PERMANENT COURT OF ARBITRATION

ARBITRATION UNDER ANNEX VII OF THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

x

In the Matter of Arbitration Between:

THE REPUBLIC OF MAURITIUS,

and

THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

-x

PCA Reference MU-UK

Volume 3

HEARING ON JURISDICTION AND THE MERITS

Thursday, April 24, 2014

Pera Palace Hotel
Mesrutiyet Cad. No:52 Tepebasi, Beyoglu
Conference Room Galata II & III
34430, Istanbul-Turkey

The hearing in the above-entitled matter convened at 9:30 a.m. before:

PROFESSOR IVAN SHEARER, Presiding Arbitrator

SIR CHRISTOPHER GREENWOOD, CMG, QC, Arbitrator

JUDGE ALBERT J. HOFFMANN, Arbitrator

JUDGE JAMES KATEKA, Arbitrator

JUDGE RÜDIGER WOLFRUM, Arbitrator

Permanent Court of Arbitration:

MR. BROOKS W. DALY
Registrar
MR. GARTH L. SCHOFIELD
PCA Legal Counsel
MS. FIONA POON
PCA Legal Counsel

Court Reporter:

MR. DAVID A. KASDAN, RDR-CRR
Certified Realtime Reporter (CRR)
Registered Diplomate Reporter (RDR)
Worldwide Reporting, LLP
529 14th Street, S.E.
Washington, D.C. 20003
+001 202 544 1903
info@wwreporting.com

APPEARANCES:

On behalf of the Republic of Mauritius:

MR. DHEERENDRA KUMAR DABEE, GOSK, SC
Solicitor-General, Attorney General's Office
Agent of the Republic of Mauritius

MS. ARUNA DEVI NARAIN
Parliamentary Counsel, Attorney-General's Office
Deputy Agent of the Republic of Mauritius

Counsel:

PROFESSOR JAMES CRAWFORD, AC, SC
University of Cambridge

MR. PAUL S. REICHLER
Foley Hoag LLP

PROFESSOR PHILIPPE SANDS, QC
Matrix Chambers, London

MR. ANDREW LOEWENSTEIN
Foley Hoag LLP

MS. ALISON MACDONALD
Matrix Chambers, London

Advisers:

MR. SURESH CHUNDRE SEEBALLUCK, GOSK
Secretary to Cabinet and Head of the Civil Service, Republic of Mauritius

H.E. DR. JAYA NYAMRAJSINGH MEETARBHAN, GOSK
Ambassador and Permanent Representative of the
Republic of Mauritius to the United Nations, New York

MS. SHIU CHING YOUNG KIM FAT
Ministry of Foreign Affairs, Regional Integration and International Trade,
Republic of Mauritius

DR. DOUGLAS GUILFOYLE
University College London

MS. ELIZABETH WILMSHURST
Doughty Street Chambers (academic panel), London

MR. YURI PARKHOMENKO

Legal Researchers:

MR. REMI REICHHOLD
Legal Assistant, Matrix Chambers, London

MR. FERNANDO L. BORDIN

Assistants:

MR. RODRIGO TRANAMIL
MS. NANCY LOPEZ
Foley Hoag, LLP

On behalf of the United Kingdom:

MR. CHRISTOPHER WHOMERSLEY,
Deputy Legal Adviser, Foreign and Commonwealth Office
Agent for the United Kingdom

MS. MARGARET PURDASY
Assistant Legal Adviser, Foreign and Commonwealth Office
Deputy Agent for the United Kingdom

Counsel:

THE RIGHT HONOURABLE DOMINIC GRIEVE, QC MP
Her Majesty's Attorney General

SIR MICHAEL WOOD
20 Essex Street Chambers, London

PROFESSOR ALAN BOYLE
University of Edinburgh and Essex Court Chambers

MR. SAMUEL WORDSWORTH, QC
Essex Court Chambers, London

MS. PENELOPE NEVILL
20 Essex Street Chambers, London

MS. AMY SANDER
Essex Court Chambers, London

Legal Researcher:

MR. ERAN STHOEGER

Advisers:

MS. JO BOWYER
Foreign and Commonwealth Office, London

MS. MINA PATEL
Foreign and Commonwealth Office, London

MS. NEELAM RATTAN
Foreign and Commonwealth Office, London

MS. REBECCA RAYNSFORD
Attorney General's Office, London

MR. DOUGLAS WILSON
Attorney General's Office, London

C O N T E N T S

P R O C E E D I N G S

PRESIDENT SHEARER: Good morning, ladies and gentlemen.

Just before I call on Ms. Macdonald to resume her argument submissions, just two brief announcements:

First of all, the Tribunal was discussing this morning the difficulty in following all of the documentary exhibits that have the names of officials of both the U.K. and Mauritius, and we thought that it would be very helpful if at some time – not today or tomorrow, but next week – if there could be a kind of a dramatis personae, who was who in all this correspondence and dealings. And if perhaps we could just have one list. I think it's mostly on the U.K. side, but there are some names on the Mauritian side as well. If the two sides could actually put together a consolidated list of the names and their designations, where they stood in their respective bureaucracies and so on, we would find that very helpful.

And the other announcement, it that if anybody feels a need to remove their jacket or so on during the course of the proceedings, please feel free to do so without seeking the leave of the Tribunal.

All right. With that, Ms. Macdonald.

MAURITIUS v. UNITED KINGDOM

MERITS AND JURISDICTION HEARING

Speech 3 (Continued)

24 April 2014

Ms. Alison Macdonald

MS. MACDONALD: Good morning, Mr. President, Members of the Tribunal.

Firstly, on that first housekeeping point, we will liaise with the United Kingdom and make sure that we produce a list of dramatis personae to help you, and in the final minutes of my submissions this morning, I will be looking at some internal e-mails again, and I will help you as

best I can with the identities of those concerned. But, of course, when you come to look at that documentation afterwards, we will make sure that you have a list so that you can refer back.

56. Where we had reached yesterday afternoon was the point when we look at the Witness Statement produced by the Prime Minister of Mauritius, dealing, among other matters, with the meeting that he had with the U.K. Prime Minister Gordon Brown on the 27th of November 2009. I would ask you to have that statement in front of you. It's behind flag two because Professor Sands showed it to you briefly, 2.8. Mr. Sands took you to it on Tuesday afternoon, but I think it's appropriate to look at it now in a little bit more detail.

The Prime Minister explains that the meeting took place, some introductory paragraphs, and I'm really going to take up from Paragraph 8. He explains that the meeting was pre-arranged by both governments, and we see from Paragraph 7 that this was a tete-a-tete in the margins of the Commonwealth Heads of Government Meeting held in Port-of-Spain, Trinidad and Tobago from 27th to 29th of November 2009. The meeting was pre-arranged by both Governments. He gives the location, he gives the information about who else was present, and he indicates that Mr. Brown had expressed his gratitude about the way in which he had assisted in resolving a sensitive political matter. And really I ask you to take up from Paragraph 10, which is where the crucial material begins.

I won't read this verbatim, but it is, of course, quite significant, so I will take it fairly slowly.

"Mr. Brown recognized the positive leadership role I played on this issue," reiterated his thanks, and we then start getting into the issues about the "Marine Protected Area". "I therefore took the opportunity to convey to Mr. Brown the deep concern of Mauritius over the proposal of the United Kingdom to establish a 'marine protected area' around the Chagos Archipelago and the launching of a public consultation by the UK Foreign and Commonwealth Office on 10 November 2009, just two weeks earlier.

That announcement had been the subject of media attention. I indicated to

Mr. Brown that when the British High Commissioner in Mauritius had called on me on 22 October 2009 to announce the UK's proposal, I had expressed surprise that he was not able to offer me any document in relation to that proposal."

And you will recall that Mauritius only actually saw the consultation document on the day that it was made public generally.

"and told him I would raise the matter with the British Prime Minister during the forthcoming Commonwealth heads of government meeting in Port-of-Spain. I made very clear the objection of Mauritius to the UK's proposals."

So that was some background about the pre-existing statements of objection that the Prime Minister had made.

And we turn on now to the question of the bilateral talks, and the Prime Minister says: "I also conveyed to Mr. Brown that since the bilateral talks between Mauritius and the United Kingdom were intended to deal with all issues relating to the Chagos Archipelago, they were the only proper forum in which there should be further discussions on the proposed 'marine protected area'. I further pointed out that the issues of sovereignty and resettlement remained pending and that the rights of Mauritius in the Chagos Archipelago waters had to be taken into consideration."

"In response, Mr. Brown asked me once again: 'What would you like me to do?' I remember these words clearly. I replied: 'You must put a stop to it.' There could have been no doubt that I was referring to the proposed 'marine protected area'. Mr. Brown then said: 'I will put it on hold.' He told me he would speak to the British Foreign Secretary. He also assured me that the proposed 'marine protected area' would be discussed only within the framework of the bilateral talks between Mauritius and the UK"

And then I skip on. I just ask you to look at the final two paragraphs, 21 and 22. These indicate that Prime Minister Ramgoolam next met Mr. Brown on the 17th of April 2013 in

London. “On that occasion I mentioned my understanding."

So, of course, this is some years after the “MPA” has been declared.

"On that occasion I mentioned my understanding that the subject of his commitment to me had been raised in court proceedings in London, and reiterated the deep concern and disappointment of Mauritius at the purported establishment of a ‘marine protected area' by the United Kingdom around the Chagos Archipelago. Mr. Brown plainly understood the commitment to which I was referring. He did not deny that he had ever made such commitment. He did not indicate any surprise or lack of understanding of what I had raised. Mr. Brown simply said: 'The truth always comes out.'"

Prime Minister Ramgoolam informed the Mauritian National Assembly of these events on the 18th of January 2010 in a reply given to a Private Notice Question. So only a couple of months later. You have this Annex 15(1) of Mauritius' Reply. We haven't put this in your folders, but I can just tell you know what he said. He said, "It was my clear understanding that at the end of the meeting with the British Prime Minister that the Marine Protected Area project would be put on hold."

And he went on to tell the National Assembly that Mr. Brown had agreed that the MPA "would only be discussed during the bilateral talks between Mauritius and the U.K."

Now, what does the U.K. say in response to this very clear statement? At Paragraph 314 of its Rejoinder, it says: "As stated in the Counter-Memorial, inquiries were made at the time in December 2009, and Prime Minister Brown made clear that he had given no undertaking to withdraw the public consultation. The United Kingdom reiterates its response in the Counter-Memorial."

59. So, if we follow that back to the Counter-Memorial, the relevant paragraph, you can do this yourselves with your own copies of the pleadings in due course, the paragraph is 3.63. And what do we find? There, the U.K. says that, I quote: "When the allegation first arose in late

December 2009 that the U.K. Prime Minister had given any such undertaking to withdraw the public consultation, the Prime Minister was asked whether he had. He said he had not."

We ask you to note the use of the passive form here. Who asked the Prime Minister? How was the question phrased? What exactly was the answer? Did the question relate only to the consultation rather than the MPA itself? None of these questions are answered. And as Professor Sands has pointed out, this bald assertion is not supported by any evidence, any supporting document. The U.K. offers no evidence at all to contradict what Mr. Ramgoolam has said extremely clearly. It has not, notably, presented you with a witness statement from Mr. Brown. It has not sought to call Mr. Ramgoolam to challenge his account. His evidence stands uncontradicted other than by bare assertion, including by the Attorney General on Tuesday afternoon, who stated that: "We are quite clear that no such Government commitment was given."

Again, no evidence to back up that assertion. The others who follow me will draw the necessary legal inferences from this evidence. I simply place it before you as we say a significant part of the events leading up to the creation of the "MPA".

60. We now reach the final part in this story, the decision itself. The details of how that decision was reached are fairly scant in the U.K. pleadings, as you will have seen. But, fortunately, we get again a much fuller picture from the documents which came into the public domain during the domestic judicial review proceedings, documents which were available to the U.K. presumably and in their minds when they were drafting their pleadings but which they did not choose to put before you.

At this point, there is a small series of e-mails, which I will trace through – and this is the final part of my presentation this morning – a small series of e-mails which we can follow through which show how the decision was finally reached, and they start, if we go back to the blue Tab 6, which was my documents from yesterday, behind the blue Tab 6, we're going to start at

Tab 6 there, which in the red numbering at the bottom is 296 of the bundle.

61. So, if you all have that available, this is a memo from Ms. Yeadon to the Foreign Secretary, entitled "British Indian Ocean Territory, Proposed Marine Protected Area, Next Steps. This is a long memo, and again I will not go through it. We ask you to read it in full in due course, if you have the opportunity, but I will take you because it builds directly on the point I was discussing about the Witness Statement. I will take you to Paragraph 11 on Page 298.

"Mauritius' position hardened notably" – this is under a section 'Relations with Mauritius." "Mauritius' position hardened notably following the tete-a-tete between Gordon Brown and PM Ramgoolam at CHOGM. PM Ramgoolam has historically been moderate on BIOT, but he insists that Gordon Brown promised to halt the MPA consultation at CHOGM and he briefed the Mauritian press accordingly following his return from Port-of Spain." Redacted passage. And then, "He believes the FCO has ignored Gordon Brown's promise, and this causes him greatly to distrust our position, especially in an election year."

So, although this evidence was first formalized in a Witness Statement for the purposes of these proceedings, not only did, as I have shown you, Prime Minister Ramgoolam brief the National Assembly on what happened with Prime Minister Brown, but those within the Foreign Office were well aware that that was Mauritius' position at the time.

The only other paragraph I would ask you to look at from this memo now is paragraph 19, where again we see – and the picture that you will see from the following e-mails – that there is certainly not internal support for the idea of an immediate announcement of a full no-take MPA.

Paragraph 19: "None of the above" – so there she has been looking at the various challenges to the MPA – "None of the above is insurmountable and we must recognize that the majority of respondents to the consultation support an MPA, albeit with caveats relating to Chagossians. We could make a decision now. But, for the reasons set out above, we are likely to

be able to do so more securely and with less hostility if we take more time to work through the various issues. We therefore recommend a positive, but not definitive, announcement."

So, that's the position as of the 30th of March 2010. So this is two days before the decision is taken.

62. If we flip on to the next tab, we have the response that came from the Foreign Secretary's office, and we have the Assistant Private Secretary, Ms. Clayton to Chris Bryant MP, Parliamentary Under-Secretary of State, the Foreign and Commonwealth Office: "Dear Joanne, the Minister was grateful for your submission."

That is the submission which we just looked at.

"His inclination is to be bolder in our statement. He does not think it is likely we will be able to persuade the Mauritians or those fighting the Chagossian cause otherwise, but since the proposed MPA does not conflict with either our position on Mauritius or Chagossian rights, that we should actually decide to go ahead."

So, that's the next e-mail on the 30th of March.

We get to the next day, behind the next tab.

I have an e-mail from the High Commissioner at 8:30 in the morning on the 31st of March, and he is raising significant concerns, as we see. If we take up from the second line: "I think Miliband will be seeing a balanced view of where we stand. I've no idea if he'll follow the recommendation or not. If he DOES, then we'll be in a position of 'looking favorably' upon an MPA but having to work through 'issues' relating to Chagossians/Mauritius. I think this would be good and would provide the basis for a resumption of talks following both elections. If he goes for the Park straight away, we'll face problems. For you to carry forward with Joanne."

Now, what was the response to this from the Foreign Secretary? Well, if we go to the next tab: "Joanne, the Foreign Secretary was grateful for your submission and the copy of the report on the consultation. He has carefully considered the arguments in the submission and the

views expressed during the consultation. He was grateful for your further note today."

And I indicate here, of course, we haven't put in every single e-mail that's going backwards and forwards on these days but they are set out in full in the Rejoinder.

64. "He has considered the submission in light of the High Commissioner's views" – that is the e-mail which I just showed you – "and has given serious thought to the different possible options for announcing an MPA. The Foreign Secretary has decided to instruct Colin Roberts to declare the full MPA (option 1)" – option 1 being the no-take MPA – "on 1 April. There will then need to be an announcement to this effect."

So, then we have the reaction to this from the officials in the Foreign Office.

So, if we turn to the next tab, we have – and this is one of those e-mail chains which starts from the end, so if you would go to the second page of the document that's behind that tab, so that's Page 311 in the red numbering at the bottom, we have Ms. Yeadon, 11:47 on the 31st of March, saying: "The private office" – that is the Foreign Secretary's Private Office – "have just telephoned. The Foreign Secretary is minded to ask Colin to declare an MPA and go for option 1 (full no-take zone)" – capitals – "BUT FINAL DECISION NOT YET TAKEN. The Foreign Secretary has said that in an ideal world, he would like to go for declaring an MPA and spend the next 3 months reaching some sort of agreement with the Mauritian Government on the governance [management] of the area but making it clear that we will have 3 months to consult them. But if they haven't come to any agreement, we will go ahead anyway. He has asked for ideas, whether the move is feasible, what are the implications? His objective is to find a way to mitigate the Mauritian reaction. We need to get something to him this afternoon."

Our initial reaction here is that the Mauritians [redacted] and insisting that any MPA must deal with sovereignty and resettlement. They will find it hard to backtrack, especially as the U.K. will not be able to move on sovereignty and resettlement."

And then she indicates that the Mauritian election was called today.

And final paragraph: "Alongside this, we will need to stress that we are also concerned about the reaction from Parliament, Chagossians and threat of legal action and to stress the point about funding again."

So, if we follow that on to the previous page, Page 310 –

ARBITRATOR GREENWOOD: Ms. Macdonald, I'm sorry to interrupt you.

MS. MACDONALD: Yes.

ARBITRATOR GREENWOOD: This isn't a reaction to the document at your tab 9. These documents pre-date, don't they? They are the morning of the 31st of March. The letter from the Private Secretary at tab 9 is sent at 1755.

MS. MACDONALD: I'm so sorry, that has come out of order, yes; you're right.

ARBITRATOR GREENWOOD: I just wanted to be clear about that.

MS. MACDONALD: Yes, absolutely. You're right. I'm sorry, that's just a copying error.

Yes. So, it is a reaction to the High Commissioner's e-mail that was – concerns that were before it, but comes later in the day, yes.

ARBITRATOR GREENWOOD: While reading the e-mails, it looks as though there was a telephone call from the Foreign Secretary's Private Office.

MS. MACDONALD: Yes.

ARBITRATOR GREENWOOD: And that this e-mail chain you're now talking us through is a reaction to that telephone call. And then the document at Tab 9 is the announcement of the decision, internal announcement of the decision; is that right?

MS. MACDONALD: Yes.

ARBITRATOR GREENWOOD: Thanks.

MS. MACDONALD: That appears to be the case.

65. So we then have Mr. Roberts on the 31st of March at Page 310: "Joanne, I think we need

to give a clearer steer to the Foreign Secretary. I suggest the following."

And he then sets out five measures – or five proposals which I won't take you through one by one.

And then we have Mr. Allen from the – we understand – Southern Ocean Team at the Foreign Office: "Colin, I think this approach risks deciding, and being seen to decide, policy on the hoof for political timetabling reasons rather than on the basis of expert advice and public consultation. That's a very different approach to the one we recommended yesterday and which the Foreign Secretary is still considering. i) and ii)" – and we see below, as it is important to keep the numbering here – "i) and ii) are essentially what we have already recommended, but without the 3 year timeline."

Next: "Foreign Secretary decides now that BIOTA should establish a full no-take MPA in BIOT's EEZ." And notes there are a number of issues to resolve. But ii) to vi) are elements which you would expect along with others to be developed over time with the involvement of many stakeholders.

And I take you to the second paragraph: "I continue to think we have a better chance of getting a better result if we give ourselves a chance to work the many risks through. Some will never go away. But there are a lot we ought to be able to manage down if we don't get pushed by an election timetable. If the Foreign Secretary chooses to push faster, then so be it. But I don't think we should be encouraging him to think it is the best option, and I do think we should be flagging up risks, which will be with us for months/years to come."

Now, we go on to the following e-mail, which is from Mr. Murton. And again, we have the chains in the form that we've received them. So we see that 12:31 was the Mr. Allen e-mail; 12:45, then, is Mr. Murton's response. And this is a lengthy e-mail, and I don't propose to read it all out.

67. The first paragraph – and again this is significant, we say, in light of the fact that Diego

Garcia was ultimately excluded from the "MPA": "The Foreign Secretary should be made aware the timing could absolutely not be worse locally than to declare a full no-take MPA today. The only thing that could darken things further would be if any announcement also excluded" – I believe that says – "Diego Garcia from the MPA".

And jumping down: "Obviously the Foreign Secretary is free to make whatever decision he chooses. However, I would insist that he be made aware that to declare the MPA today could have very significant negative consequences for the bilateral relationship."

And then he discusses various options to mitigate those reactions.

68. Now, on the 31st of March, later on in a memo, some of the matters which were canvassed in e-mail are formalized. And in the next tab, tab 12, by Ms. Yeadon in a memo: "Restricted Minute. To: Colin Roberts (agreed in draft) and the Private Secretary/Foreign Secretary."

And she sets out, and I won't take you through it now, but it really draws together the strands of the correspondence that had taken place that day.

And we, for now, direct your attention to paragraph 7: "Our best defence" – flip over the page – "against the legal challenges which are likely to be forthcoming whenever we establish an MPA is to demonstrate a conscientious and careful decision-making process. A rapid decision now would undermine that."

So, that's all on the 31st of March.

69. Then, of course, on the 1st of April, the Foreign Secretary declared the "MPA". You have the announcement as an annex to Mauritius' Memorial.

And if I would ask you to turn back to the Prime Minister's Witness Statement – that's at Tab 2.8 – we can finish the story with his words.

70. If we go to Paragraph 19 of his statement, and he's referring to the 1st of April 2010: "Mr. Miliband called me on that very day to announce his decision. I told him I was totally surprised to hear that a Marine Protected Area would purportedly be created by the United

Kingdom around the Chagos Archipelago. I expressed to him my strong disapproval of such a decision being taken, in spite of the clear commitments given to me by Mr. Brown that the proposed Marine Protected Area would be put on hold. This was a commitment on which I placed reliance."

He then instructed that this Note Verbale be sent, and we will look at some of the correspondence relating to Mauritius' reaction to the "MPA" on Friday in the context of Article 283, but for now that concludes the story of the creation of the "MPA".

71. So, in conclusion, Mr. President, I have taken you through some of the evidence as to how the "MPA" came into being, and you will assess that evidence for yourselves. We say it shows that the "MPA" was implemented in haste. You have seen the serious concerns of the senior officials involved. They were fully aware of Mauritius' rights in the Chagos Archipelago, and the political nature of the decision was made quite clear by Mr. Roberts himself in the report, the "raft of measures designed to weaken the movement," which I took you to yesterday, and in his evidence in the English Court, and Professor Crawford will take up those matters later today.

Mauritius, as you have seen, was kept in the dark about all of this until very late on, and was then informed of the project in a way which couldn't but derail the process of bilateral negotiations that the parties were involved in at the time. And as you have heard from Mr. Ramgoolam himself, Prime Minister Brown promised to put the project on hold, but that promise was not honored.

So, what did this process leave us with? It left us with an MPA which claims to protect the pristine waters of the Chagos Archipelago, but which exempts the only island where humans actually live now, on the military base, which we recently discovered that for decades has been, among other things, blasting the coral, dredging the lagoon, and dumping human waste. We have an MPA which must be the only one in the world to have nuclear submarines in the middle of it, and we have an MPA which the U.K. claims to be proud of but which four years later

hasn't produced a scrap of legislation to implement.

72. Mr. President, Members of the Tribunal, that concludes Mauritius' presentation on the facts.

Before I ask you to call on Professor Crawford, may I ask whether any Members of the Tribunal have any questions for me.

PRESIDENT SHEARER: It appears not, Ms. Macdonald. Thank you very much.

So, I give the floor now to Professor Crawford.

PROFESSOR CRAWFORD: Mr. President, Members of the Tribunal.

PRESIDENT SHEARER: Professor Crawford, can I ask how long you will be? At the moment the schedule provides for a 15-minute break at 10:30. I leave it to you to decide when we should take that break at a convenient point in your argument.

PROFESSOR CRAWFORD: Yes, there are various convenient points in the argument, so I will pick one of them.

PRESIDENT SHEARER: Very good. Thank you.

Mauritius v United Kingdom

Speech 7: The United Kingdom is not a coastal State entitled to declare the "MPA" – The Principle of Self-Determination

Professor James Crawford AC SC

Mr. President, Members of the Tribunal:

1. A. Introduction

1. We now move to the law. In this presentation, I will discuss the impact of the principle of self-determination on the crucial issue of status – whether the United Kingdom was a coastal State entitled freely to declare an MPA irrespective of the wishes of the government and people of Mauritius. My colleague Mr. Reichler who will follow me will discuss breaches of specific

undertakings given to Mauritius: in particular he will argue that Mauritius was and is entitled to the rights of a coastal State based on these undertakings, specifically the undertaking of reversion. But first let me deal with the *lex generalis* of self-determination. I do so on the footing or on the assumption that there is no relevant jurisdictional limitation in Article 297 of UNCLOS or elsewhere – whether that is a *sound* footing is of course a question and it will be explored tomorrow.

Mr. President, Members of the Tribunal:

2. The exercise of certain rights under UNCLOS is premised upon the possession of a particular status. Only a 'coastal State' may exercise sovereign and jurisdictional rights over the territorial sea, the continental shelf and the exclusive economic zone. This is clearly set out in various provisions in the Convention, for example Article 56, which contains a list of the rights that a coastal State enjoys in the exclusive economic zone adjacent to its territory.

3. Now, what is a 'coastal State' is not defined by UNCLOS. It is a matter of general international law. Article 56 is not limited to States Parties to UNCLOS, but it *is* framed in terms of States and their coastlines. Thus, to determine whether a State is the coastal State entitled to exercise rights under the Convention this Tribunal is required to construe the term 'coastal State' in accordance with the 'relevant rules of international law applicable in the relations between the parties', as prescribed in Article 33(3)(c) of the Vienna Convention. Similarly, the applicable law provision in Article 293(1) of the 1982 Convention requires the application of 'other rules of international law' that may be relevant, as other Annex VII Tribunals and ITLOS Tribunals have recognised.

4. It is true that this raises jurisdictional difficulties certainly with respect to States which have made declarations under Article 298. The United Kingdom has made no such declaration, and we will come to that issue, as I have said, tomorrow.

5. When the United Kingdom declared an MPA on the 1st of April 2010, it purported to exercise sovereign and jurisdictional rights under Parts V and VI of the 1982 Convention. But the UK may not exercise rights that it does not possess, or is not entitled to assert unilaterally. Our task today is to demonstrate that the UK is not the coastal state having jurisdiction or, at any rate, exclusive jurisdiction, with respect to the protection and preservation of the marine environment of the Chagos Archipelago and adjacent waters under Article 56 UNCLOS. There are two reasons for this. First, by excising the Archipelago from Mauritius in 1965, the UK violated the right to self-determination to which the Mauritian people were then and still are entitled under international law. Second, by having undertaken to 'return' the Archipelago to Mauritius once it is no longer needed for defence purposes and by giving a number of other undertakings relating to natural resources, the UK has recognised, as a minimum, that it does not have unfettered sovereignty over the Archipelago.

