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 4

HEARING ON JURISDICTION AND THE MERITS

Friday, April 25, 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

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P R O C E E D I N G S

PRESIDENT SHEARER: Good morning, ladies and gentlemen.

Just before I call upon Professor Crawford, arising out of one of the documents referred to by Mr. Loewenstein in his presentation yesterday, Judge Greenwood would like to make a request, and I think it's directed to both Parties, not just one.

I give the floor to Judge Greenwood.

ARBITRATOR GREENWOOD: Thank you very much, President.

It's very much just a request for assistance. The document is in the Mauritius Arbitrators' bundle at Document 10.3, and the original is UK Rejoinder Annex 20. This is the letter from Mr. Carter of the East African department to Mr. Brown at the UK High Commission in Mauritius, and it's about something that Sir Seewoosagur is supposed to have said relating to jurisdiction of Mauritius over the waters surrounding Diego Garcia. I cannot, however, find any of documents to which this document refers. And those documents are High Commissioner's letter of 2 December 1977, Washington telegram 5233, and London telegram to Washington, 4227. Now, those are obviously all British Government documents. It would be helpful to see them.

But also I wonder whether Mauritius has in its Government files any record of what Sir Seewoosagur said because obviously it would be interesting to see a direct report from the Mauritian Government of what he said rather than a British diplomat reporting what he had heard.

Thank you very much.

PRESIDENT SHEARER: Thank you.

Yes, Professor Crawford.

PROFESSOR CRAWFORD: Thank you, sir. My apologies for the slight delay.

Mauritius v United Kingdom

Speech 11: In declaring the "MPA" the United Kingdom breached Article 300

Professor James Crawford AC SC

A. Introduction

Mr. President, Members of the Tribunal:

1. The 1982 Convention lays down a framework for the peaceful, fair and sensible use of what is essentially a common space, or at least a set of partly-delimited but inherently undemarcated and interlinked common spaces: the world's oceans. That is why the provisions of the Convention seek to reach a balance between the sovereign and jurisdictional rights of coastal States in the various maritime zones and the rights and freedoms of all States in the high seas and—subject to limitations—those zones as well. It is striking that the Convention balances rights and obligations even over estuaries and certain internal waters of the sea. Essentially, the Convention seeks to ensure that no State can exercise its rights over the seas to the detriment of the rights of others; to this end, it imposes a series of obligations of coordination, consultation and cooperation.

Many of our complaints yesterday were complaints about lack of consultation on the footing that the United Kingdom is "the" or "a" coastal State. They're nonetheless important for that. But in the various environmental cases that the International Court has heard, and also the Law of the Sea Tribunal has heard, questions of consultation have loomed large. One thinks of Pulp Mills and Malaysia Singapore Land Reclamation.

2. My colleagues have shown yesterday how the UK breached several of these obligations when it established the so-called 'MPA' around the Archipelago. I will now demonstrate that it breached one further obligation: the prohibition on abuse of rights contained in Article 300.

B. Article 300 UNCLOS and the rights in issue

3. Article 300, of course, provides that:

'States Parties shall fulfil [their obligations] in good faith… and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.'

4. Now, we considered very carefully whether to raise Article 300. It's not, as it were, the necessary concomitant of every claim under UNCLOS and it should not become such. But the evidence is strong: lack of transparency, failure to consult, reliance on fait accompli, the obvious problems with the design and implementation or, I should say, non-implementation of the "MPA". They all point to a breach of Article 300. The Attorney General the other day evoked the notion of a sham. We've never said that the "MPA" was a sham. But in certain respects it approaches such.

5. Article 300 is not an extraordinary clause. It reflects and articulates a general principle of law having a long pedigree. The prohibition on abuse of rights was recognised in the jurisprudence of the Permanent Court,[1] and has been frequently invoked in subsequent international disputes with or without the aid of Article 300. For example, the WTO Appellate Body has referred to the 'doctrine of *abus de droit*' as a 'general principle' and held that, and I quote:

'An abusive exercise by a Member of its own treaty right… results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting'.[2] A purist might object to the phrase 'as well' – the breach of treaty rights is itself the violation of an obligation. But the basic point is made.

6. Let us take a closer look at Article 300. It plays an important role in the system envisaged by the Convention. It is the first of a list of 'General Provisions' contained in Part

[1] *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, 1926 P.C.I.J. (ser. A) No. 7, p. 30; *Case of the Free Zones of Upper Savoy and the District of Gex (France v. Switzerland)*, 1932 P.C.I.J. (ser. A/B) No. 46, p. 167.

[2] *United States – Import prohibition of certain shrimp and shrimp products* (Report of the Appellate Body, 12 October 1998), WT/DS58/AB/R.

XVI, which apply to the Convention as a whole. It is in terms an independent ground on which the Convention can be violated. But while that is the case, a breach of Article 300 typically occurs in connection with the exercise of one of the substantive rights provided for in the Convention. And in the recent judgment in the *Virginia* case, the International Tribunal for the Law of the Sea construed Article 300 as requiring a State making a claim, and I quote:

'to specify the concrete obligations and rights under the Convention, with reference to a particular article, that may not have been fulfilled by a respondent in good faith or were exercised in a manner which constituted an abuse of right'.[3] So that's a helpful, shall we say, precautionary note in relation to Article 300, and I propose to pay attention to it in relation to this presentation.

7. Our claim is based on United Kingdom's abuse of the broad jurisdictional right which it claims to have under Article 56(1)(b)(iii) to take measures for 'the protection and preservation of the marine environment' in the waters around the Archipelago.But in relation to that claim, we also pay attention to what the United Kingdom has done, or not done, in areas adjacent to the "MPA" which in effect would have significant effects in terms of the implementation of the "MPA", including the land territory of the Archipelago.

8. Mr. President, Members of the Tribunal, for a right, jurisdiction or freedom recognised in the Convention to be exercised 'in a manner which would not constitute an abuse of rights', two requirements have to be met. First, the right must not be exercised for a purpose that is entirely different from the purpose for which the right was created[4] – especially if this comes at the expense of the rights or legally-protected interests of others, of other States, or indeed, of other uses of the oceans.[5] Second, where a State takes measures in the exercise of a jurisdictional

[3] *The M/V 'Virginia G' Case* (Panama/Guinea-Bissau), Judgment of 14 April 2014, para. 399, available at: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.19/judgment/C19-Judgment_14_04_14_orig.pdf.

[4] Alexandre Kiss, 'Abuse of Rights', in MPEPIL (2012).

[5] H Lauterpacht, *The Function of Law in the International Community* p. 286 (1933).

right, those measures must at least be capable of fulfilling the purpose for which the right was exercised. If they are not, the manner in which the right is being exercised is objectionable, even if that is capable of repair. If it's not repaired, then there is a breach of Article 300.

9. Mauritius does not accept that the "MPA" was established, even on the footing that the United Kingdom was the or a coastal State, to pursue the aim of environmental protection, or that as things stand – four years after its proclamation – that it is remotely capable of doing so. The more we learn about what is going on in the "MPA"-free zone at the heart of the "MPA", an area where trees are destroyed in large numbers, the hulls of ships are being sandblasted, sewage is discharged into the lagoon, and warships trundle in and out, the more we learn about these things, the more concerned we are.

10. Indeed, the record before you casts serious doubt on the purposes behind the proclamation of the "MPA", and the manner in which it has been designed and implemented is certainly not conducive of the objectives officially declared.

Let me deal with the first of those points: the purpose underlying the "MPA".

C. The "MPA" was established for political purposes unrelated to environmental protection

11. On the 12th May 2009, Mr. Roberts, the Director of the Overseas Territories Department of the FCO, met an American Political Counsellor at the US Embassy in London to discuss the plans to establish a marine reserve. The purpose of the meeting was to assess the implications of the "MPA" for the military and strategic interests of the United States in Diego Garcia. Now, as you know, a cable reporting that meeting came into the public domain through the *Wikileaks* website, and the cable is reproduced at Tab 2.13 of your Folders [MM Annex 146]. And the paragraph I am referring to is at page 77 of the Folder; you've been taken to it already and, I believe, familiar to you, but it's at page 77. This is the Man Friday document, although

there is controversy about whether the words "Man Friday" were used. Mr. Roberts is recorded as saying, and I quote:

'BIOT's former inhabitants would find it difficult, if not impossible, to pursue their claim for resettlement on the islands if the entire Chagos Archipelago were a marine reserve.'[6]

12. And then on page 78 at paragraph 7, he is said to have emphasised that 'according to HMG's current thinking on a reserve, there would be "no human footprints" or "Man Fridays" on the BIOT's uninhabited islands'. 'In effect', Mr. Roberts says that 'establishing a marine park would... put paid to resettlement claims of the archipelago's former residents.' He acknowledged that the UK needed, and I quote, to 'find a way to get through the various Chagossian lobbies'. But that did not faze him: 'the UK's environmental lobby is far more powerful than the Chagossians' advocates'.[7]

13. Now, with respect, whether particular phrases were used or not, this memorandum, which there's no reason to think did not reflect an actual conversation, puts into question the purposes behind the proclamation of the "MPA". There may be a tendency for advocates arguing abusive of faith, to jump and down and issue rhetorical phrases. I don't propose to do that. And in fairness to Mr. Roberts, he denies making the 'Man Friday' remark. The High Court in the judicial review proceeding was inclined to believe him: see paragraph 60 of the judgment.[8] Of course if he did make it, it was a potentially noxious remark. On the other hand, there is no reason to believe that an American diplomat simply made up the account of the meeting itself and the substance of what he said can't be denied. I would refer you to the cross-examination of Mr. Roberts in the judicial proceeding, which is in the transcript. Whether he used particular phrases or not is of lesser significance. The issue is whether the UK can take advantage of the

[6] Cable from US Embassy, London, on UK Government's Proposals for a Marine Reserve Covering the Chagos Archipelago, May 2009: Mauritius Application, 20 December 2010, Annex 2: Annex 146.
[7] *Ibid*.
[8] UKCM, Authority 43.

broad jurisdictional right recognised in Article 56 to consolidate its denial of rights, the rights to which Mauritius was entitled under the Lancaster House agreement.

14. Now, the Attorney-General said on Tuesday that after reading all the internal FCO documents, it would be only be an extraordinarily far-fetched scenario on the basis of which one would conclude that the purpose of the "MPA" was to avoid resettlement. The transcripts of Mr. Roberts' cross-examination are Reply, Annex 174 Tab 2.14 [MR Annex 174]. On page 81 of that transcript, Mr. Roberts is asked how he was 'activating the environmental lobby designed to weaken the Chagossian movement'.[9]Of course the claim was brought on behalf of a former resident of the Chagos Archipelago. Mauritius' claim is a different claim and it's in relation to rights to which Mauritius as a State is now entitled by virtue of the combination of the Lancaster House undertaking and the subsequent practice of the United Kingdom in affirming those undertakings on a State-to-State basis. Nonetheless, what Mr. Roberts said is relevant . His answer is revealing, and I quote – this comes from page 81 of the folder:

'the government was in a very difficult public position. Not only was there a great deal of political pressure relating to the Chagossian movement but we also were dealing with a series of allegations relating to rendition and we were looking to see what we could do to try and improve the reputation of the government in relation to the Territory specifically but also other territories.'

15. So the "MPA" was conceived as a multi-purpose enterprise, and that itself puts into question the objective of 'protection and preservation of the marine environment' underlying the right that the United Kingdom claims to be exercising under UNCLOS. It is conceded by the United Kingdom that a no-take MPA was not the only option available. In assessing whether the United Kingdom has acted in a manner which constituted an abuse of rights, or now

[9] Extract of Transcript, R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs, Examination and Cross-Examination of Mr Colin Roberts, 15-17 April 2013 (MR, Annex 174)

constitutes an abuse of right, your Tribunal should not, with all respect, turn a blind eye to the political aims the United Kingdom was pursuing.

Mr. President, Members of the Tribunal:

16. Mauritius takes note of the reports in the press last March of renewed plans by the FCO to conduct studies to assess the feasibility of resettlement, and the Attorney General referred to those plans on Tuesday.[10] If the UK is serious about this course of action, this would signal a shift in the policy pursued so far – the policy of eviction expressed with such clarity by Mr. Roberts. But so long as the "MPA" stands, and unless it is reconsidered, the UK continues to exercise its jurisdictional rights in a manner which is contrary to Article 300.

I turn to the question of the design and implementation of the "MPA."

D. The design and implementation of the "MPA" is not reasonable in relation to its stated objectives

17. In the present case, a finding of abuse of rights would be warranted on the basis of the evidence now in the record. But, even if the motives that led Her Majesty's Government to establish the "MPA" were in principle purely environmental, the Tribunal could still conclude there had been a breach of Article 300 because there has been no serious attempt to follow up on those objectives.

18. Here the judgment of the International Court in the *Whaling* case is helpful. Assessing the programme, JARPA II, the whaling program in the Southern Ocean, to determine whether it fell within the exception provided for by Article VIII of the Whaling Convention, the Court observed, and I quote, 'whether a programme is for purposes of scientific research does not turn on the intentions of individual government officials, but rather on <u>whether the design and implementation of a programme are reasonable in relation to achieving the stated research</u>

[10] Day 1 Transcript, p. 43, lines 5-25 (Grieve); see also, *e.g.* The Guardian, 'Chagos Islands: UK experts to carry out resettlement study', 13 March 2014, available at: http://www.theguardian.com/world/2014/mar/13/chagos-islands-uk-experts-resettlement-study.

objectives'.[11] Now, of course, the specific legal context of the *Whaling* case was different from the present one. But the test that the Court formulated in the *Whaling* case can be extended by analogy to the assessment of whether a State has acted and in breach to Article 300 in the exercise of rights under Article 56. A State taking measures for the purpose of protection and preservation of the marine environment will abuse its rights unless the measures which encroach on the rights and interests of other States, as these measures plainly do, are reasonable in relation to the stated objectives. And I think the Court struck an important note when it said it was not concerned with the subjective intentions of individual government officials. International courts are not criminal courts in State-to-State cases, unless there is the plainest evidence of individual wrongdoing. Their concern is with the conduct of the State, not with the conduct of the particular minister who makes a particular decision, which may be made "on the hoof" to use a phrase derived from the documents, or maybe made with the best of intentions about which the Government has no objective intention of following through.

19. So the question is whether it can be said that, whatever the actual purposes of individuals might have been, the "MPA" is still capable of succeeding in fulfilling its official purpose – the protection of the living resources and the environment of the waters around the Archipelago? Can it be said that the design and implementation of the "MPA" is reasonable in relation to achieving its stated objective? The answer to these questions is 'no', categorically. As things stand, and the possibility of reparation is a function of these proceedings, not a reason for denying the claim. There are five reasons for that.

20. First, the scientific justification that the UK has provided is not established. The previous efforts to manage fisheries around the Archipelago were generating good results. At Tab 11.1 [UKCM Annex 76] it's Tab 11.1 in the Folder, and this time I've drawn the blue straw, page 444, you will find an excerpt from the Chagos Conservation Management Plan, submitted

[11] *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)*, Judgment of 31 March 2014, para 97.

to the FCO by the environmental adviser to the "BIOT" in October 2003. In the second paragraph under section 6, headed Fisheries, the environmental advisers observe, and I quote, the '[f]isheries arrangement provide[s] a good example of successful management' in the territory, the waters of which were 'one of the few large areas of the Indian Ocean with demonstrable and beneficial husbandry'.[12] That is well before the "MPA".

21. Why did then the UK decide that a stricter regime, if a refusal to issue permits can be described as a regime, was necessary to promote the conservation of fish stocks? The UK has put in no expert evidence showing that the "MPA" meets the environmental goals that the EPPZ could not meet. The UK disregarded advice received from its own consultants, in particular MRAG Ltd., which strongly disapproved of the plan. That advice is available on Tab 5.25 [MR Annex 137] of the Reply. Again, you don't need to go to it because you've been taken to it already. But the relevant passage is at page 243 of the Folder, which says in big letters, and I quote:

'There are alternatives to declaring the entirety of BIOTs Exclusive Economic Zone (EEZ) a no-take Marine Protected Area (MPA) that can achieve similar environmental and political benefits, could have a more beneficial economic outcome and would be consistent with international law.'[13]

22. On the next page at page 244 of the Folder, the consultants warned the UK that closing its highly sustainable fishing zone would not only fail to 'address all conservation concerns': it was 'likely to fall short of expectations' and even be 'negative in some cases'.[14] The consultants were sceptical because the "MPA" would be of limited relevance to the conservation of highly

[12] "Chagos Conservation Management Plan, for the BIOT Administration, FCO", by Dr Charles Sheppard & Dr Mark Spalding, October 2003 (UKCM, Annex 76), p. 8.

[13] Email dated 9 July 2009 from Development Director of MRAG to Joanne Yeadon, Head of "BIOT" & Pitcairn Section, UK Foreign and Commonwealth Office, & "MRAG Comments on the proposal to designate the BIOT FCMZ as a marine reserve": MR, Annex 137.

[14] Email dated 9 July 2009 from Development Director of MRAG to Joanne Yeadon, Head of "BIOT" & Pitcairn Section, UK Foreign and Commonwealth Office, & "MRAG Comments on the proposal to designate the BIOT FCMZ as a marine reserve": MR, Annex 137.

migratory species such as tuna, because closing the fishing zone would create an incentive for unregulated fishing in areas outside the "MPA" – you can see that at the top of page 246 of the Folder.[15] The conclusion that follows from that assessment is that the UK has traded an effective and tested conservation regime for a radical ban that will encourage 'illegal, unregulated and unreported fishing'[16] with the potential for depleting the fish stocks that the "MPA" was ostensibly meant to protect.

23. The UK argues in its Rejoinder, and the Attorney-General argued in his very engaging presentation the other day,[17] that Mauritius has provided no expert evidence to underlie its criticism of the scientific basis of the "MPA". I stress, we are not asking the Tribunal to judge the scientific worth of the "MPA" or to make its own environmental assessment of the need for the "MPA". The present dispute is not about the scientific justifiability of the "MPA". It's about the denial of Mauritian rights. But it is relevant to draw attention to the scientific assessment commissioned by the UK itself which it disregarded. Moreover, there is no indication that the UK is engaging in any significant research to back up the "MPA". It's the way in which the UK has dealt with the science must give rise to doubts about the reasonableness of its stated objectives.

24. Second reason. The UK has not enacted and implemented regulations setting out in detail the particular measures required to achieve the stated goals of environmental protection. This is despite the fact that the Proclamation establishing the "MPA" indicated that these would follow soon. You just have to compare the "MPA" with similar initiatives, such as the United States' establishment of a Northwestern Hawaiian Islands Marine National Monument. I think it's nice that a marine national park is described as a monument but we'll pass that. When the United States established this protected area, it did so by means of a Proclamation accompanied

[15] Ibid.
[16] Ibid.
[17] UKR, 3.15; Transcript, Day 1, p. 48, lines 16-17.

by detailed regulations.[18] It supplemented those regulations with a substantial and carefully–considered long-term management plan.[19] The contrast is striking.

25. Over four years have passed since the "MPA" was proclaimed, yet no detailed regulations have been delivered. Now we're told they're forthcoming, and it's comforting to know that they're forthcoming, but they've been forthcoming for a long time. The United Kingdom is unable to offer any concrete information regarding the steps that the UK has taken to this end and incapable of providing us with any information on timetables. This is the declaration of an MPA without a real MPA; to use an Australian phrase: It's a Claytons' MPA, the MPA you're having when you are not having an MPA!

26. I notice that four Members of the Tribunal are baffled. Claytons was a short-lived non-alcoholic beverage brewed. Some said it was like beer and some said it was like whiskey. It was like neither. It was absolutely dreadful. It's advertised in Australia as 'the drink you have when you're not having a drink'.[20] The "MPA" is an unregulated MPA; it's a Claytons' MPA. It's no more an MPA than beer without alcohol can be described as beer! And I should say in relation to Claytons' MPA, there is a Web reference for those of you who would like to pursue the subject.

27. Third reason. Just as the UK has failed in regulation, so it has failed in financing. It has failed to appropriate a budget that bears any relationship to the proclaimed environmental objectives of what is supposed to be one of the largest marine protected areas in the world. This is a paper MPA unsupported by funds. The experience again with the Northwestern Hawaiian Islands Marine National Monument in the United States indicates that projects of this magnitude, if they are not to be pure pieces of public relations, require substantial expenditures –

[18] Establishment of the Northwestern Hawaiian Islands Marine National Monument, United States Presidential Proclamation 8031 of June 15, 2006. F.R. Vol. 71, No. 122, p. 36433.

[19] Papahānaumokuākea Marine National Monument, Monument Management Plan (December 2008),located at http://www.papahanaumokuakea.gov/management/mp/vol1_mmp08.pdf

[20] See http://en.wikipedia.org/wiki/Claytons.

in the tune of hundreds of millions of dollars. The best our opponents could do was to inform your Tribunal that the "MPA" will be funded by a public-private enterprise – a phrase that has fallen into disrepute in the United Kingdom as a general matter – a public-private enterprise between the "BIOT" Administration and private sector NGOs,[21] but then again, they are not in a position to provide any information about the size of the budget or the effectiveness, perhaps by way of exception, of this public-private partnership.

28. Fourth, there is the question of enforcement. To guarantee that the ban on all fishing is enforced in an area of 640,000 square kilometres, the UK relies on a single vessel. That is what Henry Bellingham, then Under Secretary of State at the FCO, told MP Andrew Rosindell on 16 May 2011, as stated in the transcript which is Annex 171 of our Memorial.[22] When Mauritius made this point, the United Kingdom replied, in the vaguest of terms and again without providing any evidence, that '[t]he prohibition on fishing without a license in BIOT waters is enforced by the BIOT patrol vessel and protection officers'[23]

29. For one single vessel to police an area the size of France would be really something! If you turn back to the comments of the environmental consultants on page 246 of the Folder, at Tab 5.25 [MR Annex 137], in the second paragraph of Section 3 they say, and I quote:

> in the absence of the opportunity to fish legally, the incentive to fish illegally is increased, particularly if the perceived risk of detection is considered to be low. This implies the need for greater and faster patrolling capacity (more patrol vessels to cover the entire zone, faster to match the speed of tuna vessels).[24]

[21] UKCM, 8.63(b).

