acquisition Corp.*,<sup>22</sup> and *Prosecutor v. Furundžija*.<sup>23</sup>
43. Mauritius contends that “the proper inquiry is not whether actual bias or dependence upon a party exists, but instead, whether there is an appearance of bias or lack of independence [or impartiality]”.<sup>24</sup> According to Mauritius, “it is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done”<sup>25</sup> and “bias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interests to affect his mind, although nevertheless he may have allowed it unconsciously to do so”.<sup>26</sup> Mauritius comments that “the objective standard of judicial impartiality is not there simply for the purpose of the particular case, it is concerned with the integrity of the international judicial process [...]”.<sup>27</sup>

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<sup>12</sup> *Vito G. Gallo v. Government of Canada*, Decision on the Challenge to Mr. J. Christopher Thomas, QC, NAFTA/UNCITRAL (14 Oct. 2009), para. 19.

<sup>13</sup> *National Grid P.L.C. v. Argentine Republic*, Decision on the Challenge to Mr. Judd L. Kessler, Division of the LCIA Court, Case No. UN 7949 (3 Dec. 2007), para. 80.

<sup>14</sup> *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales de Agua S.A. v. Argentine Republic* ICSID Case No. ARB/03/17, *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A.* ICSID Case No. ARB/03/19, *AWG Group Limited v. Argentine Republic*, UNCITRAL Arbitration, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, (12 May 2008), para. 22.

<sup>15</sup> *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator (12 Aug. 2010), para. 43.

<sup>16</sup> *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (“*PetroEcuador*”), Decision on Challenge to Arbitrator (8 Dec. 2009), paras. 54-58.

<sup>17</sup> *Porter v. Magill* [2002] 2 A.C. 357, para. 103.

<sup>18</sup> *De Cubber v. Belgium* (1985) 7 EHRR 236, para. 26.

<sup>19</sup> *Webb and Hay v. The Queen* (1994) 181 CLR 41, 47.

<sup>20</sup> *Johnson v. Johnson* (2000) 201 CLR 488, 492, para. 11.

<sup>21</sup> *BTR Industries South Africa (Pty) Ltd. and Others v. Metal and Allied Workers' Union and Another* [1992] ZASCA 85, 49.

<sup>22</sup> *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 858-862 (1988). All cases cited in the Transcript, pp. 12-17.

<sup>23</sup> *Prosecutor v. Furundžija*, ICTY Case No. IT-95-17/1-A, Appeals Chamber Judgment (21 July 2000), para. 189.

<sup>24</sup> Memorial on Challenge, para. 32.

<sup>25</sup> Transcript, p. 19.

<sup>26</sup> Transcript, p. 20.

<sup>27</sup> Transcript, p. 37.

44. Mauritius asserts that the reputation of the arbitrator is immaterial, as found by the Secretary-General of the PCA in *Perenco Ecuador v. Ecuador*,<sup>28</sup> and his or her professed intention to be independent and impartial is not a relevant consideration either, as held in *ICS Inspection and Control Services Ltd. v. Argentine Republic*.<sup>29</sup>
45. Mauritius claims that the Appearance of Bias Standard has been codified in the International Bar Association (the “IBA”) Guidelines on Conflicts of Interest in International Arbitration (the “IBA Guidelines”) at General Standard 2. These Guidelines “are intended to apply to all forms of international arbitration,”<sup>30</sup> since in the words of the Chair of the IBA Working Group, Mr. de Witt Wijnen, these Guidelines “enjoyed the full support of all 19 members [of the Group], as reflecting best international practice in international arbitration”.<sup>31</sup>
46. Mauritius argues that the Appearance of Bias Standard reflected in the IBA Guidelines is a universal standard that is also reflected in the UNCITRAL Arbitration Rules, the PCA’s Optional Rules for Arbitrating Disputes Between Two States, and in the respective rules of the Court of Arbitration of the International Chamber of Commerce, the London Court of International Arbitration, the International Centre for Dispute Resolution of the American Arbitration Association and the Arbitration Institute of the Stockholm Chamber of Commerce. It is “applicable to all arbitrations” and “there is no justification in law or policy for a different or lower standard of arbitral ethics in inter-State arbitrations, especially where the tribunal must resolve disputes that involve issues of national importance and great public interest”.<sup>32</sup>

## 2. *The United Kingdom’s Position*

47. The United Kingdom argues that Article 2(1) of Annex VII of the Convention establishes a standard for the purposes of any given challenge to an arbitral nominee, a standard which has “a key component of fairness, or ‘*impartialité*’ in the French text, and also comprises competence and integrity”.<sup>33</sup> The United Kingdom further argues there is no textual basis for this standard to comprise a justifiable doubts test.<sup>34</sup>
48. The United Kingdom also submits that Article 3(e) of Annex VII of the Convention, the default provision which applies both where the respondent State has failed to nominate an arbitrator and where the two States have been unable to agree on the identity of the three remaining arbitrators, establishes a standard of independence of the arbitral nominee by providing that the members so appointed may not be in the service of any of the parties to the dispute.<sup>35</sup>
49. The United Kingdom further submits that, since “[n]either the Parties nor the Tribunal have adopted any provisions [to be applied to the determination of the Challenge], [...] the Tribunal should have regard primarily to the rules and practice applied by other courts and tribunals dealing with inter-State cases”.<sup>36</sup>

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<sup>28</sup> Memorial on Challenge, para. 31, referring to *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (“PetroEcuador”)*, Decision on Challenge to Arbitrator (8 Dec. 2009), para. 62.

<sup>29</sup> Reply of Mauritius, para. 64, referring to *ICS Inspection and Control Services Ltd. v. Argentine Republic*, Decision on Challenge to Arbitrator (17 Dec. 2009), para. 5.

<sup>30</sup> Memorial on Challenge, para. 36.

<sup>31</sup> Memorial on Challenge, para. 35, citing the Statement of Mr. O.L.O. de Witt Wijnen, Annex 1, para. 10.

<sup>32</sup> Reply of Mauritius, para. 8.

<sup>33</sup> Transcript, p. 94.

<sup>34</sup> Transcript, p. 95.

<sup>35</sup> Transcript, pp. 95-96.

<sup>36</sup> Response of the United Kingdom, paras. 45-46.

50. The United Kingdom argues that, in addition to “the inter-state context, [...] Annex VII arbitration is one of the options (the default option) for compulsory dispute settlement under Part XV of [the Convention]”, alongside the ICJ and ITLOS. The United Kingdom adds that “[t]he disputes concerned are identical in nature”.<sup>37</sup> The United Kingdom asserts that “[i]t cannot have been intended, and it would make no sense, if the applicable law and practice concerning matters such as conflict should vary between the three forums when dealing with identical cases”.<sup>38</sup> In this respect, arbitration should not be different and apply a higher standard than judicial settlement.<sup>39</sup>
51. The United Kingdom argues that the rules and practice of the ICJ and ITLOS, as well as inter-State arbitrations, in particular those under Annex VII of the Convention, are of most relevance.<sup>40</sup>
52. The United Kingdom contends that under the law and practice of these forums, “close past relationship” has never been a ground for challenging an arbitrator.<sup>41</sup> In fact, according to the United Kingdom, “the law and practice applicable in inter-State arbitrations fully supports the election of judges with a close professional relationship to their own State, as shown by the record of most serving and previous ICJ and ITLOS judges, and the limited basis on which they are disqualified from sitting in particular cases”.<sup>42</sup>
53. The United Kingdom argues that, under the aforementioned law and practice related to inter-State disputes, “the principal test of conflict of interest is prior involvement in the subject-matter of the case”.<sup>43</sup> In other words, “the arbitrator must not have had any involvement with the actual dispute that is before the arbitral tribunal”<sup>44</sup> (the “Specific Prior Involvement Standard”). In this respect, besides Judge Guillaume’s Statement on ICJ practice, the United Kingdom relies on Articles 16, 17 and 24 of the ICJ Statute, Article 34 of the Rules of the Court of the ICJ, Article 8 of the Statute of ITLOS, and the practice of these two international courts and of inter-State arbitral tribunals under Annex VII of the Convention.
54. With respect to ICJ practice, the United Kingdom refers to ICJ cases where Members of the Court sat even though they had close connections with their States. In particular, the United Kingdom refers to the disposal of the Israeli challenge to Judge Elaraby in the case concerning legal consequences of the construction of a wall in the occupied Palestinian territory whereby in its Order of 30 January 2004, the Court (by 13 votes to 1) dismissed the challenge on the basis that “Judge Elaraby could not be regarded as having ‘previously taken part’ in the case in any capacity”.<sup>45</sup>
55. Moreover, with respect to what would be the practice of the ICJ in regard to Judge Greenwood’s sitting on the Board for the selection of the new FCO Legal Adviser, the United Kingdom refers to a conclusion reached by judges of the Permanent Court of International Justice (the “PCIJ”) on the application of Article 16 of the PCIJ Statute, the wording of which remained unchanged under the ICJ Statute:

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<sup>37</sup> Response of the United Kingdom, para. 48.

<sup>38</sup> Rejoinder of the United Kingdom, para. 14.

<sup>39</sup> Transcript, pp. 141-142, 157.

<sup>40</sup> Response of the United Kingdom, para. 46.

<sup>41</sup> Response of the United Kingdom, para. 61.

<sup>42</sup> Response of the United Kingdom, para. 70.

<sup>43</sup> Response of the United Kingdom, para. 2(iii).

<sup>44</sup> Response of the United Kingdom, para. 66.

<sup>45</sup> Response of the United Kingdom, paras. 54-58, citing the Order of 30 January 2004, ICJ Reports 2004, p.3, para. 7.

*There was no incompatibility between the functions of a judge and the functions of a member of a government commission for testing candidates for the diplomatic service.*<sup>46</sup>

56. With respect to ITLOS practice, the United Kingdom submits that no judge of ITLOS has yet been challenged. However, it submits that many Members of ITLOS, similarly to the ICJ, have a closer connection with the government which nominated them than Judge Greenwood, as former government employee for example, and have continued to sit, without challenge, in cases involving the State by which they had been employed. An example given by the United Kingdom of such a case before ITLOS is that of Judge Anderson in the proceedings on provisional measures in the *MOX Plant Case (Ireland v. United Kingdom)*.<sup>47</sup>
57. With respect to the practice of inter-State arbitral tribunals under Annex VII of the Convention, the United Kingdom submits that “arbitrators often have a similarly close relationship to the State which appoints them and that in practice this has not been a bar to their sitting in cases in which their own government is a party”.<sup>48</sup> An example given by the United Kingdom in this respect is the case of Sir Arthur Watts, formerly FCO Legal Adviser, who served without challenge as a UK-appointed arbitrator in the *MOX Plant* arbitration under Annex VII of the Convention.<sup>49</sup>

### **3. Comments of Mauritius on the United Kingdom’s Position**

58. Mauritius maintains that the Appearance of Bias Standard is a general principle of law and Annex VII of the Convention should not be considered as a *lex specialis* in this respect as argued by the United Kingdom.<sup>50</sup> Mauritius states: “[...] if Annex VII was a *lex specialis* in relation to the questions of independence, it would be hard to understand why all Annex VII tribunals that have adopted rules have adopted rules allowing for challenge to arbitrators”.<sup>51</sup>
59. Also, according to Mauritius, the application of the standard of a “reasonable state”, by opposition to a “reasonable person”, advanced by the United Kingdom to inter-State arbitrations, is entirely novel, lacks any supporting authority, and should not be accepted.<sup>52</sup>
60. In response to the United Kingdom’s submission that, based on the practice of the ICJ and of ITLOS, the applicable standard should be one of previous involvement in the subject-matter of the case, Mauritius argues that the practice of the ICJ and of ITLOS is very different from that claimed by the United Kingdom: both require recusal of a Judge where there is a special reason that gives rise to an appearance of bias,<sup>53</sup> pursuant to Article 24 of the ICJ Statute and Article 8(2) – (4) of the ITLOS Statute.<sup>54</sup> Mauritius contends that having advised a government on the subject-matter of a dispute is not the only ground for recusal.<sup>55</sup> Mauritius seeks support for its view in Judge Mensah’s and Professor Shany’s Statements. According to the former, the

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<sup>46</sup> Transcript, p. 133 referring to PCIJ publication series D number 2 at page 12.