6. In my presentation today I will deal with the first of these arguments, leaving the second to my colleague, Mr. Reichler. I will begin by establishing that at the time of Mauritius' independence – and, for that matter, at the time of the excision of the Archipelago three years earlier – the UK was bound to respect the rights of the people of Mauritius to decide on their own political future, this being the future of the entire territory of Mauritius as a self-determination unit. More than this, as an administering power, the UK was under an obligation to enable Mauritius to exercise its right to self-determination. I will then demonstrate that by excising the Archipelago from Mauritius – with no sufficient regard or no personal regard at all to the opinion of the population or of their representatives – the United Kingdom violated Mauritius' right to self-determination. Because it acquired control over the Archipelago unlawfully in this way, the UK has no valid claim to exercise sovereignty over the Archipelago.

7. I must once again draw your attention to the special context, the *sui generis* context – I accept, of course, that the words *sui generis* do not add anything to the word 'special' but it comforts us to use it – the *sui generis* context in which the present dispute arose. Professor Sands explained to you on Tuesday that this is not an 'ordinary sovereignty dispute'. There is simply no other case like it, and the United Kingdom has not been able to point to one. As we will demonstrate today, the dispute between Mauritius and the UK concerns a former colony's entitlement to the maritime zones around its rightful territory, in circumstances in which the UK has recognised that Mauritius has the attributes, or at least some of the attributes, of a coastal State.

2. B. The right to self-determination was clearly established at the relevant period and applicable to the UK

Mr. President, Members of the Tribunal:

(i) The emergence of the right to self-determination

8. The right to self-determination is a fundamental principle of international law. It has been described by the International Court as an *erga omnes* right[1] and as, and I quote, 'one of the major developments of international law during the second half of the twentieth century'[2](of course in the Kosovo opinion). I do not need to remind you that self-determination provided the legal underpinning for the process of decolonisation carried out under the auspices of the United Nations, which led to the creation of more than half the present number of States. Ever since the United Nations General Assembly adopted Resolution 1514(XV), the *Declaration on the Granting of Independence to Colonial Countries and Peoples* in 1960 – I will refer to in short as the 'Colonial Declaration' – it has been established that all peoples have the right to 'freely determine their political status and freely pursue their economic, social and cultural

[1] *East Timor* (Portugal v. Australia) Judgment, ICJ Reports 1995, para. 29.
[2] *Accordance with International Law of the Unilateral Declaration of Independence In Respect of Kosovo*, 22 July 2010, para. 82.

development'. The applicability of this right to colonial peoples finds ample support in the practice and *opinio juris* of States, and in the jurisprudence of the International Court.

9. Now, the standing of the principle of self-determination in current international law is not open to contest, and the UK does not contest it. But our opponents seek to persuade you that the UK was not bound to respect Mauritius' right to self-determination in 1965 – or even in 1968 – at the date of independence.

10. To the UK, the critical date for this purpose is 1965. But it was in 1968 that Mauritius exercised its right to self-determination, opting to become independent. Until 12 March 1968, the UK was directly responsible, under international law, for enabling the people of Mauritius to exercise that right with respect to its entire territory. Up to that date, the United Kingdom had the means to revoke, as a matter of domestic law, the Order in Council that detached the Archipelago from Mauritius. It was in 1968 that the composite act constituting the breach by the United Kingdom as a colonial power was accomplished – and that breach has a continuing character.

11. But even if this Tribunal was to decide that 1965 is the critical date rather than 1968 – I don't think anything turns on it – the applicable law would remain exactly the same. Self-determination started to emerge as a legal right already in the early 1950s. At Tab 7.1 of your folders you will find General Assembly Resolution 545(VI)[3] [Mauritius Legal Authority 89]. It is at page 317. In this Resolution, adopted on the 5th of February 1952, the General Assembly decided to include in the International Covenants on Human Rights, which were then under development, an article 'on the right of all peoples and nations to self-determination in reaffirmation of the principles enunciated in the Charter of the United Nations'. This same resolution makes the connection between the right of self-determination and the obligations of administering powers in relation to Non-Self-Governing Territories. I stress this was in 1952.

[3] GA res. 545 (VI) (1952).

It is not new. That is Tab 7.1 There are not very many tabs in this speech, I am relieved to say but there are some. This time I draw the purple color.

12. Now, in the Rejoinder the United Kingdom points to the fact that Resolution 545 and other early resolutions relied upon by Mauritius were adopted with a number of States voting against or abstaining. In fact, Resolution 545 was adopted by 42 votes in favour, 7 against and 5 abstentions. Diverging opinions on the character of self-determination were voiced, and the solution that the great majority of States favoured, was clear from the outset. Resolution 545 demonstrates that even in 1952 State practice was pointing the direction in which the right to self-determination would go.

13. The position of principle expressed in these resolutions was further strengthened by the subsequent practice of the General Assembly and the Security Council. And if there are any doubts that self-determination had become a legal right, they were dispelled by the powerful and unequivocal statement contained in the Colonial Declaration, which was adopted by 89 votes in favour, no votes against and 9 abstentions. It affirms that, and I quote, 'all peoples have the right to self-determination'— not a principle of self-determination; all peoples don't have a principle of self-determination — they have a right to self-determination.[4] And the practice that followed from that moment until the excision of the Chagos Archipelago and the independence of Mauritius serves only to corroborate the view that the right to self-determination was already well established in customary international law by the early 1960s.

14. The right to self-determination was described in those terms by authoritative contemporaneous sources. For example, Rosalyn Higgins — not a tear-away radical I think it would be fair to say — writing in 1963, affirmed that the *Colonial Declaration*, and I quote, 'taken together with seventeen years of evolving practice by United Nations organs, provides

[4] GA res. 1514 (XV) (1960).

ample evidence that there now exists a right of self-determination'.[5] That is in her book, *Development of International Law Through the Political Organs of the United Nations* at page 103 — early '60s. Remarkably, because the controversy about peremptory norms was just cranking up, other authoritative contemporaneous sources described self-determination not just as an ordinary rule of international custom, but also as a peremptory norm. In 1963, the International Law Commission referred to the principle as a contender for peremptory status. Peremptory status was itself a contender for peremptory status at the time. But self-determination was there at the beginning of that process. The first edition of Brownlie's *Principles of Public International Law*, published in 1966, stated, and I quote, 'certain portions of *jus cogens* are the subject of general agreement, including… self-determination'.[6] That's in 1966. As indicated in Mauritius' pleadings, there are other distinguished writers to the same effect. The United Kingdom stresses that these, however distinguished they may be or have become, these writers do not make international law.[7] Well, no doubt they do not, unaided. But the views of so substantial a body of distinguished scholars and practitioners, read in the light of practice and authoritative articulations such as Resolutions 1514 and 1541 of the same year, should be regarded as authoritative in stating what the law is.

15. The problem with the UK's position is that it takes an excessively formalistic and static view of how international law – and customary international law in particular – emerges and operates. International law is a dynamic system, and its dynamic in relation to self-determination was evident well before 1965. In 1960 alone, 17 African colonies achieved independence, increasing the membership of the United Nations by over 20 per cent, from 83 to 99 members. Over a dozen new States were created by decolonisation in the five years that

[5] Rosalyn Higgins, *Development of International Law through the Political Organs of the United Nations* (1963), p. 103.
[6] Clarendon Press 1966, p. 418.
[7] UKR, p. 96, fn 445.

followed the adoption of the Colonial Declaration and prior to the excision of the Archipelago. The process of Mauritius' decolonisation must be viewed in this context.

16. In 1971, the International Court confidently affirmed, in the *Namibia* opinion, and I quote: 'the subsequent development of international law in regard to non-self-governing territories – Mauritius was a non-self-governing territory – as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them'.[8] It did not hesitate to take into consideration the changes which had 'occurred in the supervening half-century' – that's a half-century prior to 1971 – changes that it considered to be well-established – even in interpreting a mandate agreement that had been concluded in 1919.

17. So we don't need the benefit of hindsight. It's impossible to look back to the 1960s and view what was happening as anything but the achievement of independence on the basis of the exercise of the legal right categorically affirmed by the General Assembly in 1960. It makes no sense to postpone to the 1970s the date when the right to self-determination can be said to have emerged. So it is far-fetched to argue, as the United Kingdom does, that it was not under an obligation to respect the right of the Mauritian people to freely determine their political status in the period 1965 to 1968.

(ii) The UK cannot claim to have been a persistent objector

18. Then we have another claim by the United Kingdom which is that the right of self-determination that may have emerged by the early '60s was not opposable to it. The United Kingdom attempted in its written pleadings to acquire the status – one might describe it as a retrospective status – of a persistent objector. It persists in seeking to be persistent half a century too late. But it cannot have been – and in fact did not even seek to qualify – as a persistent objector at the time when the right to self-determination emerged. This is for three reasons.

[8] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution(1970)*, Advisory Opinion, ICJ Reports 1971, para. 52.

19. First, as the United Kingdom itself argued before the International Court in the *Anglo-Norwegian Fisheries* case, a State cannot be a persistent objector to a 'fundamental principle' of international law.[9] In that case, the UK was referring to the drawing of baselines and the delimitation of the territorial sea. Now, one might doubt – as the Court in *North Sea Continental Shelf* doubted – that the rules on delimitation ever had such a fundamental character. But if ever there was a fundamental principle of international law, then and now, self-determination is one.

20. Secondly, the record shows that the UK was not an objector, let alone a persistent one, by the 1960s. If it was trying to be a persistent objector, it made an incredibly poor job of doing so. In fact, the main piece of evidence the UK produced in support of its claim to be a persistent objector is an internal document, 'Report of a Working Group of Officials on the Question of Ratification of the International Covenants on Human Rights' – which is Counter-Memorial, Annex 27.[10]

21. Well, internal documents do not establish persistent objection. They may establish the queries of officials, but that's a different matter. The position the UK adopted in international debates was thoroughly ambivalent, and fell far short of meeting the strict requirements of the persistent objector rule, assuming for the sake of argument that such a rule exists. For example, in the plenary debates that preceded the adoption of the *Colonial Declaration*, the United Kingdom conceded that there was, and I quote, 'no argument about the right of the people [of colonial territories] to independence' and 'no argument whether the people will be independent or not'.[11] But the crucial factor to consider is the position the UK adopted when the *Colonial Declaration* was put to the vote at the General Assembly. It abstained. If it really were a

[9] *Fisheries (United Kingdom v Norway)*, Reply of the United Kingdom (28 November 1950), Pleadings, vol. II, p. 429.

[10] Report of the Working Group of Officials on the Question of the Ratification of the International Covenants on Human Rights, 1 August 1974 (UKCM, Annex 27).

[11] Official Records of United Nations General Assembly, Fifteenth Session, 925th Plenary Meeting, 28 November 1960, 10.30 a.m., UN Doc. A/PV.925, para. 50.

persistent objector seeking to avoid the binding application of the right to itself, it should have voted *against.* I would refer you to Tab 7.2 of your folders which contains the record of the 947th Plenary Meeting of the General Assembly on the 14th of December 1960, and I apologize that this was not put in to the legal authorities; it should have been. It is a public document of course. It contains part of the procedure by which the *Colonial Declaration* was adopted. It is at page 319. You will find there the British Delegation's explanation of vote in relation to the *Colonial Declaration*. Most of the objections of the UK concerned what it considered to be implied criticism of its policies as a colonial power. The key paragraph is paragraph 53, which is at page 323 of the folder, and I will read it:

"The United Kingdom, *of course*, subscribes wholeheartedly to the principle of self-determination set out in the Charter itself, and we feel that we have done as much to implement this principle during the past fifteen years as any delegation in this Assembly. Nevertheless, members of the Assembly will be familiar with the difficulties which have arisen in connexion with the discussion of the draft International Covenants on Human Rights and in defining the right to self-determination in a universally acceptable form. These difficulties have not yet been finally resolved by the Assembly, and we feel that it *might have been better* not to make the attempt now in a rather different context."[12]

Well, that is not the Superman of persistent objection. It is the mild-mannered reporter. No sign of a phone box.

22. As a colonial power watching its Empire dissolve, it was not surprising that the UK would be careful in debates leading to the articulation of self-determination as a legal right. It was affected by those debates. But the UK did not deny the <u>existence</u> of the right. It only expressed doubts of an indefinite kind in relation to its content. That does not come even close to meeting the onerous burden of persistent objection in international law.

[12] United Nations General Assembly, 947th Plenary Meeting, 14 December 1960, GAOR, p. 1275, para. 53 (emphases added).

23. Third reason, by 1967 it was possible to discern a shift in the position of the United Kingdom in international forums—from ambivalence, in the passage I just read, to stronger support for the notion that self-determination constituted a right. And as we know, the position of the United Kingdom on key disputes at present is founded on self-determination. This is evident in the records of the preparatory work for the 1970 *Friendly Relations Declaration*. The UK made a proposal to the Special Committee which was working on the Declaration, in which it affirmed the 'duty to respect the principle of equal rights and self-determination' and made it clear that the principle was applicable 'in the case of a colony or other non-self-governing territory'.[13] Discussing this proposal at a meeting of the Special Committee – this was in 1967 – the UK representative stated that the position that the UK had held 'in the past' – one of opposition to defining self-determination as a right – was being 'held in abeyance'.[14] One year later, in 1968, the United Kingdom signed the two human rights Covenants, both of which recognise in Article 1, pursuant to that decision of 1952, the right of peoples to self-determination by which 'they freely determine their political status and freely pursue their economic, social and cultural development'. It's true that the United Kingdom made a declaration to common Article 1, a declaration that maintained on ratification in 1976, that in the event of conflict between 'Article 1 of the Covenant and the United Kingdom's obligations under the Charter (in particular, under Articles 1, 2 and 73 thereof) [its] obligations under the Charter shall prevail'. But this would have been true in any event by virtue of Article 103 of the Charter, and it hardly amounted to an objection, persistent or otherwise, relevant to the present case. It affirmed Article 73.

[13] United Nations General Assembly, Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States (1969), UN Doc. A/7619, 71.

[14] United Nations General Assembly, Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States (1969), Summary Record of the Sixty-Ninth Meeting, 4 August 1967, 10.30 a.m., UN Doc. A/AC.125/SR.69, p. 18.

24. In short, the UK was not a persistent objector to the right to self-determination, which was well established as a matter of international law in the early 1960s. The record indicates that, although the United Kingdom may have shown some hesitation in characterising self-determination as a right, this hesitation was far too vague and inconsistent to have had the effect of precluding the binding application of this fundamental principle to the United Kingdom in 1965.

25. In the Rejoinder, the UK responds to Mauritius' attack on the persistent objector argument by suggesting that it had not shown that the UK had 'agreed' that the right of self-determination reflected international law.[15] This is neither true nor to the point: by 1965 self-determination as a principle was well-established: even if its earlier arrival had been accompanied by a grumble of dissenters. By the 1960s this grumble of dissenters did not include any consistent voice from Her Majesty's Government.

3. C. By Excising the Chagos Archipelago from Mauritius the UK breached Mauritius' right to self-determination

Mr. President, Members of the Tribunal:

26. I turn from these remarks on the standing of the right of self-determination to the specific question of how the United Kingdom breached it when it partitioned the territory of Mauritius in 1965 by excising the Chagos Archipelago.

27. If what I've said is right, then at the time of the excision, Mauritius had the right to exercise self-determination and to freely determine its political status in respect of the entirety of its territory, which included the Archipelago. Yesterday, Ms. Macdonald established that the Archipelago was and remains an integral part of Mauritius. As such, it was and remains protected by the principle of territorial integrity, stated in paragraph 6 of the *Colonial*

[15] UKR, para. 5.21.

Declaration, reproduced at Tab 7.3 of your folders, page 333. [MM Annex 1] Paragraph 6 of course prescribes, and I quote:

"Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."[16]

28. I should clarify two points here. First, the territorial integrity of non-self-governing territories is an essential aspect of the right to self-determination, which can only be waived by the freely expressed wishes of the people concerned. The colonial power did not have the right or the authority arbitrarily to dismember a non-self-governing territory before the people had had any chance to exercise the right to decide on its own political future. Affirming otherwise would deprive the right to self-determination of its meaning; it would also negate the obligations that a colonial power has to enable the exercise of the right.

29. This interpretation is confirmed by numerous resolutions adopted by the General Assembly. For example, Resolution 2232(XXI), which I discussed yesterday and which is reproduced at Tab 4.13 of your folders [MM Annex 45]. You do not need to turn it up again. Referring to the situation of various non-self-governing territories including Mauritius, the Assembly confirmed the applicability of paragraph 6 of the *Colonial Declaration* to colonies and reiterated that, and I quote:

"Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of colonial Territories… is incompatible with the purposes and principles of the Charter of the United Nations and of General Assembly resolution 1514(XV).[17]"

30. In its written pleadings the United Kingdom has sought to downplay the relevance of General Assembly resolutions, noting that they are not binding or dispositive. Well, that's true; they're not binding as such, as a general matter. The position that the Assembly has taken on

[16] GA res. 1514 (XV) (1960).
[17] GA res. 2232 (XXI) (1966).

questions of self-determination is authoritative, as the Court recognised in *Western Sahara*. The Court there referred to the 'measure of discretion' that the Assembly enjoys in determining 'the forms and procedures' for the fulfilment of the right. It noted that the right to self-determination of the people of Western Sahara—constituted 'a basic assumption of the questions put to the Court'.[18] The General Assembly had a special role in developing and implementing the right, and some of its resolutions have been universally regarded as law-making particularly in this field, like the *Colonial Declaration*; others are regarded as determinative in the implementation of self-determination, as the Court noted in *Western Sahara.*

31. Resolutions of the General Assembly not only confirm that the territorial integrity of non-self-governing territories is an essential element of self-determination—the Assembly specifically concluded that the excision of the Chagos Archipelago constituted a breach of the right of self-determination. That was in Resolution 2066(XX), tab 4.12 of your folders. I read the relevant paragraph yesterday, and I won't read it again. The Assembly further reaffirmed the 'inalienable right of the people of the Territory of Mauritius to freedom and independence'.

32. Finally I should refer to the United Kingdom's argument that Mauritius has failed to address the allegation that the UK has not relinquished sovereignty since the islands were ceded from France in 1814.[19] I hope I have stated that argument accurately because I find it incomprehensible; this may be a weakness of mine. As we have shown, the Chagos Archipelago was part of the colony of Mauritius in 1945. The principle of self-determination was applied to its territory as such, far flung though it was. No distinction has ever been made in international practice based on different modalities of the acquisition of colonial territory, whether by cession or otherwise. It is true that there is a disputed body of practice dealing with colonial territories claimed by third States, but the Archipelago was not so claimed at any time after 1945, or for that matter after 1814. Paragraph 6 of the *Colonial Declaration* applies to all

[18] *Western Sahara*, Advisory Opinion, ICJ Reports 1975, para. 70.
[19] UKR, para. 5.7.

colonial territories identified as such pursuant to Resolution 1541(XV), irrespective of how those territories might initially have been acquired by the colonizer – and that point was confirmed by the Court in *Western Sahara*.

Mr. President, this would probably be the first of the convenient moment to break

PRESIDENT SHEARER: Very good, Professor Crawford.

The Tribunal will break for 15 minutes. We will return at 10:45.

Thank you.

(Brief recess.)

PRESIDENT SHEARER: Yes, thank you, Professor Crawford.

PROFESSOR CRAWFORD: Thank you, sir.

33. The conclusion – that the excision of the Archipelago was a breach of international law and specifically of paragraph 6 of the Colonial Declaration – is not affected by the International Court's recent pronouncement on the principle of territorial integrity in the *Kosovo* opinion, as the UK suggests in its pleadings. In the *Kosovo* opinion in 2010 the Court clarified, and I quote, 'the scope of the principle of territorial integrity is 'confined to the sphere of relations between States'.[20] But the Court was not making this point in connection with any claim of self-determination, the application of which to Kosovo was of course controversial. Serbia was not administrator of a non-self-governing territory and there was no claim that a colonial power had attempted to breach the territorial integrity of Serbia by excising Kosovo from it. Serbia sought to invoke the principle of territorial integrity as a defence against an attempt by one of its constituent units to separate and become an independent State. The Court's *dictum* stands for the proposition that States may not invoke territorial integrity as a legal barrier to declarations of independence coming from internal territorial units.

[20] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, para. 80.

34. The situation that stands before you in the present case is quite different. From the perspective of international law, the relations between a colonial power and one of its non-self-governing territories are not purely 'domestic constitutional relations'. They're not within the reserved domain of domestic jurisdiction. They were and are in key respects analogous to the 'relations between States' to which the Court referred in the *Kosovo* opinion. This is so because while international law does not, generally speaking, govern the relations between constituent units within a State, the law of self-determination by the early 1960s directly governed the relations between metropolitan States and their colonies and included a guarantee of territorial integrity for the colonial territory. If metropolitan States could lawfully dismember the territory of the colonies for the administration of which they are responsible, the right of self-determination would be an empty shell. Metropolitan States could keep the bits they wanted and discard the rest. Territorial integrity may not protect States against internal attempts at separation, but it surely protects a colony against decisions of the colonial power that affect the territory with respect to which the right of self-determination is to be exercised.

35. Likewise, the right of the people of Mauritius to exercise self-determination with respect to its entire territory is not prejudiced by the principle *uti possidetis juris*. In our Memorial, we made a passing reference to the principle of stability of boundaries to highlight that territorial integrity shares a common rationale with *uti possidetis* – that of safeguarding the right to self-determination. Territorial integrity preserves the exercise of self-determination before independence is achieved, protecting the non-self-governing territory from prejudicial territorial changes that the metropolitan State may seek to enforce. *Uti possidetis* protects self-determination after independence, as the International Court noted in *Burkina Faso/Mali*.[21]

36. In its written pleadings, the UK attempts to turn Mauritius' argument upside down. It claims that *uti possidetis* 'fully supports' its own position by protecting the administrative

[21] *Burkina Faso/Mali*, ICJ Reports 1986, para. 25.

boundaries existing at the time of Mauritius' independence in 1968.[22]But this is disingenuous. First, the creation of the "BIOT" did not involve the emergence of a newly independent State, but the retention of part of the territory of a colony by the colonial power. As the International Court made clear, *uti possidetis* is 'logically connected' with the emergence of States through decolonization.[23]Again, that's *Burkina Faso/Mali.* Secondly, *uti possidetis* cannot be construed as protecting international boundaries unlawfully established through a serious breach of the right of self-determination. This would be diametrically opposed to the rationale and purpose of *uti possidetis*, which is to promote the stability of the boundaries of lawfully created States whose peoples have expressed the wish to become independent as a unit.

4. D. The people of Mauritius did not waive their right to territorial integrity by a free expression of their wishes

I turn to the third part of this presentation, which concerns the question whether the people of Mauritius waived their right to territorial integrity through a free expression of their wishes.

Mr. President, Members of the Tribunal:

37. The right that the people of a non-self-governing territory enjoys to 'freely determine [its] political status' corresponds to the obligation, on the part of the colonial power, to ensure that the people in question is in a position to freely express its wishes. This is what the law as reflected in the *Colonial Declaration* requires, no more and no less. The Court stated this obligation in even clearer terms in the *Western Sahara* opinion, when it said, and I quote, 'the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned'.[24]

[22] UKR, para. 5.8.
[23] *Burkina Faso/Mali*, ICJ Reports 1986, para. 23.
[24] *Western Sahara*, Advisory Opinion, ICJ Reports 1975, para. 55.

38. Now, our opponents of course argue that the representatives of Mauritius 'agreed' to the detachment of the Chagos Archipelago, at the fourth Constitutional Conference in 1965 and subsequently. What they cannot demonstrate is that this 'agreement' constituted a free and genuine expression of the will of the people of Mauritius.

39. I explained yesterday in detail how it was that the United Kingdom obtained the 'agreement' of the Mauritian ministers to excision. The decision to excise was made by the UK unilaterally in advance, with no consultation with the people. It was not beneficial to Mauritius or in its interest. It fulfilled Anglo-American security interests in the Indian Ocean, involving the construction of a military base in Diego Garcia as well as the removal of the Archipelago's population. The UK took advantage of this Constitutional Conference, in which the political future of Mauritius was on the agenda, to induce the Mauritian delegates not to oppose the partition of the colony.

40. We looked carefully at the record yesterday. The evidence shows two things. First, at the Constitutional Conference, United Kingdom made it clear that the excision of the Chagos Archipelago was non-negotiable. Prime Minister Wilson and Colonial Secretary Greenwood were caught on record informing Mauritius that it was a legal right to detach the islands, and that the United Kingdom would do so by an Order-in-Council whether or not Mauritius gave its consent.

41. Secondly, the United Kingdom made it known to the Mauritians that they must consent to the excision if they wanted to see any progress in the negotiations leading to independence. I won't go back to the documents which established that yesterday. While the UK made an effort in its pleadings to portray the questions of independence and partition as separate, it is quite clear that they were not.

42. What it comes down to is this. The agreement to dismemberment of the territory of Mauritius was obtained in a situation amounting to duress, or at least analogous to duress. It

completely contradicted the position that the Mauritian representatives had always defended. The outcome was pre-determined, independence was at stake, and preserving the territorial integrity of the colony was not an option available to the Mauritian ministers.

43. The UK responds to the allegation of duress by referring to the criteria laid down in Articles 51 and 52 of the Vienna Convention on the Law of Treaties, on coercion of a representative of a State and coercion of a State itself by the threat or use of force.[25] It says, and I quote: '[i]f a deployment in negotiations between political leaders of their respective understandings of the domestic political position and ambitions were to amount to duress or coercion for the purposes of international or domestic law, all politics and all negotiations between governments would infringe these principles'.[26] Once again, the UK views the relations between the British and Mauritian authorities with no regard to the context in which it took place, or to the applicable legal framework.

44. This calls for two comments. First, your Tribunal should be careful – I say this with all respect – not to approach these exchanges as negotiations between equal parties. At the one end of the table was a powerful colonial power with far more leverage than the representatives of the colony sitting at the other end of the table.

45. Second, at the moment in which the UK came to the table it committed a serious breach of its obligations to give effect to the right of self-determination of the people of Mauritius by insisting that excision was a certain outcome. There was no choice whether or not to allow the detachment. The reason that the UK wanted the assent of the Mauritian authorities was not concern that the detachment was in accordance with the wishes of the people of Mauritius. It needed the agreement because it feared criticism.

46. The questions that stand before you are thus the following: does an agreement given to a measure that was not proposed but imposed, and required in return for independence to which

[25] UKCM, para. 7.38, fn 570.
[26] UKR, para. 5.25.

Mauritius was already entitled, constitute a genuine expression of the will of the people? Did the UK comply with its obligations under the law of self-determination when it obtained the agreement in such a way? In its Counter-Memorial, the United Kingdom concedes, as if it was not at all problematic, that 'the Council of Ministers [of Mauritius] secured benefits – a "deal" – in return for their consent, in full knowledge of the fact that the excision would have been effected without their consent, and without any benefits to Mauritius'.[27] That's at paragraph 2.61 of the Counter-Memorial. Is this the type of 'deal' that a colonial power can procure in accordance with the law of self-determination? The question answers itself.

47. The UK gave priority to its security interests in preference to the right of the people of Mauritius to self-determination. It cornered the representatives of Mauritius, and made sure that they acquiesced to a deal which neither they nor the people of Mauritius wanted.

48. That this is an accurate version of the facts is demonstrated by the international community's condemnation of the excision, notably in resolution 2066 (XX), to which I took you yesterday. The United Nations was not rightly convinced that the deal had been reached in accordance with the requirements of self-determination.

49. The same position was taken by the vast majority of States in a variety of forums, including the Non-Aligned Movement, the Group of 77, the African Union and so on.

50. The view held by so many States as to the illegality of the partition of the territory of Mauritius discredits the United Kingdom's version of the facts. So does Mauritius' repeated attempts to resume exercising *de facto* the sovereignty to which it is entitled *de jure*. And you have in the record the various accounts of Mauritius' protest, which again I dealt with yesterday.