[22] Hansard, House of Commons Written Answers, 16 May 2011: Annex 171.

[23] UKCM 8.63(c).

[24] Email dated 9 July 2009 from Development Director of MRAG to Joanne Yeadon, Head of "BIOT" & Pitcairn Section, UK Foreign and Commonwealth Office, & "MRAG Comments on the proposal to designate the BIOT FCMZ as a marine reserve": MR, Annex 137 (emphasis added).

30. By imposing prohibitions without doing anything to establish the necessary enforcement mechanism, it makes it difficult to claim that the "MPA" is capable of meeting its stated purposes. Perhaps the protection officers wearing wetsuits could fan out from the protection vessel – they may be good swimmers – to at least the scope of it!

31. Fifth reason. The "MPA" is subject to an 'exclusion zone covering Diego Garcia and its territorial waters', where recreational fisheries are permitted and where considerable pollution is taking place.[25] In 2010, recreational fishing in this – you might call it the "black hole" – amounted to '28.4 tonnes of tuna and tuna-like species'.[26] There seem to be an inherent contradiction in establishing a 'no-catch' conservation zone and then permitting the fishing of dozens of tonnes of protected fish stock within a sizeable enclave inside the zone. This tension was acknowledged by Ms. Yeadon, the Head of the "BIOT" Section at the FCO, when she stated, on 14 July 2009, and I quote, 'it would be difficult to impose any kind of no-take zone in the rest of BIOT waters but permit' recreational fishing 'to carry on' in Diego Garcia.[27]

32. Then there is the Sheppard Report to which you have already been taken. The Report reveals that the US Navy – and even the patrol vessel – have been polluting the pristine waters of the Chagos Archipelago. And I refer again to the email exchange at Tab 6.4 [MR Annex 135] page 291 of your Folder, where a British official writing to Joanne Yeadon, said, 'as a complete novice': 'doesn't a marine park enjoy some sort of environmental protections', 'would be some inconsistency in saying that military vessels can trundle in and out (presumably polluting as they go)'?[28] Well, that novice asked an expert question: now that it has been confirmed that the military presence in Diego Garcia has been responsible for causing considerable pollution, perhaps 'the novice' should become an expert!

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[25] See MM 4.84; UK (British Indian Ocean Territory) National Report to the Scientific Committee of the Indian Ocean Tuna Commission, 2011 (Received 25 November 2011), IOTC-2011-SC14-NR28, p. 3.
[26] Ibid.
[27] Email exchange between Colin Roberts, Director, Overseas Territories Directorate, and Joanne Yeadon, Head of "Biot" & Pitcairn Section, UK Foreign and Commonwealth Office, 13-14 July 2009; RM, Annex 138.
[28] MR, Annex 135.

33. In short, the "MPA" is not only scientifically debatable; it is deprived of the regulations, funding and enforcement mechanisms necessary to make it effective; and plagued by the loophole presented by the exclusion of Diego Garcia from the non-fishing zone. In light of the extraneous political considerations that motivated its proclamation – and we say with respect – the Tribunal should conclude that it was not designed and is not adapted for ensuring the conservation of the marine environment of the Archipelago.

Mr. President, Members of the Tribunal:

34. On Tuesday the Attorney-General – thankfully preserved from shark attack – said he would say very little about the merits of Mauritius's case, and he was true to his word. But he did spend quite some time reading an extended passage on improper purpose from the English judicial review proceedings – and he asked rhetorically how the Article 300 claim could survive that judgment? Well, there are five points to make by way of response.

(1) First, as the Attorney quite properly noted, the decision is subject to appeal—the Court of Appeal judgment is pending but previous Chagos cases have gone to the Supreme Court, and I suppose this one might too.

(2) Second, the issue before you is different: it is not about the right of return under English law, a right that was already precluded by the 3-2 decision of the House of Lords in 2008. It is about what we say was a deliberate decision to ignore Mauritius' international legal rights by proclaiming the "MPA", and doing so without any consultation. The English Court made it clear that it was not deciding the issues before your Tribunal: see paragraph 153 of the Judgment. Indeed it was inclined to think – and I think, probably correctly – that the issues before you are non-justiciable before an English court, and I quote from the judgment: "The question whether, as a matter of international law, Mauritius enjoys fishing rights in BIOT waters is not one that we consider appropriate for determination in these proceedings."

That's the issue that you've got to face. It's non-justiciable.

(3) Third, the English Court did not have before it relevant materials, including for example Mauritius' notes of the January 2009 bilateral discussions. In the event it did not even have the Wikileaks document properly before it because it held it was protected by the diplomatic immunity of archives. You have a much more substantial record before you, and no claim of archival immunity.

(4) Fourthly, and perhaps for that reason, the English Court seriously misapprehended Mauritius' position in respect of its rights over the Archipelago, which it thought were limited to a sovereignty claim: I refer to paragraph 156 of the judgment, which is at Tab 11.2 [UKCM Legal Authority 43] of your Folders, on page 446. I won't read paragraph 156, which you can read for yourself. But, with respect, it completely misapprehends Mauritius' position. The case illustrates a maxim which might be drawn from Wittgenstein's more famous remarks, a maxim which national courts could do well to heed in cases which they hold are non-justiciable. Whereof (because of non-justiciability) one may not speak, thereof one must be silent![29] To hold that something is just non-justiciable and then to make a seriously defective assessment of what the non-justiciable position is a mistake.

(5) And fifth, this is an interstate proceeding before an international tribunal. You have your own function and mandate. You are not bound by what a national court applying a different law and process and answering a different question might have decided. In January 2008, there were bilateral consultations between the UK and Mauritius on fisheries around the Archipelago, but the UK concealed the fact that the "MPA" was under active consideration. Its policy vis-à-vis Mauritius, as compared with sundry anonymous stakeholders, was 'proclaim first, consult afterwards' – or indeed not at all. Was that consistent with the cooperation the

[29] L Wittgenstein, *Tractatus Logico-Philosophicus* (1921) Proposition 7 (in the original; '*Wovon man nicht sprechen kann, darüber muss man schweigen.*')

International Court spoke of as flowing from good faith in paragraph 145 of the *Pulp Mills* judgment?[30] It was not.

Mr. President, Members of the Tribunal:

35. Finally I should say a word about the UK's change of position with respect to outer continental shelf determination. Earlier colleagues have discussed the facts in some detail, in particular, Mr. Loewenstein. The logic of argument in a contentious case can lead to positions being taken, and provided – if they're positions on the law, we're not talking about the non-disclosure of evidence – it is for the tribunal itself to decide on their merits. That's the point of making legal submissions. But if the United Kingdom were to object to our full submission on the outer continental shelf and thereby prevent consideration of it by the CLCS, after encouraging the filing of the preliminary information and offering support in the filing of the full submission, that would be wantonly to impair the reversionary interest of Mauritius in the resources of the Archipelago. It would be conduct with no conceivable benefit to the United Kingdom, which never had any intention of making, and by its delay has now disabled itself from making, such a submission. Such conduct, if it had occurred, could only be considered as in bad faith. It would be a bit like a temporary freeholder destroying the resource which only the reversioner could enjoy. Yet the United Kingdom states in paragraph 8.39 of the Rejoinder that we have no entitlement to file that document, paving the way to an objection when we do so. That is why Mauritius will be asking for an order from this Tribunal that the United Kingdom not object to the full submission by virtue of Article 300.

[30] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment*, I.C.J. Reports 2010, p. 14, at 67 (para. 145).

E. Conclusion

Mr. President, Members of the Tribunal:

36. For the reasons given, the Tribunal is respectfully and understatedly asked to adjudge and declare that the UK has abused its rights under the Convention, in particular Article 56, and thus is in breach of the general obligation in Article 300.

Mr. President, Members of the Tribunal, this brings to an end – perhaps rather belatedly because we had hoped to do so yesterday – Mauritius' submission on the merits of the dispute in the first round of oral argument. We now turn to questions of jurisdiction.

Mr. President, Members of the Tribunal, if there are no questions, thank you for your attention.

PRESIDENT SHEARER: Thank you very much, Professor Crawford.

Are there any questions?

Professor Crawford, did I understand that you were going to continue now with jurisdiction?

PROFESSOR CRAWFORD: No, jurisdiction is being dealt with by others.

PRESIDENT SHEARER: Okay.

PROFESSOR CRAWFORD: I didn't get that joy.

PRESIDENT SHEARER: Thank you. So, is Ms. Macdonald next, is it? Yes. Thank you very much.

(Pause.)

MS. MACDONALD: Mr. President, Members of the Tribunal, before I start Mauritius' submissions on jurisdiction, there were a few outstanding matters from Wednesday morning and from my submissions on the history, the background history, of the Archipelago, and, in particular, there were outstanding questions from Judges Wolfrum and Greenwood as to voting and citizenship rights. So, if it's convenient, I would propose, I have, unfortunately, detailed

answers to those slightly complex questions and that might take us up conveniently to the first morning break after which I could start our submissions on jurisdiction.

In response, first, to Judge Greenwood's question, it was in two parts, and the first was, if I could paraphrase, whether or not at the time of the Lancaster House Conference, the inhabitants of Rodrigues had the right to vote and whether this was also the case for the Chagos Archipelago.

As you pointed out, Judge Greenwood, at the time of the Lancaster House Conference, the inhabitants of the Chagos Archipelago did not have the right to vote in the elections for the Mauritius Legislative Assembly, and this was the same for Rodrigues. This is because Section 36(1) of the 1964 Constitution of Mauritius, set out in the Mauritius Constitution Order of the same year, provides that, I quote, "for the purpose of electing members of the Legislative Assembly, the island of Mauritius shall be divided into 40 electoral districts, each of which shall return one member." And at Section 90(1), it goes on to provide that "the Island of Mauritius," as referred to in Section 36(1), which I just quoted, "includes the small islands adjacent thereto but does not include the Dependencies of Mauritius." Therefore, the constitutional framework in place at the time of the Lancaster House Conference in 1965 was that none of Mauritius' Dependencies were included within an electoral district and, therefore, that the residents of those Dependencies couldn't vote.

After the Lancaster House Conference, the right to vote was extended to the inhabitants of Rodrigues, and we understand that they voted for the first time in 1967. But by the time that Rodrigues became an electoral constituency, the Chagos Archipelago had, of course, been excised from Mauritius.

The second part of Judge Greenwood's question was how many of the population in the islands in the period from 1965 to 1968 had links with Seychelles rather than with Mauritius. There is, indeed, as you point out, Sir, a disparity in the figures provided in the various documents

which we have in the annexes to the case. Mauritius considers that the most reliable source of information in this regard is to consider to which country the inhabitants went upon their forcible removal. Now, a recent general publication in the journal *Population Space and Place* provides these figures based on a comparison of the best available contemporary records and Government archives, and the authors of that article considered that between 1,328 and 1,522 inhabitants of the Chagos Archipelago were removed to Mauritius whereas 232 went to Seychelles. This publication is available online, and we've provided a Web link for the transcript,[31] and we can provide hard copies, of course, if the Tribunal so wishes.

There was also a question primarily from Judge Wolfrum on citizenship. When Mauritius was a British colony, people born there or otherwise qualifying, for example, by naturalization, were categorized as citizens of the United Kingdom and Colonies as defined in the British Nationality Act 1948. On the excision of the Chagos Archipelago in 1965, and the creation of the so-called "BIOT", those born in or with another relevant connection to the Archipelago retained their citizenship of the United Kingdom and Colonies. Then in 1968, on the independence of Mauritius, its new Constitution enacted by the UK in the Mauritius Independence Order 1968, provided that any person born in Mauritius who was on the 11th of March 1968, the day before independence, a citizen of the United Kingdom and Colonies became a citizen of Mauritius. And the effect of another provision in the Constitution, Section 20(4), was that persons who were born in the Chagos Archipelago were regarded as having been born in Mauritius for the purpose of the nationality provision, even though, according to the UK, the Chagos Archipelago had been part of the so-called "BIOT" for the previous three years. There was no reference to persons born in Rodrigues. Since the island was a part of Mauritius, even to UK eyes, there was no need for legislation to refer to it separately.

Following its normal practice for its former colonies emerging to independence, the

[31] http://onlinelibrary.wiley.com/doi/10.1002/psp.1754/full

UK provided by legislation in the Mauritius Independence Act 1968, part of UK law, that new citizens of Mauritius would not retain their citizenship of the United Kingdom and Colonies, but the same legislation provided that persons with the connection by birth or descent to any UK colony, which would have included under UK law the "BIOT", did not lose their citizenship of the UK and colonies. Under the law of the UK, therefore, from the date of independence, persons born in the Chagos Archipelago were citizens of Mauritius without distinction as to their origins in the Chagos Archipelago, and they were also classed by the UK as citizens of the UK and Colonies. The latter status did not carry a right of abode in the UK.

And just to bring the store up to date, the category of citizenship of the United Kingdom and Colonies was replaced under the British Nationality Act 1981 by a number of different categories of citizenship. Citizens of the UK and Colonies became what was termed "British Dependent Territories Citizens." And following litigation by former residents of the Chagos Archipelago in the English courts, the UK passed the British Overseas Territory Act 2002. This renamed British Dependent Territories Citizens as British Overseas Territory Citizens, and, for the first time, conferred full British citizenship on persons who were British Dependent Territories Citizens by virtue of a connection with the so-called "BIOT", and that brought with it a right of abode in the UK.

I apologize for the length, but it is a slightly detailed issue, and it's important to get it absolutely right. I hope that that answers the questions that the Members of the Tribunal had on those issues.

ARBITRATOR GREENWOOD: Ms. Macdonald, I am very grateful to you both for your answer to Judge Wolfrum's question, which I found very enlightening as well, and for the answers to my questions.

May I just put two points to you?

The first is, unless I misheard you, I think you said that Rodrigues was also a

Dependency of Mauritius in the period of the Lancaster House Conference. Was that right? Was that what you said?

MS. MACDONALD: Yes, and we have seen it under the Treaty of Paris. It was ceded from France to – Article 8 – the Treaty of Paris ceded it from France to the UK and categorized it as a Dependency.

ARBITRATOR GREENWOOD: Thank you. Yes, I'm not quite so concerned with the position in 1814.

MS. MACDONALD: Yes.

ARBITRATOR GREENWOOD: I just want to be clear that, in 1965, on the eve of excision, as it were, Rodrigues was a Dependency with the same status that the Chagos Archipelago had as a matter of UK colonial law.

MS. MACDONALD: Yes.

ARBITRATOR GREENWOOD: Right. Thank you.

And the second point is really more to give advanced notice of something I want to hear the United Kingdom talk about next week. The figures you have just given, which are really very interesting – I'm most grateful to you for that – they are quite radically at odds with the picture given from the figures of Seychellois and Mauritian origin inhabitants of the Chagos islands. And I think it's the Stevens report, which is the prelude to excision. And that breaks the figures down island by island, but it gave me the impression that many more people were destined for the Seychelles than the figures you've just given, and I would be grateful if the United Kingdom would comment on that.

MS. MACDONALD: It may be of assistance to have a look – as I say, we can provide hard copies as well. There is an extremely, in my submission, helpful and detailed article that was what we considered to be the best source of these figures, and which carried out a very thorough review. The problem was that many different people visited the islands and took

numbers for different purposes, those extremely shifting data figures, and the authors of that article, it certainly is the most thoroughly analysis that I have seen of all the various reports, all the various British officials and others who visited the islands and considered the numbers for their various purposes. It collates those, it assesses them, and it attempts on the basis of that very comprehensive – the most comprehensive that I have seen – review of the evidence, it attempts to come up with the best definitive figures that one can get. So, that's the analysis that we have there, and we invite the Tribunal to look at that. But, of course, the United Kingdom may have different views as to the numbers.

ARBITRATOR GREENWOOD: Ms. Macdonald, thank you. I certainly would like to see a copy. I can't obviously speak for my colleagues. But quite, without any prejudice to the question of what impact this has on any of the legal issues, and it may have none at all, I think that the Tribunal and both Parties would want any account of the facts in our award to be as accurate on this particular issue as possible because much of what was written in the past was so very inaccurate.

MS. MACDONALD: Absolutely.

PRESIDENT SHEARER: Good. Is this the appropriate time to take the morning break, Ms. Macdonald?

MS. MACDONALD: Yes.

PRESIDENT SHEARER: Well, in that case, I think we will break, and we will continue at 10:45. Thank you.

(Brief recess.)

PRESIDENT SHEARER: Ms. Macdonald.

MS. MACDONALD: Mr. President, we made copies of that Article available, which I hope are sitting in front of each of you. We also made a copy available to the United Kingdom.

Mauritius v United Kingdom

SPEECH 9

Jurisdiction 1:

The Exchanges of the Parties and Article 283(1)

Alison Macdonald

1. Mr. President, Members of the Tribunal, as the first part of Mauritius' submissions on jurisdiction I shall address you, I hope fairly succinctly, on the requirements of Article 283 of the Convention, and demonstrate that there exists a dispute between the Parties, and that there has been the necessary exchange of views.

2. The UK's argument to the contrary is based on two related assertions:

(1) Firstly, the UK argues that there is no "dispute between the Parties concerning the interpretation or application of the Convention." This is said to be because Mauritius did not refer expressly to the provisions of the Convention in its bilateral communications with the UK.

(2) Secondly, the UK claims that, because Mauritius failed to raise a dispute with regard to the interpretation or application of the Convention, one consequence of this is that it did not engage in the necessary exchange of views before bringing this claim.

3. Now, we say that both of these arguments are wrong, and that they are not supported by the factual record. The UK says in the Counter-Memorial that it "had no idea what the subject-matter of the dispute was until it received Mauritius' Notification and Statement of Claim."[32] It complains that "Mauritius did not refer to UNCLOS and the substantive provisions of UNCLOS, either expressly or with sufficient clarity so that the United Kingdom could understand (i) that a dispute was being raised, (ii) what it was, (iii) that it was under UNCLOS and (iv) that an "exchange of views regarding its settlement by negotiation

[32] UKCM, para. 5.49.

or other peaceful means" was being sought." That's at Paragraph 6.21 of the Rejoinder. [UKR 6.21]

4. But as I will show you, there is indeed a dispute between the Parties, on all aspects of which there has been a lengthy and a robust exchange of views. The subject matter of the dispute – including historic fishing rights; rights to an EEZ and Extended Continental Shelf; and the right to be consulted – has been raised regularly by Mauritius over several decades, in bilateral and multilateral contexts, intertwined, of course, with the continuous assertion of its sovereignty over the Chagos Archipelago.

5. By the time it announced the "MPA" in the spring of 2010, the UK was well aware of the possibility of international proceedings being brought by Mauritius. The UK knew very well that Mauritius would object to the legal status of the "MPA", and UK officials even anticipated some of the legal bases for Mauritius' objections. To take one example, nineteen months before Mauritius learned of the proposal for the MPA (when it was first reported in the press), the UK official responsible for the "BIOT" advised that "a no fishing zone" faced "obstacles," the "first being Mauritius" because "Mauritius did have some rights" to "fishing" in the Chagos Archipelago.[33] And I should just say here for clarity that I will take the evidence and the law fairly briefly. In this presentation, there are detailed footnotes which will appear on the transcript, so everything that I quote from will be referenced for you when you get the transcript. So, hopefully that will save some note taking as well. [UKCM Annex 87]

6. The UK also knew that the dispute over the "MPA" was of such seriousness that it risked causing Mauritius to commence legal proceedings. Just a day before the "MPA" was declared, as I showed you yesterday, the British High Commissioner in Port Louis warned of

[33] Email from Joanne Yeadon, Head of "BIOT" and Pitcairn Section, to Andrew Allen, 22 April 2008, UKCM, Annex 87.

Mauritius "taking legal action to challenge the establishment of the MPA."[34] He was not the only British official to give this warning. The same day, the Administrator of the so-called "BIOT", Ms. Yeadon cautioned about an impending "threat of legal action."[35] I will return to the factual record after a brief overview of the law.

The Requirements of Article 283(1)

7. In deciding whether there is a "dispute" there are, in our submission, four key propositions, and these are, of course, well-rehearsed in the case law, so I would take them briefly:

(1) Firstly, the Parties agree that, for the purposes of Article 283(1), a dispute is, as the Permanent Court put it in their much-cited words from the *Mavrommatis Palestine Concessions* case, "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."[36]

(2) Secondly, as the International Court put it in the *South West Africa* case, whether there exists an international dispute has to be decided objectively, and cannot be judged with reference to the subjective views of the Parties.[37]

(3) Thirdly, whether there is a dispute is a question of substance, not form.[38]

(4) Fourthly, in deciding whether there is a dispute, an international tribunal should consider "not only" the Application and the final submissions, but also "diplomatic exchanges, public

[34] Email dated 31 March 2010 from John Murton, British High Commissioner to Mauritius, to Colin Roberts, Director, Overseas Territories Directorate and Joanne Yeadon, Head of "BIOT" & Pitcairn Section, UK Foreign and Commonwealth Office: Annex 156.

[35] Email dated 31 March 2010 from John Murton, British High Commissioner to Mauritius, to Colin Roberts, Director, Overseas Territories Directorate and Joanne Yeadon, Head of "BIOT" & Pitcairn Section, UK Foreign and Commonwealth Office: Annex 156.

[36] *Mavrommatis Palestine Concessions*, 1924 P.C.I.J. (ser. A), Judgment No. 2, p. 11.

[37] *South West Africa Cases* (*Ethiopia v South Africa; Liberia v South Africa*), Preliminary Objections, Judgment of 21 December 1962: ICJ Reports 1962, p. 319, at p. 328:
"[I]t is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence." See also *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, ICJ Reports 1950, at p. 74: "The mere denial of the existence of a dispute does not prove its non-existence."

[38] *Georgia v Russian Federation*, para. 30. UKCM, Legal Authority 37.

statements and other pertinent evidence," as well as the conduct of the Parties both prior to and after the commencement of legal proceedings.[39]

8. What, then, of the requirement to exchange views about the dispute? Here, the jurisprudence deals firstly with what an exchange of views is to contain and secondly with the circumstances in which such an exchange may be brought to an end. And, again, I say the key principles can be boiled-down to some core propositions:

(1) Firstly, there is the important general proposition that the requirement to engage in an "exchange of views" is not an onerous burden. International courts and tribunals have long recognised, again in the words of the *Mavrommatis Palestine Concessions* decision, in that case considering the slightly different concept of negotiation, that "[n]egotiations do not of necessity always presuppose a more or less lengthy series of notes and dispatches; it may suffice that a discussion should have commenced, and this discussion may have been very short."[40] But as we will see in this case, we do actually have a lengthy series of notes and dispatches, but my general point here is that the bar is not set high in terms of what the exchange must contain.