<sup>47</sup> Response of the United Kingdom, para. 62, referring to the *MOX Plant Case (Ireland v. United Kingdom)*, Provisional Measures Order, ITLOS (3 Dec. 2001).

<sup>48</sup> Response of the United Kingdom, para. 64.

<sup>49</sup> Response of the United Kingdom, para. 64, referring to the *MOX Plant Case (Ireland v. United Kingdom)* (PCA). See *MOX Plant Case (Ireland v. United Kingdom)*, Press Release of 2 June 2003, released by the PCA on behalf of the Annex VII Tribunal.

<sup>50</sup> Transcript, p. 161.

<sup>51</sup> Transcript, p. 164.

<sup>52</sup> Reply of Mauritius, para. 77.

<sup>53</sup> Reply of Mauritius, para. 43.

<sup>54</sup> Reply of Mauritius, paras. 35, 39.

<sup>55</sup> Reply of Mauritius, para. 35.

standard of “‘appearance of bias’ [...] which would govern matters before ITLOS should also be applied in an Annex VII arbitration”.<sup>56</sup>

61. Mauritius further argues that even if the United Kingdom’s assertions regarding the practice of the ICJ and ITLOS were correct, there is no basis for transposing that purported practice to inter-State arbitration.<sup>57</sup> Mauritius contends that the system of adjudication by a permanent court or tribunal, such as the ICJ or ITLOS, is fundamentally different from inter-State arbitration, including arbitral proceedings conducted pursuant to Annex VII, since in the former (i) the weight of the views of any particular judge is much more diluted given the higher number of judges, (ii) judges are elected, by contrast to an arbitrator unilaterally selected by a State as its party-appointed arbitrator, and (iii) most cases will not involve adjudication of a judge’s home or nominating State.<sup>58</sup> By contrast, the present Tribunal is an “*ad hoc* arbitration Tribunal appointed to hear a specific case involving specific parties and known in advance to be a case of acute sensitivity. Any dispensation that may be associated with the International Court membership is of no relevance [...]”.<sup>59</sup>
62. With respect to the structural argument concerning the Convention made by the United Kingdom, to the effect that it could not have been intended that the applicable law and practice concerning matters such as conflict should vary between the three forums under the Convention dealing with identical cases, Mauritius argues that “the solution adopted in Part XV [of the Convention] involves all three judicial bodies, but it doesn’t meld them or merge them in their procedures. There is no common set of procedural rules for bodies exercising jurisdiction under Part XV. [...] To take an example, there is no provision for intervention before Annex VII Tribunals. There are different provisions for intervention before the court and before ITLOS.”<sup>60</sup>

#### **4. Comments of the United Kingdom on Mauritius’s Position**

63. The United Kingdom submits that “Mauritius asks [the Tribunal] to be guided by, in effect to apply, the IBA guidelines or the PCA or UNCITRAL Arbitration Rules, or a broad series of municipal sources, although there is no agreement between the Parties as to the application of such sources. [...] As to that consent, it is evident that [the] Tribunal must function in accordance with Annex VII and the Convention, as Article 4 of Annex VII expressly requires, and as is consistent also with Article 293 of [the Convention]”.<sup>61</sup>
64. The United Kingdom argues that, whilst the test of bias as to the independence and impartiality of members of international courts and tribunals “may be objective”, “it cannot simply be formulated as what a well-informed and reasonable person would be justified in thinking”.<sup>62</sup> Rather, according to the United Kingdom, “if, *arguendo*, one were to apply an objective test, the relevant point of view or perception in inter-state cases would be that of a ‘reasonable State’”.<sup>63</sup>
65. Concerning the applicable standard to the Challenge, the United Kingdom argues that Mauritius “misleadingly and wrongly focuses on the law and practice applied in international commercial and investment protection arbitrations”.<sup>64</sup> In its view, the issues that arise concerning the

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<sup>56</sup> Reply of Mauritius, para. 15, citing the Statement of Judge Thomas A. Mensah, former President and Judge of ITLOS, Annex 1, at 5.

<sup>57</sup> Reply of Mauritius, para. 44.

<sup>58</sup> Reply of Mauritius, para. 45.

<sup>59</sup> Transcript, p. 54.

<sup>60</sup> Transcript, p. 56.

<sup>61</sup> Transcript, pp. 92-93.

<sup>62</sup> Response of the United Kingdom, para. 49.

<sup>63</sup> Response of the United Kingdom, para. 50.

<sup>64</sup> Response of the United Kingdom, para. 2(v).

- appointment of arbitrators in commercial and investment treaty cases do not arise in the same way in inter-State arbitrations. The latter do not involve “repeat arbitral appointments, whether by the same party or by the same law firm; potential for influence where arbitrators may be perceived as worrying about where their next appointment will come; [and] cross-overs, where individuals repeatedly switch between the roles of counsel and arbitrator [...]”.<sup>65</sup>
66. The United Kingdom adds that the law and practice applied in international commercial and investment arbitrations Mauritius invokes in fact establish different tests: the UNCITRAL Rules applies a justifiable doubts test as interpreted in the case of *AWG Group Ltd. v. Argentine Republic*,<sup>66</sup> and the ICSID Convention places a heavy burden of proof on the party making the challenge so that certainly more than justifiable doubts are required, as interpreted in the case of *Suez and Others v. Argentine Republic*.<sup>67</sup>
67. The United Kingdom argues that the IBA Guidelines “are intended for cases involving private parties, not inter-state arbitration,” since “[n]o specific reference is made in the Guidelines to cases between two States”.<sup>68</sup> The United Kingdom adds that “[n]o government representatives participated in the drafting of the Guidelines, and there is no suggestion that Governments were consulted”.<sup>69</sup>
68. The United Kingdom further asserts that “[e]ven if (which is denied) the Guidelines were relevant to an inter-state arbitration, [...] [they] are neither binding nor universally accepted;”<sup>70</sup> “they are ‘guidelines’ not rules”.<sup>71</sup>
69. The United Kingdom further argues that the lists of the IBA Guidelines cited by Mauritius “provide guidance as to the situations that should be disclosed but do not dictate the impact of such disclosure for challenges”.<sup>72</sup>
70. Finally, the United Kingdom contends that Mauritius “insists on applying the Guidelines in an unduly formalistic manner,” making reference to the commentary of the Working Group which drafted the Guidelines, and “without due regard for the particular facts of this case”.<sup>73</sup>

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<sup>65</sup> Transcript, pp. 103-104.

<sup>66</sup> *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales de Agua S.A. v. Argentine Republic* ICSID Case No. ARB/03/17, *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A.* ICSID Case No. ARB/03/19, *AWG Group Limited v. Argentine Republic*, UNCITRAL Arbitration, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, (12 May 2008), para. 22.

<sup>67</sup> *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales de Agua S.A. v. Argentine Republic* ICSID Case No. ARB/03/17, *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A.* ICSID Case No. ARB/03/19, *AWG Group Limited v. Argentine Republic*, UNCITRAL Arbitration, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, (12 May 2008), para. 29.

<sup>68</sup> Response of the United Kingdom, para. 80.

<sup>69</sup> Rejoinder of the United Kingdom, para. 19.

<sup>70</sup> Response of the United Kingdom, para. 81.

<sup>71</sup> Rejoinder of the United Kingdom, para. 9.

<sup>72</sup> Response of the United Kingdom, para. 83.

<sup>73</sup> Response of the United Kingdom, paras. 83, 84.

## **B. Application of the Standard to be Applied to the Present Challenge**

### ***I. Mauritius's Position***

#### **i. General Remarks**

71. Mauritius highlights that according to the Appearance of Bias Standard, a finding that Judge Greenwood is actually biased is not necessary in order for the Challenge to be sustained.<sup>74</sup>
72. Mauritius submits that there is an extremely close and longstanding relationship between Judge Greenwood and the United Kingdom. That relationship has included numerous formal engagements to serve as counsel to the United Kingdom and several of its organs. Mauritius submits that such involvement, together with the continuing relationship between Judge Greenwood and the United Kingdom, as evidenced by his role in the selection of the new Legal Adviser at the FCO, after his appointment as arbitrator in the present case, are sufficient to create an appearance of bias.<sup>75</sup>
73. Mauritius supports its position by reference to the Statements of Mr. de Witt Wijnen,<sup>76</sup> Professor George Bermann,<sup>77</sup> Professor Abimbola A. Olowofoyeku,<sup>78</sup> and Professor Kate Malleson.<sup>79</sup> These individuals expressed views that “provide an important gauge as to how a reasonably informed person might react” although “they may not be public international lawyers”.<sup>80</sup> Mauritius also annexed to its Reply Statements by two public international lawyers: Professor Yuval Shany,<sup>81</sup> and Judge Mensah.<sup>82</sup>

#### **ii. Application of the IBA Guidelines**

74. Mauritius also relies on the Red and Orange Lists of the IBA Guidelines and argues that Judge Greenwood's relationship with the United Kingdom entails factual situations contemplated in these lists that either necessarily give rise to justifiable doubts, or may, in the eyes of the parties, give rise to justifiable doubts regarding the arbitrator's impartiality and independence.<sup>83</sup>
75. In particular, Mauritius argues that Judge Greenwood should be disqualified because (i) he provided advice to a party during the arbitration by taking part, as an external member, in an appointments board as part of the selection process of a new Legal Adviser to the FCO, in breach of Section 2.3.1 of the Waivable Red List,<sup>84</sup> and (ii) has regularly advised the United Kingdom for nearly 20 years, in breach of Section 2.3.7 of the Waivable Red List.<sup>85</sup> Also,

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<sup>74</sup> Reply of Mauritius, para. 61.

<sup>75</sup> Memorial on Challenge, paras. 44, 49.

<sup>76</sup> Memorial on Challenge, para. 50, citing the Statement of Mr. O.L.O. de Witt Wijnen, Annex 1, para. 35.

<sup>77</sup> Memorial on Challenge, para. 51, citing the Statement of Professor George Bermann, Annex 2, para. 19.