51. I need only add that in addressing the issue of the occasional failure of protest after independence, the Tribunal should, with respect, apply the standard articulated by the International Court in the *Certain Phosphate Lands* case. There the Court had to deal with a

[27] UKCM, 2.61.

somewhat analogous argument of acquiescence based on delay. It said – this is at paragraph 36 of the judgment:

"The Court... takes note of the fact that Nauru was officially informed, at the latest by letter of 4 February 1969, of the position of Australia on the subject of rehabilitation of the phosphate lands worked out before 1 July 1967. Nauru took issue with that position in writing only on 6 October 1983."

It's only 16 years later.

"In the meantime … the question had on two occasions been raised by the President of Nauru with the competent Australian authorities."

But not in writing.

"The Court considers that, *given the nature of relations between Australia and Nauru*, as well as the steps thus taken, Nauru's Application was not rendered inadmissible by passage of time. Nevertheless, it will be for the Court, in due time, to ensure that Nauru's delay in seising it will in no way cause prejudice to Australia with regard to both the establishment of the facts and the determination of the content of the applicable law."[28].

It's a very carefully considered paragraph.

It is true that that decision was made at the preliminary objections stage, and that acquiescence by Nauru could still formally have been pleaded by Australia as somehow relevant to the merits. But in light of the Court's approach, can there be any doubt as to what the result would have been? Yet Nauru's silence on the rehabilitation of the phosphate lands mined before independence lasted rather longer than there was the case here.

5. E. Conclusion

Mr. President, Members of the Tribunal:

[28] ICJ Reports 1992 p. 240 at p. 254-5 (para. 36) (emphasis added); see also ibid., p. 255 (para. 38).

52. For the reasons given, Mauritius is the only state entitled to exercise sovereign and jurisdictional rights over the Archipelago under UNCLOS. The basis on which the United Kingdom now purports to establish a Marine Protected Area reflects back to a serious breach of a fundamental principle of international law.

53. The sovereignty the United Kingdom had over Mauritius as a colonial power prior to independence was qualified – not displaced but qualified – by Mauritius' right to self-determination. When Mauritius became an independent state, the sovereignty that the UK continued to exercise over territory unlawfully detached became legally untenable. That breach has a continuing character. It will only cease when the Archipelago is returned to Mauritius or the dispute otherwise settled.

54. If your Tribunal decides that the United Kingdom is entitled to declare an MPA with respect to the Archipelago, it will, with great respect, contribute to consolidating an unlawful situation that denies the right of Mauritius to self-determination and to its territorial integrity. On that basis, Mauritius respectfully requests the Tribunal to declare that the United Kingdom was not entitled to declare an MPA.

Mr. President, this is a convenient moment to respond to two questions asked yesterday by Judge Greenwood and Judge Wolfrum. Judge Greenwood asked two questions, one about the legal status of the Lancaster House commitments in international law, and one about their content. Mr. Reichler will deal with the latter question. I'm going to deal with the former question.

Judge Greenwood asked, and I quote: "What is the legal basis on which Mauritius says these undertakings are binding because, of course, whatever form they took, they were given at a time when Mauritius was still a colony? So, is Mauritius' case that they're a treaty or the otherwise binding is some form of international law agreement, or are you looking to another

legal system, or are you saying that their nature changed over the years?" That was the question.

The answer emerges from what I just said about the role of the international law of self-determination. In 1965, as the process of the move to independence was underway, the relations between Mauritius and the United Kingdom were not matters of United Kingdom domestic jurisdiction insofar as they concerned the exercise of the right to self-determination, including the territorial integrity requirement. In principle, international law required free consent of the people concerned or their representatives to any dismemberment of a Chapter XI territory.

Now, that consent could be given on condition; and, in this case, as I've shown earlier, the consent was obtained in conditions of duress. Such consent as was given was given on condition, notably the reversion condition, and the other condition as Mr. Reichler discussed yesterday.

This was not a treaty, but it was a binding commitment by the United Kingdom intended to procure consent.

Now, the United Kingdom cannot be in a better position as to the binding character of the commitments it made in 1965 because the General Assembly judged – and maybe this Tribunal will also judge; we submit that it should – that the consent was obtained by duress or improper pressure. In either case, the commitment is binding.

Further, the commitment was confirmed by U.K. Ministers and senior officials following the independence of Mauritius. There was no discontinuity. One notable example is the assurance given by the United Kingdom Minister Mr. Rollins in 1975, which is at Annex 78 of the Reply. He wrote on 23 March 1975 to the High Commissioner of Mauritius: "To repeat my assurances Her Majesty's Government will stand by its undertakings reached with the Mauritian Government concerning the former Mauritian islands now formally part of the British

Indian Ocean Territory and in particular" – in particular, it wasn't the only assurance – "they would be returned to Mauritius when they're no longer needed for defence purposes."

Such statements by the United Kingdom Ministers made in the context of State-to-State relations, of course, confirm the binding commitments made before independence and represent the repetition of undertakings under international law which are binding on the Nuclear Tests principle.

We note that successive lawyers in the legal advisers' office, including Sir Arthur Watts, as he would become, characterize the situation as giving rise to rights for Mauritius and correspondingly its obligations to the United Kingdom. We have not been able to see the detailed legal reasoning behind that conclusion, but it was consistent over many decades. In the circumstances of the case, the United Kingdom is either precluded by operation of law in accordance with the good faith principle or estopped by its own conduct from treating the undertakings it then made as not giving rise to rights of Mauritius.

I should say that we referred to the international practice, which was contemporaneous with the excision, in particular Paragraph 526 of our Reply. I won't go through those details, but I refer you to it for more detail on the point.

In this context, I should also deal with Judge Wolfrum's question put to Mr. Reichler but ceded kindly to me. This is not a case of return or reversion. There has been a detachment of the question. Unlike Mauritius, I genuinely and without duress consented to that.

Judge Wolfrum asked, “could you give us a qualification of the consent” – this is the question from the Transcript – “given by the Ministers of Mauritius to separate the Chagos Archipelago, was that a legal commitment or how would you qualify it? I should very much like an assessment, a legal assessment of that, qualification of the consent given.”

As I said yesterday, a form of consent was given, but it was given under circumstances amounting to duress. It was therefore not a valid consent for purpose of international rules embodied in the *Colonial Declaration* adopted by the General Assembly.

Mr. President, that's all I have to say on self-determination, unless there are any questions from the Tribunal. If not I would ask you to call on Mr. Reichler.

PRESIDENT SHEARER: Very good. Thank you, Professor Crawford.

So, I give the floor now to Mr. Reichler.

Thank you.

THE LEGAL IMPLICATIONS OF

THE UNITED KINGDOM'S UNDERTAKINGS TO MAURITIUS

Paul S. Reichler

24 April 2014

Mr. President, Members of the Tribunal, good morning.

Yesterday I presented the facts regarding the undertakings made by the United Kingdom to Mauritius in September 1965, the repeated renewal and reconfirmation of those undertakings by the U.K. in subsequent years, and the U.K.'s fulfillment of them over the 45-year period between September 1965 and April 2010. Today, as I indicated at the end of yesterday's remarks, I will address the legal implications of these undertakings.

There are two. First, the undertakings are legally binding on the United Kingdom. Second, they irrevocably endow Mauritius with the attributes of a coastal State under the 1982 Convention. I will address each of these conclusions in turn, and show how the second flows inevitably from the first.

Mauritius and the United Kingdom are agreed on the applicable rule of law that determines whether the undertakings are binding. As the United Kingdom stated in its Rejoinder: "What matters in this, as in any case, is whether there was the requisite intent to be bound so as

to establish legal obligations….[W]hat is determinative is the existence of the intention to be bound." (para 8.10). Now, I want to be very careful not to take the U.K.'s statements out of context on this very fundamental issue. So, Mr. President, with your indulgence, I will display on the screen the two full paragraphs from the Rejoinder, 8.10 and 8.11, that articulate the U.K.'s position.

We do not agree with everything in these paragraphs, but on the applicable legal standard we are in agreement. Paragraph 8.10: "The central point, however, is that this internal documentation is not relevant." [Of course, this is something we do *not* agree with, as I discussed with you yesterday, we believe the 28 contemporaneous British documents are not only relevant, but dispositive]. Continuing with the Rejoinder: "It is for the Tribunal to interpret the 1965 understanding (or whatever Mauritius wishes to call it) and to determine whether they establish legal obligations on the United Kingdom and, if so, what those obligations are." [Now, we fully agree with the U.K. on this: it *is* for this Tribunal to determine whether the U.K.'s undertakings establish legal obligations, and what they are.] Continuing: "As a general matter, limited weight is to be accorded to what an instrument is called; and the descriptors employed in subsequent internal communications of one party can only be immaterial." [Well, this is certainly a defensive statement, and, after yesterday, I think we know why the U.K. is so defensive about its internal communications, especially the 28 British documents that we reviewed – many of which were not internal at all, but communications from senior British officials to senior Mauritian officials. But even internal communications can be highly material if they reflect an intention to be bound by the undertakings that were made.] Next is the crucial part. *What matters in this, as in any case, is whether there was the requisite intent to be bound so as to establish legal obligations.* [We completely agree, and this is the main point.] They go on: "Mauritius relies on the *Nuclear Tests* cases to support a *generalized* proposition that undertakings are binding. This is not a tenable characterization, even leaving to one side the point that Mauritius was not a State

in 1965. [This, in fact, is a mischaracterization of our argument. We do not subscribe to a "generalized proposition that undertakings are binding." Instead, we agree fully with the next two sentences of this paragraph.] As is clear from the passage of *Nuclear Tests* to which Mauritius refers, *what is determinative is the existence of the intention to be bound.* It is only as a result of such an intention that a declaration becomes 'a legal undertaking' (to use the Court's phraseology." That is our position, too.

Paragraph 8.11 of the Rejoinder: "In performing its interpretative exercise, the Tribunal *may wish to look at the subsequent practice of the parties in the sense of their exchanges over the decades from 1965*, in particular whether any binding commitment was given, or agreement was reached, as between States in the period subsequent to the independence of Mauritius. [We agree with this, too; although, as Professor Crawford has explained, in response to Judge Greenwood's question, Mauritius also believes that, in the circumstances of this case, the undertakings made by the U.K. to Mauritius in 1965 – even before Mauritius became a State were binding, as were the U.K.'s repeated renewals and reconfirmations of these undertakings after Mauritius became independent in 1968.] Insofar as the Vienna Convention on the Law of Treaties is to be looked at by way of analogy (it is emphasized that, in considering the 1965 understanding, the Tribunal is not interpreting an agreement reached or a statement made at the international level), *such practice would fall to be taken into account to the extent that it establishes the agreement of the parties*." Leaving aside the parenthetical remarks, we agree again.

So, to summarize, Mauritius and the U.K. agree on three key principles: First, what matters, what is determinative, is the existence of the intention to be bound. Second, it is for the Tribunal to interpret the U.K.'s undertakings to Mauritius to determine whether they establish legal obligations on the U.K. and, if so, what they are. And third, in performing its interpretative exercise, the Tribunal may look, indeed is encouraged to look, at the subsequent practice of the

parties with a view to establishing as a matter of fact whether there existed an intention to be bound such that legally binding commitments were given.

Mr. President, we submit that, under these principles, these agreed principles, the contemporaneous documentary evidence, which I reviewed with you yesterday, and which describes in considerable detail the exchanges between the parties in 1965 and their subsequent practice over the next 45 years, leaves no doubt about the United Kingdom's intentions in giving its undertakings to Mauritius, or about its understanding of the legal consequences of those undertakings at all times — at all times right up until the unilateral declaration of the "MPA" in 2010. The evidence shows that, at all times, the United Kingdom intended and considered the undertakings to be legally binding, establishing legal obligations for the U.K. and legal rights for Mauritius. This is reflected in the language and circumstances of the exchanges made at Lancaster House in September 1965 and subsequently, and in the consistent pattern of statements and actions by responsible U.K. representatives and officials, including its Legal Advisers.

Mr. President, you do not need to fear that I intend to take you through all of that evidence again. I am sure that you and your distinguished colleagues recall it well. But, with your indulgence, I would like to underscore just a few of the most salient elements. First, as reflected in the official, written record of the Lancaster House meetings, which is at Tab 2.3 of your folder, the undertakings by the United Kingdom, on the United Kingdom's own view, were given in exchange for what the U.K. then regarded and still regards as Mauritius' consent to the detachment of the Chagos Archipelago. They were part of what a U.K. legal adviser called a "package deal." According to the official record, you will recall that the U.K. was, "anxious to settle this matter by *agreement*," with Mauritius. (MM-Annex 19) The Secretary of State is recorded as saying: "[h]e had throughout done his best to ensure that whatever arrangements were *agreed upon* should secure the maximum benefit for Mauritius." To that end, "he was prepared to recommend to his colleagues if Mauritius *agreed* to the detachment of the Chagos

Archipelago," a package of inducements in the form of specific undertakings by the British Government. Bargaining was done over these undertakings, as a result of which new ones were added, including especially in regard to fishing rights for Mauritius, oil and mineral rights, and an undertaking that the Chagos Archipelago would revert to Mauritius.

The United Kingdom considered the result of the Lancaster House meeting to be an *agreement*. This can hardly be disputed. You will recall the document at Tab 5.1: On 6 October 1965, two weeks after the Lancaster House meeting, the Colonial Office sent a copy of the official record of the meeting to the Governor of Mauritius: "I should be grateful for your early confirmation that the Mauritius Government is willing to *agree* that Britain should now take the necessary legal steps to detach the Chagos Archipelago on the *conditions* enumerated in items (i) – (viii) in paragraph 22 of the enclosed record." (MM-Annex 21) And at Tab 5.2: On 5 November 1965, the Governor of Mauritius reported to the Colonial Office that: "The Council of Ministers today confirmed *agreement* to the detachment of Chagos Archipelago *on conditions enumerated…"* (UKCM-14)

As Professor Crawford has explained, Mauritius' consent to the detachment of the Chagos Archipelago was not freely given. It was unlawfully extracted by the U.K. under conditions amounting to duress, including the threats that the U.K. would, one, proceed unilaterally with the detachment and, two, refrain from moving forward on Mauritius' independence. For Mauritius, therefore, there was no valid agreement reached in September 1965, and the detachment of the Archipelago was an unlawful violation of its territorial integrity and the right of its people to self-determination. However, whichever way the Tribunal were to decide this question – whether the 1965 agreement is valid or not – the undertakings given by the U.K. at Lancaster House are binding, and have legal consequences for the UK.

If, *quod non,* you were to disagree with Mauritius, and find that there *was* a lawful agreement on detachment of the Archipelago, then the consideration for Mauritius' consent must

include the undertakings that the United Kingdom expressly gave in exchange for it. They would then be legally binding terms of a lawful agreement under international law. As Professor Crawford has explained that this would be so, even though that agreement initially was between a State and a colony.

On the other hand, if you agree with us that there was no valid agreement, or even if you agree with the U.K. that there could be no agreement in international law between a State and a colony, then the U.K.'s undertakings to Mauritius, all of which were repeated and expressly renewed by successive British governments over the next four and a half decades, after Mauritius became an independent State, still constitute binding legal obligations. Either way, the test is the same, as both parties agree: Did the United Kingdom intend itself to be bound by these undertakings? The contemporaneous documentary evidence, which we reviewed in detail yesterday, leaves no doubt that the U.K. intended and understood itself to be bound by them at all times from the time it made them in September 1965, through the next 45 years.

This understanding of the undertaking and the intention to be bound was confirmed time and again, especially, but not only, by the U.K.'s own Legal Advisers. We submit that, in determining whether the United Kingdom intended and understood itself to be bound by its undertakings, the opinions of its Legal Advisers carry special weight. They cannot be brushed away as mere internal documents written by junior officials unschooled in the law. Yesterday, I quoted from the legal opinion of Mr. Aust, dated 26 October 1971, on, "The British Government's *Undertakings* to the Mauritius Government in 1965." In Mr. Aust's view, "[f]ailure of the Mauritius Government to agree to the resettlement of persons of Mauritian origin in Mauritius would entitle us to treat our other *undertakings* (e.g. as to oil and fishing rights) as *no longer binding* on us, because the undertaking on resettlement is only part of a package deal and must be viewed as such." (MR-73)

In its Rejoinder, the U.K. refers to this as the opinion of, "the then very young Mr. Aust," as if it reflected no more than the folly of youth. (UKR, para 8.12c) This is hardly a serious response, especially since Mr. Aust's opinion is entirely consistent with the advice given by his older, and therefore, presumably for the U.K., wiser colleagues. A memo from the Legal Advisers dated 1 July 1977 set out to: "interpret what paragraph 22(vi) regarding fishing rights [of the Lancaster House official record] means." (MR-Annex 79) The Legal Advisers' memo continues: "First of all, it seems to me that the *obligation* was to ensure that fishing rights remained available." "Obligation," not "gratuitous gesture." I think it can safely be presumed that when Legal Advisers speak of "obligation," they mean "legal obligation."

Now, we don't know the age of the Legal Advisers who authored this opinion, but we do know that a mature adult named Arthur D. Watts (not yet Sir Arthur) produced this legal opinion on 13 October 1981 [TAB 5.12]: "An *agreement* was reached with Mauritius in 1965 on this matter…. [T]he terms of the *agreement* are to be found in a Colonial Office letter of 6 October 1965, read together with an extract from debates in the Mauritius Legislative Assembly on 21 December 1965 and a statement by the Mauritius Government of 10 November 1965." (MR-83)

To the same effect is the legal opinion given by Henry Steel, another distinguished lawyer, on 2 July 2004. In the course of his career, Mr. Steel served as Legal Adviser to the Foreign and Commonwealth Office, to the U.K. Attorney General, and to the "BIOT" Administrator. In his words, the official record of the 23 September 1965 Lancaster House meeting was the, "written record of an *agreement*." (MR-109). Pursuant to that agreement: "Mauritian Ministers gave their consent to the detachment of the Chagos Archipelago from Mauritius for the purpose of their incorporation into the proposed BIOT. The record shows that, in return for that consent, the British Government *agreed to accept a number of obligations…"* Here again, a Legal Adviser talks of "obligation[s]", which we can assume are "legal obligation[s]."

It is also worth recalling the analysis given by MRAG Ltd. to Ms. Joanne Yeadon, the "BIOT" Administrator, at her request in July 2009: "Legal and historical obligations may pose a constraint on declaring the whole FCMZ as a closed area…Mauritius has got historical agreements to fish inside the BIOT FCMZ.…[T]he right of Mauritians to fish in BIOT waters was enshrined in the agreements made between the United Kingdom and Mauritius in 1965." (MR-137)

This was the prevailing official British view of the 1965 undertakings, at all times prior to the declaration of the "MPA" in April 2010, that those undertakings created binding legal obligations for the U.K. There is no evidence that the Legal Advisers, or any of them, ever held a contrary view *prior to April of 2010.*

Having on all of these occasions asserted that the undertakings are binding, the U.K. might seem to be precluded from claiming otherwise in these proceedings. As the Arbitral Tribunal observed in the *Argentine-Chile Frontier Case*: "there is in international law a principle, which is moreover a principle of substantive law and not just a technical rule of evidence, according to which, 'a State party to an international litigation is bound by its previous acts or attitude when they are in contradiction with its claims in the litigation.'"[29] Accordingly, "inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible (*allegans contraria non audiendus est*)."[30]

But the central point here is the one the U.K. made in its Rejoinder, with which we entirely agree. What is determinative is the intention to be bound, and this is for the Tribunal to determine both from the undertakings themselves and the subsequent practice. We say again that the voluminous contemporaneous documentary evidence from September 1965 to April 2010

[29] *Argentine-Chile Frontier Case (Argentina v Chile)* (quoting Separate Opinion of President Alfaro in *Temple of Preah Vihear (Cambodia v Thailand)*, Merits, ICJ Reports 1962, p. 6), Award, 9 December 1966, 16 R.I.A.A. 109, 164 (1969).

[30] *Argentine-Chile Frontier Case (Argentina v Chile)*, Award, 9 December 1966, 16 R.I.A.A. 109, 164 (1969).

shows that the United Kingdom intended its undertakings to be binding, and that at all times prior to April 2010, the U.K. acted in a manner that reflected an understanding that it was legally bound by them. Even if Mauritius was not a State at the time the undertakings were initially given, a situation that Professor Crawford has said not to be dispositive, the evidence makes clear that these undertakings were repeatedly renewed and reconfirmed, on many occasions, *after* Mauritius achieved independence. Professor Crawford has told you that these repeated renewals and reaffirmations of the undertakings after Mauritius became a State are themselves sufficient to establish binding legal obligations. Yesterday, I gave you many examples of the U.K.'s repeated reaffirmations of its undertakings to Mauritius regarding fishing rights, after Mauritius achieved independence over the course of many years. Today in a few moments, I will give you examples of the U.K.'s repeated reaffirmations of its undertakings in regard to Mauritius' oil and mineral rights, and the reversion to Mauritius of sovereignty over the Archipelago.

First, somewhat inconsistently with its statement of the applicable legal principle, the Rejoinder argues that the U.K. could not have been bound by its undertakings to Mauritius, regardless of its own intentions or practice, because *Mauritius* did not consider the undertakings to be binding. This is both unsupported by the evidence and untrue. In fact, Mauritius has repeatedly asserted its rights under the undertakings given by the U.K. A few examples may make the point. May I please refer you to Tab 8.1 of your folder. I hope I'm right, and I apologize if there's a typo in my statement. What I'm looking for is a Note Verbale, dated 19 November 1969, from the Office of the Prime Minister of Mauritius to the British High Commission. This, as I said, is a Note Verbale dated 19 November 1969, from the Office of the Prime Minister of Mauritius to the British High Commission. It begins: "The Prime Minister's Office (External Affairs Division) presents its compliments to the British High Commission and has the honour to refer to the agreement between the Government of Mauritius and the British Government whereby the Chagos Archipelago was excised from the territory of Mauritius to

form the British Indian Ocean Territory. This excision, it will be recalled, was made on the understanding, inter alia, that the benefit of any minerals or oil discovered on or near the Chagos Archipelago would revert to the Government of Mauritius." The Note Verbale goes on to state, at the end of the third paragraph that: "The Government of Mauritius wishes to inform the British Government that it will, at the same time, vest in its ownership any minerals or oil that may be discovered in the off-shore areas of the Chagos Archipelago." (MM-Annex 54). This, of course, is in reliance on the rights of Mauritius under the undertakings.

Please turn next to Tab 8.2. On 4 September 1972, the Prime Minister of Mauritius wrote to the British High Commissioner acknowledging receipt of a payment, "in full and final discharge of your Government's undertaking, given in 1965, to meet the cost of resettlement of persons displaced from the Chagos Archipelago since 8 November, 1965, including those at present still in the Archipelago. *Of course, this does not in any way affect the verbal agreement giving this country all sovereign rights relating to minerals, fishing, prospecting and other arrangements* (MM-Annex 67).

If you please, I would ask you to turn now to Tab 8.3. To the same effect as the document we just reviewed, on 24 March 1973, the Prime Minister wrote to the British High Commissioner that, as he stated in the third paragraph, another resettlement payment by the U.K. "does not in any way affect the verbal agreement on minerals, fishing and prospecting rights reached at the meeting at Lancaster House on 23rd September 1965." (MM-Annex 69) There then follows a list of six of the undertakings given by the U.K. at that meeting that, according to the Prime Minister, remained unaffected by the payment and, therefore, still binding.

More recently, during bilateral talks on 14 January 2009, Mauritius again invoked its rights pursuant to the undertakings given by the U.K. in September 1965. I ask you now, please, to turn to Tab 8.4. This is the contemporaneous record of that bilateral meeting of January 2009 that was prepared by Mauritius. I refer you to page 364 in your folder, and in particular to the

statement by Mr. Boolell, who was the Mauritian Parliamentary Counsel: "Chairman, a series of inducements were given in 1965. The Territory to be ceded when no longer needed. This is clearly a commitment which UK consistently honoured. The second is the fishing rights – This cannot be severed. Both have the same status. This should also be honoured. I would invite you to reconsider the request." (MR-Annex 129)

The Rejoinder asks why, if Mauritius believed it had fishing rights pursuant to the U.K.'s undertakings, it did not invoke those rights in the bilateral discussions that took place in January or especially in July of 2009, when Mauritius objected to the planned establishment of the "MPA". This is, in some respects, a trick question. The evidence shows that "fishing rights" were on the agenda for these discussions, and that Mauritius did, in fact, claim that it had legal rights to fish in the Chagos waters. The remarks of Mr. Boolell at the January meetings, which we just reviewed, showed us. It's also shown at Tab 8.5. Tab 8.5 is the Joint Communique issued by the parties following the 14 January 2009 talks. I refer you to the second paragraph, fourth sentence, four lines from the bottom of the paragraph: "There was also a mutual discussion of *fishing rights…"* (MM-137) In fact, fishing rights were also discussed at the bilateral meeting on 21 July 2009. Even the U.K.'s internal record of those talks, which you will find at Tab 8.6, acknowledges this. I refer you to page 370 of your folder. Paragraph 12, at the bottom of the page, records that, "There was a short discussion about access to fishing rights." (MR-143)

The Rejoinder ignores the rather extensive historical record of Mauritius' insistence upon and exercise of what it believed to be its legal "rights" derived from the U.K.'s Lancaster House undertakings, in favor of a single observation in the Governor of Mauritius' report to the Colonial Office of 5 November 1965. That document is at Tab 5.2, and we reviewed it yesterday. But the U.K. invokes it for a different purpose, so I am obliged to take you back to it. This is Tab 5.2. I refer you, please, to paragraph 3 at the bottom of the page. Referring to the

Mauritian Ministers from the opposition PMSD political party, the penultimate sentence of the paragraph states: "They were also dissatisfied with mere assurances about [items] (v) and (vi)." (UKCM-14) The reference, of course, is to subparagraphs (v) and (vi) of paragraph 22 of the official record of the Lancaster House meeting. From this reference, the Rejoinder at paragraph 8.18b, leaps to the conclusion – without any evidentiary support whatsoever – that these opposition Mauritian Ministers were "dissatisfied" because, quoting from the Rejoinder, "they did not consider that they had received anything that could be regarded as a binding commitment." There is nothing in the record to support this belated and self-serving conjecture, and the Rejoinder makes no citation to any evidence here at all. One can just as easily presume that the PMSD Ministers were "dissatisfied" – if the Governor's account of their state of mind is accurate – with "mere assurances" because, in regard to subparagraphs (v) and (vi), the U.K.'s undertakings were to use its "good offices" to secure the approval of the U.S. for those particular rights and benefits, including fishing rights as far as practicable. There could be no guarantee given at Lancaster House that the U.S. would approve. And the Ministers might have, if we want to continue speculating, underestimated how diligent or successful the U.K. would be in using its "good offices" with the U.S. to obtain that approval. But that does not detract from the binding nature of the commitments undertaken by the U.K. in those subparagraphs. In any event, as I pointed out yesterday, the Governor's remarks about the opposition Ministers' apparent dissatisfaction follows his report, in the first paragraph, that: "*Council of Ministers* today confirmed agreement to the detachment of Chagos Archipelago on conditions enumerated…"

This seems the appropriate time for me to respond to Judge Greenwood's question regarding the undertaking in paragraph 22 (vi), of the official record of the Lancaster House meeting, that, "the British Government would use their good offices with the U.S. Government to ensure that the following facilities in the Chagos Archipelago would remain available to the

Mauritius Government as far as practicable… Fishing Rights." Judge Greenwood asked: "I want to know how you get from that reference to good offices to what you described as an obligation to ensure and respect fishing rights of Mauritius?"