(2) Secondly, as the Court put it in *Georgia v Russia*, "it is not necessary that a State must expressly refer to a specific treaty in its exchanges with the other State to be able later to invoke that instrument before the Court."[41] It follows from this, of course, that a State need not refer to specific articles of a treaty either. Rather, as the Court put it, "the exchanges must refer to the subject-matter of the treaty with sufficient clarity to enable the State against which a claim is made to identify that there is, or may be, a dispute with regard to that subject-matter."[42]

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[39] *Fisheries Jurisdiction* (*Spain v Canada*), Jurisdiction of the Court, Judgment, ICJ Reports 1998, p. 432, para. 31; *Nuclear Tests* (*Australia v France*), Judgment, ICJ Reports 1974, p. 253, paras. 29-31.

[40] *Mavrommatis Palestine Concessions*, at p. 13.

[41] *Georgia v Russia*, para. 30. UKCM, Authority 37.

[42] *Georgia v Russia*, para. 30. UKCM, Authority 37.

This approach can also be seen in the decision of the Annex VII Tribunal in *Guyana v Suriname,* in which of course the Tribunal rejected, again, the argument that specific treaty provisions must be cited in order to satisfy the requirements of Article 283.[43] And, of course, the International Tribunal on the Law of the Sea took the same approach to Article 283(1) in the *Land Reclamation* case, where it held that Malaysia was not required to invoke the Convention at all, much less its specific provisions. It was enough for Malaysia to have "informed Singapore of its concerns about Singapore's land reclamation in the Straits of Johor." The fact that Malaysia had not "detailed its specific concerns" until the institution of proceedings was not considered to be an obstacle to the exercise of jurisdiction.[44]

And in the *Louisa* case, the Tribunal considered that there was no reason to decline jurisdiction for failure to comply with Article 283(1), simply because Saint Vincent and the Grenadines, again, had not referred to the specific Convention provisions which underpinned its claims.

(3) As a third proposition, courts and tribunals will accord considerable respect to a State's judgment as to when to terminate the exchange of views. Again, in the words of *Mavrommatis*, States themselves are "in the best position to judge as to political reasons which may prevent the settlement of a given dispute by diplomatic negotiations."[45]

Again, these principles have been applied in relation to Article 283(1). In the *Land Reclamation* case, the International Tribunal on the Law of the Sea held that Malaysia was "not obliged to continue with an exchange of views when it conclude[d] that the possibilities of reaching agreement [had] been exhausted."[46] Mr. President, this will be a particularly pertinent observation when we turn to look at the factual record. As you have already heard, Mauritius only initiated proceedings after a clear and specific promise made at the highest level of government had been broken.

[43] *Guyana v Suriname*, paras. 408-410.
[44] *Land Reclamation (2003)*, paras. 39, 41.
[45] *Mavrommatis Palestine Concessions*, at p. 15.
[46] *Land Reclamation*, para. 44.

9. What this brief summary shows, I would suggest, is that the requirements of Article 283 are not particularly onerous. They form a threshold jurisdictional requirement to ensure that parties are not taken by surprise by the initiation of proceedings, but they do not require lengthy exchanges, they do not require reference to specific treaties or provisions, and the State's judgment as to when to terminate exchanges will be accorded considerable respect. This is an area where the law is concerned with substance, not with form.

10. Mr. President, we submit that Mauritius' claims very comfortably satisfy this test. It has raised, on many occasions, over many years, the subjects which form the basis of this dispute. I now turn to look at the factual record. It has been analyzed in detail in the pleadings, and I do not propose to take you through all the documents, simply to highlight what we say are the main points for you to consider. For a fuller analysis of the many years of exchanges, we would direct you, in particular, to chapter 4 of Mauritius' Reply.

Mauritius' claim that the UK is not the coastal state

11. I will first deal with the dispute about whether the UK is the coastal State entitled to declare maritime zones.

12. Here, there has been an interesting change of position on the UK's part. Originally, it did not dispute that Mauritius had met the requirements of Article 283 in respect of this part of the claim. You will recall that, in its Preliminary Objections to Jurisdiction filed in October 2012, it expressly accepted that Article 283 had been complied with in respect of what it termed Mauritius' 'sovereignty claim'.

13. This was not entirely surprising. It would be impossible to claim that Mauritius has, over the years, left the UK in any doubt about its view that Mauritius, rather than the UK, enjoys sovereignty over the Chagos Archipelago.

14. But despite these decades of very clear communications on the point, the UK has now reversed its position. And it <u>now</u> argues that Article 283 has <u>not</u> been satisfied, because Mauritius did

not frame those communications in terms of the Convention itself. In other words, as we understand the point, the argument is that although Mauritius said to the UK on countless occasions 'You do not have sovereignty over the Chagos Archipelago', it did not go on to say 'and therefore you are not the coastal State for the purposes of the Convention', and the argument is that because of that we cannot bring this part of the claim before you.

15. We say this argument is wrong as a matter of law and as a matter of fact. As a matter of law, as I have indicated, it is quite clear that there is no requirement for a State to refer to a specific Convention or its provisions. The question is whether the State has raised the subject-matter of the dispute. So when the UK complains that the dispute over sovereignty was never expressed in terms of the Convention [UKCM 5.20], this is something which Mauritius was simply under no obligation to do. And as I've already noted, and the record shows over many decades, Mauritius has repeatedly expressed its view that the UK lacks sovereignty over the Chagos Archipelago. And we say this necessarily entails that the UK lacks all the rights enjoyed by a sovereign State, which of course includes the right to declare maritime zones. Test that this way: the UK could not possibly have been left in the position of thinking that Mauritius considered that it, the UK, had the right to declare the "MPA", or any other maritime zone. It's just a conclusion which cannot follow from Mauritius' continuous assertion of sovereignty.

16. Now as well as being wrong in law, as I said, the UK's submission is wrong in fact. Although it was not under any obligation to do so, Mauritius has in fact formulated the dispute in terms of the entitlement of a "coastal State" to declare maritime zones in the waters of the Chagos Archipelago.

17. We see this in the Parties' diplomatic correspondence relating to their declarations of maritime zones and related deposits of charts and coordinates with the UN. On 13 August 2003, the UK informed Mauritius of its intention to declare an Environmental (Protection and Preservation)

Zone within 200 nautical miles of the Archipelago, as you've seen.[47] The UK cited the Convention as authority for this measure, and specifically those provisions which, as it described it, entitle "States to establish an exclusive economic zone (EEZ), extending 200 nautical miles from the territorial sea baselines, within which they may exercise certain sovereign rights and jurisdiction." Further, confirming that it was exercising its purported entitlement under the Convention as a coastal State, the UK stated that it would deposit the relevant Proclamation and charts and co-ordinates with the UN "under Article 75 of UNCLOS."

Mauritius' Minister of Foreign Affairs objected to this development in a letter addressed to the UK Foreign Secretary dated 7 November 2003.[48] After recalling its often-repeated "position regarding our sovereignty or territorial and maritime jurisdiction over the Chagos Archipelago and its surrounding waters," the Foreign Minister went on to say the following: "In view of the above, I earnestly request the UK Government not to proceed with the issue of a Proclamation establishing an Environmental (Protection and Preservation) Zone around the Chagos Archipelago and not to deposit a copy thereof together with copies of the relevant charts and coordinates with the UN under Article 75 of UNCLOS. As you are aware, Article 75 falls under Part V of UNCLOS which deals solely with EEZs. Depositing copies of relevant charts and coordinates with the UN under Article 75 of UNCLOS would in effect amount to a declaration of an EEZ around the Chagos Archipelago, something the UK undertook not to do in the letter of 1 July 1992..."

18. Despite this, the UK went on to declare the EPPZ, by Proclamation which it deposited with the UN, along with the relevant charts and co-ordinates, pursuant to Article 75. And this led to protest from Mauritius. In a diplomatic note addressed to the UN Secretary-General, Mauritius was explicit that its objection was founded on the fact that the UK is not a coastal State in

[47] Letter dated 13 August 2003 from the Director of Overseas Territories Department, UK Foreign and Commonwealth Office, to the Mauritius High Commissioner, London, MM, Annex 120.

[48] Letter dated 7 November 2003 from the Minister of Foreign Affairs and Regional Cooperation, Mauritius to the UK Secretary of State for Foreign and Commonwealth Affairs, MM, Annex 122.

regard to the Chagos Archipelago, and as such is not entitled to declare an EEZ.[49] And Mauritius made the same point in a diplomatic note from its High Commission in London to the Foreign and Commonwealth Office in the, dated 20 April 2004.[50]

19. And similar exchanges took place following the UK's deposit with the UN of geographical coordinates on 26 July 2006.[51]

20. In summary on this point, then, the UK is wrong to suggest that Mauritius was obliged to make the obvious point that, if the UK lacks sovereignty over the Chagos Archipelago, it necessarily lacks the right to declare maritime zones. This is inherent, we say, in Mauritius' continuous assertions of sovereignty over the Chagos Archipelago. Moreover, the EPPZ is the area within which the limits of the "MPA" are established. There was absolutely no need, we say, for Mauritius to go any further in its communications or, indeed, legally, as I've said, to go as far as it did.

21. But in any event, every time the UK did declare a maritime zone, Mauritius protested, including on the basis that the UK was not the State entitled to do so. When the UK built on these previous maritime zones by declaring the MPA in 2010, it can have been in no doubt, we say, about Mauritius' view that it was not entitled to do so. The exchange of views on this subject, we say, amply meets the requirements of Article 283. And the position which the UK initially adopted in this case, we say, is the correct one.

The compatibility of the "MPA" with UNCLOS

22. I now turn to the other part of Mauritius' claim, relating to the compatibility of the "MPA" with the other provisions of the Convention. My submissions on this point also tie in with

[49] Note Verbale dated 14 April 2004 from the Permanent Mission of the Republic of Mauritius to the United Nations, New York, to the Secretary General of the United Nations, No. 4780/04 (NY/UN/562), MM, Annex 126, and Extract from Law of the Sea Bulletin No. 54, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, 2004: Annex 108.

[50] Note Verbale dated 20 April 2004 from the Mauritius High Commission, London to the UK Foreign and Commonwealth Office, Ref. MHCL 886/1/03, MM, Annex 127.

[51] Note Verbale dated 19 March 2009 from the United Kingdom Mission to the United Nations, New York to the Secretary General of the United Nations, No. 26/09, MM, Annex 141.

Mauritius' factual submissions about its historic fishing rights, dealt with by Mr. Reichler, and with my previous submissions on the facts relating to the creation of the "MPA", so I hope you will forgive me if I do not review the evidence in detail at this stage, but simply build on what has gone before, again with the benefit of footnotes for the transcript.

23. The exchanges on this subject can conveniently be divided into two categories. The first is exchanges which show Mauritius asserting its rights in the Archipelago before the MPA proposal came into existence. These form an important part of the background because they show Mauritius continuously asserting its rights over the Archipelago, including the fishing rights which would be brought to an end by the decision to impose a no-take MPA. The second is exchanges between the Parties after the MPA proposal emerged. Again, the record shows that Mauritius made it quite clear that it did not consider the "MPA" to be compatible with its rights, thus giving rise to a difference of views, of course, about Mauritius' rights and entitlements, and thus crystallizing the dispute under the Convention.

Exchanges before the MPA proposal emerged

24. Now in relation to the first category, the lengthy record, as I said, is set out in Mauritius' pleadings. Focusing on the few years before the MPA proposal emerged, I would simply draw attention to some exchanges which took place at the highest possible level. This is in addition, of course, to our written and oral submissions on the huge number of occasions on which Mauritius asserted its specific rights in the Archipelago, at all levels and in a range of circumstances.

25. On 1 December 2005, the Prime Minister of Mauritius wrote to his British counterpart, Mr. Blair, emphasizing the importance of Mauritian rights in the waters of the Chagos Archipelago. And he said in that letter "I look forward to discussing with you in the near future the important issue of fishing rights of Mauritius in the Chagos waters."[52] And this elicited the

[52] Letter dated 1 December 2005 from the Prime Minister of Mauritius to the Prime Minister of the United Kingdom, MM, Annex 132.

response from Prime Minister Blair, in a letter of 4 January 2006, that "[t]he question of fishing rights in the Archipelago and its implications needs to be talked through."[53]

26. Mauritius took up its rights in the Archipelago again to the Prime Minister in a meeting with Prime Minister Gordon Brown on 24 November 2007: so a couple of years before the meeting dealt with in Prime Minister Ramgoolam's witness statement. The notes of that meeting record that two "main subjects" were discussed: "Mauritian Sovereignty over the Chagos Archipelago," and separately, "Mauritian fishing rights over the Chagos Archipelago islands." These are, of course, the twin elements of the claim now brought by Mauritius. With regard to the latter subject, the Mauritian Prime Minister "brought up the question of the exercise of our fishing rights over the Chagos waters (i.e. the Chagos Archipelago), excluding Diego Garcia where there is an American presence. This will enable Mauritius to contribute meaningfully in the conservation of fish stocks and the exchange of commercial fisheries data."[54]

27. Following up on their discussions, on 13 December 2007, the Prime Minister of Mauritius sent a letter to the British Prime Minister raising "the question of our fishing rights in the waters of Chagos Archipelago excluding of course the immediate vicinity of Diego Garcia for obvious security reasons."[55] The Mauritian Prime Minister expressly stated that "Mauritius had historically exercised such rights over the waters of the Chagos Archipelago."[56] And in the UK's response of 7 February 2008, Prime Minister Brown acknowledged that "fishing" was among the "issues relating to the British Indian Ocean Territory that we can discuss."[57]

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[53] Letter dated 4 January 2006 from the Prime Minister of the United Kingdom to the Prime Minister of Mauritius, MM, Annex 133.

[54] Extract of Information Paper CAB (2007) 814 – Commonwealth Heads of Government Meeting, 29 November 2007: Annex 115.

[55] Letter dated 13 December 2007 from Prime Minister of Mauritius to Prime Minister of the United Kingdom, MM, Annex 135.

[56] Letter dated 13 December 2007 from Prime Minister of Mauritius to Prime Minister of the United Kingdom, MM, Annex 135.

[57] Letter dated 7 February 2008 from the UK Prime Minister to the Prime Minister of Mauritius: Annex 118.

28. And UK officials, as you've seen, were well aware of the fact that Mauritius had raised these specific rights in the Archipelago. In my factual submissions on the creation of the "MPA", I have shown you the internal Foreign Office communications from late 2008 and early 2009, planning for the January 2009 talks. It is clear that the officials concerned were fully aware that Mauritius would expect fishing rights to be on the agenda, and indeed they were then discussed in detail at the January talks, as you have seen.

Exchanges after the MPA proposal emerged

29. Looking now to events after the MPA proposal came to Mauritius' attention, I have already shown you how Mauritius only learned of the proposal through articles in the press in February 2009. This discovery came as a surprise to it, of course, given the UK's failure to mention it at the first round of talks just a month before and Mauritius promptly made a diplomatic protest.[58]

30. In the period between the first and second round of talks, again as we saw yesterday, internal Foreign Office discussion shows clear awareness of Mauritius' position regarding its rights in the waters of the Chagos Archipelago. And the evidence was reviewed in some detail by Mr. Reichler in his submissions. For present purposes, the relevance of this material, I suggest, is to undermine the UK's claim to have been kept in the dark about the subject matter of the dispute.

31. And against this backdrop, the second round of bilateral talks was held in July 2009 at the Prime Minister's Office in Port Louis. Again, I have dealt with those talks previously, so I can take them briefly here. Mauritius proposed the agenda, and the UK agreed to it.[59] So, to use the words from the agenda, "access to natural resources of the maritime zone / fishing",

[58] Note Verbale dated 5 March 2009 from the Ministry of Foreign Affairs, Regional Integration and International Trade, Mauritius to the UK Foreign and Commonwealth Office, No. 2009 (1197/28) MM Annex 139.

[59] Note Verbale dated 20 July 2009 from the British High Commission, Port Louis to the Ministry of Foreign Affairs, Regional Integration and International Trade, Mauritius, No. 37/2009: MR Annex 140.

environmental issues, and 'EEZ Delimitation and Extended Continental Shelf' were all on the agenda.[60]

32. The UK tries to present these talks out of context. It seems to be saying that they are evidence that those on the Mauritian delegation did not consider that Mauritius had fishing rights, or perhaps that they considered those rights so trivial that they did not need to be mentioned. The UK says at Paragraph 3.6 of the Rejoinder that 'the obvious inference remains that Mauritius did not then consider that these were material considerations in discussions then underway.' [UKR 3.6] But in fact, as the UK officials had expected, the Mauritian delegation made it quite clear that the proposed MPA would have to accommodate its rights in the Chagos Archipelago. The fact that Mauritius' rights would have to be reconciled with any MPA was plain from the Joint Communiqué, which the parties prepared after the talks which records that the agreed joint examination of the proposal "would also have to include consideration of the implications of the proposed Marine Protected Area."[61] The Joint Communiqué also records discussion of the "Extended Continental Shelf," as well as Mauritius' insistence that consideration of the MPA proposal include ongoing bilateral consultations between the technical experts.

33. None of this could have come as a surprise to the UK. Because as we have already seen among many other communications at the previous round of bilateral talks a few months before, Mauritius had set out its rights in the Chagos Archipelago in detail, and it had argued vigorously that the UK was violating those rights by requiring Mauritians to apply to the authorities of the so-called "BIOT" for fishing licences. Now, if Mauritius considered that a *pro forma* licensing regime violated its rights, then how much more serious would it be to ban Mauritius from fishing in the Archipelago at all? But this was exactly what was involved in the MPA plan. Can the UK seriously suggest that, only a few months after those discussions in

[60] Note Verbale dated 16 July 2009 from the Ministry of Foreign Affairs, Regional Integration and International Trade, Mauritius to the British High Commission, Port Louis, No. 29/2009 (1197/28/4): MR Annex 139.

[61] Joint Communiqué of meeting on 21 July 2009, UKCM Annex 100.

January, it had no idea that Mauritius' objections to the MPA would include the fact that it would cut across Mauritius' historic fishing rights? This appears to be what the UK is saying, but as you can see, that is just not supported when you look at the evidence.

34. Now, the Joint Communiqué does not pick out any specific rights which, in Mauritius' view, the MPA proposal would violate, precisely because at that stage it was – or at least it appeared to be, as Mauritius was told by the UK – nothing more than a proposal which needed to be worked up. As far as Mauritius was concerned, this was merely the start of a process of joint scientific work and further bilateral discussion. Of course, as you have heard, the plans for the MPA by that point seemed to have been far more advanced than Mauritius was told. But is there anything in the record of the talks which diminishes the clarity of Mauritius' position on its rights over the Archipelago? No, we say.

35. Following the July talks, Mauritius continued to make clear its opposition to the MPA, and to the UK's unilateral approach. This was made clear at the meeting between Prime Minister Ramgoolam and the British High Commissioner in Port Louis on 22 October 2009. And Mauritius continued to raise its dispute with the UK over the following months: see for example Mauritius' Note Verbale of 10 November 2009,[62] the note of the 10 November 2009 telephone conversation between the UK Foreign Secretary and the Prime Minister of Mauritius[63], and Mauritius' Note Verbale of 23 November 2009, which we will look at in a moment.[64]

The meeting between the Mauritius and UK Prime Ministers on 27 November 2009

[62] Note Verbale dated 10 November 2009 from the Ministry of Foreign Affairs, Regional Integration and International Trade, Mauritius to the UK Foreign and Commonwealth Office, No. 1197/28/10, MM, Annex 151.

[63] Record of telephone call between Foreign Secretary and Mauritian Prime Minister, 10 November 2009, UKCM Annex 106.

[64] Note Verbale dated 23 November 2009 from the Ministry of Foreign Affairs, Regional Integration and International Trade, Mauritius to the UK Foreign and Commonwealth Office, No. 1197/28/10 MM, Annex 155.

36. Then on 27 November 2009, as you've already heard, Prime Minister Ramgoolam and Prime Minister Brown had the meeting which is detailed in the Prime Minister's witness statement. As you have seen, Mr. Brown promised that he would put the "MPA" on hold, and that the subject would only be discussed within the bilateral talks. As I showed you yesterday, this discussion was recorded by Prime Minister Ramgoolam in his statement to the National Assembly, as you have seen, and the Foreign Office was clearly aware of his view that such a commitment had been given.

37. This exchange of views took place at the highest level of Government. A clear commitment was made by the UK and it was then broken. Against this background, and all that came before, we consider that there is no serious argument that the requirements of Article 283 have not been met. And we say that the breaking of this commitment is particularly important when we come to the question of whether Mauritius was entitled to terminate the exchange of views when it did.

Further exchanges in 2009

38. Following the chronology onwards, and again, it's a brisk pace, in a Note Verbale of 23 November 2009,[65] which it followed up on 30 December[66], Mauritius made clear that, this is from the Ministry of Foreign Affairs, "The Ministry of Foreign Affairs Regional Integration and International Trade would like to state that since there was an ongoing bilateral Mauritius-UK mechanism for talks and consultations on issues relating to the Chagos Archipelago and a third round of talks is envisaged next year, the Government of the Republic of Mauritius believed that it is inappropriate for the consultation on the proposed Marine Protected Area, as far as Mauritius is concerned, to take place outside this bilateral

[65] Note Verbale dated 23 November 2009 from the Ministry of Foreign Affairs, Regional Integration and International Trade, Mauritius to the UK Foreign and Commonwealth Office, No. 1197/28/10, MM Annex 155.