<sup>78</sup> Memorial on Challenge, para. 52, citing the Statement of Professor Abimbola A. Olowofoyeku, Annex 3, para. 81.

<sup>79</sup> Memorial on Challenge, para. 52, citing the Statement of Professor Kate Malleson, Annex 4, para. 4.

<sup>80</sup> Transcript, pp. 74-75.

<sup>81</sup> Reply of Mauritius, Annex 2.

<sup>82</sup> Reply of Mauritius, Annex 1; see also Judge Mensah's letters of 16 September and 30 September 2011 submitted by Mauritius at the hearing with the consent of the United Kingdom.

<sup>83</sup> Memorial on Challenge, paras. 54, 55 and 61.

<sup>84</sup> Section 2.3.1 of the Waivable Red List describes the situation where the arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.

<sup>85</sup> Reply of Mauritius, para. 59. Section 2.3.7 of the Waivable Red List describes the situation where the arbitrator regularly advises the appointing party or an affiliate of the appointing party, but neither arbitrator nor his or her firm derives a significant financial income therefrom.



according to Mauritius, “Judge Greenwood’s recusal is further warranted under section 3.1.1<sup>86</sup> and section 3.2.3<sup>87</sup> of the Orange List because he served as counsel to the United Kingdom within three years of his appointment, and because he has regularly advised the United Kingdom”.<sup>88</sup>

76. With respect to Section 2.3.1 of the Waivable Red List, Mauritius argues that the relationship between Judge Greenwood and the United Kingdom continued after his appointment as arbitrator since he contributed to the selection of the United Kingdom’s new Legal Adviser at the FCO, one of the principal legal advisers in these proceedings, on 7 and 14 March 2011.<sup>89</sup>
77. Mauritius further relies on Judge Mensah’s Statement in which he expresses the view that:

*[a] member of the ITLOS would have to refrain (or be required to refrain) from participating in a case involving a Government if the member has been involved in providing advice to the Government in the choice of a Legal Adviser to the Government or any of its component Ministries. This would be particularly so if the advice has been given during the course of the proceedings before the Tribunal or not long prior to the institution of the proceedings.*<sup>90</sup>

78. With respect to Section 3.1.1 of the Orange List, also reflected in the Burgh House Principles of the International Law Association (the “ILA”) at Principle 10,<sup>91</sup> Mauritius points to the fact that Judge Greenwood served as leading counsel for the United Kingdom not only in the *Entico* case,<sup>92</sup> litigation that was ongoing less than three years prior to Judge Greenwood’s appointment to the Tribunal, but also in the *Kadi* case.<sup>93</sup> In addition, referring to the commentary of the IBA Working Group, Mauritius contends that “the three-year period described in Section 3.1.1 is a flexible standard, and depending on the circumstances, should be extended to include representation or advice given by an arbitrator to his or her appointing party longer ago”.<sup>94</sup> Mauritius argues that “given the strong public interest in this arbitration, the numerous occasions in which Judge Greenwood represented the United Kingdom, the sensitive nature of those engagements, and the fact that many of them occurred within a short period of time prior to three years ago,” the circumstances justify consideration of a longer period.<sup>95</sup>
79. Mauritius points to the fact that Judge Greenwood represented the United Kingdom in litigation in at least four other cases within five years of his appointment to the arbitral tribunal, all of

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<sup>86</sup> Section 3.1.1 of the Orange List describes the situation where the arbitrator has within the past three years served as counsel for one of the parties or an affiliate of one of the parties or has previously advised or been consulted by the party or an affiliate of the party making the appointment in an unrelated matter, but the arbitrator and the party or affiliate of the party have no ongoing relationship.

<sup>87</sup> Section 3.2.3 of the Orange List describes the situation where the arbitrator or his or her firm represents a party or an affiliate to the arbitration on a regular basis but is not involved in the current dispute.

<sup>88</sup> Reply of Mauritius, para. 59.

<sup>89</sup> Memorial on Challenge, para. 4.

<sup>90</sup> Reply of Mauritius, para. 70, citing the Statement of Judge Thomas A. Mensah, former President and Judge of ITLOS, Annex 1; see also Judge Mensah’s letters of 16 September and 30 September 2011 submitted by Mauritius at the hearing with the consent of the United Kingdom.

<sup>91</sup> Transcript, p. 68.

<sup>92</sup> Memorial on Challenge, para. 62, referring to *Entico Corp. v. United Nations Educational, Scientific and Cultural Association and Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 531 (Comm.).

<sup>93</sup> Memorial on Challenge, para. 62, referring to *Case T-315/01, Kadi v. Council of the European Union, Commission of the European Communities, and United Kingdom of Great Britain and Northern Ireland*, 2005 ECR II-3649.

<sup>94</sup> Memorial on Challenge, para. 63.

<sup>95</sup> Memorial on Challenge, para. 64.

which concerned important issues of national security.<sup>96</sup> Mauritius asserts that in the five-year period from 2006 to 2011, Judge Greenwood has advised the United Kingdom on at least seven occasions, including his participation on the Board.<sup>97</sup> According to Mauritius, these representations disqualify Judge Greenwood from service in the present case pursuant to Section 3.1.1 of the Orange List.<sup>98</sup>

80. With respect to Sections 2.3.7 of the Waivable Red List and 3.2.3 of the Orange List, according to Mauritius, the fact that Judge Greenwood has advised States other than the United Kingdom and has served on other arbitral tribunals is without relevance, since it does not dissipate the concern generated by Judge Greenwood's frequent and regular representation of the United Kingdom, and other services performed for the United Kingdom.<sup>99</sup>
81. Mauritius further argues that the fact that Judge Greenwood has occasionally acted against the United Kingdom "provides no justification for ignoring the fact that he has on many more occasions represented the United Kingdom in matters of the highest national importance".<sup>100</sup>
82. In addition, Mauritius argues that the fact that Judge Greenwood's longstanding advocacy on behalf of the United Kingdom was performed in the capacity of independent practitioner is without effect. Mauritius adopts the view of Professor Olowofoyeku whereby "the concept of an 'independent bar' does not prevent the disqualification of a judge where the judge's relationship with a litigant 'gives rise to a reasonable apprehension that the judge might not bring an impartial mind to the resolution of the issues in the case', for example, where there is a 'long, recent and varied connection'".<sup>101</sup> According to Mauritius, "Judge Greenwood enjoyed a unique role as a member of the Bar" and "was involved" in what the UK Attorney General referred to as "the formation of UK government policy".<sup>102</sup>
83. Mauritius concludes that the application of the IBA Guidelines (which reflect international standards regarding arbitral conflicts of interest) requires Judge Greenwood's disqualification from service on the present arbitral tribunal because a reasonable third party having knowledge of the relevant facts would conclude that there are justifiable doubts as to his impartiality and independence.<sup>103</sup>

## 2. *The United Kingdom's Position*

### i. General Remarks

84. The United Kingdom submits that Judge Greenwood has had no prior involvement in the subject-matter of the case and thus the Challenge should fail.<sup>104</sup>

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<sup>96</sup> Memorial on Challenge, para. 65, citing *inter alia* *R (Al-Jedda) v. Secretary of State for Defence* [2007] UKHL 58; *R (Al-Skeini) v. Secretary of State for Defence* [2008] 1 A.C. 153 (HL); and *Jones v. Saudi Arabia* [2006] UKHL 26.

<sup>97</sup> Memorial on Challenge, para. 66.

<sup>98</sup> Memorial on Challenge, para. 66.

<sup>99</sup> Reply of Mauritius, paras. 72-73, citing the Supplemental Statement of Professor George A. Bermann, Annex 4, para. 22.

<sup>100</sup> Reply of Mauritius, para. 74.

<sup>101</sup> Reply of Mauritius, para. 75, citing the Statement of Professor Abimbola A. Olowofoyeku, Annex 3 of Mauritius's Memorial on Challenge, para. 74.

<sup>102</sup> Transcript, pp. 65-66.

<sup>103</sup> Memorial on Challenge, para. 69.

<sup>104</sup> Response of the United Kingdom, para. 2(iv).

85. The United Kingdom argues that “there is no suggestion in this Challenge of any subject-matter conflict of interest that might call into question Judge Greenwood’s impartiality as far as concerns the specific issues in the current case”,<sup>105</sup> therefore fulfilling the standard of impartiality found at Article 2(1) of Annex VII of the Convention. Moreover, Judge Greenwood acted as a barrister, *i.e.*, as an “independent practitioner” “required at all times to be independent” rather than as a government employee.<sup>106</sup> According to the United Kingdom, Judge Greenwood therefore fulfils the standard of independence found at Article 3(e) of Annex VII of the Convention as he is not in the service of the United Kingdom.<sup>107</sup>
86. The United Kingdom argues that the Challenge “does not, nor could it, allege actual bias against Judge Greenwood” and that it “is based solely on the fact that Judge Greenwood has previously represented and advised the United Kingdom in wholly unrelated matters”.<sup>108</sup> According to the United Kingdom, Mauritius emphasizes the number and sensitivity of the cases in which Judge Greenwood has acted for the UK “as if he had been a government employee”.<sup>109</sup>
- ii. Application of the IBA Guidelines
87. Even if the IBA Guidelines were applicable, the United Kingdom submits that they could not justify the removal of Judge Greenwood since, when he acted for or gave advice to the United Kingdom, it was “as an independent member of the English Bar” or “in an independent capacity” on the Board.<sup>110</sup> According to the United Kingdom, Judge Greenwood has represented “many other States”, has been appointed as arbitrator by States other than the United Kingdom, has acted against the United Kingdom, and does not currently act for or advise the United Kingdom; thus the situation does not correspond to that evoked under Section 2.3.7 of the Waivable Red List nor Section 3.2.3 of the Orange List.<sup>111</sup>
88. The United Kingdom emphasizes that Judge Greenwood “does not currently represent or advise the United Kingdom in respect of any matter”.<sup>112</sup> According to the United Kingdom, even if Section 2.3.1 of the Waivable Red List of the IBA Guidelines, which covers a situation where ‘the arbitrator currently represents or advises one of the parties or an affiliate of one of the parties’,<sup>113</sup> “were to be interpreted in such a way that membership of a selection panel amounts to ‘advising’ a party, which seems inherently improbable given the normal meaning of advice in the context of this provision, it would not be applicable to the present case”.<sup>114</sup>
89. The United Kingdom points to the fact that Judge Greenwood “received no remuneration for his service on the [Board]” and was nominated “prior to the commencement of the present proceedings and his appointment to the Tribunal, performed that role independent from the United Kingdom Government and no longer plays any role in respect of the Board”.<sup>115</sup>

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<sup>105</sup> Transcript, p. 98.

<sup>106</sup> Response of the United Kingdom, para. 27.

<sup>107</sup> Transcript, p. 98.

<sup>108</sup> Response of the United Kingdom, paras. 44(i), 69.

<sup>109</sup> Response of the United Kingdom, para. 69.

<sup>110</sup> Response of the United Kingdom, para. 87(i)-(ii).

<sup>111</sup> Response of the United Kingdom, para. 86.

<sup>112</sup> Response of the United Kingdom, para. 44(vi).