This might be, Mr. President, an appropriate time for a break since I am halfway through my presentation. If you can stand the suspense about my answer to Judge Greenwood's question.

PRESIDENT SHEARER: I think we can stand the suspense, Mr. Reichler.

Yes, we will take the 15-minute break now and be back at 12:05.

MR. REICHLER: Thank you, Mr. President.

PRESIDENT SHEARER: Thank you.

(Brief recess.)

PRESIDENT SHEARER: Yes, Mr. Reichler.

MR. REICHLER: Thank you, Mr. President.

The obligation undertaken by the United Kingdom was to use its good offices with the U.S. to ensure for Mauritius fishing rights in the Chagos waters as far as practicable. This undertaking was given in the context of Secretary of State Greenwood's express commitment, as reflected in the official record, "to ensure that whatever arrangements were agreed upon should secure the maximum benefit for Mauritius." Why good offices in relation to fishing rights as distinguished a direct undertaking to ensure those rights? The U.K. was, after all, going to be the administrating power in the Archipelago with supervising authority over its waters including access to fishing rights. The answer is straightforward. Much as it might have wanted to, the U.K. could not obligate itself unconditionally to ensure fishing rights as far as practicable for Mauritius because of its obligations to its ally, the United States, which might have had objections. The entire purpose of detaching the Archipelago was to secure it for the establishment of the U.S. military base. The U.S. might have been concerned that expansive

fishing rights for Mauritius or anyone else, for that matter, especially in close proximity to the islands, might compromise the security of the base. The U.K. could and did undertake, *without* condition, "that the benefit of any minerals or oil discovered in or near the Chagos Archipelago should revert to Mauritius." But it could not ensure Mauritius' *fishing* rights without first obtaining the consent of the United States. Hence, the undertaking was to use "good offices" with the Americans to ensure fishing rights for Mauritius "as far as practicable." Now, our very esteemed opponents would have you believe that by this undertaking the U.K. did no more than hire itself out to Mauritius as a lobbying firm. It would lobby in Washington to obtain U.S. consent to Mauritian fishing rights. Under this theory, as long as the U.K. made a good faith lobbying effort regardless of result, the obligation undertaken would be discharged and nothing would remain of it. But this is not a helpful analogy. It does not fit our case. To be sure, the U.K. did not by its undertaking guarantee the results of its exercise of good offices with the Americans. It could not do so without first consulting with them. Arguably if the U.K. had made its best efforts to secure U.S. consent to Mauritian fishing rights and the U.S. had stubbornly, or even unreasonably refused, the obligation might have been considered fulfilled, but that is not what happened, and that is what makes all the difference. The U.K.'s good offices were successful. The Americans agreed to the very broad array of fishing rights to Mauritius that the U.K. proposed, as you will see again when I briefly recall for you a very small number of the contemporaneous documents that we reviewed yesterday. After obtaining American consent, the U.K. then took steps directly to ensure all of these fishing rights for Mauritius exercising its powers as administrator of the "BIOT." It took these steps to ensure Mauritius' rights because it understood itself to be obligated to do so by virtue of its undertaking to Mauritius. How could it have believed otherwise? It would make absolutely no sense, Mr. President, to interpret the 1965 undertaking so as to obligate the U.K. to endeavor to obtain U.S. consent to Mauritian fishing rights as far as practicable but then after this consent was obtained,

to allow the U.K. to unilaterally choose not to give effect to those rights or to give effect to them briefly and then immediately abolish them. That surely would have been bad faith, and that surely was not what the U.K. intended when it gave Mauritius its undertaking in regard to ensuring fishing rights as far as practicable. The undertaking was not a trick. It was not a shell game. It was not a trap. It was a commitment to obtain for Mauritius the broadest possible fishing rights first by making best efforts to get the U.S. to consent to them and then, if successful, to establish and preserve them in the exercise of the U.K.'s own power, and that is exactly how the U.K. interpreted and understood its obligation as the contemporaneous documents show.

To demonstrate this, I am compelled to refer you back, very briefly I promise, to a small number of the documents that we reviewed yesterday. So I ask your indulgence, please, in turning back to Tab 5.1 from yesterday. This is from the Colonial Office to the Governor of Mauritius transmitting the official record of the Lancaster House meeting. Please see paragraph 5: "As regards points (iv), (v) and (vi) [(vi) of course being Fishing Rights] the British Government will make appropriate representations to the American Government as soon as possible." The next stop is at Tab 5.3. You will recall this one from yesterday, as well. This is the fishing regime in regard to Mauritius' rights proposed by the Colonial Office, as stated in paragraph 3, "to put to the Americans." At the bottom of the first page, as you will recall, the Governor of Mauritius is asked whether, "a proposition along these lines…would be acceptable to your Ministers," and is Mauritian Ministers, "and regarded by them as an adequate fulfillment of the undertaking given by British Ministers on this point." The note continues on the next page, at paragraph 5, this is three lines from the bottom of the paragraph, and I did not read this yesterday: "Obviously the greater the importance of the Archipelago from the point of view of feeding the population of Mauritius, the stronger is the case we can make to the Americans for an understanding approach on this matter."

What is obvious here, is that the U.K. took very seriously its undertaking to approach the Americans, in good faith, and seek to obtain from them in regard to fishing rights, what Secretary of State Greenwood called, "the maximum benefit for Mauritius." The U.K. was endeavoring, as these documents show, to fulfill that undertaking. The next stop is at Tab 5.4. This is the note from A.C. Seller of the Commonwealth Office to the Governor of Mauritius restating the proposal to be made to the Americans that we just reviewed. Then we come to Tab 5.5. This is where you will recall the General and Migration Department informs the Governor of Mauritius that the Americans have agreed to the very proposal set forth in Mr. Seller's note. But there is something else here. The heading on the document is, "Extension of Fishery Limit," and that is indeed the main subject. It is here that the proposal is made to create a 12 mile fishery zone, and to extend Mauritius' fishing rights throughout this zone. And then there is this comment, immediately following the statements that the Americans approved Mr. Seller's proposal in regard to Mauritius' fishing rights: "The extended proposals," that is extension from a three mile zone to a 12 miles zone, "have altered the position to some extent, and we consider that we shall have to further consult the Americans in light of any comment arising from this letter."

What this shows, and the pattern is later repeated, is that whenever the U.K. chose to extend its fishery zone, first to 12 miles and then to 200 miles, the U.K. understood that it was obligated by its 1965 undertaking to use its good offices each time to obtain U.S. approval to ensure Mauritius' fishing rights as far as practicable in the larger zone. The U.S. did approve the 12 mile proposal, and Mauritius' rights in that zone were thus ensured. The expansion to 200 miles occurred in 1990 and 1991. I refer again to the paper by the FCO's East Africa Department, at Tab 5.14. I referred you yesterday to paragraph 12, where extension of Mauritian fishing rights to 200 miles was recommended, and paragraph 14, where it is reported that the Americans consented. The next document, at Tab 5.17, is the report of the FCO's Africa

Research Group Analysts, that when the fishery zone was expanded from 12 to 200 miles, Mauritius' fishing rights were recognized throughout the zone, because, and I quote: "re-examination of HMG's undertaking on fishing ruled out any alternative." Again, good offices were used to obtain U.S. consent to the application of Mauritius' fishing rights in the expanded area.

From this synopsis, we can draw the following conclusions, in answer to Judge Greenwood's question. One: the U.K. undertook in 1965 to endeavor to obtain U.S. consent so that Mauritius would be able to enjoy fishing rights in the Chagos waters to the maximum extent practicable, consistent with the intended use of one or more of the islands for military purposes. Two: the U.K. in fact used its good offices with the Americans and succeeded in obtaining their consent. Three: the U.K. did not then consider its obligations discharged. Rather, it understood that fulfillment of the obligation required not only obtaining the Americans' consent, but also and necessarily giving effect to and ensuring the rights that were consented to. Four, when the U.K. decided to expand its fisheries zone to 12 miles and 200 miles, it understood itself to be obligated by its undertaking to Mauritius to go back to the Americans each time to obtain their consent, and each time that consent was obtained, and each time fishing rights in the larger zone were recognized for Mauritius. That is why in the 1990s and the 2000s, responsible U.K. officials repeatedly stated that, "Mauritius have got fishing rights in BIOT waters out to 200 miles," and that these, "historical fishing rights were enshrined in HMG's 1965 undertaking."

Mr. President, we submit that the evidence leaves no doubt that the U.K. intended to be bound not only by its undertaking with respect to fishing rights, but by all its undertakings at Lancaster House, and that its subsequent statements and actions over a 45-year period, when it repeatedly renewed and reconfirmed all of those undertakings to Mauritius, demonstrate that it intended and understood at all times that it was legally bound by them. As the U.K. has affirmed in its Rejoinder, the existence of an intention to be bound is a matter for determination by the

Tribunal, and you are entitled, even encouraged, by both parties, to consider the practice over the relevant 45-year period in making your determination. We submit that the overwhelming volume of contemporaneous evidence points in only one direction: that the U.K. intended and understood itself to be legally bound and that its undertakings constitute binding legal obligations.

I come now to the second conclusion to be drawn from these undertakings: that they endowed Mauritius with the attributes of a coastal State. As it would seem, the U.K. undertook to, and did, ensure that Mauritius had fishing rights throughout the Chagos Archipelago's waters, out to a distance of 200 miles, subject only to restrictions for defence purposes in the immediate vicinity of Diego Garcia. Mauritius is the only State with such fishing rights. No other State has them. The U.K. itself has no interest in fishing rights for itself, has sought no benefit from them, and seems not ever to have licensed any British-flagged vessels to fish in the Chagos waters. But the U.K.'s undertakings ensured more than fishing rights exclusively to Mauritius.

Paragraph 22(viii) of the Lancaster House official record reflects that the U.K. made the undertaking to Mauritius that "the benefit of any minerals or oil discovered in or near the Chagos Archipelago should revert to the Mauritius Government." Thus, the U.K. undertook not only to ensure that Mauritius had legal rights to the living resources of the Chagos waters by official rights, but also that Mauritius had the exclusive right to the benefits of the non-living resources of the seabed and subsoil. This undertaking, like the one on fishing rights, was also renewed and reconfirmed several times over after Mauritius became an independent State. Please now if you will turn to Tab 8.7. This and the documents that I will show you today are all new ones and were not shown prior to today, except of course as annexes to the written pleadings. At Tab 7, this is a note dated—actually, if you would please turn to the last page of the document, which is page 383 of your folder. It's actually a composite exhibit, and attached at the end of this exhibit, including at page 383, is a note dated 15 December 1969 from the British High Commissioner to the Prime Minister of Mauritius. And at the top of page 383 it says: "The

British Government have no intention of departing from the undertaking that the Government of Mauritius should receive the benefit of any oils or minerals discovered in the Chagos Archipelago or the offshore areas in question in the event of the matter arising as a result of prospecting being permitted while the Archipelago remains under British sovereignty." (MR-56) To the same effect, please turn next to Tab 8.8. You will see that this undertaking was again renewed on 10 November 1997, by the Foreign Secretary of the U.K., Mr. Robin Cook, who wrote this to the Prime Minister of Mauritius: "I also reaffirm that this Government has no intention of permitting prospecting for oil and minerals while the territory remains British, and acknowledges that any oil and mineral rights will revert to Mauritius when the Territory is ceded." (MM-105)

The reversion of sovereignty to Mauritius was an especially important undertaking made by the U.K. in exchange for Mauritian consent to the detachment of the Chagos Archipelago. This was set forth in paragraph 22(vii) of the official record of the Lancaster House meeting: "if the need for the [defence] facilities on the islands disappeared, the islands should be returned to Mauritius." This undertaking was also renewed several times after independence. I ask you to please turn to Tab 8.9. On 23 March 1976, Parliamentary Under Secretary of State Ted Rowlands wrote to the High Commissioner of Mauritius in London. I refer you to the middle of the third paragraph, at the end of the eighth line: "I also take this opportunity to repeat my assurances that Her Majesty's Government will stand by the undertakings reached with the Mauritian Government concerning the former Mauritian islands now forming part of the British Indian Ocean Territory; and in particular that they will be returned to Mauritius when they are no longer needed for defence purposes in the same way as the three ex-Seychelles islands are now being returned to Seychelles." (MM-78))

This is consistent with the document we reviewed yesterday at Tab 5.18, the letter of 12 December 2003 from the U.K. Minister responsible for Overseas Territories, Bill Rammell, to

the Mauritian Minister of Foreign Affairs: "The British Government has always acknowledged that Mauritius has a legitimate interest in the future of the Chagos Islands and recognizes Mauritius as the only state which has a right to assert a claim of sovereignty over them when the United Kingdom relinquishes its own sovereignty." And in particular, "*Successive* British Governments have given *undertakings* to the Government of Mauritius that the Territory will be ceded when no longer required for defence purposes subject to the requirements of international law. This remains the case." (MM-Annex 124)

Even today, this remains the case. The United Kingdom considers that its undertakings are still in effect in respect of reversion of sovereignty to Mauritius when the islands are no longer needed for defence purposes, and exclusive enjoyment by Mauritius of the benefits of oil and mineral exploitation. The British Government has attempted to resile from, or reinterpret out of existence, *only* its undertaking to fully ensure and respect Mauritius' fishing rights, which it did ensure and respect for 45 years, until its declaration of a no-fishing MPA in April 2010, an act which Mauritius considers unlawful and in violation of its rights under international law including the undertakings given to it by the U.K.

Because of the U.K.'s undertakings, the situation of Mauritius in respect of the Chagos Archipelago is unique. There is none like it anywhere in the world. There is no place else where sovereignty is disputed and one of the claimants has endowed the other with *de facto* sovereign rights over both the living and non-living resources in the territorial sea, exclusive economic zone and continental shelf; has acknowledged as legitimate the future interests of the other State in the disputed territory and its adjacent waters; and has pledged to restore sovereignty to the other State at some future date. There is no place else where one of the claimants considers itself no more than a "temporary freeholder," in the words of former "BIOT" Administrator Joanne Yeadon, thus recognizing that the underlying sovereignty ultimately belongs to the other claimant State. (MR 120 and MR 121)

Nor is there any other place in the world where one of the claimants has allowed the other claimant, with its encouragement, to make submissions to the Commission on the Limits of the Continental Shelf, in respect of the delineation of the outer continental shelf emanating from the disputed territory. Yet, that too is what has occurred in respect of the Chagos Archipelago.

Please, if you will, turn back to the document at Tab 8.4, which I remind you is the contemporaneous record of the bilateral talks held on 14 January 2009. And I refer you first here to page 361. I refer in particular to the comment of Mr. Doug Wilson, whom I had the pleasure of meeting here on Tuesday when he accompanied the Attorney General to these hearings. In the second paragraph of the comments of Mr. Wilson: "Art. 76 UNCLOS provides that a state make an application to the UN for Continental Shelf beyond 200 miles zone. UK has no interest to applying to the UN for extension…." If you will, please turn to the next page, page 362 of your folder, and to the remark of Mr. Colin Roberts, whose name is misspelled as Robert. Mr. Roberts asks to clarify one aspect; this is at 362: "We have no expectation of deriving any benefit from what we will get. It will flow to Mauritius when the territory will be ceded to you. It is one of the reasons why we have not invested resources to collect data. …" (ibid., p. 24).

The UK's own contemporaneous record of the January 2009 talks is equally instructive. You will find it at Tab 8.10. (MR-Annex 128) And I would ask you, please, to turn to page 391 in your folder.

ARBITRATOR GREENWOOD: I'm sorry to interrupt. Can you just remind me, the minute you had just taken us to is prepared by the Government of Mauritius; is that right?

MR. REICHLER: Yes, at Tab 8.4, that's the contemporaneous Government of Mauritius record. The one I'm now asking you to go to is U.K.'s record.

ARBITRATOR GREENWOOD: Were those records shown by one Government to the other at any time stage, or are they entirely internal documents that the Government drew up? I cannot remember from the pleadings.

MR. REICHLER: Nor can I, Judge Greenwood, and I beg your indulgence, so I could refer to the record and come back to you or have one of my colleagues come back to you this afternoon, if that is satisfactory.

ARBITRATOR GREENWOOD: Now I have a look at 8.10. I'm fairly clear there is a classification level that's been redacted so I'm fairly clear this is an internal U.K. document, but I am curious about the Mauritian one.

MR. REICHLER: I will certainly provide it for you.

I will read from page 391 in your folder. Under the heading, "Continental Shelf," the U.K. document records that: "The U.K. opened up the possibility of co-operating with the Mauritians, under a sovereignty umbrella, on an extended continental shelf agreement (i.e., a joint submission to the Commission on the limits of the Continental Shelf." Skipping ahead to the beginning of the following paragraph: "The Mauritian delegation welcomed the UK statement about a joint submission but was concerned that the deadline was 30 May 2009 [actually the deadline was 13 May 2009] so much work would need to be done. They already had some basic data that could help." Then, at the beginning of the next paragraph: "The UK delegation clarified that all that was needed by May was an outline submission. The UK delegation reiterated that the UK had no expectation of deriving commercial or economic benefit from anything discovered on the continental shelf. Our understanding was that this would flow to Mauritius once the territory had been ceded. This was one of the reasons why the UK had not invested resources in collecting data. What we were talking about was legal and political co-operation to secure the continental shelf on the premise that it is scientifically possible to do so."

Mauritius quite rightly interpreted this offer of cooperation as an encouragement to go ahead and submit preliminary information to the CLCS to beat the May 2009 deadline and stop the clock so that the two States could work together on a joint full submission without being time-barred. The Mauritian record of this meeting, turning back to the document at Tab 8.4, at page 362 of your folder, actually records Mr. Roberts as saying this at the end of the same paragraph from which I read a few moments ago: **"**You may wish to take action and we will provide political support."

ARBITRATOR WOLFRUM: Mr. Reichler, may I draw your attention to Tab 8.10 and go back to the chapter on the continental shelf. Remember the last chapter starting with the questions why, et cetera, could you kindly comment on this paragraph and compare it with the report of the Mauritians.

Thank you.

MR. REICHLER: Well, what I would like to do, Judge Wolfrum, in order to fully answer the question, I can comment on this, but comparing it with the report of the Mauritians, I would like a few minutes to do that, and I will be speaking on a different topic this afternoon, but it might offer convenient time for me to have the two documents side by side and provide you with a more helpful answer, if I may.

ARBITRATOR WOLFRUM: Thank you very much, very much indeed.

MR. REICHLER: I want to underscore the exchange that I just referred to: here we have the UK encouraging Mauritius to file preliminary information, with the offer of political support. In this manner, the U.K. gave its blessing to the filing of preliminary information by Mauritius with respect to the outer continental shelf appurtenant to the Chagos Archipelago. Mauritius went ahead and filed its preliminary information with the CLCS pursuant to Article 76(8) on 6 May 2009. You can review Mauritius' submission, at your leisure, at Tab 1.16.

The reaction of the United Kingdom was the very opposite of protest or objection. When the parties next met for bilateral talks, in July 2009, the U.K. was informed that the filing of preliminary information had been made with the CLCS. It did not object or protest. To the contrary, it again offered to provide technical assistance in the preparation of the full submission to the CLCS. Further, the U.K. proposed that the two parties file a *joint* submission with the Commission in respect of the Chagos Archipelago. I invite you to please turn back to the document at Tab 8.6. This is the U.K.'s internal record of the July 2009 meeting. And I refer you to page 369 of your folder, under the heading "Extended Continental Shelf": "The UK delegation suggested that Mauritius and the UK could work together within the UN process to secure a claim perhaps by coordinated submission. This could be of benefit to Mauritius because otherwise the submission would effectively be put on ice because of the sovereignty dispute. All benefits of an eCS would ultimately fall to Mauritius when BIOT was no longer required for defence purposes. Mauritius welcomed the suggestion that UK and Mauritian teams could work together on this." (MR-Annex 143, p. 7) The internal U.K. record continues: "Comment: There was a need, as in the January talks, to reiterate the fact that the UK had no intention of benefiting from an eCS. Any exploitation would be for the benefit of Mauritius. Our proposal was to get an eCS established. We would then talk about the basis on which exploitation could begin. We could not define a date when BIOT would no longer be needed for defence purposes, but this was one way of ensuring that the eCS could be established in principle pending the area beyond eventually ceded to Mauritius." (ibid.)

ARBITRATOR GREENWOOD: Mr. President, with your permission, could I ask you, Mr. Reichler, immediately before the comment you read out to us is the sentence, 'it was agreed that the best way forward would be a coordinated submission under a "sovereignty umbrella"'. Could you comment on what that sentence means and what the term "sovereignty umbrella" implies there.

MR. REICHLER: The term "sovereignty umbrella" implies each State is preserving its respective position on sovereignty.

A joint communique following the July 2009 meeting was issued on 21 July 2009. This is at Tab 8.11. It states: "Both delegations were of the view that it would be desirable to have a *coordinated* submission to be filed for an extended continental shelf in the Chagos Archipelago/British Indian Ocean Territory region to the UN Commission on the Limits of the Continental Shelf, in order not to prejudice the interest of Mauritius in that area and to facilitate its consideration by the Commission." (MM-Annex 148)

These statements and actions between January and July 2009 evidence a clear recognition by the United Kingdom that Mauritius is in a special category, that it is to be treated, at least for certain important purposes, as a coastal State. Under Articles 76(7) and 76(8) only coastal States may delineate an extended continental shelf and make submissions with respect thereto to the CLCS. Mauritius has done so and the United Kingdom has given its encouragement and support. Since May 2009, Mauritius has been preparing its full submission in respect of the Chagos Archipelago region, in reliance on the representations made by the U.K. in January and July 2009. It will be filed later this year.

It bears emphasis that *only* Mauritius has made a preliminary submission to the CLCS in respect of the Chagos Archipelago. The United Kingdom did not endeavor to make one, and the 10-year time period for doing so following the U.K.'s accession to the Convention has run out. As it admitted in its Rejoinder, at paragraph 8.37, the U.S. has not delineated, not even delineated, a continental shelf for the Chagos Archipelago extending beyond 200 miles (UKR, para. 8.37) This shows, again, that it is Mauritius, and not the United Kingdom, that has the real interest of a coastal State in regard to the Archipelago and its continental shelf.

As late as its Counter Memorial, filed on 15 July 2013, the United Kingdom still had found no reason to protest or object to Mauritius' preliminary submission to the CLCS. Not until

its Rejoinder of 17 March 2014 did the U.K. suddenly discover that, with regard to the CLCS submission: "Mauritius is not the coastal State in respect of BIOT and as such it has no standing before the CLCS with respect to BIOT." That is from paragraph 8.39 of the Rejoinder. (UKR, para. 8.39). This statement falls into the same category in our view as Ms. Yeadon's 2013 made for litigation witness statement. Too late and too little. And too contradictory of the U.K.'s contemporaneous statements and actions, before this arbitration was commenced. In particular, it is inconsistent with the U.K.'s pre-litigation pre-disposition, which was not only not to object to Mauritius' submission, but in fact to encourage and support it.

Mr. President, we are navigating uncharted waters here.

ARBITRATOR WOLFRUM: With your permission, Mr. President, Judge Greenwood referred to the phrase "sovereignty umbrella." Remember that, Mr. Reichler? Could I inquire – you shouldn't try to give the answer now – why Mauritius didn't make use of this joint submission as proposed by the United Kingdom? Thank you.

MR. REICHLER: Would you like me to respond later?

ARBITRATOR WOLFRUM: Totally up to you.

MR. REICHLER: In that case, I will do so.

As I said, Mr. President, we are navigating uncharted waters here. There is no situation like this one. Take the Falkland Islands, for example. The U.K. has never undertaken to ensure, respect or preserve Argentina's fishing rights in the adjacent waters. It has never undertaken to ensure that all benefits from oil or mineral exploitation accrue to Argentina's benefit. And it has certainly never promised to revert or cede sovereignty over the disputed islands to Argentina at a future date, when it no longer has the need for them. It is inconceivable, in those circumstances, that the U.K. would accept without protest or objection even a preliminary submission by Argentina to the CLCS in respect of what Argentina calls the *Islas*

Malvinas. Simply put, the U.K. has never endowed Argentina with, or recognized that it has, the attributes of a coastal State with respect to those islands.

In fact, Argentina made a submission to the CLCS with respect to the Falkland Islands on 21 April 2009, just one month before Mauritius made its submission for the Chagos Archipelago. It did not take long for the U.K. to object. Its objection can be found at Tab 8.12. It is a Note Verbale to the Secretary General dated 6 August 2009. It may be of some interest to the Tribunal that, in the third paragraph, the U.K. states: "The principle of self-determination, enshrined in the UN Charter, underlies the United Kingdom's position on the sovereignty of the Falkland Islands." Three paragraphs later, on page 399 of your folder: "The United Kingdom therefore rejects those parts of Argentina's submission which claim rights to the seabed and subsoil of the submarine areas appurtenant to the Falkland Islands, South Georgia and the South Sandwich Islands, and requests that the Commission does not examine those parts of the Argentine submission…"The United Kingdom's failure to similarly reject Mauritius' submission – and, further, its encouragement of the filing of preliminary information by Mauritius and its offer to support Mauritius with a joint submission – can only reflect the U.K.'s recognition that Mauritius, unlike Argentina in its view, *does* have rights as a coastal State..

We have a completely different, one-of-a-kind situation here. By virtue of the U.K.'s binding and irrevocable undertakings, Mauritius alone is recognized by the U.K. to have sovereign rights in regard to both the living and non-living resources of the Chagos waters. No other State, not even the U.K., can claim them. By virtue of those undertakings, Mauritius alone has a long-term interest in the management of these resources, because, as the U.K. has repeatedly pledged, Mauritius will eventually have full and exclusive sovereignty over the Archipelago and maritime jurisdiction over its waters, seabed and sub-soil. The U.K. has always recognized this, including in its offer of support for Mauritius' submission to the CLCS. In these

circumstances, the real coastal State in the very realest of senses in respect of the Chagos Archipelago is Mauritius.

We submit, based on all of the evidence, that Mauritius is the coastal State. First, as Professor Crawford explained, sovereignty over the Archipelago could not vest in the U.K. as a result of the unlawful excision and detachment of the Archipelago from Mauritius; rather, the Archipelago remained an integral part of Mauritius when Mauritius achieved independence in 1968. Second, even if *quod non* the detachment was lawful, it was done pursuant to an agreement and legally binding undertakings by which the United Kingdom, whose only interest in the islands was to use one or more of them for a defence facility, vested Mauritius with important attributes of a coastal State under the Convention. In these unique circumstances, Mauritius is entitled to be treated as a coastal State, at least in regard to its rights to enjoy the living and non-living resources of its coastal waters, seabed and subsoil, and to protect and preserve the marine environment that it will eventually inherit. To treat the U.K. as the coastal State, or the *only* coastal State, in these circumstances would be for this Tribunal either to bless its unlawful detachment of the Chagos Archipelago from Mauritius, in violation of fundamental principles of international law, or, alternatively, to ignore the legally binding undertakings by which the U.K. vested Mauritius with the attributes of a coastal State as that term is used in the 1982 Convention.

As my colleagues beginning with Professor Sands, after the break will now demonstrate, it was a violation of Mauritius' rights under the Convention, including its rights as a coastal State, for the U.K. to unilaterally declare a no-fishing MPA over the entirety of the Chagos waters, especially absent proper consultation with Mauritius.