[66] Note Verbale dated 30 December 2009 from the Ministry of Foreign Affairs, Regional Integration and International Trade, Mauritius to the UK Foreign and Commonwealth Office, No. 1197/28/4, MM, Annex 158.

framework. The Government of Mauritius considers that an MPA project in the Chagos Archipelago should not be incompatible with the sovereignty of the Republic of Mauritius over the Chagos Archipelago and should address the issues of resettlement, access to the fisheries resources and the economic development of the islands in a matter which would not prejudice an eventual enjoyment of sovereignty. A total ban on fisheries exploitation and omission of those issues from any MPA project, would not be compatible with the long-term resolution of our progress in the talks on the sovereignty issue."

All that the UK has to say about this document in its Rejoinder is that 'By this time the public consultation has been underway for nearly two weeks.' [3.13] It is not clear to us what significance this has. Mauritius, as a responsible State seeking to negotiate in good faith, was not simply going to rule out the possibility of a third round of talks the moment the consultation document was published. It spent several weeks, as you've seen, trying to persuade the UK that bilateral talks were the appropriate way of consulting on the issue, but in vain. It is hard to imagine how Mauritius could have expressed itself more clearly or indeed done more to keep the talks on the road.

Exchanges in 2010 up to the announcement of the "MPA"

39. Continuing the story, we now move into 2010, and to the period leading up to the announcement of the "MPA" on 1 April.

40. On 19 February 2010, we can see Mauritius <u>again</u> raising the disputes over its package of rights in the Chagos Archipelago and the UK's failure to consult. In a diplomatic note addressed to the British High Commissioner in Port Louis, Mauritius emphasised that the MPA denied "access by Mauritians to fisheries resources in that area." Mauritius also said that the UK had failed to consult adequately, criticising what it called the UK's "unilateral" approach, which it said was "prejudicial to the interests of Mauritius."[67] [MM Annex 162]

[67] Letter dated 19 February 2010 from the Secretary to Cabinet and Head of the Civil Service, Mauritius to the British High Commissioner, Port Louis, MM, Annex 162.

Mauritius stressed that it was "keen to resume the bilateral talks on the premises outlined above." Again, we say that this is yet another example of Mauritius raising both its procedural rights – the right to be consulted – and its substantive rights – including in particular its historic right to fish in the waters of the Archipelago.

41. The fact that this message got through to the UK at the time is clear from, among other things, a memorandum by Ms. Yeadon at the Foreign Office dated 30 March 2010, in which she states that: "The Mauritian Government accepts the underlying objective of strengthening environmental stewardship in the region but they remain unhappy with what they see as the unilateral FCO consultation…"[68]

42. And the following day – the day before the "MPA" was declared – the UK was in no doubt that Mauritius thought that the MPA violated its legal rights. In an email marked as "high importance", Ms. Yeadon "stress[ed] that we are also concerned about … [the] threat of legal action."[69] This was repeated the same day, as you saw yesterday, by the UK's High Commissioner in Port Louis, who advised against declaring the "MPA" since it could force Mauritius "to commit to taking legal action to challenge the establishment of the MPA."[70] It's very difficult in light of communications like that, we say, to say that there was no dispute between the Parties at the relevant time or that they had not exchanged views on the subject.

Mauritius' reaction to the announcement of the "MPA"

43. But as we have seen, the UK disregarded the warnings of its officials, as well as Mr. Brown's commitment, and declared the MPA the following day.

[68] Submission dated 30 March 2010 from Joanne Yeadon, Head of "BIOT" & Pitcairn Section, to Colin Roberts, Director, Overseas Territories Directorate, the Private Secretary to Parliamentary Under Secretary Chris Bryant and the Private Secretary to the Foreign Secretary, "British Indian Ocean Territory (BIOT): Proposed Marine Protected Area (MPA): Next Steps": Annex 152.

[69] Email dated 31 March 2010 from John Murton, British High Commissioner to Mauritius, to Colin Roberts, Director, Overseas Territories Directorate and Joanne Yeadon, Head of "BIOT" & Pitcairn Section, UK Foreign and Commonwealth Office: Annex 156.

[70] Email dated 31 March 2010 from John Murton, British High Commissioner to Mauritius, to Colin Roberts, Director, Overseas Territories Directorate and Joanne Yeadon, Head of "BIOT" & Pitcairn Section, UK Foreign and Commonwealth Office: Annex 156.

44. The UK Foreign Secretary phoned the Prime Minister of Mauritius on 1 April to inform him of that decision. I have already shown you Prime Minister Ramgoolam's witness statement, where he records what took place. We can also look at the UK's own record of the conversation, this states that Prime Minister Ramgoolam reacted by denouncing the UK's failure to engage in adequate consultations. Mr. Ramgoolam "said that he was disappointed that there had not been bilateral discussions."[71] The UK Foreign Secretary's response to this is significant, as it acknowledges that the Parties were in a dispute regarding the adequacy of their consultations: "While recognising the disagreement with the Mauritius Government on the process leading up to the establishment of the MPA, he hoped that this could bring the two governments closer together to work in the best interests of the environment." [UKCM Annex 114]

45. Mauritius raised the dispute again the following day, in a Note Verbale which "conveyed its strong opposition to such a project," and which referred back to the Note Verbales of 23 November and 30 December 2009. The 2 April 2010 Note again underlined the UK's failure to consult, condemning the "MPA" for having been "undertaken without consultation with … the Government of the Republic of Mauritius."[72] Mauritius informed the UK that it "will look into legal and other options that are now open to it."[73] Again, this could not have come as a surprise to the UK, given the internal documents in which officials recognised the very real risk of a legal challenge to the "MPA".

[71] Notes of telephone call from Foreign Secretary to Mauritius' Prime Minister of 1 April 2010 in email of 1 April 2010 from Global Response Centre: UKCM, Annex 114.

[72] Note Verbale dated 2 April 2010 from the Ministry of Foreign Affairs, Regional Integration and International Trade, Mauritius to the British High Commission, Port Louis, No. 11/2010 (1197/28/10), MM, Annex 167.

[73] Note Verbale dated 2 April 2010 from the Ministry of Foreign Affairs, Regional Integration and International Trade, Mauritius to the British High Commission, Port Louis, No. 11/2010 (1197/28/10), MM, Annex 167. See also Letter dated 8 April 2010 from the Minister of Foreign Affairs, Regional Integration and International Trade, Mauritius to Hon. Edward Davey MP: Annex 159; Letter dated 8 April 2010 from the Minister of Foreign Affairs, Regional Integration and International Trade, Mauritius to Rt. Hon. William Hague MP: Annex 160.

Mauritius' dispute with the UK was raised by its Prime Minister again on 3 June 2010 in a meeting with the UK Foreign Secretary. Notes of the meeting record that the Mauritian Prime Minister:

"expressed concern over the decision of the former UK Government to proceed with the establishment of a Marine Protected Area around the Chagos Archipelago despite the undertaking given by the then British Prime Minister that the project would be put on hold and brought up for consideration under the bilateral talks between the UK and Mauritius on the Chagos issue."[74]

46. The fact that Mauritius and the UK were in dispute was made clear again by Prime Minister Ramgoolam on 27 July 2010, when he addressed the National Assembly of Mauritius,[75] to whom he made similar observations on 9 November 2010. [76]

47. And then, as you know, Mauritius commenced these proceedings on 20 December 2010.

Conclusion

48. By that point, the "MPA" had been imposed on Mauritius, in violation of a commitment given at Prime Ministerial level. Mauritius had made it clear that, in its view, the UK lacked any sovereign rights over the Chagos Archipelago, including the right to declare maritime zones. It had made it clear that, in its view, such a measure would violate its substantive and procedural rights – rights which Mauritius had asserted for many years, of which the UK was fully aware, and which in many cases were self-evidently incompatible with a no-take MPA. Given the broken promise at the highest level of government, Mauritius judged that further diplomatic exchanges stood no chance of resolving the issue – a judgment which, I suggest, was entirely reasonable in the circumstances. There is a dispute, there has been an exchange of views, and Article 283, we say, provides no obstacle to your exercise of jurisdiction, and to your ability to resolve this long-running dispute.

And, Mr. President, that concludes what I have to say on the subject.

[74] Extract of Information Paper CAB (2010) 295 – Official Mission to France and the United Kingdom, 9 June 2010: Annex 161.
[75] National Assembly of Mauritius, 27 July 2010, Reply to PQ No. 1B/324: Annex 163.
[76] National Assembly of Mauritius, 9 November 2010, Reply to PQ No. 1B/540: Annex 165.

Do Members of the Tribunal have questions?

PRESIDENT SHEARER: Yes. Judge Wolfrum.

ARBITRATOR WOLFRUM: Thank you, Ms. Macdonald, for your very detailed analysis of Article 283 from the factual and the legal point of view. I have a particular interest in this particular provision of the Law of the Sea Convention, and therefore I'm very grateful for your analysis.

But your presentation brings me to a question which is – has a bearing on Article 283, but also on the case as such perhaps but perhaps mostly on 283. If I understood the arguments put forward by Mauritius so far, they are based on three strands, I may say. First, the UK is not a coastal State, and, therefore, this is for various reasons and, therefore, cannot declare an MPA.

Secondly, by declaring an MPA, the UK has violated several articles on the Convention such as Article 2(3), 56 and others.

And, thirdly, the last point you referred to, there is a violation of what you referred to as undertakings, and the UK occasionally refers to as understandings.

What is the relationship between these three strands of arguments? What I mean, if the UK, as you put it, is not a coastal State, how can it then violate Article 2(3), for 2(3) is referring to the coastal State? I won't go any further in that respect, perhaps you see my point. This has to be also reflected in the reasoning on Article 283. You don't have to respond right away. I believe it's a more fundamental issue. We can come back to that later.

Thank you.

MS. MACDONALD: I'm very tempted to respond straight away because it's an interesting issue and it's one which, of course, we have considered. But I think that the wiser course of action would be to – is really an invitation for us to draw together the strands of our case and indicate how they fit together, and I think the wiser course of action would be for us to consult

and to revert to you on that in due course. But we fully understand the question, and we'll give a detailed answer. I will just restrain myself from doing so at the moment.

PRESIDENT SHEARER: Very well, Ms. Macdonald. I thank you very much for your presentation, and I now call upon Professor Sands.

Professor Sands, I note that we will in about 15 minutes or so approach the time for our next break. I leave it to you to indicate to the Tribunal what would be a convenient moment at or about that time for us to take the break and for you to resume here.

PROFESSOR SANDS: I'm very grateful, Mr. President. In fact, what I am proposing to do is first I'm also tempted to answer Judge Wolfrum's questions, but I'm going to restrain myself like Ms. Macdonald. But I am going to answer some other questions that he asked yesterday or the day before and begin with that. That will take about ten minutes. I could either then begin my lengthier submissions on jurisdiction over the coastal State issue or take the break then and then run through in full and then in time to finish hopefully for lunch, but I'm in your hands as to that. I may run over lunch a little in any event, so whatever is more convenient for the Tribunal.

PRESIDENT SHEARER: I leave it to you, Mr. Sands.

PROFESSOR SANDS: So, if I can just begin by responding on behalf of Mauritius to the written questions that came, I think, on Day 1 from Judge Wolfrum, we understand, of course, that Questions 1 to 8 were addressed to the United Kingdom, so we offer these initial responses to those questions by way of observation as we have some information on them.

Mauritius v United Kingdom

Mauritius' Response to the Written Questions from Judge Wolfrum

Introduction

1. We understand, of course, that questions 1-8 were addressed to the United Kingdom, so we offer these initial responses to those questions by way of observation as we have some information on them.

Question 1: was on the effect of construction activities

2. We understand, but we do not know the details, that there has been massive coastal blasting and dredging operations carried out in the Diego Garcia lagoon since 1973, and this is in order to provide landfill material for construction and a turning basin for naval vessels. Having regard to the nature of those activities, and the very strict environmental regulations that are applied to them under English law in the metropolitan United Kingdom, we believe it has to be assumed that they are to be treated as having serious environmental consequences and as having caused significant harm to the marine environment of Diego Garcia, and that of the Chagos Archipelago more widely, but we look forward to hearing what the United Kingdom has to say about that.

Questions 2-4: Pollutant Discharges

3. With regard to questions 2, 3 and 4, we note that according—which relates to pollution discharges—we note paragraph 4 of the United Kingdom-United States Supplementary Arrangements on Diego Garcia, which were adopted on the (13th of December 1982), "there will be no dumping of vehicles, machinery, equipment or other non-natural waste in the territory of the Chagos Archipelago without the prior approval of the British Government Representative."[77] This provision applies to the whole of the Chagos Archipelago, not just to the Diego Garcia lagoon. And so, we look forward to being provided with copies of the approvals that have been given by the British Government since 1973.

4. The harmful environmental impacts of the discharge of untreated sewage and of hydro-blast sludge from vessels in the Diego Garcia lagoon are described, at least en passant, in Professor

[77] 2001 U.N.T.S. 397.

Sheppard's March 2013 report to the "BIOT" Commissioner, and that was at Tab 2.12, on pages 74 and 75 of your Judges' folders. The report does also outline harmful environmental effects of a different kind; namely, the introduction of alien invasive plant species that may result from submarine topside-cleaning in the lagoon, and from the importation of dirt-contaminated rocks for shoreline hardening. Again, we look forward to receiving all the information on this material in detail.

Question 5: Application of Biodiversity Convention to Diego Garcia

Turning to question 5, the Application of the Biodiversity Convention to Diego Garcia, we can go a little further on this because we can refer you, the Tribunal, to a very recent report of the House of Commons Environmental Audit Committee in London, which is dated the (14th of January 2014), and we will make a copy of that available to the Tribunal and to the United Kingdom, (although we assume that they are familiar with it) but chose not to make it part of their pleadings. That states, in relevant part, you'll find that in the text, and I quote:[78]"During our inquiry, the UK Government expressed general but unspecified aspirations to 'cherish' the environment in the Overseas Territories, but it was unwilling to acknowledge or to address its responsibilities under United Nations treaties. This was disappointing, because the environment in the Overseas Territories is globally significant and comprises 90% of the biodiversity for which the United Kingdom has responsibility. And then the Committee proceeds.

We found that the Government has failed to negotiate the extension of the Convention on Biological Diversity – the flagship United Nations policy on biodiversity protection – to the Overseas Territories. In addition, the Government has not ensured the accurate monitoring of biodiversity in the Overseas Territories. Taken together, the Government is unclear on what it is

[78] Tenth Report of Session 2013-14, vol I, HC 332, 16 January 2014, available at: http://www.publications.parliament.uk/pa/cm201314/cmselect/cmenvaud/332/332.pdf

responsible for and why it is responsible for it. In environmental terms, the 2012 Overseas Territories White Paper[79] was a missed opportunity." (All of that is at p. 3)

And then if you turn to the recommendations at page 27 and recommendation number 10, it says as follows: "The UK must fulfil its core environmental obligations to the UN under the CBD, Convention on Biological Diversity, in order to maintain its international reputation as an environmentally responsible nation state. The FCO must agree a timetable to extend ratifications of the CBD with all uninhabited UKOTs [United Kingdom Overseas Territories] where this has not yet taken place. That may entail preparations in the UKOTs, which must be clearly timetabled. The FCO must immediately extend ratification of the CBD to all uninhabited UKOTs." (Recommendation 10, p. 27)

The FCO then provided response in March of this year as follows:[80]"The Government is commissioning a new feasibility study on the resettlement of the Territory which will consider all the Islands including Diego Garcia. It will look at a range of options, associated costs and risks. Once the outcome of the study has been received, Ministers will determine the future resettlement policy for the Territory. No decision on the extension of international conventions to BIOT will be made until after the future resettlement policy has been determined." (p. 6) So we look forward to hearing more about that, I think, in yes, minister parlance, that is termed as a long-grass exercise.

Question 7: Recreational Fishing in Diego Garcia

5. Mauritius summarised in our pleadings and submissions the information which was provided by the UK to the Indian Ocean Tuna Commission about recreational fishing in Diego Garcia. That's paragraph 4.84 of our Memorial. In 2010 the "recreational fishing" at Diego Garcia accounted for 28.4 tonnes of tuna and tuna-like species.

[79] Foreign and Commonwealth Office, June 2012: *The Overseas Territories: Security, Success and Sustainability* (Cm 8374). [Footnote not in original text]

[80] Eighth Special Report of Session 2013-14, Appendix, HC 1167, 24 March 2014, available at: http://www.publications.parliament.uk/pa/cm201314/cmselect/cmenvaud/1167/1167.pdf

Question 9: Position of Mauritius concerning the protection of the marine environment, and measures undertaken with a view to implement the Biodiversity Convention.

I now move on to question 9 which was addressed only to Mauritius, and that's in two parts on the protection of the marine environment firstly, and then on measures undertaken with the future implementing the Biodiversity Convention:

a. **On the position of Mauritius concerning the protection of the marine environment**: On the protection of the marine environment, this is something that Mauritius is deeply committed to protecting and preserving and takes it very seriously its obligations under its national environmental law. Mauritius is a party to many international environmental agreements, including the Convention on Biological Diversity; the Convention on International Trade in Endangered Species; the Convention on Wetlands of International Importance; the RAMSAR Convention; the Convention on the Conservation of Migratory Species of Wild Animals; the Memorandum of Understanding on the Conservation and Management of Marine Turtles and Their Habitats of the Indian Ocean and South-East Asia; and the Straddling Stocks Agreement as well as the Convention on the Law of the Sea.[81]

The National Report of Mauritius for the Third International Conference on Small Island Developing States is available to you at (Annex 177 of our Reply) and that provides an up-to-date summary of measures taken by Mauritius on environmental protection and sustainable development. We take the opportunity to draw your attention to the Mauritius Environment Outlook Report of 2011, and chapter 6 of that report, which is specifically dedicated to coastal and marine resources. That is available on the website of the Mauritian Ministry of Environment and Sustainable Development. There is a footnote that the web-link of these comments which will be

[81] MR, para. 3.3.

in this transcript,[82] and we will provide a hard-copy of that Report to the Tribunal, the Registry and, of course, to the United Kingdom.

b. **In relation to measures taken with a view to implement the Biodiversity Convention**: As a general matter in the law of Mauritius, all treaties and conventions to which Mauritius is a party invariably apply to the entire territory of the Republic of Mauritius. Under section 111(1) of the Constitution of Mauritius, "Mauritius" includes the Islands of Mauritius, Rodrigues, Agalega, Tromelin, Cargados Carajos and the Chagos Archipelago, including all of Diego Garcia and any other island comprised in the State of Mauritius. The position with regard to the Convention on Biological Diversity is no different; it applies to the entire territory of the Republic of Mauritius, including the Chagos Archipelago.

Mauritius submitted its Fourth National Report on the Convention on Biological Diversity in August 2010. The Report notes that, "Marine Protected Areas for mainland Mauritius cover an extent of 7,190 hectares, including six fishing reserves and two marine parks."[83] It also refers to the setting up of an MPA in Rodrigues which covers an area of 43 square km^2. Although the Convention on Biological Diversity applies to the whole of the Republic of Mauritius, including the Chagos Archipelago, Mauritius' Fourth National Report for obvious reasons only covers the area over which Mauritius exercises effective control. That Report is also available online, and a Web link can be provided in the transcript and we can make a copy of that also available to you.[84]

I come to the final, Question II, the status of Diego Garcia and the other islands of archipelago under the Law of the Sea, a most interesting question, if I may say on behalf of my colleagues.

Question II: the status of Diego Garcia and the other islands of archipelago under the law of the sea

[82] http://environment.gov.mu/English//DOCUMENTS/MAURITIUS%20ENVIRONMENT%20OUTLOOK%20REPORT.PDF

[83] *Ibid,* see p. 26 of the Report.

[84] https://www.cbd.int/doc/world/mu/mu-nr-04-en.pdf

6. It was addressed to both parties, and it relates to the status, of course, of Diego Garcia and other islands in the Chagos Archipelago.

7. Mauritius is a party to the 1982 Convention, and the Convention applies to the Chagos Archipelago we say by virtue of our ratification. As set out in Chapter 4 of the Memorial, by Mauritius' Maritime Zones Act of 1977, Mauritius declared, around all of its territory (including the Chagos Archipelago) a 12 nautical mile territorial sea, a 200 nautical mile EEZ and a continental shelf to the outer edge of the continental margin (or 200 nautical miles) from its baselines.[85]

8. By the Maritime Zones Act 2005, Mauritius reaffirmed its territorial sea, EEZ and continental shelf.[86] Regulations were then made under the Maritime Zones Act which set out the precise geographical coordinates of the base points and outer limits of the various maritime zones of Mauritius, including the Exclusive Economic Zone of the Chagos Archipelago.[87] I could spend the next hour reading them out to you. I won't do that. We've brought them here. We'll make a copy available to the United Kingdom and to the Tribunal. The basepoints, as you will see from those regulations, were generated from various islands of the Archipelago, including Diego Garcia. And you'll find a map depicting the EEZ of Mauritius in that area at Figure 7 in Volume 4 of the Memorial. The coordinates of the basepoints have also been deposited with the Secretary-General of the United Nations under Articles 16 and 47 of the Convention. And if it will be helpful, we can make that submission filing also available to the Tribunal. It's publicly available anyway.

9. The point in a sense is this. A number of the islands in the Chagos Archipelago are plainly capable of sustaining human habitation. We note that before the forced expulsion of the inhabitants of the Chagos Archipelago carried out by the United Kingdom, the larger islands,

[85] MM, para. 4.2.
[86] MM, para. 4.29 and MM Annex 131.
[87] Maritime Zones (Baselines and Delineating Lines) Regulations 2005 – GN 126 of 2005 and Maritime Zones (EEZ Outer Limit Lines) Regulations 2008 – GN 220 and 282 of 2008).

including but not limited to Diego Garcia, were inhabited for many, many decades and were sufficiently economically productive and sufficiently so to sustain human habitation on a significant scale.

10. We've noted your reference, Judge Wolfrum, to the 2002 report of Posford Haskoning which was commissioned by the Foreign and Commonwealth Office and which concluded that resettlement of the Chagossians would not be possible. Now, it cannot be said of these larger islands of the Chagos Archipelago that they are "rocks" or that they "cannot sustain human habitation or economic life of their own," and accordingly in our submission there's no question but that they are entitled to an exclusive economic zones and continental shelf. As regards the issue of resettlement, which the United Kingdom says is not possible, Mauritius takes the view that its citizens should be able to reside in all parts of the territory, including the Chagos Archipelago, and it has long supported the right of return of anyone who wishes to return. Mauritius has long taken issue with the United Kingdom that resettlement is not possible, and we look forward with interest to hearing how the United Kingdom is able to reconcile that position on non-resettlement with the claim to an exclusive economic zone and continental shelf for all of the islands.