<sup>113</sup> IBA Guidelines on Conflicts of Interest in International Arbitration, May 22, 2004, “Waivable Red List” at Section 2.3.1.

<sup>114</sup> Response of the United Kingdom, para. 75.

<sup>115</sup> Response of the United Kingdom, paras. 76, 44(vii).

90. The United Kingdom asserts that “[t]his one-off and strictly time-limited activity cannot by any stretch be thought to establish either the fact or the appearance of a ‘continuing close relationship’”.<sup>116</sup>

91. In this regard, the United Kingdom refers to the Statement by Judge Dame Rosalyn Higgins in which she states:

*It never entered my head that sitting for a couple of days on an Appointment Board could be seen as being overly close to Her Majesty’s Government, nor that there was any conceivable issue with the relevant Articles of the Statute. This was not a “doubtful case” which I needed to refer to the President of the Court for decision.*<sup>117</sup>

92. Furthermore, with respect to Section 3.1.1 of the IBA Orange List, the United Kingdom argues that Mauritius “only cite[s] two cases [the *Entico* and *Kadi* cases] in support of its proposition that Judge Greenwood has served as counsel for the United Kingdom in the past three years”. Out of those two cases, only the *Entico* case falls within this time frame and is unrelated to the subject-matter of the dispute. The United Kingdom adds that Mauritius “then elects to disregard the three-year time frame [...] in order to justify citing a handful of cases dating back to 2006 and in matters entirely unrelated to the subject-matter of the current dispute”.<sup>118</sup>

iii. Arbitral Practice

93. The United Kingdom further argues that “[m]any examples from arbitral practice demonstrate that the mere fact that an arbitrator has provided legal services in the past to one of the parties in matters unrelated to the subject-matter of the current dispute does not suffice for disqualification”.<sup>119</sup>

94. The United Kingdom relies, *inter alia*, on the *Grand River Enterprises Six Nations, Ltd., et al. v. United States*, where “it was the simultaneous provision of services that created the conflict,” and similarly in the case of *Vito G. Gallo v. Government of Canada*.<sup>120</sup> The United Kingdom stresses that Judge Greenwood is not presently providing legal services to the United Kingdom.

95. The United Kingdom also points to an UNCITRAL case, *Country X v. Company Q*, where the issue was whether prior work of an arbitrator bore on an issue in dispute.<sup>121</sup> In this respect, the United Kingdom asserts that Judge Greenwood has not conducted work bearing “on the issues currently before the Tribunal, as he has certified in his signed statement dated 20 May 2011”.<sup>122</sup>

96. Finally, the United Kingdom refers to *Universal Compression International Holdings v. Venezuela* where two challenges, respectively on the basis of repeated appointment as arbitrator

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<sup>116</sup> Response of the United Kingdom, para. 76.

<sup>117</sup> Response of the United Kingdom, para. 77 referring to the Statement of Judge Higgins, Annex 7 to the Response.

<sup>118</sup> Response of the United Kingdom, para. 87(iii).

<sup>119</sup> Response of the United Kingdom, para. 88.

<sup>120</sup> Response of the United Kingdom, para. 89, referring to *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America Award*, NAFTA/UNCITRAL (12 Jan. 2011), para. 31 and *Vito G. Gallo v. Government of Canada*, Decision on the Challenge to Arbitrator, NAFTA/UNCITRAL (14 Oct. 2009), para. 30.

<sup>121</sup> *Country X v. Company Q*, United Nations Commission on International Trade Law, 11 January 1995, XXII YB Comm. Arb. 227 (1997).

<sup>122</sup> Response of the United Kingdom, paras. 89, 90.

by a party and on the basis of a former role as co-counsel with members of a party's legal team on other cases, were rejected.<sup>123</sup>

iv. Further Observations

97. Even if the Appearance of Bias Standard would be applicable, the United Kingdom submits that a reasonable and informed party would be strongly influenced by the following six factors, to which Mauritius and its experts have accorded little weight, but which point to the impartiality and independence of Judge Greenwood.<sup>124</sup>
98. Firstly, as a starting point, there are no doubts as to Judge Greenwood's actual impartiality and independence as he is regarded as an international judge of great distinction and of impeccable reputation.<sup>125</sup>
99. Secondly, Judge Greenwood was elected to the ICJ by the unanimous vote of the Security Council and with 157 votes of the General Assembly and his representation of the United Kingdom as counsel was known to the members of these organs.<sup>126</sup>
100. Thirdly, the United Kingdom argues that, as a Member of the ICJ, Judge Greenwood "has made a solemn declaration that he will exercise his powers impartially and conscientiously," which "is relevant to any assessment of his impartiality and independence in the present case".<sup>127</sup>
101. Fourthly, the United Kingdom argues that "Professor Greenwood's election to the ICJ in 2009 follows a long British tradition whereby its PCA National Group nominates university professors of international law for this post rather than former officials".<sup>128</sup> Hence, in contrast to "[m]any current ICJ judges" who "have had relationships with their own governments that are far closer than Judge Greenwood's, many having been career civil servants, [...] Judge Greenwood was a professor and lawyer in independent practice".<sup>129</sup>
102. Fifthly, the United Kingdom contends that "[Judge Greenwood] has represented, advised, and been appointed arbitrator by many States other than the United Kingdom," and also that "[h]e acted against the United Kingdom on several occasions".<sup>130</sup>
103. Finally, Judge Greenwood acted on behalf of the United Kingdom as an independent member of the English Bar.<sup>131</sup>

**3. *Comments by Mauritius on the United Kingdom's Position***

104. In response to the Statement of Dame Rosalyn Higgins, former judge and president of the ICJ, in which she stated that she regarded her sitting on the Board as a small favour for Her Majesty's government, Mauritius points out that while Judge Higgins acted on the Board, "she was not simultaneously sitting in judgement on the United Kingdom in a case run by the

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<sup>123</sup> *Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela*, Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, Arbitrators (20 May 2011).

<sup>124</sup> Transcript, pp. 105, 111.

<sup>125</sup> Transcript, p. 105.

<sup>126</sup> Transcript, p. 106.

<sup>127</sup> Response of the United Kingdom, para. 41; Transcript, pp. 107-108.

<sup>128</sup> Response of the United Kingdom, para. 73; Transcript, p. 109.

<sup>129</sup> Response of the United Kingdom, para. 74, Transcript, p. 111.

<sup>130</sup> Response of the United Kingdom, paras. 72 and 44(iv)(v).

<sup>131</sup> Transcript, p. 111.

department in which the appointment was being made, nor was she accepting an appointment as an arbitrator while she was doing that favour”.<sup>132</sup>

105. Mauritius also contends that the fact that Judge Greenwood’s position on the Board was an unremunerated one is not relevant, relying on the decision on challenge in *Vito G. Gallo v. Government of Canada* where the Deputy Secretary-General of ICSID found that “[w]here arbitral functions are concerned, any paid or gratis service provided to a third party with a right to intervene can create a perception of a lack of impartiality. The amount of work done makes no difference. What matters is the mere fact that work is being performed.”<sup>133</sup> Moreover, Mauritius adopts the view of Mr. de Witt Wijnen whereby the IBA Guidelines make “no distinction between a remunerated or a non-remunerated advisor or an advisor in public service or not”.<sup>134</sup>
106. Mauritius contends that the arbitral cases cited by the United Kingdom do not support the United Kingdom’s arguments in support of the proposition that the mere fact that an arbitrator has provided legal services in the past to one of the parties, in matters unrelated to the subject-matter of the current dispute, does not suffice for disqualification. On the contrary, those arbitral cases provide further evidence that the applicable Appearance of Bias Standard mandates Judge Greenwood’s disqualification.<sup>135</sup>
107. Mauritius observes that the ruling in *Vito G. Gallo v. Government of Canada* that “an arbitrator may not provide ‘a small amount’ of advice to a non-party but potential intervenor in an arbitration” could hardly do anything other than support Judge Greenwood’s disqualification, “since he provided advice to a party with respect to the selection of that party’s Legal Advisor after his appointment to the Tribunal”.<sup>136</sup>
108. Nor, according to Mauritius, does the *Grand River v. United States* ruling support the United Kingdom’s position, since the Secretary-General of ICSID found “that an arbitrator’s representation of a non-party in an unrelated matter which is adverse to a party to the arbitration is incompatible with his obligation of independence and impartiality”.<sup>137</sup> Further, accepting for the sake of the argument that even the “key point” of this case was “the simultaneous provision of services that created the conflict,” Mauritius argues that Judge Greenwood advised the British Government simultaneously with his appointment to the Tribunal by participating in the selection of the new FCO Legal Adviser and should therefore be disqualified.<sup>138</sup>
109. With respect to *Universal Compression International Holding v. Venezuela*, Mauritius notes that “Judge Greenwood’s appointment is challenged, not because he has been appointed to multiple tribunals by the United Kingdom, but instead because: (i) he has acted as counsel for the United Kingdom on a consistent basis for many years and in many cases involving national security and defence, including fewer than three years prior to his appointment to the Tribunal;

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<sup>132</sup> Transcript, p. 30.

<sup>133</sup> Reply of Mauritius, para. 67, citing *Vito G. Gallo v. Government of Canada*, Decision on the Challenge to Arbitrator, NAFTA/UNCITRAL (14 Oct. 2009), para. 32.

<sup>134</sup> Reply of Mauritius, para. 67, citing the Supplemental Statement of Mr. O.L.O. de Witt Wijnen, Annex 3, para. 10.

<sup>135</sup> Reply of Mauritius, para. 80.

<sup>136</sup> Reply of Mauritius, para. 81, referring to *Vito G. Gallo v. Government of Canada*, Decision on the Challenge to Arbitrator, NAFTA/UNCITRAL (14 Oct. 2009).

<sup>137</sup> Reply of Mauritius, para. 82, referring to *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, Decision on the Challenge to Arbitrator, NAFTA/UNCITRAL (28 Nov. 2007).