I thank you again, Mr. President and Members of the Tribunal, for your patient attention and your courtesy. I appreciate all of your questions, and those to which I have reserved my

answer will be answered in the course of the day. And I thank you for your indulgence in that regard.

PRESIDENT SHEARER: Thank you, Mr. Reichler.

Just before you leave the podium, before we take the luncheon adjournment, Judge Hoffmann would like to put a question to Mauritius. Thank you.

ARBITRATOR HOFFMANN: Thank you, Mr. President.

And, Mr. Reichler, I'm adding some more questions to your list already. I wonder whether you could kindly explain or perhaps further elaborate, if you wish, on what you have said during an earlier part of your Statement. If I understood you correctly, you submitted that, notwithstanding whether this Tribunal finds that the 1965 Lancaster House agreement in terms of which the Archipelago would be excised or detached from the Territory of Mauritius is valid or not, I think that's what you said – would you, of course, submit based on what Professor Crawford asserted earlier today, namely that the Mauritius' consent was not freely given, whether the undertakings given by the United Kingdom as part of what has been referred to this package deal, whether these undertakings are valid and legally binding? I would like you to elaborate on that.

I hope I have made myself clear. There is an agreement, and this is part of the undertakings part of this Lancaster House agreement, this package deal, which you argue the Agreement itself is not, would have, but the undertakings flowing from that you maintain itself.

I would appreciate if you could respond, but you don't have to do it now. You can do that as you may find convenient.

Thank you.

MR. REICHLER: Judge Hoffmann, with your indulgence, given the hour, I would respectfully request that I be permitted to answer your question in full after the lunch break.

PRESIDENT SHEARER: Absolutely.

MR. REICHLER: Thank you.

PRESIDENT SHEARER: Very well, then. We will adjourn for lunch and return at 2:30. Thank you very much.

(Whereupon, at 1:00 p.m., the hearing was adjourned until 2:30 p.m., the same day.)

AFTERNOON SESSION

PRESIDENT SHEARER: So, Mr. Reichler, you are going to respond to some questions now?

MR. REICHLER: Yes, Mr. President.

PRESIDENT SHEARER: Will this affect the timing of this afternoon's schedule?

MR. REICHLER: I believe, first of all, it will not take that long, but I'm under the understanding that it had been worked out with the Tribunal that some small amount of time might be added on at the end of our presentation today.

PRESIDENT SHEARER: Yes, that is understood. Thank you.

MR. REICHLER: Thank you.

Well, thank you for this opportunity, and I want to assure you that I'm only here to answer questions, and I do not have another large set of documents to ask you to go through with me.

Let me say that we have been keeping careful track of the questions from you, Mr. President and all of your colleagues, and we will be sure that all of them will be answered fully by the end of the day tomorrow to the extent that they have not been answered already or will not be answered by me at this moment.

Judge Greenwood asked whether the records kept by each of the Parties or prepared by each of the Parties with respect to the bilateral meetings of January 2009 and July 2009 were shown to one another; and, as he rightly intuited, the answer is that they were not. But that, in our view, is what makes them all the more remarkable.

My point in showing them to you was to point out how consistent they are with one another on all of the issues that I brought up with respect to them. The U.K. said that it had no interest in making its own submission to the CLCS; that it would not invest the resources in doing so; that any benefits from the continental shelf would be for Mauritius alone; that the U.K. was

willing to work with Mauritius on a joint submission as of January in what they call a "coordinated submission" in July; that Mauritius was concerned about the May 2009 filing deadline; that only an outline submission, according to the U.K., was required by that date; that is Preliminary Information; and that the U.K. was encouraging Mauritius to file this Preliminary Information.

So, even though the documents were not seen or approved by the other side, they are really quite consistent, at least in regard to all of the points for which I cited them.

Judge Wolfrum pointed to the last paragraph of the document at 8.10, which was the U.K.'s record of the January 2009 meeting, the last paragraph in the section on continental shelf, and he asked me if I would compare that with the subject matter as it was reported in Mauritius' own record of that meeting at Tab 8.4. And again, this is another example where the reports are consistent. The Mauritius report addresses the same subject matter, at Pages 25 and 26 of the Mauritius report, which are, in terms of Mauritius folder numbers, 363 and 364.

And, in essence, what both of these parallel reports provide is that both States maintain their positions on sovereignty over the Chagos Archipelago. They also provide that, notwithstanding its position on sovereignty, the U.K. wants to help Mauritius. It says that cooperation is useful to help Mauritius. Why? Because it is only Mauritius that has an economic or commercial interests in the continental shelf. And this again reflects what we have said. The U.K. recognizes in important respects that Mauritius has the attributes of a coastal State.

Judge Wolfrum also asked as to, given the United Kingdom's willingness and encouragement and offer to participate in a joint submission, why did not Mauritius accept that offer? And the answer is this: As of July 2009, as reflected in the respective records kept by the Parties, and more particularly in the Joint Communiqué issued by both of them, of course, Mauritius was anticipating what that Joint Communiqué called a "coordinated submission," which would be made by Mauritius since it was Mauritius that filed the Preliminary Information, but with the Technical Assistance and, as the records show, legal and political support of the U.K. The

Joint Communiqué stated that a joint technical team would be set up to explore the modalities of the coordinated approach, and this was anticipated, but it never happened, and the reason is the relationship soon broke down over the U.K.'s plan to go forward unilaterally with the declaration of the "MPA" and Mauritius' strong objection to that.

So, in lieu of the technical assistance, legal and political support from the U.K., Mauritius engaged the technical and legal support of the Commonwealth Secretariat, and the Commonwealth Secretariat has been of enormous assistance to Mauritius in the preparation of its full submission, which is now almost completed and, as I said earlier, will be ready for filing sometime this year.

Judge Hoffmann asked me just before the lunch break whether – he pointed to my remarks which were consistent with those of Professor Crawford, that whether the 1965 "agreement" at Lancaster House is lawful and valid or, even if it is not, the undertakings which the United Kingdom made at that time and then repeated, renewed, reaffirmed later are valid and binding legal obligations. You called my attention to the comment that I made, that either way, whether the 1965 "agreement" is lawful and valid or even if it is not, the undertakings given by the United Kingdom are lawful, or binding legal obligations.

Let me respond: Of course, if you find – and it is for you to so find – if you find that a lawful and valid agreement was reached at Lancaster House in 1965 and that lawfully and validly consent to detachment of the Chagos Archipelago was obtained by the United Kingdom in exchange for all of the undertakings it gave at that time, then of course those undertakings would be binding legal obligations made as part of a lawful and valid agreement – that's the easy part – but we would say it's really just as easy to conclude that the undertakings are binding legal obligations, even if that agreement is determined by yourselves to be invalid itself because, if the Agreement is not valid because, as we say, the consent of the Mauritian representatives was obtained through duress, then, as Professor Crawford pointed out, the position of the U.K. cannot,

because of that invalidity, be better; that is, it cannot have placed itself in a better situation as to the binding character of the 1965 undertakings than it would be if the Agreement was valid.

The undertakings are in any way legally binding because, as Professor Crawford also explained this morning, they were confirmed by U.K. Ministers and senior officials and reconfirmed repeatedly following on from independence; and, in accordance with the Nuclear Test Cases, they are binding under international law.

I took you through some of the documents yesterday and also this morning: They confirm that the U.K. at all times intended and regarded its undertakings as legally binding; and, as the Rejoinder states, what is determinative is the intention to be bound. That is a determination for the Tribunal to make. And if the Tribunal agrees with us that the U.K.'s undertakings and its subsequent practice over 45 years evidence an intention to be bound by those undertakings, then they are legally binding on the U.K.

Just the last point would be the question that was asked by Professor Shearer during yesterday's session, in regard to the chart that we presented that we displayed of tonnage of fish caught by Mauritian-flagged vessels in Chagos waters, which is from Paragraph 2.124 of our Reply. President Shearer noted that no tonnage figures were recorded for the Years 2005 and 2008. And you asked, Mr. President, whether that means that there are no records or that no licenses were issued in either of those two years. Or since yesterday, we managed to consult with the Fishing Authorities in Port Louis, and we can answer your question as follows:

In those two years, no licenses were taken up by Mauritius-flagged vessels because the vessels that had taken up licenses in the years prior or the years subsequent to the two in question were damaged and having difficulties obtaining certification of seaworthiness for navigation. So, they opted not to obtain licenses in either of those two years, but that applies only to those two years.

I thank you very much for the opportunity you have given me to respond to these

questions, and I repeat, to the extent that there remain other questions not yet fully answered, we will endeavor to have them all fully answered by the time we finish speaking tomorrow.

Thank you.

PRESIDENT SHEARER: Thank you, Mr. Reichler.

MR. REICHLER: I would then ask that you call my colleague, Professor Sands, to the podium.

PRESIDENT SHEARER: Yes, and I call on Professor Sands.

Thank you

ARBITRATION UNDER ANNEX VII TO 1982 UNCLOS

Republic of Mauritius

v.

United Kingdom

Professor Philippe Sands QC

Thursday 24 April 2014

Speech 9: Violations of Articles 2(3) and 194

1. We turn then to the violations by the United Kingdom of the 1982 Convention. I am going to deal in particular with Article 2 and Article 194. Mauritius has set out its case, of course, that you're now fully praised of it, that the UK is not "the coastal State" within the meaning of the Convention in regard to the Chagos Archipelago, and it therefore has no authority under the Convention to establish maritime zones of any kind in the waters of the Archipelago, or to seek to restrict activity of Mauritius in that area. This part of the argument now turns to the unlawfulness of the United Kingdom's purported establishment of the "MPA" for the additional and related reason that, even if – and I stress that strongly – (*quod non*), you would find the UK is "the coastal State", the restrictions imposed by the "MPA", as well as the unilateral manner in which the "MPA" was adopted, violate the rights of Mauritius and the

United Kingdom's obligations under the Convention. I have mentioned I will deal with Parts II and XII of the Convention, Mr. Loewenstein will then address the violations of Parts V and VI of the Convention, and Professor Crawford will deal with the violation of Part XVI of the Convention. And Mr. President, I've noticed you've taken up your copy of the Convention. We have, in consultation with our colleagues from the United Kingdom and the Secretariat, not included in the core bundle, extracts from the Convention, on the basis that you have copies available to you. And, in fact, it would be useful if you have them close to hand because I will be taking you to various provisions, as will some of my colleagues. But we have not put them in the bundle to save a little on paper.

Article 2(3)

1. Let me begin then with Article 2 and Part 2 and the violation of Article 2 Paragraph 3. And I think I can put our claim in five straightforward propositions in relation to Article 2. I'm going to take you to the provision. First:

(i) The UK purports to exercise sovereignty over the Territorial Sea of the Chagos Archipelago;

(ii) By Article 2(3) of the Convention, such exercise is "subject to [the 1982] Convention and other rules of international law", and we say that means in conformity with those "other rules"; "other rules of international law" include the rules that allow Mauritius the right to fish up to 200 miles from the Chagos Archipelago islands, including the Territorial Sea, as traditional fishing activity and pursuant to undertakings given by the United Kingdom, but it's not limited to such traditional fishing activity;

(iii) by decision taken, and publicly announced on 1 April 2010, the rights of Mauritius under those "rules of international law" have purportedly been extinguished by the United Kingdom with immediate effect, without notice, without consultation, and unlawfully;

(iv) it follows that by depriving Mauritius of the rights that it is entitled to exercise in the

Territorial Sea of Chagos and that arise under "other rules of international law", the United Kingdom has not acted in conformity with Article 2(3) of the Convention.

2. Let's begin with the relevant provisions, and I can see that you have the text in front of you of Article 2. Article 2(1) provides that

"[t]he sovereignty of a coastal State extends, beyond its land territory and internal waters, and in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea."

Article 2(3) then limits "the coastal State's" exercise of sovereignty over the Territorial Sea: it, and these are the words that it provides:

"The sovereignty over the Territorial Sea is exercised subject to this Convention and to other rules of international law."

This is language that follows very closely the earlier language of Article 1(2) of the 1958 Convention, which says, just for the purpose of the record:

"This sovereignty is exercised subject to the provisions of these articles and to other rules of international law."

So, it's not identical but there is no material difference between the two. The written pleadings have dealt extensively with the interpretation of this provision, and its application to the facts of this case.[31] The parties are in dispute on both aspects, but they do agree on one point, and it is this: none of the exceptions to jurisdiction that the drafters of the Convention adopted in Articles 297 and 298 are applicable such as to exclude the Tribunal's jurisdiction in relation to a dispute under Article 2(3). And for that reason, we say, jurisdiction is plainly established.

3. Mauritius submits that the only reasonable interpretation of Article 2(3) leads to the result that the exercise by the coastal state of sovereignty of the Territorial Sea is limited by obligations

[31] See MM, Chapter 7; UKCM, paras. 8.41-8.43; MR, paras. 6.20-6.73; UKR, paras. 8.2-8.27.

arising under those "other rules of international law" (and in particular, but not exclusively, those "other rules of international law" that pertain to the exercise of maritime rights). For Mauritius, those "other rules of international law" include the following four categories:

(i) the rules of international law that require a coastal State to respect traditional fishing rights, as affirmed in the UK's undertakings;

(ii) the rule of international law that requires a State to respect its undertakings more generally, including those that protect fishing and mineral rights;

(iii) the rule of international law that requires a State to comply with a commitment it has given, through its head of government, to the head of government of another State; and

(iv) the rule of international law that requires a coastal State to consult in regard to matters that can affect the rights of another State.[32]

4. These are all rules of international law covered by the formulation in Article 2(3). As Mr. Reichler demonstrated yesterday, the UK undertakings made in 1965 with regard to fisheries, and the issue has come up again just now, not limited to traditional fisheries, and with regard to mineral resources, are legally binding under international law: they were made in the context of the attainment of independence and have subsequently been confirmed by UK Ministers after the independence of Mauritius.[33] Second, the undertaking given in November 2009 by then UK Prime Minister Gordon Brown was clearly intended to, and it did, bind the United Kingdom Government, as I shall show later. Three, international law provides obligations to consult in relation to the use of maritime zones which affect other States' rights. That is well established. These are all rules of international law that operate to limit the

[32] MM paras. 7.6-7.27; UK, para. 6.5.

[33] For example, on 23 March 1975, Parliamentary Under Secretary of State Ted Rowlands wrote to the High Commissioner of Mauritius in London: "to repeat my assurances that Her Majesty's Government will stand by the understandings reached with the Mauritian Government concerning the former Mauritian islands now forming part of the British Indian Ocean Territory; and in particular that they will be returned to Mauritius when they are no longer needed for defence purposes in the same way as the three Seychelles islands are now being returned to Seychelles." (MM, Annex 78).

exercise of sovereignty in the Territorial Sea. It happens also, although much is added, but these rules also fall within the applicable law provisions in Article 293 of the Convention and they cannot be said on any reasonable approach to be incompatible with the Convention (although we note that Article 2(3) conspicuously does not in terms require "other rules of international law" to be compatible with the Convention.)

5. The United Kingdom has breached all of these rules. In April 2010 it purported to extinguish the entirety of Mauritius' fishing rights, whether traditional or other, whether inshore, or within three miles of the coast, or within 12 miles of the coast, or within 200 miles of the coast. In April 2010 by that decision, the UK failed to respect the undertakings that it had, on its own account, given to Mauritius. In April 2010 it also failed to honour the commitment that was given by Prime Minister Gordon Brown to Prime Minister Ramgoolam in November 2009 that the "MPA" would be put "on hold". In the period leading up to the announcement of the decision taken in April 2010, as we have seen, the United Kingdom manifestly failed to consult with Mauritius, instead Mauritius was presented with a *fait accompli*, it was communicated in a telephone call unexpectedly on the morning of 1 April 2010 by Mr. David Miliband to Prime Minister Ramgoolam. By establishing and applying the "MPA" in this manner which purports to deny the exercise by Mauritius of its rights, the UK, we say, is in manifest violation of Article 2(3) of the Convention.

6. So what does the United Kingdom have to say? It is, it must be said, a rather limited reading of the Convention in relation to Article 2(3). It makes essentially three arguments: (1) the provision in Article 2(3) is merely descriptive; (2) and alternatively, if it is more than descriptive, it is to be interpreted as imposing a limitative obligation, that is only in respect of what the United Kingdom calls 'general rules of international law'; and they, it says, are not engaged in the present case; and in the further alternative, (3) if it does incorporate obligations that are more specific than those of 'general rules of international law', they haven't been

violated in any event.

So, the issue for the Tribunal is the interpretation of Article 2(3). We say that our approach is consistent with the general rules of interpretation set out in Article 31 of the Vienna Convention.[34] You start with the ordinary meaning: the exercise of sovereignty in the Territorial Sea is subject to (i) the Convention and (ii) other rules of international law. We say that the verb "exercise" is defined as "[t]o make use of; to put into action."[35] Used in context of Article 2(3), the words "subject to" mean "bound by law" or "under obligation."[36] The words "subject to" are used throughout the Convention as you will be very aware: I refer you to Articles 17, 34(2), 38(3), 42(1), 49(3), 52(1), 55, 75(1), 87(1), 105, 116 and so on. In our view, when the words "is exercised" precede both "subject to" and "this Convention and to other rules of international law," the construction as a whole means exactly what it says: that the exercise of sovereignty in the Territorial Sea is subject to these requirements. These requirements operate to set limits on the exercise of sovereignty. To exceed those limits is to act outside the authority of the Convention. That's the plain meaning.

7. We showed in our pleadings that the interpretation was consistent with what the drafters of Article 1(2) of the 1958 Convention, and also Article 2(3) of the 1982 Convention, intended namely to codify the general international law principle that a State's "possession of Territorial Sea entails not only rights but also obligations", and that these have to be respected.[37] And I don't think there is a big debate in scholarly opinion on this matter.[38] As long ago as 1929 Judge Jessup, in his book *The Law of Territorial Waters*, made the point that sovereignty in the Territorial Sea is "not an absolute concept" but "limited by the restrictions of international law".[39]

[34] MR, para. 6.7.
[35] MR, para. 6.7 (footnote 544).
[36] MR, para 6.7 (footnote 545).
[37] MR, para. 6.8 (footnote 546).
[38] MR, para. 6.8.
[39] MR, p. 153, fn 547.

It invokes the commentary, the ILC's Draft Articles Concerning the Law of the Sea, which were adopted in 1956.[40] And you will find them at Tab 9.1 of your text. You'll be, I'm sure, delighted to know that the number of tabs is rapidly diminishing as we hit the law and move away from the facts. I've just got four to take you to this afternoon. But I do want to take you to this because we do say that it is illustrative of the situation. We are back to pink for this afternoon and it's the very first tab, it's Page 401 in the bottom right-hand corner in red. And if I can just take you on the left-hand side, you will see that this is the 1956 commentary on the articles concerning the law of the sea. And I just want to take you to a couple of places. At Paragraph 3 on the left-hand side down at the bottom: [Tab 9.1] **"(3) Clearly, sovereignty over the territorial sea cannot be exercised otherwise than in conformity with the provisions of international law."** I emphasize the word "cannot".

Paragraph 4 provides more descriptive material by way of background in relation to the non-exhaustiveness of the limits. And then this at Paragraph 5, so the draft has specifically envisaged situations of this kind: "(5) <u>It may happen that, by reason of some special relationship, geographical or other, between two States, rights in the Territorial Sea of one of them are granted to the other in excess of the rights recognized in present draft. **It is not the Commission's intention to limit in any way any** more extensive right of passage [and then the crucial words] or **other right enjoyed by States by custom or treaty**."</u>

And there I think you get the purpose, really, of what was intended in Article 2(3); it's a reservation, really.

8. This 1956 Commentary makes it abundantly clear that the approach taken by the ILC, which was, of course, codified and is reflected in the law today, was to require States to respect such "other rules of international law". Otherwise why would they have put it in? To say that sovereignty "cannot be exercised" otherwise than "in conformity with the provisions of

[40] MR, para. 6.9.

international law",[41] which is what the commentary says, is merely a way of proscribing conduct that is inconsistent with these obligations.[42] The same principles animate Article 2(3), as the Virginia Commentary makes abundantly clear.[43]

9. The United Kingdom takes some refuge in different translations of the text, and we don't think that provides them with any material assistance. The fact that Article 2(3) imposes an obligation of compliance, which is how we put it, is clear in the French text of the Convention and the Russian text.[44] The French text, for example, provides that:

"La souveraineté sur la mer territoriale s'exerce dans les conditions prévues par les dispositions de la Convention et les autres règles du droit international."

You will be very pleased there is no official Creole version of the Law of the Sea Convention, which is the third official language of Mauritius, so I don't have that for you. You may recall that in French, to place the verb "s'exercer" in the indicatif présent (the present tense) indicates the formulation of a legal norm that expresses an obligation. So the word "s'exercer" in the indicatif présent, when used in conjunction with "dans les conditions prévues par les dispositions de la Convention et les autres règles du droit international," expresses an obligation in the French language to abide by the Convention and other rules of international law.[45]

10. Comparing Article 2(3) with other provisions in the Convention sort of serves to illustrate this point. If you were to look, for example, at the English text of Article 56(3), that provides: "The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI." The French text, on the other hand, uses the same verb – "s'exercer" – as it does in Article 2(3). [46] So, Article 56(3) in the French text reads:

"Les droits relatifs aux fonds marins et à leur sous-sol énoncés dans le présent article

[41] MR, 6.9 (footnote 550).
[42] MR, para. 6.9.
[43] MR, para. 6.9.
[44] MR, paras. 6.10-6.11.
[45] MR, para. 6.10.
[46] MR, para. 6.12.

s'exercent conformément à la partie VI."

11. This makes it rather clear that the drafters of the Convention – in the French version – did not intend that Article 2(3) or Article 56(3) should provide different obligations in relation to the level of compliance they imposed. And the point is also confirmed by the Russian text of Article 56(3), which uses the same grammatical formulation as in Article 2(3).[47] And I will not try to pronounce the Russian text.

12. The UK refers to Article 19(1) of the Convention, and that says, ("[innocent] passage shall take place in conformity with this Convention and with other rules of international law")[48] and then points out that the French text appears as "doit s'effectuer en conformité avec les dispositions de la Convention et les autres règles du droit international". And the UK argues that in this context there can be little doubt as to the intention to establish an obligation in Article 19(1), but that there is no equivalent formulation used in the French text of Article 2(3) and so there can be no equivalent obligation.[49] With great respect, that is hardly a persuasive argument, as a linguistic matter. The verb 'devoir' is not the one that is usually employed in the French language to convey legal obligation in international agreements. If anything, that word usually connotes a weaker commitment than the use of the present tense in French. The reference to Article 19(1) by the UK in our submission perfectly illustrates the difficulty of drawing a firm conclusion as to either the descriptive nature of the text (the UK view) or the mandatory nature (the Mauritius view) of a provision in any particular language.

13. Other provisions of the Convention make it very clear that there is nothing talismanic about the word "shall" in English and that obligations of compliance may be adopted without using that word.[50]

14. The central thrust of the UK's argument is that Article 2(3) just does not create an

[47] MR, para. 6.12.
[48] UKCM, para. 8.5(d), footnote 627; UKR, para. 8.7 (footnote 641).
[49] UKR, para. 8.7.
[50] UKR, para. 6.13.

"obligation of compliance", that's what they say in their Rejoinder at Paragraph 8.5. (UKR, para. 8.5). It says that the provision just does not establish an "independent obligation",[51] it is merely "descriptive". Well, by then you have a look at other comparable words of the Convention. For example, Article 34(2), in relation to straits, or Article 38(3), in relation to transit passage, or Article 49(3), regarding archipelagic waters, you will be able to look at this, I think, in your own time, all of which use the present tense in providing that the relevant regime that is set up in the Convention is subject to other rights and duties. Then compare this with Article 78(2) which provides that the exercise of the coastal States' rights over the Continental Shelf 'must not' interfere with navigation – we would note that the words 'must not' are not the traditional language of obligation for international agreements. And then we have provisions such as Article 87(2) which requires that high seas freedoms 'shall be exercised' with due regard to other States.

15. Can it really be argued that simply because the present tense is used for straits and archipelagic waters (and of course the Territorial Sea), the subjection of those regimes to other provisions is not mandatory, it's not an obligation of compliance? Or that because the words 'shall not' are not used, that navigation rights cannot be assured over the Continental Shelf, whereas navigation rights *can* be assured on the high seas because the word 'shall' is used in Article 87(2)? You only have to state proposition to see that it would be a rather curious, if not absurd, conclusion. The vagaries of the drafting process would lead to a most uneven approach. In particular context in which these provisions are drafted, it is clear from the history, that in each case the exercise of the rights there described is made subject to the rights of other States.

16. In sum then: Article 2(3) means that the exercise of sovereignty is limited by the requirements of the Convention – this includes all of the obligations that I set out earlier as well as the obligation to act in good faith and not to abuse rights (under Article 300) – a point to

[51] UKCM, para. 8.5.

which Professor Crawford will return. So, then the real question then becomes, what is meant by the words "other rules of international law"?

17. These are broad and open-ended words. You will find them throughout the Convention; there is no magic to them. I refer to, for example to Article 34(2) and Article 138. (see *e.g.* Article 34(2) and 138). In its Advisory Opinion of 1 February 2011, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, the ITLOS Seabed Disputes Chamber confirmed that the words encompass not only treaty rules, for example, the Vienna Convention on the Law of Treaties (para. 57),[52] but also rules of customary law (para. 169).[53]And those, I think, are not intended to be limitative words. We note the reference to "other rules of international law" in Article 2(3) is not modified by any qualifying word that might have the effect of narrowing its scope of application.[54] The word "general" is not there, the word "treaty" is not there. It is really very open-ended text.

18. I have taken you to the ILC commentaries which make clear the limitations which are set forth in the provision of Article 2 are not intended to be exhaustive and that's why these words were included.

19. The UK argues that even if Article 2(3) did establish an obligation to comply with all rules of international law, it would be only in respect of general obligations of international law, and that Mauritius' claims falls outside of that restricted ambit.[55] But, the ILC emphasized, in the commentary of draft Article 1(2) that it encompasses both obligations founded in general international law, and I took you to the text, specific arrangements entered into by the States concerned. If the Convention requires compliance with treaty-based obligations relating to the Territorial Sea, then it follows that other international rules (including with respect to specific

[52] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, 1 February 2011, para. 57.
[53] *Ibid*., para. 169.
[54] MR, para. 6.15.
[55] UKCM, para. 8.6.

undertakings) must also be complied with.[56] Even if Article 2(3)'s *renvoi* to "other rules of international law" is limited to general rules of international law, as the UK argues, the obligations that we are seeking to enforce are plainly a part of and arise under the application of those general rules of international law.[57] This is apparent from all the authorities we cite in the Reply, which I do not need to rehearse once more.[58] They are listed in the footnotes.

20. We think the UK argument also misses the point because the "other rules of international law" on which Mauritius relies *are* general rules of international law. General international law requires that acquired rights of access to natural resources be respected. General international law requires a commitment from one Prime Minister to another to be respected. The obligation to comply with undertakings given is also a rule of general international law, founded in the general duty of good faith.[59] This applies in respect of undertakings whether they are given unilaterally[60] or by mutual understanding.[61] The obligation to consult similarly is part of general international law.[62]

21. The UK then asserts that Mauritius' argument assumes that the 1965 understanding constitutes a "rule of international law", and that that is not correct , and that has all been rehearsed and I won't go back and repeat ourselves on those issues. We say that the commitments made by the United Kingdom are legally binding and that they are binding as a matter of the application of rules of general international law.