I think that covers all of the questions from Judge Wolfrum. It may be that we return to them in due course now, I note the time, Mr. President. It's quarter to. Perhaps that is a good moment to pause for the second coffee break.

PRESIDENT SHEARER: Yes. Thank you, Mr. Sands. The Tribunal will return at 12 noon. Thank you.

(Brief recess.)

ARBITRATION UNDER ANNEX VII TO 1982 UNCLOS

Republic of Mauritius v. United Kingdom

Professor Philippe Sands QC

Friday 25 April 2014

Speech 13: Jurisdiction over dispute that the UK is not "the coastal state"

I. Introduction

Thank you, Mr. President, Members of the Tribunal:

1. You've heard Ms. Macdonald address you on the obligation to exchange views, and we turn now to the other issues raised by the United Kingdom in relation to the jurisdiction of this Tribunal. Just to give you a roadmap ahead, I will go through until one o'clock, and then I will continue briefly after lunch, and I will then be followed by Mr. Loewenstein and Mr. Reichler, and that will then wrap things up. We hope to finish before 5:30 today so that you can have a slightly longer weekend. It's customary in my experience, and I think that of anyone who's been involved in these Part XV cases, for any Respondent in such a case to argue rather vigorously that the Tribunal has no jurisdiction, either entirely or in part.
2. You, Mr. President, will recall the hearings of nearly ten years ago when we sat in a room in The Hague in the Peace Palace in the summer of 2005. I think it was before Judge Greenwood had been in the proceedings brought by Guyana versus Suriname. There was an early tip—one might call it an interlocutory stage of the proceedings, when Suriname during a preliminary hearing set out its jurisdictional objections, and Suriname wanted the jurisdictional objections to be decided first. And if you recall, Professor Rosenne appeared on behalf of Suriname, and it was a great honour, I think, for all of us to be in that room with him. I think it may have been his last outing as counsel. And I remember him, and I went back to check what he said, one of his early Part XV cases: "There must be a hearing on Suriname's preliminary objections," he said, and then he said this, and I quote, and I remember him saying it: "I am not aware of a single case in which an international court or tribunal exercising jurisdiction on a compulsory basis, as is this one, has decided on the

disposal of preliminary objections to its jurisdiction without a hearing."[88] And I remember as he said that thinking, huh, can that be right? Then doing a little research, finding out that it probably was right and thinking, well, there's always got to be a first time. And if it hadn't happened before, that case, as you know, was the first time because, despite that powerful argument, the Tribunal ruled there would be no such hearing, and the issues would be joined. The skies did not fall after that happened.

3. Professor Rosenne on that same hearing then went out to set out the jurisdictional objections of Suriname. And I wanted to remind myself of what he said, and I've taken the trouble of putting it in at Tab 13.1. We are now back to purple. It's almost the end of the folders I'm very glad to let you know we have managed to squeeze everything into one folder, so you will get no more folders from us, anyway, in the first round. Second round, who knows? At 30.1 you'll see it's a copy of the transcript. Again, this is obviously publicly available. And if you go to page 447, which is the last page, all the way down to line 19 on the left-hand side, this is what Professor Rosenne said [TAB 13.1] [folder page 447]:

"the preliminary objections that Suriname has filed in this case show that there are very serious doubts – very serious doubts – as to the jurisdiction of this tribunal …that is more than could be required. The land terminus for the delimitation of the territorial sea is unsettled and no court or tribunal exercising jurisdiction under the Law of the Sea Convention has jurisdiction over a dispute relating to land boundaries. It is sufficient for me to record that between the adjacent states the maritime boundary starts from the land boundary terminus. As long as there is no agreement on the location of the land boundary terminus, the maritime boundary cannot be limited. Accordingly the preliminary objections are legitimate and substantial."[89]

That was 2005. The Tribunal proceeded with the case, it exercised jurisdiction, and eventually it

[88] *Guyana v Suriname*, Guyana v Suriname, Hearing of 8 July 2005, transcript, Day 2, p. 6, lines 16-23 (Professor Rosenne) available at: http://www.pca-cpa.org/showpage.asp?pag_id=1268

[89] *Guyana v Suriname*, 8 July 2005, transcript, p. 8, lines 19-32 (Professor Rosenne) available at: http://www.pca-cpa.org/showpage.asp?pag_id=1268

did determine the location of the land boundary terminus. Of course, by then Suriname had changed its position, as the Tribunal notes in paragraph 308 of its judgment, and so the jurisdictional objection fell away.[90] But the skies did not fall, another step forward was made. The Tribunal took into account in looking at coastal lengths, that part claimed by Venezuela. The skies did not fall away. There was not opprobrium as to the award of the Tribunal. And for those of us who were recently in that same building, oddly in the case of *Bangladesh versus India*, we are aware that, I wouldn't put it higher than this, the issue of whether an Annex VII Tribunal has jurisdiction to deal with the land boundary terminus has in reality melted way.

I recall too, the more recent approach of ITLOS, faced with the request by Bangladesh to delimit the area of the outer continental shelf beyond 200 miles. This had never happened before. Myanmar took strong exception to the possibility. The Tribunal for the Law of the Sea could go down that road. And you can see what it said in its Counter-Memorial which was filed on the 1st of December 2010. I haven't put it in. It's publicly available. Right at the beginning of that document in the opening chapter, it signalled its attachment to the argument, strongly put, some of you will recall it very well, that ITLOS could not exercise jurisdiction beyond 200 miles. And this is what it said, and I want to quote what it said: "III. The Extent of the Jurisdiction of the Tribunal

[..]

1.12. …, it must be further specified that in the present case, and contrary to what Bangladesh asserts, the Tribunal cannot exercise jurisdiction to delimit hypothetical areas of continental shelf beyond 200 miles from the baselines from which the territorial sea is measured. We then jump to paragraph 1.16.[...]

1.16. Even if the Tribunal were to decide that there could be a single maritime boundary beyond 200 miles (quod non), the Tribunal would still not have jurisdiction to determine this line

[90] *Maritime Delimitation (Guyana v. Suriname)*, Jurisdiction and Merits, Award of 17 September 2007 (2008) 47 ILM 166, at para. 308.

because any judicial pronouncement on these issues might prejudice the rights of third parties and also those relating to the international seabed area (the area beyond the limits of national jurisdiction)."[91]

ITLOS exercised jurisdiction. It delimited beyond 200 miles. The skies did not fall. It has transformed the vista.

4. The point I'm making is a simple one: with the passage of time, as dispute settlement under the 1982 Convention and Part XV has become increasingly established and settled, as the International Tribunal for the Law of the Sea and Annex VII Tribunals have been confronted with a range of issues and questions that may not have been at the forefront of the minds of the drafters of the Convention, or indeed in their minds at all, sensible solutions have been found, and the law has evolved. Those solutions have been practical and they have been effective. It is true that they may have taken the interpretation of the Convention to a place where some of the early writings that the United Kingdom likes to rely upon may not have foreseen and may not like. But it cannot be said that disaster has followed. Quite the contrary: over the past ten years a number of important disputes have been resolved, some dating back many years, in the case of Guyana versus Suriname seven decades after that Award came down, what happened. The parties went jointly for filing of their submissions on the outer continental shelf. What better example of the successful working of Part XI. Relations have been repaired in these cases. To exercise jurisdiction is to assist the parties. To not exercise jurisdiction is to undermine the purposes of the Convention.

5. So, my submissions this afternoon, I'm going to address the question of whether the Tribunal has jurisdiction over the dispute that the United Kingdom is not the coastal State entitled to

[91] *Bangladesh v Myanmar*, Counter-Memorial of Myanmar, 1 December 2010, available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/Counter_Memorial_Myanmar.pdf

declare an "MPA". Messrs. Loewenstein and Reichler will follow on the remaining jurisdictional objections of the United Kingdom.

a. The UK is not the coastal State

6. So, let's begin at the beginning. There are, we say, three questions which have to be answered by the Tribunal in deciding whether it has jurisdiction over the dispute that the United Kingdom is not a coastal State:

- First, is this a dispute concerning the interpretation or application of the Convention (288(1))?
- Second, if so, is it excluded from jurisdiction by virtue of one of the exception clauses in the Convention?
- We say that those two questions are sufficient to dispose of the matter, but the United Kingdom has introduced a third question, and it is this: is there implicit in the Convention an unwritten exclusion of disputes that touch on questions of sovereignty over territory or on who is a coastal State?

7. Now, in response to all three of those questions, Mauritius says that all aspects of the dispute, all aspects of this dispute, are firmly within the jurisdiction of the Tribunal. Before turning to these three questions, which I will do in turn, please allow me to make a number of preliminary observations of a more general nature, which arise in view of the significance the United Kingdom seeks to place on the fact that the parties dispute sovereignty over the Chagos Archipelago, and the purported implications of that fact both for the jurisdiction of this Tribunal and the future of the UNCLOS dispute settlement system in Part XV.

8. The argument of the United Kingdom on jurisdiction on this point accuses Mauritius of attempting to 'shoehorn [the sovereignty dispute] as it likes to call it, a means of dispute as to mean of the words coastal State, into the framework of UNCLOS'[92] Mauritius does nothing

[92] UKR, para. 4.2.

of the sort: we're inviting the Tribunal to determine whether or not the UK is a "coastal State" within the meaning of the Convention, so that it is entitled to create the "MPA" it has purported to establish. The United Kingdom seeks to persuade the Tribunal that a dispute as to the meaning of the words "coastal State" – what it calls the sovereignty dispute – either does not fall within Part XV of the Convention at all, or only does so in the case of what it calls a "mixed dispute" that concerns maritime boundary delimitations. And it further argues that even if Part XV covers "mixed disputes" more generally, this is not such a dispute.

9. At the heart of its pleadings, the UK contends that Mauritius had raised the question of which State should be treated as the coastal State under the Convention only as a stalking horse for the sovereignty issue. On Tuesday afternoon the Attorney General for England and Wales had very little to say on the merits – although he did find time to describe the pleasures of diving in the Maldives – and rather more to say on jurisdiction. Back off, he told you, rather like Professor Rosenne in The Hague on behalf of Suriname, and rather like Myanmar more recently in Hamburg. But with great respect, his argument is not persuasive. In our view, the reality is the very opposite of what the United Kingdom argues: far from undermining the whole Convention, if you take jurisdiction over this case, you will strengthen the dispute settlement structure of the Convention; to decline jurisdiction will be to exacerbate the dispute, to prolong it unnecessarily, and to signal that Part XV serves to perpetuate a colonial era dispute such as this one. You do not have to go down that route, and we say you cannot go down that route. You are not permitted to go down that route, because you have jurisdiction over every aspect of the claim put by Mauritius.

10. The United Kingdom once again is playing a frightening game. Back in 1965 it was Mauritius. Today it's the Tribunal, with the prospect that if you so much touch on the forbidden area, a Pandora's box of territorial disputes over islands will suddenly bloom, and you will be inundated. There is, they say, no such thing as a *sui generis* dispute: admit one

and you admit them all.[93] Of course, the difficulty for the United Kingdom is that it has already admitted a great deal that goes against its own case and which points to Mauritius with a special interest, as the Attorney General put it, being the "coastal State" under this Convention. The dispute has a number of unique characteristics. A*t the very* least, the United Kingdom has expressly admitted in respect of the Chagos Archipelago that Mauritius has certain attributes of a coastal state, in relation to fishing rights, which were extended as though it were a coastal state, from 12 to 200 miles, in relation to oil and mineral rights, which the United Kingdom has said it will not touch, they all belong to Mauritius, or in relation to the right to file preliminary information in respect of the continental shelf, which it had not protested until last month for obvious reasons, and I'll come back to that.

11. Let me deal with those first. The United Kingdom has consistently described Mauritius as having rights in reversion of the islands.[94] It has described itself as a mere "temporary freeholder." This fact alone places this dispute in a category of one. No other case like it anywhere, and the United Kingdom has not been able to find one for us. Where else in the world, in a dispute concerning an island, has the present occupant described another State as holding rights in reversion? We submit there is no such case. If there is one, we look forward to hearing about it.

12. Second, the United Kingdom has acknowledged the fishing rights of Mauritius in the territorial sea in the period 1965-72[95] and then subsequently extended that acknowledgement up to a 200 nautical mile limit during 1991 and 1992.[96] Now, that is a strange thing to do if the intention was only ever to acknowledge traditional or artisanal fishing practice. Indeed, in expanding its recognition of Mauritian rights up to a 200 nautical mile limit, the UK expressly referred to, "the special position of Mauritius and its long-term interest in the

[93] UKR, p. 76, footnote 356.
[94] MM, para. 6.40.
[95] MM, paras. 3.87-3.97.
[96] MM, paras. 3.100-3.102.

future of the British Indian Ocean Territory".[97] I mentioned the Attorney also referred to the "special interest".[98] The "special position" being acknowledged goes way beyond simple traditional inshore fishing rights, historically exercised only close to shore and only using hand-held lines.[99] It is an acknowledgement that only one State is truly entitled to the economic benefit of the living marine resources appertaining to the Chagos archipelago, and that State is Mauritius, not the United Kingdom.

13. Third, the United Kingdom has made commitments regarding the offshore mineral resources of the Chagos archipelago. You are very familiar now with the 1965 undertakings at Lancaster House that "the benefit of any minerals, any minerals or oil discovered in or near the Chagos Archipelago should revert to the Mauritius Government"[100] and the UK Foreign Minister affirmed in 1997, "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."[101] That is ownership of mineral and oil rights. Really if there were an ICSID arbitration Tribunal and someone interfered with them, they would be Mauritius' rights to protect, Mauritius' property claim. Has such a concession been made in any other maritime dispute, that any value, any value, extracted from seabed oil or minerals automatically reverts to another State?

14. So, the question one might ask, having regard to the language of Article 56(1)(a) of the Convention is this: in this case, where lie the underlying "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living"? Who is the ultimate owner? Who has the underlying rights? It is very clear from the United Kingdom's own statements and its conduct, they lie with Mauritius. Mauritius has

[97] MM, para. 3.102.
[98] Day 1 Transcript, p. 51, lines 12-13 (Grieve).
[99] MM, para 3.89.
[100] MM, para. 3.3.
[101] MM, para. 3.109.

never conceded that those rights passed from it and has frequently reminded the United Kingdom of its undertakings to respect them, and until this dispute arose the United Kingdom had respected them. Then it extinguished Mauritius' fishing rights, and now it says Mauritius has no right to make a filing with the Commission on the Limits of the Continental Shelf ("CLCS"). You can see where this goes and how this will go in the future if something is not done to stop the direction of this most unhappy dispute.

15. In this respect, we note the United Kingdom has not only *not* protested the filing by Mauritius to the CLCS, but actively *encouraged* the submission. I will not take you back to the materials. That earlier stance cannot but be understood as a recognition of Mauritius' rights in the continental shelf – the rights of a "coastal State," which the United Kingdom does not wish to exercise itself, but it now cannot exercise, and that it was content (until it filed its Rejoinder) should be safeguarded for Mauritius.

16. In all these respects, the United Kingdom has clearly acknowledged the rights – the sovereign rights – of Mauritius, as a "coastal State." And it is these rights that single out this case from other disputes which raise what the United Kingdom calls the sovereignty issues. In this respect this dispute is unique, and we invite the Tribunal to have in mind that fact, for that is what it is, as we look at the arguments on jurisdiction.

b. What the Tribunal is not being asking to decide

17. Against this background, Mauritius wishes to stress three points which the Tribunal is not being asked to decide in considering the question of jurisdiction.

18. First, the Tribunal has been asked to consider questions about *applicable law* – about whether the international instruments referred to in Mauritius' pleadings should be considered and applied by the Tribunal. Mauritius maintains that the Tribunal will indeed have to rule on instruments in addition to the Convention – that it is able to do so by operation of Article 293, if not Article 2(3) or other provisions. But that issue, the applicable

law issue, is distinct from the question of jurisdiction. Mauritius is not asking this Tribunal to extend its jurisdiction by reference to rules of international law other than the Convention. And I'll return in due course to the relevance of Article 293.

19. Second, Mauritius is not asking the Tribunal to widen or to extend its jurisdiction by looking at matters other than those 'concerning the interpretation and application of the Convention' under Article 288(1). Merely because the dispute with the UK has aspects other than those put before the Tribunal does not mean that the dispute before the Tribunal is not one 'concerning the interpretation and application of the Convention'.

20. And third, the interpretation of Article 288(2) is simply not relevant to the question of jurisdiction in this case. The United Kingdom has referred to it in its pleadings. It concerns other agreements conferring jurisdiction on Convention tribunals: it has no relevance, we say, to the question of jurisdiction in this case (perhaps beyond the Straddling Stocks Agreement, (which will be addressed by Mr. Loewenstein); jurisdiction depends expressly and solely on the wording of the Convention itself, not on any ability or need to find jurisdiction in other agreements. We are not asking you to go there in any way at all.

II. The Tribunal has jurisdiction over the claim that the UK was not entitled to create the "MPA": Articles 288(1) and (2) and 293

21. So we turn to the first question before the Tribunal: is this a dispute concerning the interpretation or application of the Convention?

22. On its face, it is – because Mauritius argues the United Kingdom is not 'the coastal state' for the purposes of the provisions of the Convention and this the United Kingdom denies. Yes, you are; no, we're not; no, we are; yes, you are, that's a dispute about the meaning of the words coastal State. Whether or not the UK has the right to declare a new jurisdictional zone around the Chagos Archipelago, a right which the UK asserts is permitted under UNCLOS, is a dispute which concerns the interpretation *and then the application* of the Convention. There

is, we say, rather obviously a dispute about the meaning of the words "coastal State." So, we say it is for the United Kingdom to show – if it can – that what looks like a dispute under the Convention, subject to the Convention's dispute settlement provisions, is not such a dispute. We say they haven't been able to do that, and they cannot do that.

23. Which State is to be treated as the coastal State under the Convention cannot simply be a question of fact or effectiveness. To paraphrase my colleague and dear friend Professor Crawford: a coastal state is not a fact in the sense that a table is a fact – "*ceci n'est pas une table*", the artist René Magritte might have printed. Whether a state qualifies as "the coastal state" under the Convention (or "a coastal state," and we note the Convention uses both formulations) in respect of a particular state of affairs is a question arising under the Convention, and it can only be resolved by reference to the Convention itself and by general international law applicable in accordance with the Convention. As Professor Boyle writing (in his academic capacity) has put it quite rightly: "even in compulsory jurisdiction cases, the Tribunal may have to decide matters of general international law that are not part of the law of the sea, and Article 293(1) allows for this."[102] That's got to be right. And I'm going to return to Article 293 in due course.

24. Which entity is the "coastal State" in respect of the Chagos Archipelago is a legal question, and it's one which arises obviously under the Convention. And we say it is for you, this Tribunal, to resolve that question. We also say that the United Kingdom's repeated concessions as to the rights of Mauritius, both at present and in reversion in the future raise another question. Here we've got a raft of repeated undertakings, before and after the entry into force for both parties of the Convention, made by the United Kingdom about how it will and will not exercise its powers under the Convention. There can be no reason, we say, why

[102] MR Annex 103, at p. 49.

the dispute about how the Convention can be applied in the light of those rights and those undertakings should be excluded from your jurisdiction.

25. Let me give you a very practical and concrete example of how this dispute concerns the interpretation and application of the Convention. In my introductory remarks on Tuesday and subsequently my colleagues', have touched on the submission on preliminary information. Mr. Loewenstein dealt with this in detail yesterday, and I don't propose to go over it again in such detail. You know by now the story and the abrupt change of position. The United Kingdom has no standing. The United Kingdom now argues that Mauritius has no standing in relation to that filing. Well, the UK contention that Mauritius lacks standing means that the UK objects to Mauritius having any right to place preliminary information before the CLCS. It thus acknowledges the existence of a dispute as to which state is entitled to submit particulars and whether Mauritius had a right to make a filing to stop the clock in the manner contemplated by SPLOS/183. So, there's rather obviously before the Tribunal what we might call a delineation dispute. What's the difference between a delineation dispute and a delimitation dispute for the purposes of jurisdiction? I will return to the effect of this in a moment. To the extent, however, that such a delineation dispute might be thought to share many essential features with a maritime boundary dispute, there is, of course, the obvious point. The United Kingdom has made no declaration under Article 298(1)(a)(i) to exclude such disputes from the jurisdiction of this Tribunal.

26. The question here – as with all aspects of our case – is not, as the United Kingdom would seek to make it, whether an Annex VII Tribunal has the power to decide sovereignty issues. The question is more nuanced and should be presented more finely. It is which aspects of this present dispute between two parties to the Convention fall within Part XV. And here is a concrete example of an aspect of which the UK would like to call a sovereignty dispute which quite clearly comes within the jurisdiction of the Tribunal, in interpreting and applying

Part VI of the Convention. What is the Commission on the Limits of the Continental Shelf to do faced with that situation? The United Kingdom says they can't do anything, and you can't decide. In fact, no one can decide. That's the conclusion the United Kingdom wishes to give effect to, and we say that gums up the operation of the Convention. It is impractical.

a. Applicable law

27. So there is one thing the UK claims this Tribunal may never rule upon – the one thing so forbidden that the UK alleges it is fatal to Mauritius' entire case: the question of sovereignty or any part of. In this context in dealing with applicable law, we have to consider the significance of Article 293 of the Convention, the very provision Professor Boyle has written to say that a Tribunal such as this, "may if necessary deal with both the land and the maritime" questions in a dispute.[103] We consider this provision, Article 293 – which concerns applicable law, not jurisdiction, a cardinal distinction which we have recognised from the outset – because the United Kingdom seeks to persuade this tribunal that UNCLOS tribunals have no more than the most limited capacity to look at general questions of international law. The ICJ can look at it, but only if it's not acting under Part XV. It did so recently in the case brought by Peru against Chile, a case that the Court has given the name "Maritime Dispute" (if we go the Judgment of the 27th of January 2014, paragraphs 152-176), and I appreciate Judge Greenwood did not sit in that case. And you will see after 24 paragraphs they deal on a maritime dispute with a land boundary terminus, and they resolve the matter wasn't under Part XV. But no says the United Kingdom. You can't look at it. No Annex VII Tribunal can look at it, and ITLOS can't look at it under any circumstances. Never, ever, ever. Judge Greenwood can look it when he's sitting at the ICJ, but not under a Part XV case, but Judge Hoffmann can't, Judge Kateka can't and Judge

[103] MR Annex 103, at p. 49.