<sup>138</sup> Reply of Mauritius, para. 82.

and (ii) during the arbitration he assisted the British Government in selecting the new Legal Advisor for the FCO”.<sup>139</sup>

110. Finally, Mauritius argues that in the case of *Country X v. Company Q*, “[t]he challenge was denied because it was determined that the arbitrator’s representation of an unrelated party was too attenuated to give rise to justifiable doubts regarding his impartiality”.<sup>140</sup> Hence, given the relationship between Judge Greenwood and the United Kingdom, Mauritius asserts that the situation in the case of *Country X v. Company Q* was very different to the present proceeding.<sup>141</sup>
111. In response to the six factors<sup>142</sup> which the United Kingdom argued would lead a reasonable and informed person to reach the conclusion of apparent independence and impartiality with respect to Judge Greenwood, Mauritius responds as follows: (i) many judges of great distinction have been required to recuse themselves;<sup>143</sup> (ii) being a judge at the ICJ does not mean that a reasonable person would not view that person’s past as raising issues, and Mauritius’s six experts concluded that Judge Greenwood, a serving judge of the ICJ, should not sit on this matter;<sup>144</sup> (iii) the fact that Judge Greenwood made a solemn declaration when he became an ICJ Judge is true of every judge who has ever been recused;<sup>145</sup> (iv) Judge Greenwood’s high level of approval for election to the ICJ as reflected by the votes he received is merely a reflection that he is an appropriate person for high judicial office;<sup>146</sup> (v) it is the record of long and consistent service on a particular type of issue that leads to the density of a particular relationship with a particular government, and the fact that Judge Greenwood has been involved in cases against the United Kingdom is irrelevant;<sup>147</sup> and (vi) Judge Greenwood’s status as a member of the English Bar does not preclude him from being dismissed from a tribunal should he be perceived to lack independence or impartiality.<sup>148</sup>

## C. The Risk of Annulment

### I. Mauritius’s Position

112. Mauritius submits that “[i]n light of the appearance of Judge Greenwood’s lack of impartiality and independence from the United Kingdom, an arbitration that proceeds with him as a member of the tribunal would be at serious risk of being annulled by a court in the Netherlands”.<sup>149</sup>
113. According to Mauritius, there is nothing in any of the sources cited by the United Kingdom, namely the European Convention on State Immunity<sup>150</sup> and the United Nations Convention on

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<sup>139</sup> Reply of Mauritius, para. 83, referring to *Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela*, Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, Arbitrators (20 May 2011).

<sup>140</sup> Reply of Mauritius, para. 85, referring to *Country X v. Company Q*, United Nations Commission on International Trade Law, 11 January 1995, XXII YB Comm. Arb. 227 (1997).

<sup>141</sup> Reply of Mauritius, para. 85.

<sup>142</sup> See paras. 97-103 above.

<sup>143</sup> Transcript, p. 169.

<sup>144</sup> Transcript, p. 169.

<sup>145</sup> Transcript, p. 185.

<sup>146</sup> Transcript, pp. 171-172.

<sup>147</sup> Transcript, p. 171.

<sup>148</sup> Transcript, p. 172.

<sup>149</sup> Memorial on Challenge, para. 70.

<sup>150</sup> European Convention on State Immunity, *opened for signature* May 16, 1972, C.E.T.S. No. 074.

the Jurisdictional Immunities of States and Their Property,<sup>151</sup> that could constrain a Dutch court from exercising such a power of annulment.<sup>152</sup>

114. Moreover, Mauritius points to the fact that the District Court in The Hague can intervene in ongoing proceedings, and has done so in a PCA-administered arbitration involving a State where the arbitration was proceeding with an arbitrator tainted by appearance of bias, namely in *Telecom Malaysia v. Ghana*.<sup>153</sup>
115. According to Mauritius, adopting the view of Mr. de Witt Wijnen, “if a Dutch Court were to intervene, it would likely ‘come to the same conclusion as in the case of [*Telecom Malaysia*] v. *Ghana*,’ where it took action to prevent an arbitrator from serving because of an appearance of bias”.<sup>154</sup>

## 2. *The United Kingdom’s Position*

116. With respect to the risk of annulment raised by Mauritius, the United Kingdom advances that Mauritius, notwithstanding its obligation under the Convention to accept the award of an Annex VII tribunal as “final and without appeal”, is in effect threatening, at the very outset of these proceedings, that it will seek to override any eventual award of the Tribunal.<sup>155</sup>
117. The United Kingdom argues that a Dutch court would have no basis to intervene and that if it did, the Netherlands would be in breach of international law pursuant to the European Convention on State Immunity, Articles 12(2) and 17 of the 2004 United Nations Convention on the Jurisdictional Immunities of States and Their Property, according to which, a State may claim immunity from the jurisdiction of a domestic court in a proceeding relating to an arbitration between States.<sup>156</sup>
118. The United Kingdom argues that “[e]ven if a Dutch court were to decide such a case, [...] such decision could not affect the binding nature of the award of the Annex VII arbitral tribunal under international law ([the Convention]), and would, from the point of view of international law be a nullity”.<sup>157</sup>
119. The United Kingdom submits that “the Dutch decisions [cited by Mauritius] had nothing to do with inter-State arbitration, and were reached on the basis of Dutch legal provisions which have nothing to do with inter-State arbitration or even the annulment of an arbitral award”.<sup>158</sup> In fact, according to the United Kingdom, these cases “were not about the annulment of a decision, but were actions in tort against the arbitrator personally”.<sup>159</sup>

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<sup>151</sup> United Nations Convention on the Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, U.N. Doc. A/59/508 (Dec. 2, 2004), *opened for signature* Jan. 17, 2005.

<sup>152</sup> Reply of Mauritius, para. 87.

<sup>153</sup> Reply of Mauritius, para. 87, referring to *Telecom Malaysia v. Ghana*, District Court of The Hague, Petition No. HA/RK 2004.667, 18 October 2004 (at ASA Bulletin 186 (2005)).

<sup>154</sup> Reply of Mauritius, para. 89, citing the Supplemental Statement of Mr. O.L.O. de Witt Wijnen, Annex 3, para. 17.

<sup>155</sup> Response of the United Kingdom, para. 94.

<sup>156</sup> Response of the United Kingdom, para. 95.

<sup>157</sup> Rejoinder of the United Kingdom, para. 22.

<sup>158</sup> Rejoinder of the United Kingdom, para. 21.

<sup>159</sup> Rejoinder of the United Kingdom, para. 21.



120. The United Kingdom finally submits that “if there were such ‘serious risk’ [of annulment] as is asserted by Mauritius, States would be reluctant to use the facilities of the Permanent Court of Arbitration in The Netherlands or to agree to inter-state arbitrations being located there”.<sup>160</sup>

#### **IV. JUDGE GREENWOOD’S COMMENTS**

121. Judge Greenwood begins his written comments by stating that he has read Mauritius’s Memorial on Challenge and the United Kingdom’s Response and confirming the content of his two disclosure statements.<sup>161</sup>

##### **A. Standard to be Applied**

122. Judge Greenwood explains that he regards the requirement of independence and impartiality whether as a judge or an arbitrator as a matter of the utmost importance.<sup>162</sup> He refers to the declaration he made, when taking office as a Judge of the ICJ, to perform his duties and exercise his powers as judge “honourably, faithfully, impartially and conscientiously,” and explains that he has always considered it to be equally applicable to any work he performs as an arbitrator.<sup>163</sup> He further explains that when he accepted his nomination as an arbitrator in the present case, he bore in mind:

*[...] the standards set out in Judge Guillaume’s witness statement, which states what [he has] always understood to be the practice not only in the ICJ but also in ITLOS and in arbitrations between States, namely that a Judge or arbitrator should always recuse themselves from consideration of a case in which they have advised, represented or in some other manner been involved with one of the parties in relation to the dispute to be adjudicated but that there was no bar to a Judge or arbitrator sitting in a case which involved a State that they had advised or represented in other, unconnected, matters.*<sup>164</sup>

##### **B. Application of the Specific Prior Involvement Standard to the Present Challenge**

###### **1. General Remarks**

123. Judge Greenwood states that he has had no involvement with the United Kingdom or any other State in relation to any of the issues set out in the Statement of Claim, or more generally, issues relating to the Chagos Islands, the BIOT, or Diego Garcia.<sup>165</sup> Moreover, Judge Greenwood discloses that none of the work he carried out for the United Kingdom (or any other client) at any time before he became a Judge has given him any information about the Chagos Islands.<sup>166</sup>

###### **2. Participation on the Board**

124. With respect to his participation on the Board for the selection of the new Legal Adviser of the FCO, Judge Greenwood provides the following clarifications as to the role he played and the reason he was asked to participate.

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<sup>160</sup> Response of the United Kingdom, para. 97.

<sup>161</sup> Judge Greenwood’s Comments, para. 1.

<sup>162</sup> Judge Greenwood’s Comments, para. 2.

<sup>163</sup> Judge Greenwood’s Comments, para. 2.

<sup>164</sup> Judge Greenwood’s Comments, para. 3.

<sup>165</sup> Judge Greenwood’s Comments, para. 4.

<sup>166</sup> Judge Greenwood’s Comments, para. 5.

125. Judge Greenwood remarks that his participation on the Board cannot be regarded as showing a continuation of his earlier work in advising the United Kingdom since it had nothing to do with any of the work he had earlier performed when he was a barrister.<sup>167</sup> Judge Greenwood states that his role was limited to a contribution to the Board's assessment of the qualifications of the candidates for the position of the Legal Adviser and did not entail advising the Board or the FCO on law or litigation.<sup>168</sup>
126. Judge Greenwood further comments that his participation on the Board was something which he was asked to undertake, and could undertake, only because his relationship with the United Kingdom had ended.<sup>169</sup> Judge Greenwood explains that "[i]t was because [he] had become a Judge and could no longer engage in work as a barrister that [he] had the independence of government and the seniority required to be an outside member of the Board".<sup>170</sup>
127. Judge Greenwood, adopting the words of Judge Higgins who had performed the same role in 2005, considers his participation on the Board "as a 'one-off' and certainly not as part of any 'relationship' of advising the United Kingdom".<sup>171</sup>

### 3. *Previous Advocacy on Behalf of the United Kingdom*

128. Judge Greenwood also submits that the only matter in which he advised or represented the United Kingdom falling within the three years prior to his nomination to the Tribunal is the *Entico* case, a case unconnected with the issues before the Tribunal.<sup>172</sup> Judge Greenwood explains that he did not refer to his participation in the *Kadi* case since, although judgment was not given until September 2008, his involvement ceased immediately after the oral hearings on 2 October 2007 as the UK was an intervener and not a party to the proceedings.<sup>173</sup>
129. Judge Greenwood recalls that if he undertook work for the United Kingdom on a range of subjects unconnected with this arbitration, he also appeared against the United Kingdom in a number of matters.<sup>174</sup> In addition, Judge Greenwood points to the fact that he advised or represented more than twenty States other than the United Kingdom.<sup>175</sup>

### 4. *Further Observations*

130. Judge Greenwood points out that since he became an ICJ Judge he is precluded from acting as counsel or as a legal adviser and that as such, he is in an entirely different position from that of an arbitrator who also conducts work as a lawyer in private practice.<sup>176</sup> Judge Greenwood observes that Mr. de Witt Wijnen is "wide of the mark," when he comments that Judge Greenwood's participation in the present proceedings reminded him of the ruling of a Dutch

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<sup>167</sup> Judge Greenwood's Comments, para. 6.

<sup>168</sup> Judge Greenwood's Comments, para. 6.

<sup>169</sup> Judge Greenwood's Comments, para. 7.

<sup>170</sup> Judge Greenwood's Comments, para. 7.

<sup>171</sup> Judge Greenwood's Comments, para. 7.

<sup>172</sup> Judge Greenwood's Comments, para. 8, referring to *Entico Corp. v. United Nations Educational, Scientific and Cultural Association and Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 531 (Comm.).

<sup>173</sup> Judge Greenwood's Comments, para. 10, referring to *Kadi v. Council of the European Union, Commission of the European Communities, United Kingdom of Great Britain and Northern Ireland*.

<sup>174</sup> Judge Greenwood's Comments, para. 11.

<sup>175</sup> Judge Greenwood's Comments, para. 12.