22. Turn briefly to the commitment given in 2009 by Gordon Brown. And I just want to pause here for a moment to pay tribute to Sir Ian Brownlie, who was for many years the adviser to the Government of Mauritius and he was the adviser to the Prime Minister and the

[56] MR, para. 6.17.
[57] MR, paras. 6.18-6.19.
[58] See MR, paras. 6.5-6.19.
[59] MR, para. 6.18 (footnote 562).
[60] MR, para. 6.18 (footnote 562).
[61] MR, para. 6.18 (footnote 564).
[62] MM, paras. 7.38-7.46.

Government of Mauritius at the time of that meeting in 2009 and you would have seen his participation in some of the Minutes of 2009. And very regrettably and very tragically, you know he was killed in a car accident very early in 2010. But I make this point, not only personally to pay tribute to the work that he did for the Government of Mauritius over many, many years, but also to make the point that when Prime Minister Ramgoolam met with Prime Minister Brown, he benefited from the advice of Sir Ian Brownlie. We have noted the rather dismissive way in which the Attorney General of England and Wales referred to what he called a 'misunderstanding' regarding the meaning of Mr. Brown's words. Mr. President, Members of the Tribunal, I want to be very firm here, we have a witness statement from the Prime Minister of Mauritius: he is a medical doctor, he is a member of the Bar of England and Wales (his pupil master, you will be interested to know, is currently a Conservative Member of Parliament), he is a Bencher of the Inner Temple (which is probably not as excellent as being a Bencher of the Middle Temple), but he is a person with great practical experience in relation to these matters. Even if he didn't have all of those qualities, when the Prime Minister of Mauritius submits a witness statement, the Tribunal is entitled to proceed on the basis that it offers an accurate recollection of events. When the United Kingdom offers no evidence to challenge that witness statement, the Tribunal is entitled to feel reinforced in its view that what he writes is accurate. When the United Kingdom then declines to call the Prime Minister as a witness in these proceedings, as it was entitled to do – and a possibility that Prime Minister Ramgoolam would have been well aware of, given the Rules of Procedure which he is familiar with – in order to cross-examine the Prime Minister, then the Tribunal is, we respectfully submit, bound to conclude that the contents of the witness statement are accurate. There is not a shred of evidence before this Tribunal of any 'misunderstanding', and we hope that going forward the United Kingdom will, out of respect for the Prime Minister of Mauritius, not repeat that unfortunate suggestion. You will recall that the Mauritius Prime Minister's witness statement

clearly sets out his subsequent meeting with Mr. Brown, which confirms that Mr. Brown did not regard the Mauritian interpretation of the commitment as a misunderstanding. This cannot be all lightly set to one side. We have a clear commitment from the highest member of the United Kingdom Government, and it is binding in international law.

23. The 1965 undertakings gave Mauritius a right to engage in fishing in the Territorial Sea; the 2009 undertaking given by Gordon Brown, Prime Minister of the United Kingdom, made it clear that its right to continue to fish would not be interfered with. Notwithstanding those undertakings, less than six months later, the United Kingdom purported to extinguish Mauritius' rights to fish in the Territorial Sea in its entirety. That act of extinction violated rights of Mauritius that exist by reference to "rules of international law" within the meaning of Article 2(3). It is a very simply point.

24. The right to be consulted has also been violated. The United Kingdom is somewhat terse on this matter; it alleges that this claim fails on the facts and the law.[63] On the facts, (they say) because it was Mauritius that brought to an end bilateral consultations; and on the law because (they say) no general rules on consultation can be 'shoehorned' into Article 2(3). On the facts, you heard Ms. Macdonald this morning, I really don't need to go back to all of those matters. But I would say this however: there was no consultation in that period between the United Kingdom and Mauritius because the United Kingdom has derailed, and it goes back to Judge Wolfrum's question, a bilateral relationship that seemed to be, certainly in January 2009, in a less bad position than it is now. And it was derailed by the proposal for the "MPA," which as you are aware, Mauritius found out about, not because it was told about it by the Government of the United Kingdom, but because it was sent a copy of an article in The Independent newspaper. The Attorney General for England and Wales says you should not have to be troubled with all these matters – and certainly, he said, there is not enough evidence to convince

[63] UKR, para. 8.25.

you the UK did comply with its obligation to consult. In this regard, we would point you, once again, to the agreement with France on Tromelin – and suggest that that was a useful precedent that could and should have been followed. France and Mauritius sought to protect the marine environment by agreement, two equal States. The United Kingdom had proceeded by fiat.

25. On the law, the UK denies the application of the findings from the *Fisheries Jurisdiction* case and the *Lac Lanoux* arbitration, all referred to in our Reply.[64] It says those cases concerned shared resources. Quite, we say. You have seen the Minutes of January and July 2009, what were they talking about in that particular context? Here we have a case *par excellence* of shared resources – assuming that we are not correct in believing ourselves to be the State that has complete sovereignty over the islands. Resources which the UK over and over again has committed itself to maintaining for Mauritius. The UK has recognised the interests of Mauritius in the Chagos Archipelago itself and in its marine resources, and in relation to any change in the position, quite simply, it had a duty under the general rules of international law to consult with Mauritius.

Conclusions

26. The conclusions I can make are very simple. For nearly five decades since the UK detached the Chagos Archipelago, fishing vessels from Mauritius have been able to fish freely in the Territorial Sea around the Chagos Archipelago. It's not in dispute. On 1 April 2010, that was brought to an end. That is, we say, as manifest a violation of Article 2(3) as one could hope to find.

Article 194

27. Then we turn to the violations of Part XII of the Convention, Article 194, and in particular Article 194(1) and (4). Both sides address these matters very fully in the pleadings.[65]

28. I can begin by inviting you to turn to Part XII of the Convention, just so that you've got

[64] MR, para. 6.69.

[65] See MM, Chapter 7; UKCM, para. 6.20-6.22, 8.49; MR, paras. 6.98-6.103; UKR, paras. 8.47-8.56.

the text in front of you. And it is useful, I think, to just see how we work our way up to Article 194. The first provision is Article 192, which affirms that "States have the obligation to protect and preserve the environment". Then Article 193 provides that "States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the environment". And you will recognize that provision, adopted in 1982, drawn pretty much straight from Principle 21 of the 1972 Stockholm Declaration, codifying it in a most important and significant way. The provision here, we say, is significant for a number of reasons: it identifies two distinct elements, which are worth mentioning: it underscores that the point the "MPA" was not proclaimed as a measure relating to the exploitation of natural resources, but rather as a measure intended to protect the environment. If you look at the France-Mauritius Agreement, you will see in the Preamble it explicitly refers to Part XII of the Convention.

29. It is therefore a measure, we say, that falls to be considered by reference to the requirements of Part XII. We really don't see how the United Kingdom could argue otherwise, although it's not exclusively Part XII and there is, as we will see, an interplay between Article 56(2) and Article 194.[66] So, let's look at Article 194. There are three relevant paragraphs. Paragraph (1):

"States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonise their policies in this connection."

Paragraph (4):

"In taking measures to prevent, reduce or control pollution of the marine environment,

[66] Memorial 7.72-7.78; Reply 6.98-6.101

States shall refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights and in pursuance of their duties in conformity with this Convention."

And then Article 194(5) refers to:

"The measures to be taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life."

Finally, but I won't take you to the provision now, you will be aware of Article 1(4) on the definition of pollution, which is extremely broad in the Convention.

30. So, let me begin with a general question: **What is the "MPA"?** Others of my colleagues have raised – and will raise this question – since the UK has bent one way and then the other, depending on which way the wind blows as to what exactly it is. The UK, when it comes to the merits, it is a measure for the protection and preservation of the marine environment. We all listened to the Attorney General. He was lyrical about the risks to the marine environment. He mentioned the protection of coral no less than 8 times in his statement.[67] But when it comes to the matter of jurisdiction, he switched, as the United Kingdom has done throughout its pleadings. For these purposes, the only thing the United Kingdom had done was to adopt "a ban on commercial fishing", an act that did not give rise to an "environmental dispute" for which the Attorney recognized you have jurisdiction under Article 297(1) of the Convention.[68] So what is it? Is it fish? Is it the environment? You can't have it both ways.

31. Characterisation is important, both for determining the legal basis on which the action is taken, to assert its lawfulness; and to determine whether this tribunal has jurisdiction. This will be especially relevant given the limitations under the Convention on measures that are to be characterised as fisheries measures. ITLOS has recently made clear that the characterization of

[67] Transcript MU-UK, Day 1, p. 46, lines 6-11; p. 47, line 6; p. 49, line 4; p. 50, line 7; p. 51, line 9 (Grieve).
[68] Transcript MU-UK, Day 1, p. 54, lines 9-14 (Grieve).

the basis for measures is significant. [Tab 9.2] And the Tribunal keeps us on our toes, it adopted a judgment, you know far better than I do, on 14 April of this year. And you will find a paragraph from that at Tab 9.2. I just want to take you very briefly to—and I do so with some deference as at least three of you will be very familiar with this provision—and it's Paragraph 224 of the judgment that I would like to take you to. It simply says:

"As to the arguments of the Parties concerning the right of a coastal State to regulate bunkering of fishing vessels [for general purposes, we know there has been an issue as to whether you can do bunkering as a coastal State and regulate it and to what extent you can do it] for the purposes of protecting the marine environment, the Tribunal considers it unnecessary to scrutinize the relevant arguments and facts presented by the Parties. In the view of the Tribunal, it suffices to point out that Guinea-Bissau incorporated its regulations on bunkering in its legislation on fishing rather than in legislation concerning the protection of the marine environment."[69]

So, on this basis, the International Tribunal was able to rule that the lawfulness of Guinea-Bissau's actions under the Convention failed to be determined on the basis of those parts of the Convention, that it was to be treated effectively as a fisheries measure. Now, I know that the Tribunal was divided and I have overnight read very carefully the strong dissenting opinion in which I know Judge Hoffman and Judge Kateka participated, but if I read it very carefully, I don't think the dissent related in any way to this particular aspect. It was on the question, essentially, of exhaustion of local remedies and related matters. So I don't think there is any dissent on that point. In any event, I am only raising this point for the very simply proposition, it really does matter how you characterize an act.

32. And that really is decisive in relation to this case because the United Kingdom has not based its proclamation of the "MPA" on fishing legislation, it has purported to establish the

[69] *The M/V "Virginia G" Case (Panama/Guinea-Bissau)*, Judgment of 14 April 2014, para. 224.

"MPA" to protect the marine environment of the Chagos Archipelago on the basis of the aim of protecting the environment, in particular, to address the conservation of biodiversity on land and at sea, to protect it from pollution as well as other harmful acts and it was declared under Proclamation No. 1 [Tab 9.3] [MM Annex 166]. So, Proclamation No. 1 is the crucial text. Let's have a look at it. I think we haven't been to it so far. You will find it at the next one, it's at Tab 9.3. So if the UK is right, and this is a fishing measure, what you'd expect to see is that it is based on fishing legislation. What do we see? Here is the document, signed by Colin Roberts. At the top you'll see it's Proclamation No. 1 of 2010. "In the name of Her Majesty Queen Elizabeth." And then if we look at Paragraph (1), there it is established that the British Indian Ocean Territory, a marine reserve to be known as the Marine Protected Area, within the environmental protection and preservation zone. Proclaimed on the 17 September 2003. That is not fisheries legislation.

Then as we continue through it, let's look at Paragraph (2).

"within the said Marine Protected Area, Her Majesty will exercise sovereign rights and jurisdiction enjoyed under international law, including the United Nations Convention on the Law of the Sea, with regard to the protection and preservation of the environment of the Marine Protected Area."

That's really the end of the matter. The UK case collapses at that point. But it gets worse.

"The detailed legislation and regulations governing the said Marine Protected Area [and then the crucial words] and the implications for fishing and other activities in the Marine Protected Area and the Territory will be addressed in future legislation."

End of case. There is no way around that. This is a measure which was addressed to protect the marine environment. It is not, as in the case of Panama/Guinea-Bissau, fisheries legislation.

33. Now, we do not know how the "MPA" will achieve the aim of protecting the marine environment. Beyond the initial no-catch rules, which are presumably intended to stop vessels from entering the area, there is after four years no detailed legislation, no regulations, nothing. We don't know how the "MPA" is going to prevent "the introduction … of substances or energy into the marine environment", so as to prevent "harm to living resources and marine life". We wonder whether such regulations have been put off since the filing of this case because their mere adoption would totally undermine a central aspect of the UK's jurisdiction argument in this case. We look forward to hearing what the United Kingdom says to your question, Judge Wolfrum, why have you not adopted any implementing measures. Such regulations to protect the environment would make crystal clear that this is a dispute relating to the environment and it's not caught by 297(3)(a) as Mr. Loewenstein will show. What we do know is they want to protect "ecosystems"[70], "atolls",[71] "reef systems and waters",[72] and "land areas".[73] If you were to rule that this was a fisheries measure, this would be the first time anywhere I suspect that any court or tribunal anywhere in the world that rules that the conservation of biodiversity on land, which is what it addresses, is a fishery measure. Hopeless.

34. Let's turn to Article 194, paragraphs 1 and 4. But this may be, Mr. President, an appropriate moment to have a break if that would be convenient to the Tribunal as scheduled. It is, I think, bang-on 3:30.

PRESIDENT SHEARER: This would be a very convenient moment to take it, yes.

(Brief recess.)

PRESIDENT SHEARER: Yes, Mr. Sands.

PROFESSOR SANDS: Thank you, Mr. President.

[70] MR, Annex 131.
[71] MM, Annex 152.
[72] MR, Annex 145.
[73] MM, Annex 152, p. 9.

So, I was on Article 194, and I'm going to take in turn Paragraph 1 and then Paragraph 4, so I begin by asking what does Article 194(1) actually require? I've taken you to the provision, and I'm sure you're very familiar with it. It requires the United Kingdom to take measures that are necessary to prevent, reduce, and control pollution of the marine environment from any source, and to endeavor to harmonize its policies in this connection, and such measures are to be taken jointly where appropriate. This provision, we say, is to be read in conjunction with Article 56(1)(b)(iii) of the Convention which provides in relevant part that the coastal State has, and I quote, "jurisdiction as provided for in the relevant provisions of this Convention with regard to the Protection and Preservation of the marine environment," and one of those sets of relevant provisions is to be found in Part XII.

Nevertheless, the right established by Part XII also has consequential obligations under Part V, including Article 56(2) of Part V which imposes an obligation on the United Kingdom, in exercising its right to exercise jurisdiction to protect the marine environment that it shall, "have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention." And Mr. Loewenstein will shortly be addressing the violations of Article 56(2). I simply want to underscore the close connection between Article 194 and Article 56.

36. In any event, it is apparent that at some point in 2008, the United Kingdom concluded that it was necessary to prevent the pollution of the Chagos Archipelago, an ecosystem that it apparently considers to be rare and fragile within the meaning of Article 194(5).

37. Now, one assumes that at that point the United Kingdom might have turned its mind to the possibility of adopting the Measures jointly with Mauritius. We know from the minutes of January 2009 that it did not do so. Such joint action in our submission, would surely have been appropriate, and it's difficult to see how it cannot be, given that the United Kingdom considered that cooperation and joint measures were appropriate in relation to the continental shelf. That

very time, the United Kingdom is actively exploring the possibility of joint action with Mauritius in relation to the Extended Continental Shelf. What's inappropriate about doing it in relation to the Marine Protected Area? Joint actions to protect rare and fragile ecosystems are important, and that is what we say precisely what France considered and then acted upon in relation to Tromelin. The resulting agreement I took you to on Tuesday. I'm not going to take you back to it now. It's at Tab 2.10, but we really do invite you to look at the Agreement and the implementing agreements adopted under it. That, we say, is what States do when they are genuinely committed to environmental protection. They reach out, they consult, they share information. They adopt a common plan for going forward. That is the very opposite of what happened in this case. Individual, unilateral measures adopted by diktat, and that stands in sharp contrast, and it is not consistent with the requirement to take joint action where appropriate.

38. Discarding the possibility of joint action with Mauritius, which is what happened, was not compatible with the requirements of Article 194(1). Someone, somewhere must have decided that between the autumn of 2008 and January 2009. Having so acted, one might have imagined the United Kingdom would be open to the other obligation imposed by the Convention; namely, to endeavor to harmonize its policies with Mauritius. Did the United Kingdom endeavor to harmonize its policies with Mauritius? Well, you only need to ask that question in light of the evidence that is before the Tribunal to recognize that it did not. To the contrary, it did the very opposite of harmonizing its policies. It hid from Mauritius what it was intending to do. You will recall that when the U.K. and Mauritius met in January 2009, the United Kingdom did not provide information to Mauritius about the proposed Marine Protected Area. Mauritius only found out about it from a newspaper article in The Independent published on the 9th of February 2009. The article is entitled, "Giant Marine Park Plan for Chagos," and you can see it at Annex 138 of our Memorial. The U.K. did not endeavor to harmonize its policies; it

hid them. Article 194 does not require Parties to hide their policies for the protection of the environment, and nor do we say that it can allow them to hide those policies.

As we noted in our Memorial, the imposition of an obligation in Article 194(1) to endeavor to act in harmony requires that States must try hard to do or achieve harmonization of policies regarding pollution prevention. The objective of harmonization requires, as we described in our Memorial, at a minimum, undertaking such efforts to make pollution-related policies for the Chagos Archipelago consistent or compatible with those of other States in the region. It requires the sharing of information, the exchange of ideas, and some degree of consultation. The United Kingdom did none of these things. To the contrary, it went out of its way to avoid finding a way to work with Mauritius. It sought, as it has done over many decades, to present Mauritius with another fait accompli.

39. Article 194(1), which may look innocuous on the first reading, nevertheless serves an important function. As Professor Stephen McCaffrey has put it, the requirement of harmonization provided for by Article 194, and I quote, "addresses the problems that can arise when States adopt different policies and standards for the prevention, reduction, and control of a watercourse they share." And he observes in relation to watercourses that, failure to coordinate pollution control efforts may frustrate or at least reduce the effectiveness of measures taken by individual countries. That's exactly what has happened. We are here today because of the frustration of two policies coming into collision. By seeking to impose measures – by presenting a fait accompli – the U.K. adopted a path that inevitably led to the result being achieved that brings us here today. You heard the advice given to Mr. Miliband at the highest levels, that if he did what he did, they would end up in court, and here we are. The Tromelin option was the alternative. It was not pursued.

Professor McCaffrey isn't alone in adopting his view as to the importance of Article 194. Another commentator, who is sitting in this room today as counsel for the United Kingdom, has

offered the following observation as to the importance of Article 194 and related provisions, and I quote: "Whereas previously States were to a large degree free to determine for themselves whether and to what extent to control and regulate marine pollution, they will now in most cases be bound to do so on terms laid down by the Convention." We agree entirely. The difficulty is the State he is now advising is arguing before this Tribunal that it should be free to determine for itself what it wants to do in the waters around Chagos, and this despite all of the rights that it has, on its own account, afforded to Mauritius.

40. In answer to the second question that might arise in exploring these provisions, has the United Kingdom endeavored to harmonize with Mauritius its policies, the answer is a resounding no. The ramifications of that negative conclusion ring all the louder that in fact the U.K. professes its belief that Chagos is a rare and fragile ecosystem. One would have thought that it would bend over backwards to achieve protections of these waters, and atolls, and reefs and for the biodiversity, but no. That suggests, and Professor Crawford will come back to it, that it was motivated by other considerations. The U.K. proceeded unilaterally and without proper notice. Mauritius maintains, as we have shown in Chapter Three of our Reply, that the U.K. simply refused to engage with Mauritius. When establishing the "MPA", there was no meaningful attempt to find out what Mauritius wanted to know, and no attempt to harmonize marine pollution policies.

41. What does the U.K. say in response? Well, for a start, it studiously ignores the Agreement between France and Mauritius, which must be something of a problem for it. You will find not a single mention of it in their written pleadings, but the Agreement was mentioned by the Attorney General on Tuesday. He asked why, if Mauritius regarded the Tromelin agreement as a good example of cooperation, Mauritius had not agreed to cooperate with regard to the implementation of the "MPA"? Well, Mr. President, Members of the Tribunal, as Ms. Macdonald pointed out yesterday, the Attorney General's reference to the agreement allows us to

show an excellent example of what the U.K. should have done. It should not have asked Mauritius to cooperate after it had produced the fait accompli of the Declaration.

42. The U.K. offers pretty much empty, bald assertions of denial of violation of Article 194.

43. And then it argues the "MPA" merely introduces a ban on commercial fishing, which brings us back to the characterization issue, and that all the relevant pollution controls have been in place since before the adoption of the environmental protection and preservation zone in 2003. It says that what other MPAs or IUCN guidelines might say with respect to environmental protection or pollution control is just irrelevant. The U.K. describes in Chapter 7 of its Rejoinder, that an MPA has no defined content in international law, and there is no consistent practice on the part of States establishing such zones. The "BIOT" MPA, "covers what it covers and no more," is the way they put it, somewhat cryptically, but perhaps also hopefully. If that is what it is, why did Mr. Miliband in announcing it described it as something so very different?

44. Putting matters another way, it seems that Mr. Miliband's words offered when he made his announcement in April 2010, have been consigned to the rubbish heap. The United Kingdom now tells us that the major step forward of which the Foreign Secretary spoke is actually nothing of the sort. We are told that the 2009 consultation exercise is not to be taken at face value, it is what it is, not what was said it is by the Foreign Secretary. Let's have a brief look at what it says, Tab 4, final one that I'm going to take you to, although I will move you around to an earlier one just to conclude in due course. Tab 4 is the consultation documentation put out by the United Kingdom in November 2009. It's Annex 152. If I could just take you to the first paragraph, you set out there the account of the area, the islands, reef systems, and waters of "BIOT" in terms of preservation and biodiversity amongst the richest on the planet, and it contains about half of all the reefs in the ocean which remain in good condition. There are about ten Important Bird Areas. It has the Indian Ocean's most dense populations of several

seaboard species, and then very important words, it also has remnants of Indian Ocean Island hardwoods. I would ask you to underscore particularly deeply those words. It also contains exceptional numbers of coconut crabs and undisturbed and recovering populations of Hawksbill and Green Turtles. That is what they sought to protect.

You then go down to the bottom of the page, and I leave it to you, sir, to read the whole of the text in due course, and at the bottom you get some of the answers to the question, what will be the added value of creating a Marine Protected Area? First indent, there's sufficient scientific information to make a convincing case for designating most of the territory as an MPA to include not only protection for fish stocks, but also to strengthen conservation of the reefs and land areas.

And then the next one, the justification for the MPA is based primarily on size, location, biodiversity, near pristine nature and health of the coral reefs, et cetera, et cetera. That's what this measure is intended to do. If I could ask you to just turn the page and look at the third indent down, MPA designation for "BIOT" would safeguard around half the high quality coral reefs in the Indian Ocean. That's what they're seeking to put up.

And then just below the final indent, we have the opportunity here to preserve "BIOT"'s unique environment. While the main focus of this consultation is whether to create a Marine Protected Area in the first instance, we would also like your views on a possible framework for the fisheries. That is absolutely clear what the central purpose of this exercise is about.

And then since we are here, I can't resist taking you to the last paragraph, since this is so prescient, we are aware that some marine parks were established and some end up in paper parks; that is the area declared as a marine protected area, but nothing more happens. I wonder if those words seem familiar. If the decision is taken to go ahead with the Marine Protected Area in "BIOT", we would need to develop an administrative framework from within the British Indian Ocean Territory to oversee the management of the MPA. Where is it? Where is the

evidence? Nothing has happened. On the next page – I won't take you to it now – you will see that they provide for no budget.

If I could, however, just take you back, and I regret, and I do apologize for doing it, but I really can't resist doing it, to Tab 2.12. You will recall there was the reference to the hardwood trees. I just want to take you very, very briefly to Professor Sheppard's report. And doing this, it is to invite perhaps through the Tribunal the United Kingdom to provide perhaps more information. It is at Tab 2.12. It's the very first one which is sort of a purply blue color, and it's Professor Sheppard's report, and I'd like to take you to the second page which is marked Mauritius folder Page 72, and at the top of the page – well, actually we should start at the bottom of Page 71, okay? Bottom of Page 71, I just want to read this into record. So, I will just pause, we're on Tab 2.12. "However, it has become clear that the plan is to eliminate 50 percent of the trees, mean trunk diameter 1 foot." These are not twigs. These are well-established trees, over 600-acres, meaning the removal of about 42,000 trees. "This was news to myself, and it seems to all on the island."

Then go down to the next paragraph. In the absence of any new study, and I'm unaware of any, it has to be said the new scheme for massive felling seems to be a very bad idea, and he then refers to the impact on vegetation.

And the next paragraph says, the problem is a new one to all concerned, although one person in DG has given me a document dated December 2011 which does talk about this, indicating that the idea is more than a year old. Then you carry on, the clearing program has apparently started and was authorized under a U.K. letter of permission dated January 2013.

Could I just remind you that the consultation document talked about protecting hardwood trees. We don't know if these are hardwood trees, but –

ARBITRATOR GREENWOOD: Mr. Sands, I think the answer might be on the next page, Page 73, under the heading "The opportunity." Do you want to have a look at the

first two sentences there?

PROFESSOR SANDS: I'm wondering which sentences you're referring to.

ARBITRATOR GREENWOOD: I was reading this last night. This can't, however, be turned into a major opportunity – sorry, if you top of the page, neither myself nor other environmental staff know the derivation scheme for clearing 42,000 coconuts. That would be palm trees?

PROFESSOR SANDS: Yes.

ARBITRATOR GREENWOOD: And then the opportunity, this can, however, be turned into a major opportunity. In Diego Garcia there is a scheme which is in place too often ignored whereby there is two for one replanting scheme whereby two native hardwood seedlings are planted for every one palm tree removed. If this is applied, you can see a good opportunity.

Now, I read that last night possibly because I read it too quickly, meaning the trees to be cut down were palm trees and that they would be replaced if Sheppard's proposal was adopted by hardwood; is that right?

PROFESSOR SANDS: Well, I read it also and I came to the same conclusion that you did, but that is why I was very careful in making this presentation to seek information because it's not exactly clear whether the entire 600 hectares includes palm. I read it in that way, but we just don't know from this text, and it would be very useful to have from the United Kingdom a clear explanation, and we ask for all the supporting documents. After all, it has committed to the protection of this vitally important fragile ecosystem, and we think it will be useful to have all of the relevant documentation that is there referred to.

It may well be that that thing tells us these are palm trees, but we won't know that until we've seen all of the documents and my reading of that, but I may be wrong, was that Professor Sheppard also had very little information as to what exactly was going on, and that was why I

framed this in relation to a question.

So, I bring you now – and you can read through the document, and you will see Professor Sheppard's reaction to the whole thing.

45. So, I bring you back on to the Article 194(1) violation. Essentially what the United Kingdom says is that we're wrong because the "MPA" actually isn't an MPA. It's merely a repackaging of old policies topped up with a total ban on fishing.

The declaration of an MPA, the U.K. now says does not stand the longstanding regulation of marine pollution which is based on and consistent with internationally agreed rules and standards established by the IMO.

And there is here, you will notice, a manifest contradiction because, elsewhere, the United Kingdom tells us new rules are being adopted, a new Ordinance we were told is in preparation, so we wonder what it is. Is it just the existing rules, is it the new rules? Again, we are in the same position that you are in. We simply are not able to tell you in the absence of newspaper reports or in the absence of information being given to us.