Wolfrum can't, when they're sitting on this Tribunal or at ITLOS. Never, ever are you allowed to touch on those matters, and we say that cannot be right.[104]

28. This is not the approach that the Convention directs us to take. There is nothing in the text of the Convention – in its plain meaning – that requires or even directs towards that conclusion. The approach of the United Kingdom is a policy-driven approach. We are not sitting in Newhaven. We are sitting in Istanbul applying the plain meaning of the Convention. We have to look at what the Convention says, not what the United Kingdom tells us would be the policy consequences of sitting that way or to have been another way. All the Convention asks us to consider first is whether there's a dispute falling within the interpretation and application of the Convention (Article 288) and it then directs, if you're satisfied that that is the case, you, "*shall* apply this Convention and other rules of international law not incompatible with this Convention" (Article 293). Those are the words of the Convention, shall apply this Convention. They admit, we say, of no difficulty. The question that arises is what other questions of public international law may be sufficiently closely connected to that dispute that they are questions the Tribunal can *and must* consider. ITLOS and Annex VII Tribunals have, on numerous occasions, indicated where other rules of international law are to be applied. You did that yourself, Mr. President, when you were sitting with four other arbitrators in the case of *Guyana v Suriname*, in relation to the rules governing the use of force.[105]

29. The United Kingdom prefers a different approach. It prefers to posit a domain of issues that are wholly outside the Convention, which by virtue of the simple fact can never be brought within its compass. The first and most obvious such argument made by the United Kingdom is in respect of any issue of sovereignty over territory. It does so not on the basis of what the

[104] UKCM, para. 4.30; UKR, para. 4.25.
[105] *Guyana v. Suriname*, Award of 17 September 2007, paras. 425 *et seq*.

Convention says, it can point to no provision, but supports that conclusion. It does so on the basis of Newhaven style policy considerations.

30. The United Kingdom asserts that rules of public international law such as the law of self-determination have no bearing on the question of the rights pertaining to a coastal state under the Convention – because they are of the realm of general international law. The same *a priori* reasoning was raised by counsel with respect to the issues and governing the use of force under the UN Charter in *Guyana v Suriname*. It was rejected by the arbitral Tribunal in that case, just as it was rejected by ITLOS in the *Saiga* case.

31. Indeed, we say the UK's line of argument could have disturbing implications for the correctness of some of the recent decisions made by the International Tribunal for the Law of the Sea. Let's take an example, the *Arctic Sunrise* dispute between the Netherlands and the Russian Federation. There, in assessing questions of urgency and irreparable harm in respect of a request for provisional measures, did the Tribunal ignore the human rights dimension of the detained crew? No, it did not. It recited in its Order, with apparent approval, the submissions of the Netherlands on that point. Does the Convention on the Law of the Sea refer to international human rights law? No, it does not. On the United Kingdom's narrow view of when general public international law might be relevant to a dispute arising under the Convention, such recourse was either improper, or would only have been relevant in cases where detention was expressly provided for under the Convention, as for example in the case of certain fisheries and pollution violations. But that was not the approach taken by the Hamburg Tribunal, and we say rightly so.

32. One of the academic commentators relied upon by the United Kingdom is Professor Talmon. Mauritius submits that Professor Talmon is correct in part in his writing. He explains, quite simply, that issues of general customary international law may be adjudicated by a Part XV Tribunal where there is what he calls a "genuine link" to a case falling within the Tribunal's

jurisdiction. So, too, Professor Boyle – in his 1997 article – where he wrote of "necessary" questions of general international law arising under Article 293. And similarly, Judge Rao of the International Tribunal for the Law of the Sea has written of a "necessary connection."[106] We have no difficulty with any of these qualifiers. The test articulated by Professor Talmon is that public international law issues must have a "genuine link" with a Convention dispute falling within Part XV. We support that view. We do not depart from that view in any way, although we do disagree with some of his other conclusions, Professor Talmon's conclusions.

33. And this is precisely why the International Tribunal for the Law of the Sea was able to make general rulings on public international law, the use of force by law enforcement authorities in *MV Saiga No 2*, an issue not addressed by a Convention. It's why the Tribunal in *Guyana v Suriname* was able to interpret and then apply provisions of the United Nations Charter, despite the objections of counsel that such a course of action was never contemplated by the drafters of UNCLOS. Again, the skies have not fallen. This is why the very same Arbitral Tribunal was not frightened off from finding jurisdiction by the strongly argued initial assertions of *Suriname* that the dispute involved questions touching on territorial sovereignty, namely the location of the land boundary terminus. This is why the International Tribunal for the Law of the Sea was able to properly consider questions of the human rights of the detained persons in its Order for provisional measures in the *Arctic Sunrise*. The claims by the United Kingdom in its Rejoinder (4.26 to 4.29) that these authorities are not analogous are misconceived and miss the point. In all three cases the international rules in question were to be found elsewhere than in the Convention, were found to be sufficiently linked to the relevant dispute under the Convention to come within the scope of Article 293, and they were applied by the Part XV Tribunal.

[106] MM, paras. 5.27-5.27; P. Chandrasekhara Rao, "Delimitation Disputes under the United Nations Convention on the Law of the Sea: Settlement Procedures", in T. M. Ndiaye and R. Wolfrum (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah*, p. 877, at p. 892 (MR Annex 114); Arbitrators' Folder Tab 13.4.

34. The UK has made one concession: it now accepts that Mauritius is not seeking to *expand* the jurisdiction of the Tribunal by reference to the applicable law provisions of Article 293, and we're grateful for that concession. We will take them where occasionally they arise. But the effect of the UK's argument, conversely, is to *reduce* the jurisdiction by reference to an impermissibly narrow interpretation of that Article. The only question, we say, governing the incidental jurisdiction of this tribunal is whether a genuine link exists between a dispute arising under the Convention and other matters governed by public international law or a necessary connection, and we say plainly there is in the interpretation and application of the meaning of the words coastal State.

b. Exclusions under Article 297 and 298

35. So, I turn to the exclusions under Articles 297 and 298. We submit that all aspects of this dispute before this Tribunal concern the interpretation or application of the Convention, the first question to be considered. So, let's now turn to the second question, namely whether the dispute as to whether the United Kingdom is a "coastal State" entitled to proclaim an MPA, or an EPPZ, or an EEZ or whatever it wants to call it – is excluded by any of the limitations and exceptions to jurisdiction set out in Articles 297 and 298. On its face it is not excluded, as the UK is bound to recognise. Compulsory procedures entailing binding decisions are available in every dispute concerning the interpretation or application of the Convention, unless an exception applies. The exceptions to this general principle are clearly stated. They're formulated in Part XV, section 3 of the Convention, as being either of general, automatic application—we call the automatic exceptions under (Article 297) or optional application where a State party has filed a declaration (Article 298), optional exceptions. None of the exceptions apply to address the question of whether the United Kingdom is a "coastal State." The United Kingdom is not able to argue otherwise.

36. These provisions do not refer to questions of entitlement or sovereignty, except in paragraph 1(a)(i) of Article 298, to which I will turn shortly. As I have already noted, Article 298 offers no direct assistance to the United Kingdom, because it's not made a declaration in respect of para 1(a)(i). The UK's attempt, therefore, is to rely indirectly on that provision to support its argument, and I'm going to return to that.

37. In any event the limitations in 297 and 298 concern the *exercise* of sovereignty in certain respects – with regard to fisheries for example. They do not address the entitlement to act as a coastal State (except perhaps in relation to 1(a)(i) of 298). But the United Kingdom is out of that.

38. So, again, it's for the UK to show that there is some limitation or exclusion that applies to this dispute. And it's our contention that they are unable to do so.

c. Jurisdiction over issues of sovereignty under Part XV/Article 298(1)(a)

39. By showing the dispute is one 'concerning the interpretation or application' of the Convention, and not excluded 297 or 298, we arrive at the conclusion that the dispute is indeed within the jurisdiction of the Tribunal. But I need now to return to the argument of the United Kingdom, perhaps their central argument, that any dispute which may be construed as necessarily involving a question of sovereignty is *inherently* beyond the jurisdiction of a Part XV Tribunal despite the fact that there is nothing in the Convention that says that.

40. The argument put by the United Kingdom before this Tribunal has also been made in various other cases. And as things stand in Bangladesh versus India, it is not one that appears to have found general currency. The *Guyana/Suriname* case eventually ended in a satisfactory outcome, apparently, for both states and a co-filing of a joint submission. I would note the same positive outcome in the case between Argentina versus Ghana, which was resolved very expeditiously and to the satisfaction of both States because of the intervention of International Tribunal for the Law of the Sea. That intervention was made in the face of a

rather determined argument on the part of Ghana that the Tribunal did not have jurisdiction. And, of course, those are arguments with which I have a certain familiarity. The reality is that when the Convention and Part XV are wisely and pragmatically interpreted, the system can be made to work as it did in the Argentina/Ghana case. The further reality is that whether an Annex VII Tribunal can make determinations on certain issues of sovereignty is not really an issue as such any more. The UK appears to be a holdout, although one rather suspects that this more for presentational purposes in this case, the issue of the jurisdiction, as I've mentioned, not even argued in *India versus Bangladesh*, as many of us in this room know. And one assumes that the Tribunal will proceed to exercise jurisdiction to decide the location of the land boundary terminus in the Hariabangha River, and sovereignty over land on either side.

41. So, how did we arrive at this position? The only reference to sovereignty disputes in the dispute settlement provisions of the Convention is found in Article 298(1)(a)(i). The President of the Third Conference on the Law of the Sea stressed that this article contained as he put it "delicate compromises that had been very carefully negotiated".[107] The text should thus be approached on the basis that it is the authoritative expression of the parties' will, and can be interpreted without recourse to extra-textual presumptions as to the intentions of the negotiators.

42. That provision, 298(1)(a)(i) makes provision for two situations:

- first, delimitation or historic bay disputes that arose before UNCLOS entered into force, they may be totally exempted from the Convention's third-party dispute settlement procedures;
- and secondly, disputes arising after the Convention enters into force are subject to compulsory conciliation, but there is an exception if such a dispute necessarily involves the concurrent consideration of sovereignty over territory.

[107] MR, Annex 81, para 7.

43. The reference to sovereignty-related claims acts only as a limitation upon an exceptional conciliation procedure, which in turn applies only if a declaration has been made 298(1)(a).

We say the result of this drafting is plain: to the extent that a dispute concerning the interpretation and application of the Convention is not excluded from the jurisdiction of the dispute settlement system it is necessarily covered. Professor Boyle has put it in these terms in his 1997 article. I'm not going to take you to it, but it is Tab 2.15, folder page 94, and I'll just read it out. This is what he wrote in 1997: [Tab 2.15] [folder page 94] "In some cases the delimitation of a maritime boundary may necessarily require a decision concerning disputed sovereignty over land, for example where an island is used as a basepoint for an EEZ or continental shelf claim. While parties to the Convention do have the option of excluding such disputes from compulsory jurisdiction under Article 298(1), the implication must be that, where this option is not exercised, a tribunal, including the ITLOS, may if necessary deal with both the land and the maritime dispute."[108]

44. Professor Boyle was entirely prescient, insofar as the practice and conduct if the *Guyana/Suriname* case and Bangladesh/India cases is anything to judge by.

45. Judge Rao, of the International Tribunal for the Law of the Sea, has concluded, where not excluded under 298(1)(a)(i) "a mixed dispute, whether it arose before or after the entry into force of the Convention, falls within the jurisdiction of a compulsory procedure," under Part XV.[109]

Now, this argument was put at more length by President Wolfrum as he then was in his speech before the United Nations in 2006, and I put that in at Tab 13.2, and I wonder if I could take you to that. I should say I hesitated slightly about putting this in. There is a sort of unwritten convention that one does not put the writings, the academic writings of arbitrators or judges

[108] MR Annex 103, Boyle, A.E., "Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction" (1997) 46 *International and Comparative Law Quarterly*, p. 49.
[109] MM, para. 5.27.

before whom one appears into the Folder. But this was not such a writing. This was a statement made, as you see on the front page, page 448 by Judge Wolfrum in his capacity as President of the International Tribunal for the Law of the Sea to the informal meeting of legal advisers in New York in October 2006. If I could just take you into that to page 453 of the text. And we accept entire that this conversation, these words are related to maritime boundary issues. That's what it says in the second paragraph down. It is apparent that maritime boundaries cannot be determined in isolation without reference territory, and then he goes on. Moreover, sea boundaries are associated with sovereignty, such as the determination of entitlements over maritime area, the treatment of islands, the identification of the relevant basepoints, whether they are located at sea, in river mouths, or on terra firma or the fixing of baselines, including archipelagic baselines. And then if we go to the next paragraph, I'd like to read that one out in full. [Tab 13.2] [folder page 453]: "Issues of sovereignty or other rights over continental or insular land territory, which are closely linked or ancillary to maritime delimitation, concern the interpretation or application of the Convention and therefore fall within its scope. This may be evidenced by a reading a contrario of Article 298, paragraph 1(a), namely, in the absence of a declaration under Article 298, paragraph 1(a), a maritime delimitation dispute including the necessarily concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory is subject to the compulsory jurisdiction of the Tribunal, or any other court or tribunal." Now, we accept entirely from the previous paragraph that related to maritime boundaries, but, of course, we do now have a situation of maritime boundaries in this case because the delineation issue, we say, is a maritime boundary issue. But even going beyond that, there is nothing in this text that says it is only limited to those kinds of situations, so say this is an entirely correct way of approaching the issue, and we're not alone in that view, as we will see.

46. Jurisdiction does not arise because of the *a contrario* reading; the *a contrario* reading merely confirms the point made by Article 293 that issues "closely linked or ancillary" to questions arising directly under the Convention are also questions "concern[ing] the interpretation or application of the Convention."

Now, we noted in our Memorial that Professor Treves agrees that this logical *a contrario* argument from Article 298(1)(a)(i) prevents – prevents any sweeping assertion that a mixed dispute per se does not fall within Part XV. His position is that whether a particular mixed dispute falls within the Convention is to be assessed on a case by case basis [Tab 13.3] [Folder page 457; UK Authority 104] and we emphasize that. That is a hugely important point for our case. We are only inviting you to resolve the dispute you have before you. We are not inviting ex cathedra general statements that fall outside the particular factual and historical context of this case. If I can take you to the next tab, Tab 13.3, you will see an extract from Professor Treves's article, if I could take you on to the second page of the excerpt, at page 457. It's the central paragraph. I just want to take you to the last line of that at the bottom of that main paragraph under (e) compulsory jurisdiction on mixed land sovereignty and maritime boundary disputes, right at the bottom he writes: "the argument *a contrario sensu* here considered seems sufficient to discard the view that whenever a case presents a land aspect, compulsory jurisdiction of the courts and tribunals competent under the Convention should automatically be excluded." And we say that applies equally in this case.

Judge Rao also makes the important point that the *a contrario* argument does not result in a Part XV Tribunal having competence, "to deal with land territory issues *per se*" as he puts it.[110] You'll have this at Tab 13.4. I'm not going to go into it now. We've put a much longer extraction in the article, and we invite you to read the totality of that article. But his point is a really important one. He says there has to be a "necessary connection" to the dispute. That's

[110] MR, Annex 114, bottom of p. 890.

at page 892 of the text of that article. [*Ibid*, p. 892.] In Judge Rao's view you cannot hive off territorial issues: [Tab 13.4] [Folder page 473; MR Annex 114] And what he writes—well, since you've got it open, let's go to it. It's at page 473 of the text. I didn't intend to detain you further, but it's at the top of page 473.

ARBITRATOR GREENWOOD: Professor Sands, my copy has got what looks like some highlighting down the side of certain pages. Are those passages –

PROFESSOR SANDS: It doesn't, actually. I noticed that. It's not my highlighting.

ARBITRATOR GREENWOOD: We just ignore it?

PROFESSOR SANDS: It's not my highlighting.

The bit I want to take you to is at page 473, top of the page, first line after the Footnote 58: "Maritime rights derive from the coastal state sovereignty over the land. The terrestrial territorial situation thus constitutes the starting point for the determination of the maritime rights of a coastal state." [*Ibid*, p. 892] Islands, too, enjoy the same status, and therefore generate the same maritime rights as other land territory. And then he says, "There may be a number of situations in which the determination of entitlements over land is a must before disputes concerning sea boundary delimitations are resolved." Again, he's writing about sea boundary delimitations, but there's no reason in principle why that cannot apply more broadly and why it would not apply to a sea boundary delineation as we have in this case or, indeed, more generally.

47. We would submit that the approach adopted by Judge Rao is an entirely correct statement of the law. Moreover, we say it is not one that on its face is limited to maritime delimitation questions. Now, I'm going to move on to that, but I notice the time, President Shearer, and I wonder whether this is a convenient moment to stop for lunch.

PRESIDENT SHEARER: Yes, I think it would be, Professor Sands, so we'll adjourn until 2:30.

(Whereupon. at 1:01 p.m., the Hearing was adjourned until 2:30 p.m., the same day.)

AFTERNOON SESSION

PRESIDENT SHEARER: Thank you, Professor Sands.

PROFESSOR SANDS: Mr. President, Members of the Tribunal, I think my last words were, "no inherent limitation," which were the words of Judge Rao. And we would submit that the approach that he sets forth is an entirely correct statement as a matter of principle and approach, nor is it one that on its face is limited to boundary issues or, as some put it maritime delimitation issues. And you'll appreciate it, a distinction between those two terms.

48. While apparently not wishing to concede that the Convention might give what it calls ancillary jurisdiction over questions of sovereignty in maritime delimitation disputes (although it must be said the United Kingdom does come perilously close to conceding that) [CM para. 4.66(a)], the United Kingdom does nevertheless acknowledge that there is an academic literature on point suggesting that such an incidental or ancillary jurisdiction, in its terms, may exist in the case of so-called "mixed disputes." It's really difficult to see how it could not do so having regard to the composition of its own team of counsel. But it seeks to draw the conclusion that if a Part XV Tribunal were ever to have incidental jurisdiction over questions touching on sovereignty, that jurisdiction could *only* arise in a delimitation dispute. So, one is bound to ask the question: What authority does it offer for that proposition? And the answer is none. Just as with the assertions of fact, misunderstandings, et cetera, – one thinks of the response to Prime Minister Ramgoolam's letter – so we've assertions of law. One bold assertion follows another. But the argument needs to be seen for what it is. It is an attempt to constrain the Convention and the jurisdiction that any Part XV court or tribunal may exercise under it.

49. The United Kingdom is wrong, we say, to argue that the inference from the academic writings and from Article 298(1)(a)(i) itself is that sovereignty questions could only arise under Part XV where they are "mixed" with a *delimitation* dispute. I've already made the

point about the distinction between delimitation and delineation, and we can't see any reason of principle why they would be treated differently. Delimitation is simply the most obvious case in which they could arise. But as we've seen with the little anecdotes I gave at the outset, the law evolves at the time new issues emerge. The UK makes the obvious point in its Rejoinder at paragraph 4.34 (UKR, para. 4.34) that the Article 298(1)(a)(i) provision deals solely with disputes regarding sea boundary delimitation and historic bays or titles. But Mauritius isn't arguing that this dispute falls within that provision as such since it refers to Article 1574 and 83. Rather, the provision illustrates the very point made by Mauritius – that there is no *exclusion* in the Convention of jurisdiction over mixed disputes either in the narrow sense of those arising in maritime delimitation cases or the broader sense of questions of public international law over which a Part XV Tribunal may properly exercise incidental or ancillary jurisdiction. Even Professor Talmon – one of the authorities upon which the United Kingdom relies – concedes that the Convention is silent as to mixed disputes.[111]

50. The result of a proper *a contrario* understanding of Article 298(1)(a)(i) is not that all sovereignty disputes are automatically included under the Convention, it is that such disputes *are not automatically excluded*. Not every question relating to land will fall within the Convention, only those which must necessarily be dealt with in order to resolve a dispute that is within the Convention. The question is, as Professor Treves has put it, "whether the dispute, as a whole, as a whole, can be seen as being about the interpretation or application of the Convention."[112] And we have to say we would find it extraordinary that the Tribunal could conclude the dispute as a whole is not about the interpretation or application of the Convention.

51. If, indeed, mixed disputes were not otherwise covered by the Convention's jurisdiction, there would have been no need for the specific exclusion in the last clause of Article 298(1)(a)(i) –

[111] UK Authority 39, page 34.
[112] UK Authority 104, 77.

and that's precisely the point noted by the powerful troika of Professor Boyle and Treves and Judge Rao.

52. To counter this obvious point, the United Kingdom repeatedly asserts that it is 'inconceivable' that States would have agreed to the determination of matters of territorial sovereignty without an opt-out provision which went wider than 298(1)(a)(i).[113] But why is it inconceivable? Is the UK contending that there was a clear consensus view at the law of the sea negotiations that any *aspects of a maritime dispute* involving questions of sovereignty could never *under any circumstances* fall within jurisdiction under Part XV? That view is not supported by the negotiating history, as I'm about to show. Or does the United Kingdom contend in the alternative that a particular group of States advocated for the complete exclusion of questions of sovereignty or determination of who is a coastal State under Part XV and won on this issue – and the text of the Convention somehow reflects their will? That can't be right because there is no express exclusion in the Convention.

53. So, let's look at the real history of what happened. We say, of course, as a starting point you don't need to look at this history because the text is clear, and you are not required to go the travaux préparatoires. But if you do want to go to the travaux préparatoires, it supports Mauritius' contentions. Some States, it is plain, and possibly a majority on the basis of the record, favoured a dispute settlement system with no exceptions at all – even in the case of territorial questions. And I'm going to return to this in a moment. Other delegations argued against either a compulsory dispute settlement system or its ability to touch on questions of sovereignty, or both.