<sup>176</sup> Judge Greenwood's Comments, para. 13.

court<sup>177</sup> that, in Mr. de Witt Wijnen's words, "an arbitrator in an important dispute could not at the same time act as advocate in another important case when the same principles were at stake".<sup>178</sup>

131. Judge Greenwood concludes that his participation as an arbitrator would be accepted by anyone familiar with the practice of the ICJ, ITLOS and international arbitration tribunals in inter-State disputes comparable to the present case as falling into the category of cases in which there is no justifiable ground for doubt as to his impartiality and independence.<sup>179</sup>

## V. THE TRIBUNAL'S ANALYSIS

### A. Introductory Remarks

132. The Tribunal, as constituted by four of its Members, as agreed by the Parties, in the proceedings to consider the challenge made by Mauritius to the appointment, on the nomination of the United Kingdom, of Judge Sir Christopher Greenwood as a Member of the Tribunal, has considered the extensive factual and legal arguments presented by the Parties in their written and oral submissions, all of which the Tribunal has found helpful. In this Decision on the Challenge, the Tribunal discusses the arguments of the Parties that it considers most relevant for its decision. The Tribunal announced its decision on 13 October 2011, reserving its reasons for a later date. The Tribunal now publishes its reasons. In these reasons the Tribunal, without repeating all the arguments advanced by the Parties, addresses what the Tribunal considers to be the matters on which it must rule in order to decide the issues arising between the Parties in this phase of the proceedings.

### B. The Independence and Impartiality of Arbitrators Under Annex VII of the Convention: The Applicable Law

133. The qualifications of arbitrators appointed under Annex VII of the Convention are set out in Article 2 of that Annex. Reference is made to a list of arbitrators drawn up and maintained by the Secretary-General of the United Nations. Every State Party to the Convention is entitled to nominate up to four persons for inclusion in the list, "each of whom shall be a person experienced in maritime affairs and enjoying the highest reputation for fairness, competence and integrity".
134. In constituting an arbitral tribunal of five members under Annex VII the parties to the dispute shall each appoint one member "to be chosen preferably from the list referred to in article 2 of this Annex, who may be its national". The other three members of the tribunal, if appointed by agreement between the parties, shall also "preferably" be chosen from the list. If the parties are not in agreement regarding the choice of the other three members, the power of appointment falls either to a person or third State chosen by the parties or to the President of ITLOS, in accordance with Article 3(e). Appointments under Article 3(e) "shall be made from the list referred to in Article 2".
135. It is evident from these provisions that party-appointed arbitrators are not required to be drawn from the list (although in fact, in the present case, both those arbitrators were so drawn). Nevertheless, the requirements of "fairness, competence and integrity" may be regarded as

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<sup>177</sup> *Telecom Malaysia v. Ghana*, District Court of The Hague, Petition No. HA/RK 2004.667, 18 October 2004 (at ASA Bulletin 186 (2005)).

<sup>178</sup> Judge Greenwood's Comments, para. 13.

<sup>179</sup> Judge Greenwood's Comments, para. 14.

equally applicable to party-appointed arbitrators from outside the list, since these qualifications may undoubtedly be regarded as deriving from general principles of international law and from the practice of international courts and tribunals.

136. Although not mandated by the Convention or by Annex VII thereto, it has become the practice in those arbitrations administered by the PCA for the parties to request that each arbitrator furnish a Declaration of Acceptance and a Statement of Impartiality and Independence. The form of this Declaration and Statement adopted by the PCA directs each arbitrator to consider “whether there exists any past or present relationship, direct or indirect, with any of the parties or their counsel, whether financial, professional or of another kind, and whether the nature of any such relationship is such that disclosure is called for pursuant to the criteria below. Any doubt should be resolved in favour of disclosure.” The criteria are contained within the options which the arbitrator is then directed to choose among. The first option states: “1. I am impartial and independent with respect to each of the parties and intend to remain so; to the best of my knowledge there are no facts or circumstances, past or present, that need to be disclosed because they are likely to give rise to justifiable doubts as to my impartiality or independence.” The alternative option states: “2. I am impartial and independent and intend to remain so; however, I wish to call your attention to the following facts and circumstances which I hereafter disclose because they might be of such a nature as to give rise to justifiable doubts as to my impartiality or independence.”
137. Judge Greenwood made a Declaration and Statement under option 2, and a Further Disclosure Statement in response to a request from Mauritius. These Statements are discussed later in these reasons.
138. For the present, it may thus be accepted that the law applicable to the appointment of arbitrators in the present arbitral proceedings requires that the arbitrators should enjoy the highest reputation for fairness, competence and integrity, and that there be no circumstances that might give rise to justifiable doubts as to the arbitrators’ impartiality or independence.
139. It is now necessary to inquire whether there exist any additional principles or rules, deriving from general international law, applicable to the arbitrators in the present proceedings.

**C. General Principles of International Law as Evidenced by the Practice of International Courts and Tribunals Relating to the Qualifications of Judges and Arbitrators**

***1. Courts and Tribunals Having Jurisdiction in Inter-State Cases***

140. It is advisable to begin with the law and practice of courts and tribunals seized exclusively, or predominantly, of disputes between States, as is the case in the present proceedings. The law and practice of international tribunals dealing with cases between non-State parties, or between a State and a non-State entity, will be considered separately.
141. The law applicable to the qualifications of judges of the ICJ is set out in Articles 2, 16, 17, 24 and 31(6) of the Statute of the Court. According to Article 2, judges shall be “independent” and “of high moral character”. According to Article 16 “no member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature”. This rule does not apply to judges *ad hoc*.
142. It is clear that Article 16 of the Statute of the ICJ applies to judges only after their election to the Court, and does not disqualify those who exercised such functions before their election.

143. Article 17(1) of the Statute of the ICJ provides that “No member of the Court may act as agent, counsel, or advocate in any case.” Article 17(2) of the Statute of the ICJ provides that: “No Member of the Court may participate in the decision in any case in which he has previously taken part as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity.” In other words, no judge, whether regular or *ad hoc*, can sit in a particular case if he or she has been involved previously with the very subject matter of that case.
144. The ICJ has dealt with objections to the participation of some of its Members in proceedings pursuant to Article 17(2) of the Court’s Statute. In a contentious case, it decided not to accede to an application by South Africa relating to the Court’s composition.<sup>180</sup> In this regard, the Tribunal wishes to emphasize that the fact that Judge Zafrulla Khan decided to recuse himself, having been persuaded by the Court’s President to do so, does not detract from the Court’s decision, which was reached by a majority vote.
145. The Court in later decisions maintained the consistent position that the prior activities of its Members as representatives of their governments did not attract the application of Article 17(2) of the ICJ Statute.<sup>181</sup> In the *Wall* case, even the dissenting Judge shared the Court’s opinion that Judge Elaraby’s previous diplomatic and governmental functions did not fall within the scope of Article 17 paragraph 2 of the Court’s Statute. Judge Buergenthal’s dissent concerned an interview Judge Elaraby gave two months before his election to the Court when he was no longer an official of his Government and hence spoke in his personal capacity.<sup>182</sup>
146. Article 24 of the ICJ Statute relates to “some special reason” – which is not specified – in which a serving judge may choose to recuse him- or herself, or where the President of the Court decides that a judge should not sit on the case.
147. Article 36(1) of the ICJ Statute applies the same rules to judges *ad hoc*, with the exception of Article 16.<sup>183</sup>

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<sup>180</sup> *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Order of 18 March 1965, ICJ Reports 1965, p. 31.

<sup>181</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p. 16, para. 9; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Order of 30 January 2004, ICJ Reports 2004, p. 3.

<sup>182</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Order of 30 January 2004, Dissenting Opinion of Judge Buergenthal, ICJ Reports 2004, p. 7, paras. 6-7.

<sup>183</sup> See also Practice Directions VII and VIII, both adopted by the Court on 7 February 2002, which provide further conditions applying *inter alia* to judges *ad hoc*. Practice Direction VII provides, in full: “The Court considers that it is not in the interest of the sound administration of justice that a person sit as judge *ad hoc* in one case who is also acting or has recently acted as agent, counsel or advocate in another case before the Court. Accordingly, parties, when choosing a judge *ad hoc* pursuant to Article 31 of the Statute and Article 35 of the Rules of Court, should refrain from nominating persons who are acting as agent, counsel or advocate in another case before the Court or have acted in that capacity in the three years preceding the date of the nomination. Furthermore, parties should likewise refrain from designating as agent, counsel or advocate in a case before the Court a person who sits as judge *ad hoc* in another case before the Court.” Practice Direction VIII provides, in full: “The Court considers that it is not in the interest of the sound administration of justice that a person who until recently was a Member of the Court, judge *ad hoc*, Registrar, Deputy-Registrar or higher official of the Court (principal legal secretary, first secretary or secretary), appear as agent, counsel or advocate in a case before the Court. Accordingly, parties should refrain from designating as agent, counsel or advocate in a case before the Court a person who in the three years preceding the date of the designation was a Member of the Court, judge *ad hoc*, Registrar, Deputy-Registrar or higher official of the Court.”

148. Article 4(1) of the Rules of the ICJ provides that every Member of the Court, on assuming office, shall “solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously”.
149. The Statute and Rules of ITLOS are in substance the same as those of the ICJ and particular reference may be made to Articles 7, 8 and 17 of the Statute of ITLOS.
150. The PCA Optional Rules for Arbitrating Disputes Between Two States contain provisions concerning the qualification of arbitrators (Articles 6(4) and 8(3)) as well as standards governing the challenge of an arbitrator (Article 10):
- (i) Article 6(4) provides that an appointing authority charged with appointing a sole arbitrator “shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties”;
  - (ii) Article 8(3) provides that “[i]n appointing arbitrators pursuant to these Rules, the parties and the appointing authority are free to designate persons who are not Members of the Permanent Court of Arbitration at The Hague”; and
  - (iii) Article 10 reads: “(1) Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence.”
151. The “Notes to the Text” of the PCA Optional Rules for Arbitrating Disputes Between Two States state that they are based on the UNCITRAL Arbitration Rules, with certain modifications, including, *inter alia*, modifications “to reflect the public international law character of disputes between States, and diplomatic practice appropriate to such disputes”. The PCA Optional Rules for Arbitrating Disputes Between Two States have not thus far been adopted by the parties in the present dispute. However, the standard for arbitrator impartiality and independence embodied in Article 10 of those Rules has been adopted in a number of PCA-administered arbitrations, including those of the Eritrea-Ethiopia Boundary Commission,<sup>184</sup> the arbitral tribunal in the *OSPAR* case,<sup>185</sup> and the Annex VII Tribunal in the *MOX Plant* case.<sup>186</sup> As such, this standard can be considered to form part of the practice of inter-State arbitral tribunals.

## ***2. Other International Courts and Tribunals***

152. By way of comparison with the law and practice of courts and tribunals in inter-State cases, regard should be paid, since reliance has been placed on them by Mauritius, to the law and practice of other international courts and tribunals that are not seized of inter-State disputes, even though, for reasons to be stated later, the Tribunal does not regard the law and practice of such courts and tribunals as directly relevant to the present case.
153. Article 40 of the Rome Statute of the International Criminal Court<sup>187</sup> provides that judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.