46. In any event, the U.K. makes its case on what we say is a very convoluted argument, that it doesn't need to seek to harmonize its policies with Mauritius or one assumes to bother to consider joint action with Mauritius because it's a party to the relevant IMO Conventions, and they are applied to the waters in question. It cites its participation in those Conventions and in the negotiation and implementation of others. It claims that is all Article 194(1) can reasonably be required to impose upon it as an obligation. We say that is not a forceful argument.

Article 194(1) doesn't invite or encourage the adoption and Application of International Conventions at the IMO or elsewhere. That is governed by other provisions of UNCLOS, in particular those under Section 5 of Part XII, which address international rules and national legislation, and there is a distinction between international rules and national legislation in Section 5 on the one hand and measures and policies under Article 194(1).

47. The U.K. further asserts that under Mauritius' interpretation of Article 194(1), coastal States would be severely constrained in going beyond the mere implementation of IMO conventions. Well, again there is a rather simple answer to this, and it is – and I do sound like a broken record, and I apologize – the France-Mauritius agreement on the protection of the marine environment around Tromelin. Can it seriously be argued that the 2010 agreement constrains France and Mauritius from implementing IMO conventions? Obviously not. I need only pose the question for the answer to be quite obvious.

48. On this issue, the United Kingdom made one further argument in its Counter-Memorial, namely that the failure to engage was the responsibility of Mauritius, which was the Party responsible for failing to engage. I don't think I really need to say anything more about that.

So, I turn to Article 194(4) and Mauritius' claim that the U.K. has unjustifiably interfered with Mauritius' exercise of its rights in conformity with the Convention. The U.K. boldly states that we have failed to particularize our claim and that our argument is spurious. We are entirely comfortable with you forming a view as to the level of spuriousness of our argument. Let us look at the provision in question and briefly at the facts.

49. Article 194(4) requires the U.K. to refrain from unjustifiably interfering with activities carried out by Mauritius in the exercise of its rights in conformity with the Convention. Those rights include fishing rights. They have been extinguished by this measure. They are rights exercised in conformity with the Convention.

50. So, a first question might be, is Article 194(4) applicable? We say it is. The "MPA" and the implementing regulations which may one day come are measures to prevent, reduce or control pollution of the marine environment. Indeed, the measures are intended to provide comprehensive protection. The waters of the Chagos Archipelago to protect reefs and atolls and marine life and the ecosystem as a whole, and we've addressed our rights in some detail. I don't need to revisit them now. There is no claim by the U.K. that the Mauritian fishing

activities are somehow not in conformity with the 1982 Convention. So, we say it is plain that Article 194(4) is applicable and it is engaged, and the United Kingdom does not argue otherwise.

51. So, what does that provision require? It requires that the measures to prevent, reduce or control marine pollution, the "MPA" and the implementing regulations that we assume will one day follow, can't unjustifiably interfere with Mauritius' rights in the Chagos Archipelago. Those rights include the fishing rights up to 200-miles as well as all of the rights of Mauritius that the U.K. has undertaken to respect. Those rights have been subjected to unjustifiable interference. And I can take the point in two stages.

52. Is there an interference? Plainly there is. All fishing by Mauritius has come to an end. If that isn't an interference, we don't know what is.

53. So, is the interference justifiable or is it unjustifiable, as we say it is? I suppose it could be argued to be justifiable if it could be shown that the very fishing activity that had been terminated was a source of pollution or harm. The United Kingdom has introduced no evidence to show that it is. To the contrary, the Attorney General showed you a chart which pointed to the de minimis activity as compared with other States. It is an assertion which I think will likely come back to haunt the United Kingdom: the absence of significant activity on the part of Mauritian fishing vessels. It surely cannot be said that that is the cause of all the problems on the Chagos Archipelago. But the argument on that activity becomes all the more untenable in light of the evidence that the United Kingdom tried to suppress from the public domain, and that is the far greater source of pollution in the area appears to be the United Kingdom's own Pacific Marlin as well as other vessels in the area.

54. The point is a simple one: The U.K. mounts no real effort, no effort at all to persuade this Tribunal that a total ban on Mauritian fishing in these waters was justifiable. The burden is on the United Kingdom to show that it was a justifiable decision. In the absence of any evidence, we simply do not see how they can do that. There is no evidence, there is no

argument.

55. So, what do they say? In the Rejoinder they revert once again to the old canard that Mauritius is attributing to the "MPA" more than is actually there. You see the constant flip-flopping, depending on what the argument is about. It says the only new measure is the ban on commercial fishing, and since Mauritius has identified no legislation on pollution which will necessarily affect any activity in these, well, the ban on fishing is a measure to stop pollution, presumably the vessels were stopped because the view was taken that they caused harm to the area. This, we say, is a really disingenuous argument. The "MPA" and its total ban is exactly such a measure. It's not intended to save fish for the purpose of managing the resource or exploiting fisheries in years to come. It's intended to prevent the polluting activity that is associated with such fishing practices. Ordinance No. 1 and the regulations that will come are measures to prevent pollution. That's the Measure.

56. What else does the U.K. argue? It claims that Mauritius hasn't argued that the early declaration of an environmental protection and preservation zone in 2003 is incompatible with UNCLOS, and it must, therefore, be assumed that its claimed rights are unaffected by that Declaration. You've got the evidence before you, Mauritius has consistently from Day 1 objected to that legislation.

57. Finally, U.K. states that it's not for the United Kingdom to speculate on how the regulation of marine pollution from ships or fishing boats might otherwise interfere with the fishing or other rights to which Mauritius lays claim. Mr. President, we will use the U.K.'s own words, the "MPA" is what it is, a total ban on all activity. It's an anti-pollution measure. It very obviously interferes with the fishing rights of Mauritius. It is unjustifiable. We do not see on what basis we are required to provide further particulars, nor, frankly, are we able to see how this can be said to be a spurious argument.

58. Mr. President and Members of the Tribunal, in our submission, the violations of Articles

2(3) and 194 are very clear. The "MPA" is a measure taken to protect the environment, a measure to prevent pollution and consequential harm from pollution. It includes a total ban on Mauritian fishing. That ban extinguishes the rights of Mauritius, and it brings all activity to an end. There is no evidence before the Tribunal to show that the measure taken in that respect or otherwise was considered to be necessary because the activity was harmful. Quite the contrary. We say this is a situation in which the violations of these provisions is manifest and clear.

That concludes, Mr. President, my submissions this afternoon, and with your permission, I would now invite you to call Mr. Loewenstein to the bar.

PRESIDENT SHEARER: Thank you very much, Professor Sands.

Are there any questions? No. Thank you.

I invite Mr. Loewenstein to approach the podium. Thank you.

Parts V and VI of UNCLOS and Article 7 of the 1995 Agreement

Speech 10 - Andrew Loewenstein

Mr. President, Members of the Tribunal, good afternoon. It is an honour to appear before you on behalf of Mauritius. My task is to show that the United Kingdom has breached its obligations under Parts V and VI of the Convention. In regard to the *Exclusive Economic Zone*, the U.K. has breached Articles 55 and 56(2) by failing to respect Mauritian fishing rights in the EEZ and by failing to consult with Mauritius before imposing the "MPA" unilaterally. The UK has further breached Articles 63 and 64, as well as Article 7 of the 1995 Fish Stocks Agreement, by failing to consult with Mauritius directly or with the relevant regional organization, the Indian Ocean Tuna Commission.

In regard to the *continental shelf*, the UK has breached Article 78 by preventing Mauritius from harvesting sedentary species. Additionally, in relation to the outer continental shelf, having regard to the UK Rejoinder, where it has for the *first time* expressed the view that Mauritius was

not entitled to submit preliminary information to the CLCS, a dispute now exists as to whether the clock has stopped such as to allow Mauritius to make a full submission in the future.

I will begin with Part V, and the UK's failure to respect Mauritian fishing rights in the EEZ despite: (1) its undertaking to respect such rights; (2) its repeated acknowledgement that Mauritius has traditional fishing rights within the 200 mile EEZ; and, finally, the undertaking given by Prime Minister Brown to Prime Minister Ramgoolam. Part V requires States Parties to comply with all three. Article 56(2) provides that "[i]n exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State *shall have due regard to the rights and duties of other States*." This is a mandatory obligation. As the UK agrees, grammatical constructions employing the word "*shall*" establish positive obligations, although as Professor Sands has explained in connection with Article 2(3), the UK disagrees with Mauritius about whether or not other formulations do so as well.[74] In this case, there is no ambiguity about what the coastal State must do. It ***must*** "have due regard to the rights and duties of other States." Article 56(2) is thus breached by the UK, assuming it to be the coastal State, when it fails to have "due regard" for the rights of Mauritius. So, too, is Article 55, which requires coastal States to exercise rights, "subject to the specific legal regime established," in Part V, including obviously Article 56(2).

The meaning of the words, "due regard," is clear. "Due" is defined as "required or owed as a legal or moral obligation." "Regard" means "attention to or concern for something." Used in combination in Article 56(2), "due regard" establishes the obligation of the UK to *respect* the rights of Mauritius, as set out in the Reply.[75] The UK's Rejoinder offered *nothing* in response. It has offered no alternative way to interpret the words, "due regard," based on their ordinary meaning.

[74] Rejoinder, para. 8.7.
[75] Reply, paras. 6.67-6.69.

The *Virginia Commentary* confirms that Article 56(2) requires coastal States to respect the rights of other States in the EEZ. It explains that Article 56(2) imposes the obligation to "*refrain* from activities that interfere with the exercise by other States of [their rights]." This perfectly describes Mauritius' position: the UK is bound to *respect* its rights. It must *refrain* from acts that interfere with them. Mauritius set out the *Virginia Commentary*'s interpretation of 56(2) in its Reply. Again, the UK had *nothing* to say in response in its Rejoinder.

The ILC reached the same conclusion in regard to a similar obligation in the 1958 Convention on the High Seas, where it interpreted the obligation to have "reasonable regard" for the interests of other States as meaning that, "[s]tates are bound to *refrain* from any acts that might adversely affect the use of the high seas by nationals of other States."[76]

This all puts the UK in evident difficulty. It adopts the strained argument at paragraph 8.36 of the Counter-Memorial that the obligation to have "due regard" for the rights of other States, "stops well short of an obligation to give effect to such rights."[77] In the Rejoinder, the UK at paragraph 8.28, declines to say more. Curiously, then, the UK has refused to take a position on what the obligation actually requires. How far short does it fall from requiring giving effect to such rights? What must a coastal State do to comply with 56(2)? What does the Article mean if it does not require coastal States to respect the rights of other States? The UK doesn't say, though on its approach it would seem the obligation must be meaningless. It simply accuses Mauritius of re-writing the clause, without suggesting any other way it could be interpreted. It doesn't require much imagination to divine why the UK is so reticent: there is no other plausible interpretation other than the one that Mauritius relies upon, the ordinary meaning.

Unable to avoid the obvious conclusion that 56(2) requires it to *respect* the rights of Mauritius in the EEZ, the UK asserts at paragraph 8.37 of the Counter-Memorial that the 1965

[76] ILC Commentaries on the 1958 Convention on the High Seas: see Nordquist eta al., *United Nations Convention on the Law of the Sea 1982: A Commentary* (1995), p. 86.
[77] CM, para. 8.36; Rejoinder, para. 8.28.

undertaking could *only* have applied "within the *territorial waters* then appertaining to the Chagos Archipelago," and that the UK, "could *not* have undertaken, and evidently did *not* undertake, to accord rights in the high seas."[78] This is wrong: the UK *could* and *did* undertake to accept Mauritian fishing rights in *all* the waters of the Chagos Archipelago, including those beyond the territorial sea. It did so automatically, as Mr. Reichler made clear, in 1991. The 1965 undertaking was a general, unqualified commitment to respect Mauritian fishing rights *throughout* the waters of the Chagos Archipelago. This is clear from the undertaking itself and the context in which it was given, as well as the way the UK understood and implemented it over a period of 45 years. Each time the UK established a zone extending *beyond* the territorial sea, it evaluated the 1965 undertaking and Mauritian fishing rights. There was never any quibbling. Each time, the UK concluded it had a *legal obligation* to respect Mauritian fishing rights, not just in the territorial sea, but in adjacent zones as well, to the 200 mile limit of the EEZ.

Mr. Reichler has already described the scope of the 1965 undertaking, its legally binding nature, and its implementation, including the UK's consistent understanding that it applied to the entire Chagos fishing area out to 200 miles. I don't have 28 documents to examine with you, as Mr. Reichler did. But the few documents that I will review are more than enough to make the point.

But before reviewing them, I will make three preliminary observations that reinforce the conclusion that the 1965 undertakings apply *beyond* the territorial sea, and they do so as a *legal obligation* on the approach of the UK. *First*, the undertaking's reference to Mauritian "fishing rights" is *not* qualified by language that limits its application to the territorial sea. No spatial limitation is placed on Mauritius' fishing rights at all. Had the intention been to *limit* Mauritian fishing rights to the territorial sea, or to any other zone, this could have been stated expressly.

[78] Counter-Memorial, para. 8.37(a).

However, no such limitation is included, or was claimed before these proceedings, making clear that was *not* the intention.

Second, the intention to apply the undertaking beyond the territorial sea is consistent with contemporaneous developments in the law of the sea, which by that time had accepted that a coastal State could claim waters adjacent to the territorial sea where exclusive jurisdiction could be exercised over fishing. This development is described in the *Fisheries Jurisdiction Case (United Kingdom v. Iceland)*. The Court's 1974 Judgment describes developments that had occurred since the UNCLOS II conference in 1960. It observes at paragraph 52 that one of the concepts which had, "crystallized as customary law in recent years," was "the concept of the fishery zone, the area in which a State may claim exclusive fishery jurisdiction independently of the territorial sea." The Court said: "the extension of that fishery zone up to a 12-mile limit from the baselines appears now to be generally accepted."

This was certainly the UK's position. Please turn to Tab 10.1. This is the United Kingdom's Memorial of 31 July 1973. If you look at paragraph 225, which will appear at page 415 of your folder, you will see what the UK wrote:

[B]y about the middle of the 1960s, a firm state practice had been established which sets the limit of a coastal State's fisheries jurisdiction at 12 miles from its coast – or more accurately, from the baseline from which its territorial sea is measured. This State practice was founded upon the consensus which had emerged at the 1958 and 1960 Conferences, which indeed had failed by only one vote to be incorporated in a Convention to be adopted by the later Conference….

Further down the same paragraph at the bottom of the page, the UK took the position that: It can be fairly said that, therefore, whatever view might then have been held about the future development of the law, the state of the customary international law at that time [now recall the

UK is talking of the mid-1960s] was that it embodied – but went no further than – the propositions which had so nearly failed to get accepted at the Geneva Conference a few years earlier.[79]

You need not read it now, but elsewhere in its Memorial the UK further observed that some States had claimed exclusive rights *beyond* 12 miles, although these claims had not achieved the status of customary international law.

So, this was the context in which the UK undertook to respect Mauritian fishing rights in 1965: in the UK's view, the law of the sea had *accepted* that coastal States have the right to a contiguous zone for fishing lying *beyond* the territorial sea. The decision *not* to limit the 1965 undertaking to the territorial sea is thus not at all surprising, especially since, as Mr. Reichler explained, it was the intent to safeguard Mauritius' future uses of the sea, which would have included uses beyond the territorial sea. It is also clear, in this regard, that in its treatment of the fishing rights of Mauritius, the UK treated Mauritius as having the attributes of a coastal State, whose fishing rights extended with each development in the law.

My *third* observation is that the only limitation on the UK's undertaking was that Mauritian fishing rights would, "remain available" "*as far as practicable*." As Mr. Reichler showed yesterday, this meant that Mauritian fishing rights could be exercised as long as they did not interfere with defence-related activities. These occurred primarily on or near the insular coasts of the Chagos Archipelago, especially Diego Garcia. The practical result was that restrictions were anticipated relatively close to shore, but generally not expected farther away, since fishing remote from the coast was unlikely to interfere with defence-related activities. Thus, few, if any, restrictions were contemplated in the waters beyond the belt of territorial sea. This is borne out in the evidence I will now address.

Please turn to Tab 5.4. The document you will find there at 5.4 was produced previously as Annex 50 to the Memorial, and Mr. Reichler reviewed it with you yesterday. I will highlight

[79] *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Memorial of the United Kingdom, 31 July 1973, para. 225.

some other aspects of the document. You can see on the first page, it is a letter dated 12 July 1960 from the Commonwealth Office to the Governor of Mauritius. The subject of the letter is indicated by the first two paragraphs, which refer to, "*fishing in the Chagos Archipelago*" and an "enquiry" "relating to the undertaking given to Mauritius Ministers in the course of discussions on the separation of Chagos from Mauritius."

Paragraph 3 addresses how Mauritian rights would be given effect. I would refer you to paragraph B(i). As you can see, it says: "Mauritian fishing vessels would of course have unrestricted access to the *high seas within the Archipelago* (of which it seems from such maps as we have there must be a considerable amount)."

ARBITRATOR GREENWOOD: (off microphone) I'm sorry, Mr. Loewenstein, you were –

MR. LOEWENSTEIN: 5.4

Now, why is the Commonwealth Office discussing Mauritian fishing rights *in the high seas*? The explanation comes if you turn the page and look at the first line of paragraph 4, in the middle of the page. There, the letter refers to the "related questions of territorial waters and fishing limits," and notes – correctly – that "These two are not necessarily the same thing." In the second line of paragraph 5, the Commonwealth Office then proposes that the UK, "declare an exclusive fishing zone up to 9 miles *beyond* the three-mile belt of territorial sea." Now, please turn the page again, and look at the top paragraph, third line. You will see that, in this zone, the proposed arrangement is for Mauritian vessels to retain the right to fish in light of what the Commonwealth Office calls the "*traditional fishing arrangements*."

When the UK implemented this regime in 1969, it took care to respect Mauritian fishing rights *beyond* the territorial sea. This is evident in the document you will find at Tab 10.2**.** As you can see from the first page at 10.2, this document, which was produced as Annex 52 to the Memorial, is a letter, dated 28 April 1969, from the FCO to the "BIOT" Administrator. The

subject-line reads: "BIOT Fishing Limits." In the middle of the page, at paragraph 3, the FCO says: "We should be grateful if the BIOT Legal Adviser would … prepare a draft Ordinance by which the BIOT Commissioner setting out the fishing regime that it is proposed to establish for British Indian Ocean Territory." Now look at subparagraph (a). You can see that the FCO reminds the "BIOT" Administrator that there is to be a 12 mile zone, which would have two components, an inner 3 mile belt, corresponding to the territorial sea, and an outer 9 mile zone *beyond* the territorial sea. Mauritius would retain fishing rights both in the territorial sea *and* in the contiguous zone. This is set out in subparagraph (d), which says that: "Mauritian fishing vessels will likewise be granted fishing rights within *both* inner and outer zones around the islands of the Chagos Archipelago." The only exception is that, after an initial phase-out period, "restrictions" could be placed "on their activities within the inner zone." If you now please turn the page and look at subparagraph (e), which appears at the top of the page. Here, the FCO says that the restrictions are to be limited to, "the immediate vicinity of islands which might in future be used for defence purposes" and, "had to be kept to the minimum compatible" with "security requirements." As Mr. Reichler explained, this is the regime that the United Kingdom adopted.

ARBITRATOR WOLFRUM: With your permission, Mr. President, Mr. Loewenstein, let me go back to 3(a) of the document you are just dealing with. You can see, at least I could see that the three and the nine have been included by handwriting. Who has done that? Was that a correction done by the author of the document or has it been done later?

MR. LOEWENSTEIN: With your indulgence, I want to make sure I'm looking at the right paragraph.

ARBITRATOR WOLFRUM: 10.2.

MR. LOEWENSTEIN: You're referring to –

ARBITRATOR WOLFRUM: 3(a) 12-mile fishing zone to be established around the islands composed of an inner three, which is done by hand.

It's correct, but I would like to know who did the correction.

MR. LOEWENSTEIN: Well, this is as the document was obtained, as it was obtained in the files.

ARBITRATOR WOLFRUM: Thank you.

MR. LOEWENSTEIN: As I was saying, the UK later reaffirmed Mauritian fishing rights in the contiguous zone. And this can be seen at Tab 10.3. This is a document that the United Kingdom produced as Annex 20 to its Rejoinder. As you can see on the first page, this is a letter from the FCO to the British High Commissioner in Mauritius. Paragraph 1 references prior correspondence concerning what it refers to as, "a Mauritian claim to *jurisdiction* over the waters around Diego Garcia." At paragraph 2 you will find the FCO's interpretation of this claim. The second sentence says: "Our conclusion is that Sir Seewoosagur [referring to the Mauritian Prime Minister] may have been referring to *fishing rights* when he stated that, 'since July 1971 the British have recognised the jurisdiction of Mauritius over the waters surrounding Diego Garcia.'" July 1971, of course, is when the UK promised Mauritius that its fishing rights would be respected in the contiguous zone. The last sentence of this paragraph is the critical one. The FCO writes: "We are *certain* that it is only in respect of *fishing rights* that Mauritius can claim any rights in respect *of these waters*." In other words, the UK objected to the Prime Minister's characterization of Mauritius having "*jurisdiction.*" But it *accepted* that Mauritius had "fishing *rights*". And it characterized those rights as a *certainty*. As we have seen, the waters being referred to here extended beyond the territorial sea.

The following conclusions can thus be drawn from the evidence we have reviewed so far: (1) the 1965 undertaking had no spatial limitation restricting its application to the territorial sea; (2) at the time it was made, recent developments in the law of the sea suggested a coastal State could claim an exclusive fishing zone beyond the territorial sea; (3) the UK, which proclaimed such a zone, understood it had to respect Mauritian fishing rights there, and did so on the basis that

Mauritius had attributes of a coastal state; and (4) the only restrictions that could be imposed were those limited to the "immediate vicinity" of islands used for defence purposes and had to be the "minimum compatible" with "security requirements." Put simply, the UK's claim that the 1965 undertaking was intended only to apply to the territorial sea is wrong, on the evidence and on the law. The opposite is true: the undertaking was intended to apply *beyond* the territorial sea, and that is how the UK implemented it.

The UK is equally wrong to suggest, as it does at paragraph 8.37 of its Counter-Memorial, that, "subsequent acts of the United Kingdom did not somehow extend alleged fishing rights, or traditional fishing rights" to the 200 mile zones it later established.[80] In fact, the UK continued to respect Mauritian fishing rights when it purported to extend its maritime jurisdiction from 12 to 200 miles.

Please turn to Tab 10.4. This document was produced by the United Kingdom as Annex 33 to the Rejoinder. As you can see from the first page, it is dated 17 May 1991 and the subject of this note is, "British Indian Ocean Territory (BIOT) Fisheries Limit." It was authored by somebody with the FCO's East African Department, although the name of the author has been redacted. You can also see from the first page that the note is circulated to various recipients in the British Government including two Legal Advisers. Still on page 1, the first paragraph says that the note will address the following question: "Should we extend BIOT's fisheries limit to 200 miles?" If you turn the page and look at paragraph 3, you will see the author recommending doing so, and records the agreement of other governmental authorities, including the Legal Advisers.

Now, please turn to page 434 and specifically to paragraph 11 which appears in the middle of that page. The note explains that the *same regime* pertaining to the 12 mile zone would have to apply in the 200 mile zone as well. It says: "A *necessary concession* will be to continue to licence Mauritian fishermen on the *same basis* as hitherto; i.e., without costs, and to *extend their present*

[80] UKCM, para. 8.37.

access to BIOT inshore fisheries in the new 200 [mile] limit." Still reading from the same paragraph, you will see the note then says: "This special facility will not prejudice the imposition of lucrative revenue fees on *other* fishing fleets *including the UK*." In other words, *only* Mauritian vessels were exempt from the licensing fees the UK could impose on *all other* vessels, including British ones.

This is the regime that the UK soon adopted. Please turn to Tab 10.5. This document was produced as Annex 99 to the Memorial. This is a diplomatic note, dated 23 July 1991, from the British High Commission to Mauritius. In the first paragraph, the UK informs Mauritius that it intends to, "extend from 12 to 200 miles the fishing zone around the British Indian Ocean Territory." If you look now at the last paragraph on the first page, you will see that, in regard to Mauritian fishing rights, the UK recalls that, "[i]n view of the *traditional fishing interests of Mauritius* in the waters surrounding British Indian Ocean Territory, a limited number of licenses free of charge" are given to "artisanal fishing companies for inshore fishing" within 12 miles. It then says this will continue, not just within 12 miles, but to its new 200 mile limit as well. The UK promises, in the last sentence of the paragraph: "We shall continue to offer a limited number of licences free of charge on this basis."

The UK confirmed again the undertaking soon *after* it proclaimed a new 200 mile zone in 2003. I don't have time to take you through the document, which you can find at Annex 124 to the Memorial, where you can see that, on 12 December 2003, the UK's Parliamentary Undersecretary of State wrote to the Mauritian Minister of Foreign Affairs to respond to Mauritian concerns about the new Zone. He said: "we have enacted legislation to regulate fishing activities within that Zone," "*whilst protecting traditional Mauritian fishing rights there*."

Contrary to the UK's attempt to suggest otherwise, Mauritius has made use of these rights in the EEZ. Annex 136 of the Reply includes data presented by MRAG – the UK's "BIOT" fisheries adviser – on the "activities of Mauritian (flagged and owned) vessels in the BIOT" 200

mile zone. By way of example, in 2003, 242,994 tonnes were caught. In 2007, the amount was 121,135 tonnes. It thus *cannot* be said that Mauritius has not exercised its rights, or that they were somehow relinquished by non-use, or that they were treated by the UK as not pertaining to the maritime area between 12 and 200 miles.

As Mr. Reichler has shown, the UK even accepted Mauritian fishing rights within the 200 limit during its deliberations over the proposed MPA. I won't belabor the point beyond reminding the Tribunal that the UK Government was very much aware that Mauritius possessed fishing rights in the waters where the proposed MPA would be located, and that this presented, as Ms. Yeadon remarked, an obstacle to its creation.[81]

In short, the evidence is conclusive: spanning a period of 45 years, the UK consistently accepted, in its internal discussions and in its communications with Mauritius, that Mauritius has the legal right to fish to the 200 mile limit of the EEZ. By prohibiting Mauritius from exercising that right, the UK has breached Article 56(2). To put it in the terms of that provision, the UK has failed to have due regard for the rights of Mauritius.

This is not the only way the UK has breached 56(2). It has *also* violated that provision by failing to consult with Mauritius. Professor Sands has already explained how the U.K. has breached its obligation under general international law with regard to consultation in the territorial sea. I will not repeat what he said about those obligations, or their breach by the UK, other than to show that they apply equally in the EEZ.

As we have already seen, Article 56(2) requires a coastal State to have "due regard" for the rights and duties of other States when it exercises its own rights in the EEZ. This necessarily implies an obligation to consult with other States when their rights or duties can be affected. How else can the exercise of competing rights be reconciled? This is what the ICJ determined in the

[81] Email exchange dated 22 April 2008 between Andrew Allen, Overseas Territories Directorate, UK Foreign and Commonwealth Office and Joanne Yeadon, Head of "BIOT" & Pitcairn Section, UK Foreign and Commonwealth Office, Counter-Memorial, Annex 87.