54. Andrew Adede has written on this, and as he puts it, numerous States during the negotiations of the Convention feared that the automatic exclusion from Part XV of any dispute involving a "claim to sovereignty" "would be used as a pretext for completely excluding from

[113] UKCM, para. 4.48; UKR, para. 4.36.

compulsory procedures all legitimate delimitation disputes."[114] And here, of course, we face a parallel situation. The United Kingdom seeks to exclude the entirety of Mauritius's case because it says there's a long dispute between the parties in relation to the Chagos Archipelago. But it is plain that the sweeping exclusion of sovereignty disputes for which the United Kingdom advocates would not have attracted general support in the negotiations, and it did not. Numerous disputes, especially those concerning maritime delimitation, but not exclusively, could simply be knocked out by a respondent State asserting that the case involved an underlying dispute as to sovereignty. So there was no consensus on a blanket exclusion, and there was no provision.

55. Indeed, as you will be aware, I'm sure, such an express exclusion was proposed and it was rejected during the Third Conference. The President of the Conference specifically referred in his report of the 23rd of August 1980 to a proposal that, "past or existing delimitation disputes *as well as disputes relating to sovereignty over land or insular territories*" should be placed within the automatic exceptions to the compulsory dispute settlement system.[115]

56. As the editors of the Virginia Commentary put it, the President of the Conference held that such, "proposals to transfer, as general exclusions, the exclusions relating to past disputes or existing disputes *and* to disputes relating to sovereignty over land or insular territories, from Article 298, paragraph 1(a), *to Article 297, could not be accepted.*"[116]

57. The United Kingdom faced with this troublesome conclusion suggests that the reaction of the President can be discounted. Why? It merely reflects the pressures of time and the need not to upset a delicate compromise already reached. Well, there is no evidence in what the President said in his report that time was the deciding factor. We're in agreement with the United Kingdom that the reason this proposed amendment was refused was because the text

[114] MR Annex 93, 175.
[115] MR, Annex 81
[116] MR, Annex 94, p. 192.

of the Article we are now discussing was indeed a carefully negotiated and delicate compromise.

58. Why was it such a delicate matter? The UK contends the delicacy was in the phrasing of Article 298(1)(a)(i) but it was nonetheless generally understood that sovereignty disputes were excluded from Part XV. We say it's difficult, with the greatest respect, to make sense of this argument. Assuming the UK to be correct, how would copying the agreed language to be found already in 298(1)(a)(i) and adding it to the automatic exclusion in Article 297 (merely to reflect a limitation on dispute settlement which was already universally agreed) have upset any delicate balance? The answer is that it would not.

59. The only way transferring the language automatically excluding sovereignty disputes to Article 297 could have upset a delicate compromise was if no consensus had been reached in support of such an automatic, general exclusion. This would only follow if there was a dispute between those who wished cases involving a claim to sovereignty to be automatically excluded from the Convention and those who did not. If the question was as plain and obvious as the UK now puts it and the agreement so overwhelming, then the amendment to what is now Article 297 would presumably have passed. It is fatal to the United Kingdom's line of argument that it did not.

60. It should not be necessary to detain the Tribunal further on this point, but the UK raises a number of further objections to a plain language reading of the Convention. First it contends that none of the negotiators had in mind the question of sovereignty disputes outside cases involving maritime delimitation.[117] Looking into the minds of so large a number of individuals who negotiated over so lengthy a period of time is always likely to be an exercise that is fraught with difficulty. But there is evidence available, and that evidence shows clearly that this was not the case.

[117] UKR, para. 4.43.

61. We have shown that in Chile's view, for example, there was an 'ample majority' supporting a compulsory dispute settlement system which: (a) did not allow for the optional exclusion of maritime delimitation disputes; and (b) did cover questions of sovereignty over territory. Similar views were expressed by many other states, including Peru, Malta and Greece – and Pakistan in particular, which endorsed Chile's position.[118] So, it simply cannot be contended that the issue was: (a) not in the mind of negotiators or (b), if so, it only arose in connection with delimitation disputes. Again, the United Kingdom's contention that the historical record demonstrates these issues were either not considered, or if they were, they were considered only in the context of delimitation disputes, withers on first scrutiny.

62. The UK's response on this point is – somewhat cryptically it has to be said – to suggest that whatever the Chilean delegation may have appreciated the situation to be, its 'ample majority' view did not prevail. Certainly, it's obvious from looking at the text that the Convention permits, contrary to Chile's position in negotiations, 'the optional exclusion of maritime delimitation disputes', but it does not go any further than that.

63. But the reason that Mauritius mentions the remarks of the delegation of Chile is simple for another reason. There was a genuine debate over the extent to which sovereignty matters and whether or not a state is a coastal state should fall within Part XV. The UK's argument there was a universal understanding that sovereignty disputes were excluded is not only not established, it is wholly untenable. The lack of consensus is what made the wording of Article 298(1)(a)(i) a delicately crafted compromise capable of disruption by the transposition of some or any of its language into Article 297.

64. The correct conclusion from this history, we say, is this: the position of the words providing for the exclusion of territorial disputes from the scope of Part XV among the *optional*

[118] MR, p. 205, footnote 759.

exceptions to jurisdiction was deliberate. Attempts to move such wording to the provisions dealing with *automatic exclusions* from jurisdiction were made and were rejected.

65. Nonetheless, the United Kingdom seeks to lead the Tribunal to a different conclusion by quoting academic commentators – some of whom they say were present as part of national delegations at the Third Conference and some of whom were not. The United Kingdom has provided a list of 16 relevant commentators and has suggested that Mauritius has been unduly dismissive in its approach to them. We have not. We have read every single thing that has been put in.

66. To be plain, we invite you to put to one side those commentators who either provide *no reasoned justification* for their interpretation of the Convention, or those who assert *without reference to the historical record* that the Convention must be interpreted against the background of certain assumptions. Mauritius would further point out that most of these commentators did not have the benefit of the case law of Part XV tribunals when they wrote.

67. Several commentators, a number of them quite eminent, simply quote the text of 298(1)(a)(i) and then assert without any intermediate reasoning, indeed without any reasoning, that it excludes all sovereignty disputes from the scope of Part XV.

68. Let's look at the UK 16.[119] We've given them very close attention and suggest the Tribunal if interested in this point may wish to do the same. Of those 16:

- two were writing before the Convention was concluded in 1982;
- a further 5 were writing before it came into force in 1994;
- another 6 were writing before the case-law and practise of Annex VII arbitral tribunals on delimitation matters got under way, including, as well as ITLOS practice, including the issues that were raised in some of the cases that I've mentioned were not raised and not argued, for example, in *Bangladesh v Suriname*.

[119] UKR, para. 4.42.

69. So, of the 16, you are left with three commentators: Messrs Torres Bernárdez, Yee and Talmon. Mr. Torres Bernárdez does no more than express an extremely preliminary view that Article 298(1)(a)(i) is not consistent with Part XV giving jurisdiction over sovereignty. He says no more than that. Yee relies on a remark reportedly made by the President of the Third Conference in 1977. And Talmon makes an argument that we actually find rather helpful.

70. Put another way, we've taken pains in reviewing these 16 authors. Many, we think it's at least eight, merely assert that Part XV cannot cover issues of territorial sovereignty: they offer no footnote and no explanation and no reasoning, beyond – at most – a bald reference to the words of Article 298(1)(a)(i), unaccompanied by any further textual analysis. We put Professor Sohn in this category and note the posthumous co-authors of his *Law of the Sea in a Nutshell* did not agree with him when the time came to revise his work.[120] Another three attempt some explanation of their views but offer no reasoning at all beyond a sentence or two (that is Churchill, Oxman and Thomas). Closely read, at least two of the authors cited do not actually seem to rule out the possibility of jurisdiction in at least some sovereignty disputes (Torres Bernárdez and Smith). In fact quite a few of the authors cited use language along the lines of the Convention *seeming*, or *appearing* to, or *probably*, excluding such disputes, but they don't actually offer a firm conclusion. One author (Adede) makes the historical point that the President of the Conference in 1977 said, *in his view*, territorial disputes would not fall within Part XV and another, Yee, simply repeats that observation. So, in terms of substantive reasoned argument, we were just left with Professor Talmon, and no doubt that is why the United Kingdom has embraced him.

71. He does make arguments proceeding from the text. He observes that on its face, for example, the Convention does not regulate questions of title to territory and that such questions would ordinarily be left to general public international law. From this Professor Talmon appears to

[120] MR, para. 7.45.

suggest that questions of sovereignty could only ever give rise to a parallel dispute; that is, maritime questions result in a dispute capable of being dealt with by the Convention while sovereignty questions are left to general international law.

72. But, even Professor Talmon acknowledges that first:

- where there is a well-founded dispute under the Convention, Article 293 allows the Tribunal to consider and apply rules of general international law having a "genuine link" to the dispute under the Convention; and second, that
- the Convention is on its face silent as to the question of mixed dispute.

73. With respect, Professor Talmon's argument does not sustain his apparent conclusion that sovereignty disputes can never fall within Part XV. Rather, we say that his arguments lead to a conclusion that only such sovereignty disputes as have a "genuine link" to a maritime dispute under the Convention fall within Part XV. And this, once more, is nothing more than that which Mauritius has argued from the very outset of this case.

74. Against this rather solitary figure referred to rather summarily with his 15 colleagues by the United Kingdom – and I would just pause here to note that you will observe the striking difference that is placed on the significance of the views of these lawyers and international lawyers rather than those (on another matter, it must be said) expressed by its own legal advisers, including the youthful Mr. Aust and the not so youthful Messrs. Steel and Watts – there are, of course, alongside all these matters a myriad of other views. I've already taken you to some of them. I suppose we could play the numbers game. I'm not sure that's very helpful. I've taken you to the views of present or former judges of ITLOS, of Annex VII arbitrators, and of other commentators. We have already taken you to the academic article written by Professor Boyle in 1997, which we inserted at Tab 2.15. This is, as is all of his work, a fully reasoned and properly researched academic article, scholarship at the genuine level.

So, let's return to Professor Boyle, also in his academic capacity. What did the United Kingdom have to say about that article written in 1997? At paragraph 4.9 of its Rejoinder, the United Kingdom says that the passage that we refer to from his 1997 article has become "a mainstay" of this part of Mauritius's case. We'll allow the exaggeration. It's not a mainstay. Let's just say it's a source of inspiration. The United Kingdom made some effort in its Rejoinder to show that the paper by Professor Boyle does not support Mauritius' argument, and that there cannot be Part XV jurisdiction. What do they say? Professor Boyle, says the United Kingdom, was referring only to issues such as whether or not a territory was a rock or not within Article 121(3), not to questions of sovereignty over territory more generally. I have argued on the first day that if you read that article, that conclusion is not justified by the words that are actually to be found on the printed page, but words that are found on the printed page appear to be of little importance on occasion to the United Kingdom. Let's put aside that debate on what Professor Boyle did or did not intend back in 1997. Let's look instead at a more recent article written by Professor Boyle which settles the matter conclusively and which confirms our interpretation and our approach both of what he said in 1997 and what is the correct approach today. At Tab 13.5, and we've put it in in full in fairness to Professor Boyle, you will find an article that was published in 2007. At page 481 of our folder, you will see the heading is 'Forum Shopping for UNCLOS Disputes Relating to Marine Scientific Research.' The article is concerned with Part XIII of the Convention. It has no intention to deal with delimitation or boundary issues. In the article Professor Boyle offers a detailed example about a sovereignty dispute. It, in fact, concerned with a rock, but it could quite equally be an island. Please turn to page 490 in the bottom of Mauritius folder page 490. If I could take you to the bottom of that page, and I'm going to take it slowly and read you through. Towards the bottom you see a sentence beginning "However." If I could just direct you to that point, "However, Article 298 allows states to make a declaration opting out of one or more of the four compulsory procedures with respect to

disputes which concern delimitation of the territorial sea, EEZ or continental shelf or which involve historic bays or title. When this right to opt out is exercised, an obligation arises to submit the dispute to non-binding conciliation unless it necessarily involved disputed sovereignty over islands or land territory when no compulsory process of any kind is required."

And we move on to the next page, page 491 of the Judges' Folder.

"Now suppose that we have a research ship undertaking marine scientific research in continental shelf waters near Atlantis, a pinnacle of rock claimed by Gormenghast and Ruritania. If the ship is British, and is arrested by either Gormenghast or Ruritania, we will simply have a dispute about whether the ship is engaged in High Seas research or continental shelf or EEZ research. The entitlement of rocks such as Atlantis to an appurtenant shelf or EEZ may be an issue, and the interpretation and application of Part 13 will be an issue, but the competing territorial claims of Ruritania or Gormenghast to sovereignty over Atlantis need not be, and it would serve no purpose for the UK to try to make them an issue. There would appear to be compulsory jurisdiction in this case: It remains a dispute about marine scientific research."

"Then suppose that the ship is Ruritanian, and is arrested at sea by Gormenghast, resulting in UNCLOS proceedings initiated by Ruritania. Here we inevitably have a territorial sovereignty dispute. If the Atlantis rock belongs to Ruritania, then Gormenghast has no right to arrest a Ruritanian vessel for carrying out unauthorized research in the vicinity of Atlantis. Ruritania cannot easily rely on the rock's probable non-entitlement to an EEZ or a shelf if that would contradict its own territorial claim, and it cannot let Gormenghast's implied territorial claim succeed by default. It has to argue that the ship was within Ruritanian waters when arrested by Gormenghast. This is no longer simply a dispute about marine scientific research in the EEZ or continental shelf, because it necessarily involves disputed sovereignty over territory and sovereign rights over adjacent maritime areas. A court or tribunal could not easily avoid those questions. But if Gormenghast has made the appropriate Declaration under Article 298 the dispute as

presented would appear no longer subject to compulsory binding settlement under Part XV." [Folder page 490].

76. I note the use of the words "no longer." This is in relation to Part XIII. It could apply equally in relation to Part V, Part VI, Part X, Part XII. It's not about maritime delimitation. Before the declaration was made under Article 298, assuming it was made, on Professor Boyle's clear academic view expressed in 2007, the dispute on sovereignty in relation to a claim under Part XIII is subject to compulsory dispute settlement under Part XV. Our case is not a dispute about marine scientific research in the EEZ or continental shelf because Professor Boyle writes, it necessarily involves disputed sovereignty over territory and sovereign rights over adjacent maritime areas, a court or tribunal could not easily avoid those questions. This is bang on point. It is exactly the situation we face in this case. There is no wiggling out of what was written in that 2007 article. It is absolutely squarely in line with what Mauritius is arguing. Substitute the right to create a 'marine protected area' (under Part V of the Convention, for example) for the right to authorize or carry out marine scientific research (under Part XIII), and Professor Boyle offers us and the Tribunal exactly the reasoning that leads to the result we say this Tribunal is bound to reach in this case.

77. Not only has the list of authorities given by the United Kingdom as denying jurisdiction over sovereignty been shown to be less than convincing, but a member of the United Kingdom's own team, admittedly in his academic capacity, has come out clearly in support of the powers of an UNCLOS tribunal to resolve sovereignty issues where 'necessary'.

Conclusions

78. This allows me to come to our conclusions. The UK seeks to persuade the Tribunal that it must first resolve a contentious question regarding mixed disputes and then, having settled that issue, place the present dispute within or without that category. The argument is, in effect, that

mixed disputes are not covered by Part XV – but even if they were, the sovereignty aspect of Mauritius' case would be a creature of a different stripe.

79. We say these are the wrong questions to be asking. We have consistently submitted from the outset that:

- nothing on the face of the Convention excludes from consideration by a Part XV Tribunal disputes touching on sovereignty;
- We say that the first question will always be the existence of a dispute falling within the Convention (which this very plainly is); and
- We say relatedly that where such a dispute exists, the Tribunal may – indeed *shall* – apply other rules of international law which are sufficiently closely connected to the dispute; and
- We say finally that, it is entitled to rule, this Tribunal, in that regard on the meaning of the term "coastal State" given the facts of the present dispute and the legal significance of statements made by the United Kingdom regarding the special situation of Mauritius and its rights over these islands, a judgement that we accept will necessarily involve questions of general public international law which you are entitled to visit.

80. The United Kingdom has posed this question in its Rejoinder at paragraph 4.11 (UKR, para. 4.11): if Mauritius is correct in its argument on jurisdiction 'which contested territorial issue involving some island or mainland with a coastline could not be presented as a claim under UNCLOS whenever …a coastal State exercised some form of right falling within one of the numerous articles of UNCLOS that establish the rights of the coastal State?'

81. Mr. President, contrary to the United Kingdom's contention, to admit one dispute touching upon such matters is not to admit them all. I've shown that there is nothing in the Convention which in principle excludes a dispute affecting territorial sovereignty from the jurisdiction of a Part XV Tribunal. But not all such disputes will necessarily come within the jurisdiction of a Part

XV court or tribunal. This Tribunal is concerned with the facts of this case and this dispute and this case and this dispute only and no other. And in that regard:

82. The United Kingdom has explicitly acknowledged that:

- Chagos will be returned (not given) to Mauritius when no longer needed for defence purposes;
- that Mauritius has special interests over the long term in these islands; but
- the UK has made no protest – until these proceedings – with relation to the outer continental shelf;
- And the UK has acknowledged that Mauritius holds sovereign rights in reversion relating to the exploitation of mineral wealth on the continental shelf;
- And that Mauritius holds fisheries rights out to 200 miles going well beyond the need to respect the historic rights of artisanal fishing.

83. The threads of these acknowledgments may be drawn together into a single overarching conclusion which ring fences this case: the UK recognises that Mauritius is, for certain purposes, to be treated as the "coastal State" in relation to the Archipelago. That recognition – affirmed long ago, repeated on many occasions since – is the key to this case. It allows you to open the door that leads to the particular facts of this unique dispute, the very "special situation" on which Mr. Grieve addressed you on Tuesday.

84. These acknowledgements by the United Kingdom of the rights of Mauritius put this dispute in a category of its own. The rights in question are obviously intimately linked with Convention rights appertaining to the Archipelago. Furthermore, we'd remind the Tribunal of the nature of the obligations which the United Kingdom has breached in detaching the Chagos Archipelago from Mauritius. The fact that the United Kingdom is in continuing breach over more than five decades of so fundamental a principle of international law as the principle of self-determination,

the right to self-determination underlines the importance of this case to the Tribunal and to the international community as a whole, and of its special character.

85. We say that Mauritius is a “coastal state”, and we say the United Kingdom has recognised that it is a coastal state. There is nothing in the text of this Convention that requires you, or even allows you, to decline jurisdiction on that issue.

If I could now turn, having concluded those submissions, the response that we'd like to make to the question that was put by Judge Wolfrum just before the break, I will then conclude unless there are any questions from the Tribunal which, of course, I'm very happy to seek to address. But I wonder if I could just deal with the response first because it may relate.

Judge Wolfrum, this morning you asked Mauritius in effect – and we didn't have the written version of the text, so please forgive us if we haven't got it exactly right – how Mauritius could maintain a claim for breach of various articles of UNCLOS which are predicated on the existence or the exercise of the powers of a coastal State when Mauritius' core legal position is that the United Kingdom is not the coastal State for the purposes of the Convention. Specifically, you asked, as we understood it, what is the relationship amongst what you referred to as the three strands of the arguments put by Mauritius. In our Memorial, and I refer you to Paragraph 1.6, we set out the strands of that argument. In the first place we said, "The UK does not have sovereignty over the Chagos Archipelago, is not the coastal State for purpose of the Convention and cannot declare an MPA or other maritime zones in this area." And we went on to say at further, and I emphasize that word, so this is an additional argument, "the UK has acknowledged the rights and legitimate interests of Mauritius in relation to the Chagos Archipelago, such that the UK is not entitled in law under the Convention to impose the purported “MPA” or establish the maritime zones over the objections of Mauritius."

Our Reply also stated, just to be clear, that independently of the question of sovereignty, the “MPA” is fundamentally incompatible with the rights and obligations provided for by the

Convention. We explained in our Reply what we meant by this. Even if the United Kingdom were entitled in principle to exercise the rights of a coastal State and, of course, we say it is not in principle or otherwise, the purported establishment of the "MPA" is unlawful under the Convention.

We've had to run two arguments for obvious reasons. We've had to argue the claim of entitlement, and we've had to argue the Claim of exercise both under the Convention. The effect of your question, as we understand it, Judge Wolfrum, is this.

What is the position if United Kingdom is not the coastal State? Does that dispose of our arguments under the Convention? The problem we've had to face is that the UK has been acting on the basis that it has Convention rights in relation to the Chagos Archipelago, and further that it does, in fact, control the Archipelago and its waters. We've therefore had to argue under the rubric of the Convention provisions independently of the coastal State argument.

So, the issue calls for analysis given the interplay between the issues of jurisdiction and merits in the case. First, it's necessary to consider your question on the basis that either the Tribunal has jurisdiction over the entirety of Mauritius' claim or that it does not. By that its jurisdiction on this alternative argument is limited to claims that are predicated on United Kingdom status as a coastal State. It is, of course, for this Tribunal to decide as between these possibilities in the exercise of its Competénce-Competénce.

So, let's first consider the situation on the basis that the Tribunal were to decide that the United Kingdom's principal jurisdictional argument is correct and that the Tribunal has no jurisdiction to deal with issues that touch on sovereignty over land territory, irrespective of whether the Respondent State has made a declaration under Article 298. Of course, we say that's wrong, but let's proceed nevertheless on that assumption. On that assumption, the Tribunal will, we are bound to accept, have to decide on the footing that, for the purposes of this case and deciding the coastal State issue, the United Kingdom is to be treated as the coastal

State. Whether that designation is a valid one in law or not would necessarily have to be set aside if you don't have jurisdiction. The United Kingdom would have to be treated as indisputably exercising the powers of a coastal State, and on that assumption, the Tribunal cannot decide that such exercise is per se unlawful because there is no entitlement.

But even on that assumption there are a whole range of issues relating to the "MPA" that you would have jurisdiction to decide. These include – I just give four examples – first, whether the Lancaster House commitments, as affirmed and confirmed by senior British officials since 1968, are binding in international law, or bring legal consequence under international law.