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<sup>184</sup> *Eritrea-Ethiopia Boundary Commission (Eritrea/Ethiopia)*, Rules of Procedure of the Commission, Article 8.

<sup>185</sup> “*OSPAR*” *Arbitration (Ireland v. United Kingdom)*, Rules of Procedure of the Tribunal, Article 6.

<sup>186</sup> *MOX Plant Case (Ireland v. United Kingdom)*, Rules of Procedure of the Annex VII Tribunal, Article 6.

<sup>187</sup> Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

154. Rule 15(A) of the Rules of Procedure of the International Criminal Tribunal for the former Yugoslavia<sup>188</sup> provides that “[a] Judge may not sit on a trial or appeal in any case in which the judge has a personal interest or concerning which the judge has or has had any association which might affect his or her impartiality.”
155. Article 12(1) of the UNCITRAL Arbitration Rules (as revised in 2010) provides that “any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality and independence”. It is to be noted in this connection that UNCITRAL is a Commission of the United Nations rather than an international court or tribunal, but its proposed Arbitration Rules have been used in numerous inter-State arbitration agreements.

**D. Principles and Rules Regarding the Independence and Impartiality of Arbitrators Developed by Non-Governmental Bodies**

156. For reasons to be stated below at paragraphs 165 to 168, the Tribunal does not consider that principles and rules relating to arbitrators, developed in the context of international commercial arbitration and arbitration regarding investment disputes,<sup>189</sup> are applicable to inter-State disputes, such as the present. However, since Mauritius has placed emphasis in its pleadings and oral argument on such sources, at least its primary source should briefly be set out here.
157. In paragraph 1 of the Memorial on Challenge, it is stated that:

*This application is made by Mauritius to protect its fundamental due process right to a fair hearing by an international tribunal that is – and is seen to be – independent, impartial and free from appearance of bias. The standard is reflected in the Guidelines on Conflicts of Interest in International Arbitration of the International Bar Association (IBA), which provide, inter alia, that even where actual bias is not present, an arbitrator should not serve where there is an appearance of bias.*<sup>190</sup>

158. Mauritius then relies upon the following specific provisions of the IBA Guidelines in support of the Challenge:
- (i) Section 2.3.1 of the Waivable Red List, which describes the situation where “[t]he arbitrator currently represents or advises one of the parties or an affiliate of one of the parties”;
  - (ii) Section 2.3.7 of the Waivable Red List, which describes the situation where “[t]he arbitrator regularly advises the appointing party or an affiliate of the appointing party, but neither the arbitrator nor his or her firm derives a significant financial income therefrom”;
  - (iii) Section 3.1.1 of the Orange List, which describes the situation where “[t]he arbitrator has within the past three years served as counsel for one of the parties or an affiliate of one of the parties or has previously advised or been consulted by the party or an

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<sup>188</sup> International Criminal Tribunal for the former Yugoslavia Rules of Procedure and Evidence, U.N. Doc. IT/32 (as amended Oct. 20, 2011).

<sup>189</sup> Mauritius refers to the IBA Guidelines; the UNCITRAL Rules (Articles 9 and 10 of the 1976 version; Articles 11 and 12 of the 2010 version); the 1998 International Chamber of Commerce Rules of Arbitration (Articles 7, 11 and 15); the Rules of the London Court of International Arbitration (Articles 5 and 10); the International Arbitration Rules of the American Arbitration Association (Articles 7 and 8); and the 2010 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (Articles 14 and 15). Memorial on Challenge, para. 25; Reply, para. 26.

<sup>190</sup> Memorial on Challenge, para. 1.

affiliate of the party making the appointment in an unrelated matter, but the arbitrator and the party or affiliate of the party have no ongoing relationship”; and

(iv) Section 3.2.3 of the Orange List, which refers to the situation where “[t]he arbitrator or his or her firm represents a party or an affiliate to the arbitration on a regular basis but is not involved in the current dispute”.

159. The Tribunal recalls that in the IBA Guidelines, the “Red List” provides for circumstances that, depending on the facts of a given case, necessarily give rise to justifiable doubts as to the arbitrator’s independence and impartiality, and is further divided into “waivable” and “non-waivable” conflicts. The “Orange List” refers to circumstances that, depending on the facts of the given case, may, in the eyes of the parties, give rise to justifiable doubts regarding an arbitrator’s impartiality or independence.
160. The Claimant also refers to the Rules of Conciliation and Arbitration of the International Chamber of Commerce (1998), Article 7 of which provides that “every arbitrator must be and remain independent of the parties involved in the arbitration”. It is further stipulated that “a prospective arbitrator shall sign a statement of independence and disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator’s independence in the eyes of the parties”.<sup>191</sup>

#### **E. The Grounds of the Challenge to Judge Greenwood**

161. Mauritius does not allege actual bias against Judge Greenwood. Indeed, it reiterated in its written pleadings and again in its oral argument its highest regard for the personal and professional qualities of Judge Greenwood. Mauritius bases its challenge on the ground of “appearance of bias”. In paragraph 2 of Mauritius’s Memorial on Challenge, the test to be applied is set out as follows:

*The IBA Guidelines, national case law and international practice define ‘appearance of bias’ as a situation in which it is possible for an objective third party to have justifiable doubt about an arbitrator’s impartiality.<sup>192</sup> This will be the case where an arbitrator has a longstanding and close professional relationship with one of the parties before his appointment, and it is all the more true where the relationship continues following appointment.<sup>193</sup>*

162. In substantiation of its claim of appearance of bias, Mauritius points to the following circumstances:

*[Judge Greenwood] has represented the United Kingdom as counsel in a great number of cases before national and international courts between 1992 and 2008, including within the past three years. Many of these cases involved matters of war and peace, national*

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<sup>191</sup> Equivalent provision is made in the ICC Arbitration Rules as revised in 2011 (in force from 1 January 2012), Article 11. See also Articles 14, 19 and 22 of the 2012 Rules.

<sup>192</sup> The footnote in the original (fn. 2) cites the following: IBA Guidelines, Annex 5, General Principle 2 and the Explanation to General Standard 2; Burgh House Principles on the Independence of the International Judiciary, Annex 6, Art. 8.1; *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (“PetroEcuador”)*, Decision on Challenge to Arbitrator (8 Dec. 2009), paras. 54-58; *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimants’ Proposal to Disqualify Professor Campbell McLachlan, Arbitrator (12 Aug. 2010), para. 43; *Prosecutor v. Furundžija*, ICTY Case No. IT-95-17/1-A, Appeals Chamber Judgment (21 July 2000), para. 189; and the Statement of Professor Abimbola A. Olowofoyeko, annexed to the Memorial, at paras. 44-75.

<sup>193</sup> Memorial on Challenge, para. 2.



*security, counter-terrorism and other highly sensitive matters that raise issues of national interest and security.*

[...]

*[F]ollowing his appointment as arbitrator in these proceedings, during February and March 2011, Judge Greenwood had contributed to the appointment of the new Legal Adviser at the Foreign and Commonwealth Office, the UK government department that has responsibility for the conduct of these proceedings and the lead role in UN and other diplomatic and political initiatives relating to the Chagos Archipelago. This implies a continuing relationship, and one that raises serious concerns about perceptions as to the integrity of the proceedings. Mauritius regrets that the United Kingdom fails to see any problem where an arbitrator, following his appointment, contributes to the selection of one party's principal legal adviser.<sup>194</sup>*

#### **F. The Response of the United Kingdom**

163. The United Kingdom, in its written pleadings and oral argument, has urged, as to the applicable law, that:

*The law and practice to be applied to the determination of the present challenge by Mauritius (the applicable standards) are not set down in any text. Neither the parties nor the Tribunal have adopted any provisions in this regard, nor are any rules laid down in [the Convention].*

*In these circumstances, it is submitted that the Members of the Tribunal should have regard primarily to the rules and practice applied by other courts and tribunals dealing with inter-state cases. Of most relevance are the rules and practice of the International Court of Justice and the International Tribunal for the Law of the Sea, as well as inter-state arbitration, in particular under Annex VII of [the Convention].<sup>195</sup>*

164. In relation to the practice of the ICJ, the United Kingdom annexed to its Response an opinion by Judge Gilbert Guillaume, a former ICJ President. Judge Guillaume concluded:

*[T]he practice of the Permanent Court of International Justice and that of the present Court is clear: a member of the Court or an ad hoc judge having had in the past close relations with one of the Parties to the dispute need not for that reason alone be disqualified. On the contrary, there is abundant practice to show that relations with one of the parties much closer than those alleged between Judge Greenwood and the United Kingdom does not at all prevent the person involved from sitting. In fact, many members of the International Court of Justice, as well as ad hoc judges, have formerly held posts of ministers or State officials (including that of Foreign Ministry legal advisers). On the other hand, it is prohibited for a member of the Court or an ad hoc judge to sit in a case if he had, in one way or another, been previously involved with the very subject matter of the case.<sup>196</sup>*

#### **G. The Tribunal's Evaluation of the Applicable Law**

165. The Tribunal has decided that the law applicable to the present arbitration is that to be found in Annex VII of the Convention as described in paragraphs 133 to 139 above, supplemented by the law and practice of international courts and tribunals in inter-State cases. There is no reason, in the Tribunal's view, for considering challenges to arbitrators appointed under Annex VII of the

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<sup>194</sup> Memorial on Challenge, paras. 3-4.

<sup>195</sup> Response of the United Kingdom, paras. 45-46.

<sup>196</sup> Statement of Judge Guillaume, para. 6. Response of the United Kingdom, Annex 6.

Convention, be they appointed by the parties, or by an independent appointing authority, on grounds other than those contained in the law and practice of international courts and tribunals concerned only with inter-State cases. For this reason, the Tribunal does not consider the many other texts invoked by Mauritius, in particular the IBA Guidelines, to be relevant for the purposes of its analysis in the present proceedings.

166. This leads the Tribunal to the conclusion that a party challenging an arbitrator must demonstrate and prove that, applying the standards applicable to inter-State cases, there are justifiable grounds for doubting the independence and impartiality of that arbitrator in a particular case.
167. The Tribunal recalls that the system of inter-State dispute settlement is based upon the consent of the Parties, and more specifically upon the rules of public international law, the sources of which are set out in Article 38(1) of the Statute of the ICJ. In the Tribunal's view, Mauritius has not demonstrated that the rules adopted by non-governmental institutions such as the IBA have been expressly adopted by States, nor do they form part of a general practice accepted as law, nor fall within any other of the sources of international law enumerated in Article 38(1) of the Statute of the ICJ.
168. It follows that the Tribunal is not persuaded that such additional rules, which cannot be considered as a source of law as regards judges of ITLOS or the ICJ, are any more relevant to arbitral tribunals established under Annex VII of the Convention than they are to judges of ITLOS or the ICJ. The Tribunal in this context refers to Article 287(1) of the Convention, which gives States the option alternatively to submit a case to ITLOS, the ICJ, or arbitration under Annex VII (or, for purposes not relevant here, under Annex VIII). Article 287(1), together with Article 286 of the Convention, forms the expression of States' consent to the comprehensive dispute settlement framework created by the Convention. It cannot have been the intention behind that framework that different conditions would apply to the independence and impartiality of adjudicators in the third forum (arbitration under Annex VII) in comparison with the ICJ or ITLOS. In this context, where an Annex VII tribunal is an alternative forum to ITLOS or the ICJ, the Tribunal takes the view that only the rules applying to, and practice of, inter-State tribunals are of relevance to the qualification and challenge of arbitrators in proceedings under Annex VII.
169. For these reasons, the Tribunal is not convinced that the Appearance of Bias Standard as presented by Mauritius and derived from private law sources is of direct application in the present case. Scrutinizing several of the Statements submitted by Mauritius with the view to endorsing its position it is not clear to the Tribunal on which basis the experts come to the conclusion that a particular activity is to be considered as an appearance of bias; without being fixed within the framework of the applicable law, such an approach risks supporting a wholly subjective standard.
170. As for any application of the Netherlands Arbitration Act, the Tribunal notes that Mauritius did not pursue this point at the hearing. In any event, the Tribunal does not consider that there is any basis under the Convention for the application of the Netherlands Arbitration Act or the jurisdiction of the Dutch courts in these proceedings.