Fisheries Jurisdiction cases when it addressed what should happen when the exercise of the fishing rights of a coastal State could impinge upon the competing fishing rights of another State. The Court ruled at paragraph 65:

> The most appropriate method for the solution of the dispute is clearly that of negotiation. Its objective should be the delimitation of the rights and interests of the Parties, the preferential rights of the coastal State on the one hand and the rights of the Applicant on the other, to balance and regulate equitably questions such as those of catch-limitation, share allocations and 'related restrictions concerning areas closed to fishing, number and type of vessels allowed and forms of control of the agreed provisions.'[82]

The Court went on to hold that the "obligation to negotiate flows from the very nature of the respective rights; to direct them to negotiate is therefore a proper exercise of the judicial function. And then said that, "this corresponds to the Principles and provisions of the Charter of the United Nations concerning peaceful settlement of disputes."[83]

The UK attempts to distinguish this from the present case, but it does not succeed. It is not dispositive that the *Fisheries Jurisdiction* cases concerned the exercise of preferential rights in the high seas by the coastal State, rather than rights purportedly exercised under Part V of UNCLOS. The Court's point is that where two States seek to exercise rights in a manner that may be incompatible, consultation is required. This is the interpretation given to 56(2) by the *Virginia Commentary*, which observes that it "*balances* the rights, jurisdiction and duties of the coastal State with the rights and duties of other States in the exclusive economic zone."[84] The proper balance in any particular set of circumstances is achieved through consultation.

This rule certainly applies in the present case, where the UK, purportedly acting under Part V, has forbidden Mauritius from fishing in the EEZ, despite having recognized that Mauritius

[82] *Fisheries Jurisdiction,* p. 47, para. 65
[83] *Fisheries Jurisdiction,* p. 47, paras. 66-67.
[84] *Virginia Commentary,* Vol. 2, p. 543.

possesses the right to fish those same waters. Indeed, elsewhere the UK appears to accept this interpretation of 56(2). Paragraph 8.27 of its Rejoinder, at footnote 710, makes clear the inherent contradictions in its own arguments: it refers to the *Fisheries Jurisdiction Case*, which the UK says "identifi[es] how the obligation to negotiate flows from the specific rights at issue."

The UK's obligation to consult is caught by another part of Article 56(2) as well. The provision requires the coastal State to "act in a manner compatible with the provisions of this Convention." Two such provisions are relevant: Article 61 and Article 197. These are both obligations of cooperation that the UK has ignored, in breach of 56(2).

The breach of the UK's consultation obligations extend as well to Articles 63 and 64 of UNLCOS and Article 7 of the 1995 Agreement, assuming (*quod non*) that those measures are applicable to an MPA that is, as has been explained, an environmental protection measure and not a fisheries management measure. 63(1) concerns the conservation of fish stocks in the EEZ of two or more States. 63(2) addresses stocks occurring within the EEZ, in an area beyond and adjacent to the zone. 64, which is complemented by Article 7 of the 1995 Agreement, concerns highly migratory species, species which—by definition—are not confined to the EEZ of any single State.

The object and purpose of these provisions is twofold. First, to impose upon the coastal States and fishing States the obligation to take measures for the conservation, development and optimal utilisation of fish stocks. Second, to require that these measures be taken in a coordinated manner—States must cooperate. The provisions thus limit the possibility for States to take unilateral measures without regard to the interests of other States, specifically coastal and fishing States. And for good reason—in the governance of a common space, unilateral action is bound to be counterproductive and to unduly interfere with the rights of others.

Article 7 of the 1995 Agreement is particularly clear on this matter. It provides that:

'[c]onservation and management measures established for the high seas and those adopted for areas under national jurisdiction shall be *compatible* in order to ensure conservation and management of the straddling fish stocks and highly migratory fish stocks in their *entirety*. To this end, coastal States and States fishing on the high seas have a duty to *cooperate* for the purpose of achieving compatible measures in respect of such stocks.

Article 7 further specifies what the duty to cooperate entails. It means making, 'every effort to agree on compatible conservation and management measures within a reasonable period of time'.

From the duty to cooperate imposed by these provisions flow important additional obligations of consultation. The parties must—either directly or having recourse to a competent regional organization—share information and take into account each other's opinions when they devise regulations for the conservation of fish stocks. And here is where the UK failed to honour its international commitments. When it proclaimed the "MPA", the UK made no serious attempt to consult with Mauritius, either directly or under the auspices of the competent regional organization—the IOTC.

Contrary to what the UK may suggest, Mauritius does have standing to assert claims under these provisions. The UK does not deny that the relevant stocks occur within the EEZ of both the Chagos Archipelago (assuming *quod non* the UK is the coastal State) and Mauritius, for purposes of 63(1). Mauritius is also a 'State fishing for stocks' in an area adjacent to the Chagos Archipelago's EEZ in the sense of 63(2). The IOTC Scientific Committee has reported: "In 2010, a total of 592 calls of fishing vessels was registered and transshipped amounting to 43,723 tonnes of fish. The local longliner unloaded 306 tonnes of tuna and related species. Mauritius has issued 225 licenses to foreign vessels to operate in its waters during 2010. Licenses are issued to foreign longliners (mostly Asian) and purse seiners to operate in the Mauritian waters"[85] Underscoring

[85] UKCM, Annex 126, p. 54.

the importance of such fishing to the Mauritian economy, the IOTC reported in 2012 that the, "tuna fishery provides direct and indirect employment to some 12,000 persons and contributes 1% to the GDP."[86]

The UK's only response is to concede that Mauritian vessels target swordfish and tuna, but to claim they fished too far away, "to the southwest of the BIOT MPA, mainly" – but not exclusively – "in Mauritius' own EEZ." The UK, however, cites no authority for its long-distance theory. This finds *no* support in the Convention or any of its commentaries, which is unsurprising given the species in question are, by their very nature, highly migratory, as attested to by the heroic tuna tracked by the Indian Ocean's Regional Tuna Tagging Project. These fish traveled *on average* 880 miles in a single month.[87]

Nor is the UK correct that Mauritius does not satisfy Article 64's requirement that Mauritian "nationals fish in the region for the highly migratory species listed in Annex I." The IOTC's 2010 report referred to the development of the Mauritian "artisanal tuna fishery,"[88] and the 2012 report refers to the Mauritian "national fishing vessels" catching swordfish, yellowfin tuna, bigeye, and albacore tuna, all species listed in Annex I.

In short, there is no question that the UK had the obligation to consult with Mauritius, and that Mauritius has standing to invoke this obligation.

I will now turn to the specific question of the UK's breach of these provisions. The UK failed to comply with its obligation to coordinate efforts with Mauritius by—and I must once again refer to Professor Sands' remarks—failing to consult with Mauritius before establishing the "MPA". The UK did *not* inform Mauritius of its plans; it provided Mauritius with inaccurate information; and it ignored Mauritius' repeated calls for bilateral consultations, insisting on

[86] UKCM, Annex 130, p. 4.

[87] Jean-Pierre Hallier and Julien Million, *The Contribution of the Regional Tuna Tagging Project - Indian Ocean to IOTC Stock Assessment*, IOTC-2009-WPTT-24, p. 8 (2009) (referring to yellowfin tuna tagged off Tanzania).

[88] UKCM, Annex 126, p. 54.

proceeding instead with a fundamentally flawed public consultation, all despite a commitment by the UK Prime Minister to his Mauritian counterpart that the MPA would be put on hold.

Of course, the UK had the option to consult with Mauritius via the IOTC. But it failed to do so. Instead of engaging with the Commission, the UK merely informed the IOTC in late 2009 that it was considering various 'options' in regard to the establishment of the MPA—'options' which, it conceded, 'could have implications' for the Commission's work.[89] The UK made no effort to consult with the Commission or its member States about the form, content or objectives of the forthcoming measures. It chose to disregard the Commission's machinery for facilitating consultations; it could have, but did not, place discussion of the MPA on the agenda of either the Commission's annual session[90] or the meetings of the Scientific Committee.[91]

The UK's Rejoinder tries to defend this conduct by arguing that "[h]aving notified the IOTC and its member states about the MPA, the UK had set in motion the process of consultation," and that it, "was up to the IOTC or its members to come back with a response for more information or to seek further dialogue had they wanted to."[92] You will note, however, that the UK's submission to the IOTC did *not* invite the organization or its Members to engage. It was simply a *notification* of what the UK intended to do. Once again, it's action by *fait accompli*. The articles relied upon by Mauritius are *not* notification provisions. They are clauses that set out obligations of consultation and cooperation. Notification provisions look very different. Article 62(5) is an example. It provides: "Coastal States shall give *due notice* of conservation and management laws and regulations." This bears no resemblance to the coordination and cooperation requirements invoked by Mauritius.

[89] IOTC Twelfth Session of the Scientific Committee, Mahe, Seychelles 30 November-4 December 2009, UK ("BIOT") national report, IOTC-2009-SC-INF08, p. 7.
[90] Rule IV.5.
[91] Rules of Procedure, Rule X.
[92] Rejoinder, para. 8.63.

Nor is the UK helped by manufacturing an alleged inconsistency in Mauritius' approach, arguing that, "if the consultations with the UK on fisheries management were sufficient to satisfy the requirements of Article 283, as we say it does," then the consultation requirements of UNCLOS and the 1995 Agreement must have been satisfied as well. The UK misses the point: the exchange of views under 283 was concerned with the UK's *failure* to consult with Mauritius.[93] It was not a consultation on the substance of the parties' views on stock management, an obligation which the UK has failed to discharge.

In short, the UK has not satisfied its obligation to "cooperate directly or through the appropriate international organizations." Instead, it chose the path of unilateral action—the path that the Convention specifically precludes. For this reason, the UK has breached fundamental procedural obligations that are essential to guarantee that conservation measures are effective, reasonable and fair, and take account the rights of affected States, including fishing States.

I will turn now to Part VI of the Convention and will address, first, the UK's breach of Article 78 by prohibiting Mauritius from harvesting sedentary species in violation of the undertaking to respect Mauritian fishing rights. I will then address the new dispute over Article 76. I suspect that now would be an appropriate time to take a break with the Tribunal's permission and the President's permission.

PRESIDENT SHEARER: I thought we were going to go straight through, weren't we? We don't normally take a second break in the afternoon; is that right? The program I have – if you want to take a short break, that's fine, but it's now ten past 5:00, and we are cued to finish, I think we have the next 15 minutes didn't we because of the answers to questions after lunch? So we would be going through until 5:45. Is it –

Well, yes, how much time would you need to finish?

MR. LOEWENSTEIN: I would think not more than 20 minutes.

[93] Rejoinder, para. 8.67

PRESIDENT SHEARER: Twenty minutes. You would be followed by Professor Crawford; is that right?

MR. LOEWENSTEIN: Yes.

PRESIDENT SHEARER: How long will Professor Crawford need?

MR. LOEWENSTEIN: Professor Crawford will speak tomorrow morning instead.

PRESIDENT SHEARER: Oh, I see. He will not be speaking this afternoon.

PROFESSOR CRAWFORD: Sir, it's been a long day, and I wouldn't inflict myself on you, in any case.

PRESIDENT SHEARER: Well, if you're only going to be another 20 minutes, then that would conclude today's proceedings. Is that right?

MR. LOEWENSTEIN: That's right.

PRESIDENT SHEARER: In that case you might as well go straight on. I don't see any point in breaking now.

MR. LOEWENSTEIN: Well, as I look at the number of pages left, it might be a bit more than 20 minutes but probably not terribly more. I would be happy to continue at this point.

PRESIDENT SHEARER: We will compromise. We will take a 10-minute break.

(Brief recess.)

PRESIDENT SHEARER: Thank you, Mr. Loewenstein. In the end, we are grateful to you for forcing us to take a 10-minute break.

MR. LOEWENSTEIN: I was grateful as well.

I will now turn to Part VI of the Convention, and we will address first the U.K.'s breach of Article 78 by prohibiting Mauritius from harvesting sedentary species in violation of the undertaking to respect Mauritian fishing rights. I will then address the new dispute over Article 76.

Article 77(4) provides that, for purposes of Part VI, "natural resources" include "living organisms belonging to sedentary species." Although the UK insinuates that sedentary species are not found on the continental shelf, they are, in fact, present in abundance and include lobsters, sea cucumbers, and no fewer than 384 species of mollusk.[94]

Article 78(2) requires coastal States purporting to exercise rights under Part VI not to infringe upon the rights and freedoms of other States as provided for in the Convention. It provides: "The exercise of the rights of the coastal State over the continental shelf must not infringe or result in any *unjustifiable interference* with navigation or other rights and freedoms of other States as provided for in this Convention." The "rights and freedoms" referred to in Article 78(2) include: (i) the right to harvest sedentary species, whether characterized as fishing or other natural resource activity, pursuant to the undertakings given by the UK in 1965; (ii) Mauritius' traditional fishing rights; and (iii) the commitment given by UK Prime Minister Gordon Brown that the MPA, which would violate those rights, would be put on hold. These give rise to rights that are enforceable under the Convention, including by operation of Article 293.

The UK does *not* generally challenge this legal analysis other than to suggest that, "the sovereign rights of the coastal State to manage access to sedentary species on the continental shelf are even more exclusive than their rights with respect to fisheries in the EEZ."[95] This may be so as a general proposition, but it is *immaterial* when the coastal State *recognizes* the rights of another State to harvest such species, and has undertaken to respect those rights.

Tacitly accepting this is the case, the UK places the weight of its argument on claiming that the 1965 undertaking did not encompass the harvesting of sedentary species.[96] The evidence disproves this claim. The Tribunal may wish to pay particular attention to the document the United Kingdom produced as Annex 18 to the Rejoinder, which you will find at Tab 10.6. This is

[94] Chagos Conservation Trust, *Molluscs in Chagos*, available at http://chagos-trust.org/sites/default/files/images/Card_021_A4_Molluscs_30_May_07.pdf

[95] Rejoinder, para. 8.46.

[96] Rejoinder, para. 8.44.

a note prepared by the Commonwealth Office, dated 24 August 1967. As you can see from the first paragraph, it addresses "fishing rights in the British Indian Ocean Territory."

In the third paragraph, the author mentions the "undertaking given to the Mauritian Ministers in the course of discussions on the separation of Chagos from Mauritius." He then says that the "matter" is "new" to him, but as requested, he will comment on the meaning of the undertaking based on how it had been "quoted" to him. In a sense, then, the author was in a position not dissimilar to the Tribunal: he was asked to interpret the undertaking based on the ordinary meaning of the text.

Please turn to the second page. Beginning at the last paragraph, the author discusses information the UK had obtained on the "Chagos' fishing potential." If you turn the page, you will see that, "the area was considered to be sufficiently rich in fish to merit the setting up of a fishing base in Chagos to catch tunny for Japan and other fish for the Ceylon market." The author then refers to the potential for, "establishing a *cultured pearl industry on the Great Chagos Bank*" and "the possibility of setting up a *crawfish industry*." He goes on to say: "It is as yet too early to foresee how the fishing potential of Chagos will be developed," but it is "apparent that the area is potentially rich and that *we should safeguard the future interests of Mauritius*…"

The note thus makes two points clear, both of which contradict the UK's claim about the 1965 undertaking. *First*, it was taken for granted that the undertaking applied to sedentary species, including specifically mollusks used for culturing pearls, as well as crustaceans, like crawfish. *Second*, it was immaterial that Mauritius did not exploit sedentary species in 1965, since the undertaking was intended to "safeguard" Mauritius' *future* uses of the sea. It was *not* the intention that Mauritius would be forever constrained by its 1965 fishing practices.

We come now to the important matter of Mauritius' submission to the United Nations Commission on the Limits of the Continental Shelf. While rights in an outer continental shelf are inherent, a State which plans to declare and delineate – and indeed exploit – its outer continental

shelf must make a submission and do so within a 10 year time-limit. The consequences of failing to do so are significant. In 2009, Mauritius and the UK knew the clock was ticking, as the minutes of the January 2009 bilateral talks that Mr. Reichler reviewed with you make very clear. Mauritius filed preliminary information on the 6th of May 2009, with the encouragement of the UK. As you have heard, for five years the UK offered no objection, no protest. It then changed its position last month, when it filed its Rejoinder. As you know, the UK has made no submission, and says it will not. Indeed, it now cannot. If the UK is correct that it is the sole sovereign, and correct that the Mauritius filing is a nullity, the value of the outer continental shelf has been irretrievably diminished. This is all the more disturbing as Mauritius was *promised* that inheritance.

To put this in context, I will review the relevant provisions on the Convention and related decisions by the States' parties.

Article 4 of Annex II provides: "Where a coastal State intends to establish, in accordance with Article 76, the outer limits of its continental shelf beyond 200 nautical miles, it shall submit particulars of such limits to the Commission [on the Limits of the Continental Shelf] along with supporting scientific and technical data as soon as possible but in any case within 10 years of the entry into force of this Convention for that State."

Such submissions are required under Article 76(8) of the Convention. The effect is that if a State does not make a submission within that time limit it effectively declares it does not intend to make such a submission *ever*.

Members of the Tribunal will doubtless recall that, historically, it became apparent that smaller States would have difficulty meeting the original deadline of 10 years set for CLCS submissions in Article 4 of Annex II. Many such States were among the first to ratify the Convention, so the clock started ticking for them from 16 November 1994. Having ratified the Convention on 4 November 1994, Mauritius was among this group. Only in 1997 were the Commissioners elected, and only on 13 May 1999 did the Commission adopt technical guidelines

allowing States to craft submissions meeting the requirements of Articles 76(8) and Article 4, Annex II.

This problem led to a Decision of the States Parties to UNCLOS, referred to often as SPLOS/72. Referring specifically to the difficulties of "developing countries, including small island developing States," the Decision stated that in the case of States for whom the Convention entered into force before 13 May 1999, the ten year time limit would run from *that* date.

But as the new 10 year deadline approached - 13 May 2009 - it became apparent that this would still be a difficult deadline for "developing countries, including small island developing States" to meet. Thus, the States Parties made another Decision on 20 June 2008, referred to as SPLOS/183. This stated that the requirement to "submit particulars" under Article 4 of Annex II could be satisfied by the filing of *preliminary information*. Paragraph 1(a) of that Decision provided that the 10 year time limit (as extended) could: "be satisfied by submitting to the Secretary-General preliminary information indicative of the outer limits of the continental shelf beyond 200 nautical miles and a description of the status of preparation and intended date of making a submission."

The purpose of these decisions was to allow small States – especially small island States – with limited economic means and technical capacity, to preserve their ability to delineate and exploit a continental shelf beyond 200 miles. It is that policy that the UK's change of position – in mid-litigation - now threatens, a point I shall elaborate upon in a moment.

First, however, let us consider the record. The UK was certainly alive to the issue of the outer continental shelf. Ms. Joanne Yeadon wrote in an e-mail dated 31 October 2008, which you can find at Annex 122 to the Reply, and I apologize that it is not currently in your judges' folder, and that e-mail said: "At one point we were looking at the possibility of the extension of the continental shelf under UNCLOS which would benefit Mauritius when we reach the point of ceding the territory, but this would be astronomically expensive so I am not convinced it is on the cards." Ms. Yeadon was clearly aware of the potential benefit to Mauritius of making a

submission, but had determined it was not worthwhile evidently from the UK's perspective. Not for any reason of principle, but for reason of cost.

Mauritius opened talks with the UK on this and other issues related to the Archipelago on 14 January 2009. In those discussions, the UK raised the possibility of a joint submission: in other words, allow Mauritius to help defray some of the "astronomically expensive" costs. The UK record of those discussions is at Annex 128 of the Reply: this, as you recall from earlier today, is at Tab 8.10, and I invite you to turn to 8.10, and specifically page 390 of 8.10. At page 390 you will see under the heading number 6 the heading: "Access to natural resources". And then over the page, you will see sub-heading (2): "Continental shelf". And I will ask your indulgence in quoting from the first few paragraphs, which appear at the top of page 391 in your folders. They say: "The UK opened up the possibility of co-operating with the Mauritians, under a sovereignty umbrella, on an extended continental shelf agreement (i.e., a joint submission to the Commission on the Limits of the Continental Shelf). We [this is, the UK] had no interest ourselves in seabed mineral extraction. That would be for Mauritius when we have ceded "BIOT". There would be no exploitation or exploration until then. It would require much expensive scientific and research work to collect and analyse data, but it could be done if both sides agreed that a joint submission was appropriate.

The Mauritian delegation welcomed the UK statement about a joint submission but was concerned that the deadline was 30 May 2009 so much work would need to be done. They already had some basic data that could help. Mauritian agreement to a joint submission would, however, be conditional upon an equitable exploitation of resources whenever they may occur.

The UK delegation clarified that all that was needed by May was an outline submission. The UK delegation reiterated that the UK had no expectation of deriving commercial or economic benefit from anything discovered on the continental shelf. Our understanding was that this would flow to Mauritius once the territory had been ceded. This was one of the reasons why the UK had

not invested resources in collecting data. What we were talking about was legal and political co-operation to secure the continental shelf on the premise that it is scientifically possible to do this…."

So, even on the UK's account, this was positive encouragement of the possibility of a joint submission which would preserve the rights of Mauritius until such time as the archipelago was returned to it. You file the preliminary information, the UK is essentially saying, and we will help you make the submission in due course (provided you help meet the costs). The UK record explicitly acknowledges the need for an "outline submission" by May. Indeed, the Mauritian internal record of the meeting is consistent with this understanding. May I take you to Annex 129 of the Reply, which is at Tab 8.4, of your folder. Specifically it's at page 362. You will see at page 362 towards the bottom the following statement by Mr. Roberts, who was the head of the UK delegation: **"**Can I just clarify on one aspect. We have no expectation of deriving any benefit from what we will get. It will flow to Mauritius when the territory will be ceded to you. It is one of the reasons we have not invested resources to collect data. *We recognise the underlying structure of this discussion. You may wish to take action and we will provide political support.*"

Mauritius got the message: the UK did not seem keen on making a submission, so Mauritius therefore proceeded to prepare and then submit the required preliminary information by itself on the 6th of May 2009, at its own cost. You can find this at Annex 144 to the Memorial. The UK did not file an objection with the United Nations Commission on the Limits of the Continental Shelf. Nor did it object during the second round of bilateral talks which occurred a few months later in July 2009, during which the possibility of a "coordinated submission" remained on the table. Further talks were envisaged in late 2009 but put on hold due to the presentation of the national budget before parliament in November of that year. It was proposed to resume talks in 2010 but then, of course, the 'MPA' was unilaterally announced – significantly straining relations that had until this time been increasingly cooperative over a range of difficult issues.

Mauritius in its Memorial and Reply noted that the UK had not objected to its filing of preliminary information before the Commission or at any point since. In its Counter-Memorial the UK claimed its inaction was without significance because, as it says at paragraphs 7.51 to 7.58, and I'll now summarize:

this action by Mauritius followed from two rounds of bilateral discussions conducted under "the sovereignty umbrella" in 2009 with the understanding that actions taken as a result of that meeting would not prejudice the position of either party;

the CLCS will not proceed to consider a case where there is a dispute;

Mauritius itself notified the CLCS of the existence of a dispute; and

At that time in 2009 there were bilateral discussions regarding a joint technical submission.

Nowhere, however, did the UK suggest that Mauritius lacked standing to make a submission to the CLCS. To the contrary, the standing of Mauritius was recognised, and the filing encouraged as we had seen from the review of the records.

The UK further agrees that States are not obliged to file preliminary information if they intend to file a claim beyond 200 miles and acknowledges that the time to do so has passed. It can be taken to have accepted that it can now no longer make such a submission.

All of this was, perhaps, consistent with an agreed situation where neither State took steps to prejudice the other's rights as a result of the "sovereignty umbrella". But in its Rejoinder the UK appears to have made a significant change in position. This is what it says at paragraph 8.39: "In accordance with the terms of Article 76(7), only the coastal State may delineate the outer limits of the continental shelf. In accordance with Article 76(8), only the coastal State may submit information to the CLCS on the limits of the shelf beyond 200 miles. Mauritius is not the coastal State with respect to BIOT and as such *has no standing before the CLCS* with respect to BIOT."

This is very different from the UK attempting to rationalize its non-objection on the basis that Mauritius was acting under the "sovereignty umbrella." The UK is now asserting *Mauritius*

has no standing before the CLCS, that it was not entitled to make the filing, and that the filing could have no effect. The UK now contends in these proceedings that Mauritius may not exercise the right of a coastal State to submit preliminary information to the CLCS under Article 4 of Annex II, in accordance with SPLOS/183.

Being in a position to assert its rights over the full continental shelf to the "outer edge of the continental margin," until such time as the UK deigns to return the Chagos Archipelago to Mauritius is of vital economic importance to Mauritius. However, the one act that could preserve its position is, in what appears to be the view of the United Kingdom, a nullity. The dispute between the Parties thus encompasses the question of whether the filing by Mauritius has the legal effects that it was intended to have, having regard to Annex II, Article 4, and the SPLOS/183 procedure.

The matter goes beyond the narrow question of the existence of a procedural right – and the UK's interference with that right. The consequences, here, are grave. In asserting that Mauritius is without standing before the CLCS, the UK if correct, is extinguishing the future rights of Mauritius over the natural resources of the outer continental shelf. These are rights which the UK has repeatedly acknowledged vest in Mauritius. It has abetted in this failure through its own inaction.

Let us consider the matter more closely. This case concerns two States claiming rights with respect to the continental shelf. Those rights under Article 76 inherently extend throughout the natural prolongation of the coastal State's territory to the outer edge of the continental margin or to 200 nautical miles if the continental margin does not extend to that distance. The point of filing before the Commission is not to establish *title* to an outer continental shelf. One has that as an automatic attribute of territorial sovereignty out to the edge of the continental margin. One does not gain anything in delineating an outer continental shelf: rather one risks *losing* something if one does not. If a State does not file with the Commission within the 10 year time limit, then the International Seabed Authority may license exploitation in any continental shelf areas otherwise

appertaining to the coastal State: in fact, the ISA has *already* granted exploration licenses for areas located nearby (and we can provide you with information on this if you wish to have it). In other words, these are areas that are now being actively explored. If the UK is correct, Mauritius will have lost the region, abandoned ownership essentially, if you will. As regards the present situation, one State – Mauritius – considers that it is sovereign, or at least in this case seeks an award from this Tribunal that recognises it as the "coastal State" for the purposes of filing the Article 76 preliminary information. The other State – the UK – claims it is the sole sovereign, and that Mauritius is not entitled to file, and that it has allowed the clock to run out. Further, the UK claims it was the only State entitled to do so under UNCLOS. Even accepting the UK position on sovereignty, that argument would be flawed. It had no entitlement to allow time to run out because of the undertakings to Mauritius regarding mineral rights, and it is now not entitled to nullify the filing of preliminary information and to stop Mauritius from making the final – and full - submission, having encouraged Mauritius to make the filing in the first place.

The UK has consistently undertaken to return to Mauritius the full benefit of the mineral wealth appertaining to the Chagos Archipelago. How can it now, in good faith, claim it was entitled to abandon the outer continental shelf and diminish what it returns to Mauritius? How in good faith can it encourage Mauritius to take action to preserve its position and then declare that action to be a nullity?

Put simply, this dispute concerns the interpretation and application of Article 76 and Article 4 to Annex II. Mauritius has the right under the Convention to proceed with its submission to the CLCS, and the UK must take no steps to prevent that from happening. As will be shown tomorrow, this is a matter that is plainly within the jurisdiction of the Tribunal.

Mr. President, Members of the Tribunal. This concludes my speech this afternoon. Thank you very, very much for your kind attention.

PRESIDENT SHEARER: Are there any questions?

Thank you, Mr. Loewenstein. There appear to be no questions.

And we will resume tomorrow morning at 9:30 a.m. Thank you.

(Whereupon, at 5:49 p.m., the Hearing was adjourned until 9:30 a.m. the following day.)

CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

DAVID A. KASDAN

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