#### **H. The Tribunal's Evaluation of the Evidence: Judge Greenwood's Prior Record as Counsel to the United Kingdom**

171. On the basis of the rules of the ICJ, ITLOS and Annex VII arbitral tribunals, as well as the practice of those bodies, the Tribunal will now assess the evidence submitted by Mauritius.

172. Since it is not disputed that Judge Greenwood was not involved in the present dispute before he was appointed as arbitrator, the Tribunal notes that Article 8(1) of the Statute of ITLOS cannot serve as a ground for challenge.
173. As far as the frequency and regularity of Judge Greenwood's appearances to advise the UK Government, and appear as counsel on its behalf, are concerned, in the Tribunal's view regard is to be had to the practice of the ICJ in this evaluation, and in particular to the conditions that govern the activities of Members of the Court and judges *ad hoc*, as set out at paragraphs 141 to 148 above. In light of those conditions, and for the reasons given by Judge Guillaume in the Opinion cited above, the Tribunal is not persuaded that Judge Greenwood's prior activities as counsel are such as to give rise to justifiable doubts as to his independence or impartiality.
174. Finally, the Tribunal notes, although this is not in itself a reason for its decision, that, so far, it is not aware of any case under the Convention in which a judge or arbitrator has been successfully challenged on the ground that he or she held a senior position in government or had acted as counsel before being elected or nominated as judge or arbitrator. The United Kingdom has pointed to the Annex VII Tribunal in the *MOX Plant* case in this context, in which the late Sir Arthur Watts had served as arbitrator although he had previously held the position of the Legal Adviser to the FCO, and in which the parties to the dispute had accepted the standard set forth in Article 10 of the PCA Optional Rules for Arbitrating Disputes Between Two States.<sup>197</sup> The Tribunal would add that, given that a party which is entitled to challenge an arbitrator may validly waive its right to do so for a number of reasons, without such waiver or reasons ever being articulated, it views any instance of an absence of challenge with this consideration in mind.

**I. The Tribunal's Evaluation of the Evidence: Judge Greenwood's Participation on the Board for the Selection of the FCO Legal Adviser**

175. The Tribunal will now turn to Judge Greenwood's participation on the Board for selection of the FCO Legal Adviser and assess it on the legal basis as set out in paragraphs 165 to 170 above.
176. It is advisable to set out this evidence in some detail, since it was Judge Greenwood's participation on the Board in March 2011 for the selection of the new Legal Adviser to the FCO that was especially emphasized by Mauritius in its written pleadings and oral argument. It is also a matter on which there was a conflict of opinion between distinguished experts, whose reports were tendered by the Parties.
177. Judge Greenwood explained the facts of the matter in his submission to the Tribunal as follows:

*So far as my participation in the Board which interviewed candidates for the position of Foreign and Commonwealth Legal Adviser is concerned, I believe that there has been a misunderstanding of the role I played and the reason why I was asked to participate. The Memorial of Mauritius refers to this participation as showing that I have a 'close and continuing relationship' with the United Kingdom, in effect a continuation of my earlier work in advising the UK. That is not the case. My participation in the Board had nothing to do with any of the work I had earlier performed when I was a barrister. I was not advising the Board or the Foreign Office on law or litigation. My role was simply to contribute to the Board's assessment of the qualifications of the candidates for the position.*

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<sup>197</sup> *MOX Plant Case (Ireland v. United Kingdom)*, Rules of Procedure of the Annex VII Tribunal, Article 6.

*Indeed, far from this being a continuation of a prior relationship with the United Kingdom, it was something which I was asked to undertake, and could undertake, only because the relationship had ended. It was because I had become a Judge and could no longer engage in work as a barrister that I had the independence of government and the seniority required to be an outside member of the Board. There was nothing unusual in my participation. As she explains in her witness statement, Judge Higgins had performed the same role in 2005 when the position of Legal Adviser had last been advertised. My understanding of what was involved was exactly the same as she describes in her witness statement. Like Judge Higgins I saw my participation in the Board as a ‘one-off’ and certainly not as part of any ‘relationship’ of advising the United Kingdom.<sup>198</sup>*

178. Dame Rosalyn Higgins, a former President of the ICJ, in her Statement referred to by Judge Greenwood in the passage above, stated, *inter alia*:

*It never entered my head that sitting for a couple of days on an Appointment Board could be seen as overly close to Her Majesty’s Government, nor that there was any conceivable issue with the relevant articles of the Statute. This was not a ‘doubtful case’ which I needed to refer to the President of the Court for decision.*

[...]

*Had there soon after been a case involving the United Kingdom, neither the UK Government, nor I, would, for a moment, have thought that I would have done other than vote on the merits of the case as I saw it. That is, of course a quite general point, and sitting on an Appointment Board would not have affected that situation.<sup>199</sup>*

179. A contrasting opinion was expressed by a former President of ITLOS, Judge Thomas A. Mensah. In his Statement, appended to the Reply of Mauritius to the Response of the United Kingdom, Judge Mensah commented that:

*[I]t is my view that a member of the Tribunal would be expected to consult the President (and possibly seek the agreement of the President) before agreeing to serve on a body that plays a role in the selection of a senior official such as the Legal Adviser of a Ministry. At all events, I consider that advising a Government or Ministry in the choice of such a senior official is precisely the sort of activity which should be undertaken by a member of the Tribunal with due regard to the potential complications for the member if a case involving the Government comes before the Tribunal. This is because, while serving on a board to advise on the choice of a Legal Adviser for a Ministry may not per se constitute ‘a political or administrative’ function that is prohibited to a member of an international court or tribunal, there can be little doubt that performing such a function for a Government would constitute a ‘relationship or association’ with the Government that would plainly make it inappropriate for a member of ITLOS to sit in a case involving the State of that Government. This is all the more so where the member concerned has also had a close professional relationship with the Government, including acting as counsel for the Government within the past three years.<sup>200</sup>*

In his letter of 19 September 2011, Judge Mensah clarified that this statement did not reflect the practice of ITLOS but was his understanding of an internal discussion within ITLOS on incompatible activities of the members of ITLOS.

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<sup>198</sup> Judge Greenwood’s Comments, paras. 6-7.

<sup>199</sup> Statement of Dame Rosalyn Higgins, paras. 4-6. Response of the United Kingdom, Annex 7.

<sup>200</sup> Statement of Judge Thomas A. Mensah, pp. 2-4. Reply of Mauritius, Annex 1.

180. Neither of the above Statements can be regarded as evidence of the general practice of the ICJ or of ITLOS on the precise point at issue. They are opinions of eminent jurists with a record of long service in those two bodies.
181. In the Tribunal's view, the fact that the procedure for the selection of the FCO Legal Adviser occurred "simultaneously" with Judge Greenwood's position as an arbitrator in the present proceedings has required that the Tribunal scrutinize Judge Greenwood's participation in that procedure with special care.
182. It is not in dispute that Judge Greenwood's participation in the selection procedure was advisory only; it did not entail any advice on legal issues; it was confined to advising on one aspect of the candidates' suitability; and it entailed membership of a panel whose conclusion was unanimous. Furthermore, Judge Greenwood's participation in the procedure was of considerably limited duration: the interviews, discussion and decision took place over two days.
183. Mauritius has sought to present that participation as part of a "continuing" relationship. With respect for the care with which Mauritius argued this issue, the Tribunal does not accept that analysis. Judge Greenwood considered that it was his very distance from the UK Government, following his appointment to the International Court of Justice, that made him suitable for the role. The Tribunal finds Judge Greenwood's role to be consonant with the requirements pertaining to the activities of a judge of the ICJ as set out in paragraphs 141-148 above. Bearing those requirements in mind, it is the Tribunal's view that, in the circumstances, Judge Greenwood's participation in this process, which was restricted to that particular purpose and which was essentially limited to a brief participation in a panel, neither constituted nor continued an already existing relationship. For this reason, such a limited activity, which did not involve his advice on legal issues, is not of the kind that would give rise to justifiable doubts as to his impartiality and independence concerning the case to be decided by the Arbitral Tribunal.

#### **J. Concluding Remarks**

184. The Tribunal wishes to state that, in its opinion, the present proceedings to challenge Judge Greenwood's appointment to the Tribunal were not without object and purpose. Mauritius advanced carefully fashioned arguments, invoking substantial material in support of its position. If in the end the Tribunal has decided to reject those arguments, it is not for lack of respect for the cogency with which those arguments have been presented. Moreover, Mauritius has at all times declared its respect for the probity and standing of Judge Greenwood. The Tribunal therefore trusts that the present proceedings will have served to clear the air.

#### **VI. COSTS**

185. At the conclusion of the oral hearing the United Kingdom asked that the costs of the Challenge proceedings be reserved for later decision by the Tribunal. The Tribunal will thus reserve that question for further argument at the Merits phase, having regard also to its present reasons.

## VII. DECISION

**NOW THEREFORE**, we, the other four members of the Arbitral Tribunal in this matter, having carefully considered the materials submitted by the Parties and by Judge Greenwood, and having established to our satisfaction our competence to decide this challenge in accordance with the agreement of the Parties,

### **HEREBY DECIDE:**

- (1) To dismiss the challenge against Judge Sir Christopher Greenwood CMG QC;
- (2) To defer any decision regarding the costs of the Challenge.

Done at The Hague on 30 November 2011.



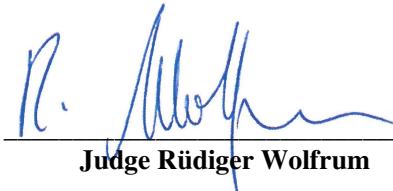
**Professor Ivan Shearer (President)**



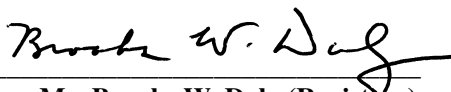
**Judge Albert J. Hoffmann**



**Judge James Kateka**



**Judge Rüdiger Wolfrum**



**Mr. Brooks W. Daly (Registrar)**