Second, you would have to decide, if so, to what extent they're relevant, say, for the purposes of Article 2(3) and other provisions of UNCLOS to the Declaration and implementation of the "MPA".

Third, you would have to address the question of whether the reversion commitment places Mauritius in a special position as respects the exercise of the powers of the United Kingdom as a coastal State.

And another example of a question you might have to decide, fourth, is whether the declaration of the "MPA" contravened other provisions of UNCLOS on which we relied.

As to point A, the first one, the Lancaster House commitments, I would simply stress that, for the reasons we've explained, the Lancaster House commitments are binding on the United Kingdom whether or not the consent of Mauritius to excision in 1965 was lawfully or validly obtained. I'm not going to repeat Mauritius' substantive arguments on each of these points. We've set them out carefully and in full.

So, that's hypothesis one, let's call it. What about hypothesis two that you reject, United Kingdom's principal jurisdictional argument and hold that, as against a State Party which has not made a Declaration under Article 298(1)(a) and having regard to the acts by the United Kingdom recognizing that Mauritius has the attributes of a coastal State for some or all purposes, you have

jurisdiction to determine who is the coastal State in the context of this dispute over maritime rights in relation to the declaration of the "MPA".

On that hypothesis, hypothesis two, you then get two possibilities, let's call them (a) and (b). Hypothesis 2(a) is that you might decide that United Kingdom is, in truth, the coastal State having regard to your exercise of jurisdiction. On that basis, you would then again come back to all the issues I have indicated, you would have to decide on hypothesis one. They don't go away. And then hypothesis 2(b), you might decide that United Kingdom is not the coastal State. It would follow that the declaration of the "MPA" was simply ultra vires. That would in itself resolve the dispute, and would give you, no doubt, very much less work in relation to what Mauritius has brought to the Tribunal, although not, of course, in the way the United Kingdom would want.

On that basis, other issues raised by Mauritius as to the modalities of the exercise of the powers of a coastal State might fall away, unless the United Kingdom were to argue that there was some other basis for the exercise of coastal State power, an argument not yet made, and which, ex hypothesi, you would have jurisdiction to decide, and we will have to see next week what the United Kingdom has to say and how this case evolves into its third week. And we all, of course, have experience with these cases that things do take curious turns in the course of the evolution of a case.

Now, you also referred in your question to Article 283 as well as the case as a whole, and so I just want to finish with something very brief on exchanges of views under Article 283.

As Ms. Macdonald mentioned this morning, views were exchanged between the Parties in regard to all three strands, as you have characterized it, Judge Wolfrum, of Mauritius' argument. For example, at the bilateral talks held in January and July of 2009. And the records are very helpful and consistently clear in that regard. We would invite you, when you're reviewing the contemporaneous records of these meetings, both of those prepared by

Mauritius and the United Kingdom to take account of the fact that views were exchanged on three things, amongst others: One, sovereignty over the Chagos Archipelago and the consequent matter of which State is the coastal State.

Two, whether the United Kingdom's actions, including what was then the plan to establish an MPA, violated specific provisions of the Convention.

And, three, whether these actions and plans violated the specific undertakings given by the United Kingdom to Mauritius. You can find the records of these meetings at Tabs 8.4, 8.6, 8.10, and 8.11, and we think they are sufficient to dispose of the matter. If for some reason you think they are not, which we do not think can be the case, the exchanges between Prime Minister Ramgoolam and Prime Minister Brown, we would say, are finally dispositive of the matter. The events of November 2009 and subsequently.

Mr. President, that concludes our response to Judge Wolfrum's questions, and my submissions for the afternoon. Unless there are any questions, I would invite you to invite Mr. Loewenstein to the bar.

PRESIDENT SHEARER: Thank you very much, Professor Sands, and I would call Mr. Loewenstein.

Mr. Loewenstein, before you start, I note that we are due to take a break in half an hour's time, ten to 4:00. I leave it to you to indicate the point at around about that time where you would find it convenient to pause. Thank you.

MR. LOEWENSTEIN: I shall, Mr. President.

Speech No. 14: Jurisdiction

Andrew Loewenstein

1. Mr. President, members of the Tribunal, good afternoon. My task will be to address the Tribunal's jurisdiction over the UK's breaches of Parts V, VI and XII of the Convention as well as Article 7 of the Fish Stocks Agreement.

2. My presentation will be in three parts. I will *first* describe the provisions of the Convention that are relevant for determining whether you have jurisdiction over these claims. I will then show that the claims fall within your jurisdiction because they concern the contravention of specified international rules or standards for the protection and preservation of the marine environment, matters over which you have jurisdiction under Article 297(1), and that the UK's attempt to recharacterize the "MPA" as a fisheries conservation measure does not succeed. I will show that, even if the UK were correct in characterizing this as a fisheries dispute, you would still have jurisdiction because the claims would fall within the grant of jurisdiction over fisheries disputes set out in Article 297(3), and that they do *not* fall within the exception to jurisdiction relied upon by the United Kingdom.

3. As the Tribunal is aware, the evaluation of jurisdiction under UNCLOS begins with Articles 286 and 288, which provide that subject to section 3, any dispute concerning the interpretation or application of the Convention is within the jurisdiction of a Part XV tribunal. In other words, *all* disputes concerning the interpretation or application of the Convention are subject to compulsory procedures under Part XV unless an exception found in section 3 applies. Or, if I may put it this way, all disputes are *within* your jurisdiction, unless an exception rules them *out*. The only exceptions found in the Convention are located in two places: automatic limitations on jurisdiction are found in Article 297; and optional exceptions to jurisdiction are found in Article 298. None of the 298 exceptions are relevant to Mauritius' claims under Parts V, VI or XII, so I will confine my remarks to 297.

4. Article 297 addresses four categories of disputes. If a dispute falls within any of these four categories, a tribunal constituted under Part XV will have jurisdiction. The only exception is for fisheries disputes that fall within the limitation found in 297(3)(a), which applies to disputes relating to a coastal State's sovereign rights with respect to the living resources in the EEZ or their exercise, and for disputes that are subject to conciliation under 297(3)(b). Except for

these cases, all disputes addressed by Article 297 are within the jurisdiction of an Annex VII tribunal.

5. Two of the provisions I just mentioned are relevant for these proceedings. They are: *first*, 297(1)(c), which provides for jurisdiction over disputes where it is alleged that a coastal State has contravened specified international rules or standards for the protection and preservation of the marine environment which are applicable to the coastal State and which have been established by the Convention or through a competent international organization or diplomatic conference in accordance with the Convention. *Second*, 297(3), which provides for jurisdiction over disputes concerning the interpretation or application of the Convention with regard to fisheries.

6. 297(1)(c) and 297(3) are both affirmative grants of jurisdiction, though in the case of 297(3) the grant is limited by an exception. The fact that 297(1)(c) and 297(3) are *independent* grants of jurisdiction means that an Applicant need only satisfy one of them. It also means that a dispute that falls within a Tribunal's jurisdiction because it concerns an alleged contravention of an international rule or standard for the protection or preservation of the marine environment, *cannot* be excluded from jurisdiction if it may also be said to involve a coastal State's sovereign rights over the living resources of the EEZ or their exercise. If a dispute falls within 297(1)(c), jurisdiction is established. The exception contained in 297(3) is irrelevant.

7. The Convention is clear about this. The two provisions are independent of one another; nothing in the text indicates the exception to jurisdiction for fisheries under 297(3) applies *sub silencio* to disputes under 297(1)(c) as well. Had that been the intention, Article 297 would have been drafted differently.

8. This is confirmed by scholarly authority. I would now invite you to turn to Tab 14.1. This is an article by Judge Mensah, and as the title indicates, it concerns "Protection and Preservation of the Marine Environment and the Dispute Settlement Regime in the United

Nations Convention on the Law of the Sea." The United Kingdom produced this authority as Authority 74 with the Counter-Memorial. I should note that the UK produced only an excerpt; Tab 14.1 reproduces the entire article, in case the Tribunal wishes to review it in full.

9. If you look at the first paragraph of the article, Judge Mensah writes, after some introductory remarks about Part XV courts and tribunals, "these courts and tribunals have an important role in the implementation of the Convention's provisions, including the provisions that relate to the protection and preservation of the marine environment. Specifically, the courts and tribunals may be called upon to settle disputes between States Parties, or involving States Parties and other entities, regarding the interpretation or application of such provisions. For example, Article 297 of the Convention provides that a dispute may be submitted to the competent court or arbitral tribunal by a State Party against another State Party when," and then Judge Mensah goes on to quote 297(1)(c).

10. He then continues: "The jurisdiction of a court or tribunal in such a case [such a case meaning a 297(1)(c) case] is *not subject to any of the limitations on jurisdiction specified in Article 297* or the optional exceptions to jurisdiction available under 298. Thus, where all the States involved in a dispute are subject to the jurisdiction of a particular court or tribunal under 287, that court or tribunal will be competent to deal with such a dispute if it concerns the interpretation or application of any provisions of the Convention relating to the marine environment, as provided for in the Convention."

11. In other words, if you have jurisdiction under 297(1)(c), 297(3) is irrelevant.

12. This brings me to the *second* part of my speech: your jurisdiction over Mauritius' claims under 297(1)(c). I will begin by addressing Article 194. This is located in Part XII of the Convention, which governs "Protection and Preservation of the Marine Environment." As Professor Sands has explained, paragraph (1) requires States to "harmonize their policies" in connection with measures to "prevent, reduce and control pollution of the marine environment

from any source." Paragraph (4) requires States, when "taking measures to prevent, reduce or control pollution of the marine environment," to "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 the Convention."

13. These are plainly international rules regarding the protection and preservation of the marine environment. The United Kingdom all but agrees when it concedes that Article 194 is a provision relevant to the protection and preservation of the marine environment, as it says in its Counter-Memorial at Paragraph 6.31. Indeed, it is hard to see how the obligation to endeavour to harmonise policy on the reduction and control of pollution, as stipulated in 194(1), is not a rule relating to the protection of the environment. It is equally difficult to come to any other conclusion regarding the obligation set out in Article 194(4), to refrain from unjustifiably interfering with the rights of other States when a State takes measures to prevent, reduce or control pollution.

14. The United Kingdom tries to avoid the obvious jurisdictional difficulty it faces by claiming there can be no dispute under Article 194, and thus no jurisdiction, because the "MPA" does not regulate marine pollution. Or, at least not yet. The UK says that "Article 194 deals with the regulation of marine pollution, not fishing" and thus "provides no basis on which to regulate conservation and management of living resources and no basis on which to challenge a ban on fishing," as it says in the Rejoinder at Paragraph 7.70. On this basis, the UK maintains there is no dispute over protection and preservation of the marine environment.

15. This attempt to sidestep the tribunal's jurisdiction does not succeed. As is plain from the "MPA" proclamation itself, and the many official descriptions of it, the "MPA" is intended to govern a host of matters relating to the protection and preservation of the marine environment, and indeed, the terrestrial environment as well. To take but one example, consider the report entitled "Making British Indian Ocean Territory the World's Largest Marine

Reserve." It can be found at Annex 133 to the Reply. The report was drafted by the FCO's Overseas Territories Directorate and submitted to the Foreign Secretary's Private Secretary on 5 May 2009. It asks: "What, in a nutshell, is the marine reserve proposal?" The report also provides the answer: "In practical terms, the *broad concept* would be to declare the entirety of BIOT's EEZ a no-take Marine Protected Area (MPA), bring to an end fishing *and legislate for the protection of the seas and atolls*." Legislation "for the protection of the seas and atolls" is not a fisheries conservation measure.

16. Apparently the referenced laws are coming, although they have been a long time coming. The UK says in its Counter-Memorial at Paragraph 3.3 that "a new MPA Ordinance "is in the course of being prepared" which will "replace the existing BIOT legislation protecting the environment, flora and fauna of the islands and their waters."[121]It says in the Rejoinder that: "Inter alia, this will cover marine scientific research, conservation of living resources, the prohibition of fishing, pollution, and the mooring of vessels within the MPA." The use of "inter alia" indicates the list is not exhaustive.

17. The UK urges you to ignore these laws because, it says, its "legislation is still in the process of preparation." It uses this argument to suggest that disputes over anything other than fisheries restrictions are, to use its word, "*hypothetical*." But they are not hypothetical when the UK says the laws are being prepared and will address inter alia pollution, the protection of the seas and atolls, and the land and marine flora and fauna. The Tribunal is not so jurisdictionally hamstrung that it must wait for them to be officially adopted. The UK has cited no authority to support its view that the lawfulness of a regulation only becomes justiciable once it formally enters into force. Plainly, the tribunal can exercise jurisdiction in these circumstances.

18. This is reinforced by the fact that, as Professor Sands addressed yesterday, the "MPA" can only be understood as a measure to protect and preserve the environment, a fact

[121]UKCM, para 3.3.

proven by the Proclamation creating it, which refers to the "MPA" as a zone where the United Kingdom will "exercise sovereign rights and jurisdiction enjoyed under international law, *with regard to the protection and preservation of the environment*." It is impossible, based on this record, we would submit, to characterize the "MPA" any other way. But if more evidence is needed, it is provided by the fact that the "MPA"'s proclamation links its establishment to the Environmental Protection and Preservation Zone (EPPZ), which was established by the UK in 2003.

19. At Tab 14.2 you will find the proclamation establishing the EPPZ. It uses nearly identical language as would later be used to establish the "MPA". It states: "Within the said environmental zone, 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 marine environment* of the zone." [MM, Annex 121] Like the "MPA" Proclamation, it does *not* refer to the zone as a measure for the conservation, or regulation, or management of living resources.

20. These descriptions may be taken to reflect how the UK *itself* conceived of the zones and how it thought they should be justified under UNCLOS. Among the rights and jurisdiction of a coastal State in the EEZ that are set out in the Convention are two that are relevant. Paragraph (1)(b)(iii) of Article 56 refers to a coastal State's jurisdiction over "the protection and preservation of the marine environment." Paragraph (1)(a) of the same article refers to its "sovereign rights" for, among other things, "conserving and managing" the living resources of the superjacent waters.

21. The UK had a choice: it could justify the "MPA", and before it the EPPZ, by reference to either or both provisions, or on some other basis. Each time, the UK justified the zone as a measure for the "protection and preservation of the marine environment." Neither zone was justified as an exercise of the right to regulate the conservation of living resources.

22. This is clear evidence of how, on 1 April 2010, the UK *itself* understood the legal basis for the "MPA". It was considered to be a measure for the protection and preservation of the environment pursuant to Paragraph (1)(b)(iii) of Article 56; it was *not* a measure for fisheries conservation under Paragraph (1)(a). For these reasons, we say, there is plainly a dispute over the interpretation or application of Article 194 over which you may exercise jurisdiction.

I now turn to Article 56(2). This is another specified international rule or standard for the protection and preservation of the marine environment. Before explaining why, I will address a broader issue that divides the Parties. The United Kingdom argues that insofar as any specified rules or standards for the protection and preservation of the marine environment are found in the Convention at all, they are located only in Part XII. This is mistaken. Specified rules and standards for the protection of the marine environment are found in various Parts of the Convention. And I would ask you to turn back to Judge Mensah's article at Tab 14.1, which, as you recall, was produced by the United Kingdom as Authority 74. You will recall that he was discussing specified international rules and standards for the protection and preservation of the marine environment, the contravention of which would allow a court or tribunal to exercise jurisdiction under 297(1)(c). Now, at Page 506 in your folder (which is Page 10 of Judge Mensah's article), he writes: "The provisions of the Convention on the marine environment are not just the articles in Part XII of the Convention, but also include articles in other Parts and Annexes to the extent they concern activities that have an impact on the quality of the marine environment. Among these are the articles which give rights and powers to take measures for the prevention and pollution of the marine environment, or which set conditions and limitations upon the exercise of such rights and powers."

He then writes: "*Disputes concerning the interpretation or application of any of these provisions may be brought before one or other of the courts or tribunals designated in Article 287 of the Convention*."

23. Now, this brings me back to Article 56, and the question of whether it is a specified international rule for the prevention and protection of the marine environment. It plainly is. Judge Mensah addresses this question as well. You can see that he concludes the paragraph we were just reviewing by stating that "[s]pecial reference may be made" to certain provisions of the Convention. If you look at the next page (Page 11 of his article), he singles out Article 56.

24. This, we would submit, is clear authority for the fact that Article 56 is a specified rule "for the protection and prevention of the marine environment." And the same thing, we would say, applies to Article 55.

25. Now, moving on to Articles 63 and 64 of UNCLOS and Article 7 of the 1995 Agreement, the UK is mistaken to suggest that Article 282 deprives you of jurisdiction because the disputes over those articles are committed to the dispute settlement procedures established by Article XXIII of the Indian Ocean Tuna Commission Agreement. Article XXIII only applies to disputes concerning the interpretation or application of the *IOTC Agreement*. Mauritius has not made any claims under the IOTC Agreement; all of its claims are based upon breaches of UNCLOS or the 1995 Fish Stocks Agreement. Regardless, even if they were based on the IOTC Agreement, Article 282 would not deny your jurisdiction. Article XXIII of the IOTC Agreement applies only where the States Parties have agreed that a dispute "*shall*" be submitted to another procedure for a "*binding decision*." This does *not* describe what the States Parties to the IOTC Agreement agreed to do in Article XXIII. That article established a two-step dispute settlement process. Disputes are initially referred to conciliation, which Article XXIII takes pains to say is "*not* binding in character." If conciliation does not settle the dispute, the Parties "*may*" – but are *not* required to – refer the dispute to the ICJ. This leaves open the possibility, the option, of utilizing UNCLOS's Part XV procedures. Article 282's criteria for the exclusion from Part XV are thus not fulfilled: there is no mandatory referral to another dispute settlement procedure for a binding decision.

26. The UK's reliance on Article 281(1) fares no better.

27. It does not describe Article XXIII of the IOTC Agreement. Now, I would think that the Tribunal will have its own views on whether the *Southern Bluefin Tuna* case was rightly decided, the case that the UK relies upon. Mauritius is content, for its part, to endorse a Separate Opinion of Judge Keith, which stated that "The requirement is that the Parties have agreed to exclude any further procedure for the settlement of the dispute concerning UNCLOS.... They require opting out. They do not require that the Parties positively agree to the binding procedure by opting in."

28. I now turn to Article 297(3), which as you know grants jurisdiction over fisheries disputes, unless an exception applies. The exception invoked by the United Kingdom is for disputes relating to its purported sovereign rights as a coastal State in relation to the living resources of the EEZ or their exercise.

29. As I mentioned before, 297(1)(c) and 297(3) are independent grounds for exercising jurisdiction. In Mauritius's view, the dispute is properly characterized as a dispute over the UK's contravention of specified international rules or standards for the protection and preservation of the marine environment. As such, its claims for breach of these rules fall under the Tribunal's jurisdiction.

30. Moreover, even if the UK were correct in characterizing the dispute as a fisheries dispute, the Tribunal would still have jurisdiction, as I will now explain.

MR. LOEWENSTEIN: Perhaps now is the time to take the break, if it suits the President and Members of the Tribunal.

PRESIDENT SHEARER: Yes. We will come back. It's a 20-minute break. Yes, we will come back at ten past 4:00. That's right.

(Brief recess.)

PRESIDENT SHEARER: Yes, Mr. Loewenstein.

MR. LOEWENSTEIN: Mr. President, as we were reaching the break, I was just beginning my explanation for why, even if the UK were correct in characterizing the disputes as a fisheries dispute, you would still have jurisdiction.

31. Article 297(3) has three parts. First, it provides that: "Disputes concerning the interpretation or application of the provisions of the Convention with regard to fisheries shall be settled in accordance with section 2" – that is, the part of the Convention concerning compulsory dispute settlement procedures. The general rule, then, is that fisheries disputes are within a court or tribunal's jurisdiction. As Judge Keith observed in his Separate Opinion in the *Southern Bluefin Tuna* case: "the general run of fisheries disputes... is not subject to the limitations and exceptions" located in 297(3) (He says this at Page 15 of his separate opinion).

32. Second, there is an exception to the general grant of jurisdiction. As we have seen, this exception applies only to disputes concerning a coastal State's sovereign rights with respect to the living resources in the EEZ or their exercise.

33. And third, certain types of disputes falling within the sovereign rights exception are subject to compulsory conciliation.

34. So, taken as a whole, 297(3) provides that fisheries disputes are within a tribunal's jurisdiction unless they fall within the categories of disputes that are excluded. Those exclusions do not apply here.

35. Mauritius' case is straightforward. The dispute is *not* based on the purported sovereign rights of the UK as a coastal State in relation to the living resources in the EEZ. That is not how the dispute should be characterized. As Mauritius has shown in its written pleadings, and emphasized in these oral pleadings, the dispute concerns the *rights of Mauritius*. This includes *its* right to fish in the EEZ of the Chagos Archipelago; *its* right to be consulted about matters that can affect *its* interests; *its* right to have fulfilled the undertaking given by Prime Minister Brown to Prime Minister Ramgoolam. It is *these* rights – the rights of *Mauritius* – that are at issue. For

that reason, even if the dispute were to be characterized as a fishing dispute, it would not fall within the exception to jurisdiction located in 297(3). That exception, as the text makes unmistakably clear, pertains only to disputes relating to the rights of a *coastal* State; it does *not* concern disputes relating to the rights of *other* States in the EEZ arising under rules of international law.

36. Nor does the exclusion apply to the procedural obligations that Mauritius has brought before this Tribunal, including those set out in Article 63, Article 64, or Article 7 of the 1995 Agreement. Procedural obligations of consultation and cooperation under these provisions fall outside the 297(3) exclusion. I refer again to Judge Keith's Separate Opinion in the *Southern Bluefin Tuna* case, where one of the claims was for breach of Article 64. He made clear that the claims before the tribunal – including the claim of breach of Article 64 – were within its jurisdiction because they were not excluded by 297(3). Likewise, in *Barbados v. Trinidad and Tobago*, the Annex VII Tribunal was unconstrained by 297(3) from exercising jurisdiction over Article 63.

37. *Finally*, I shall say a word or two about the dispute under Part VI of the Convention in relation to the United Kingdom's breach of Article 78. There can be no doubt about the jurisdiction of this Tribunal. Nothing in Article 297 excludes from your jurisdiction the dispute over the right to harvest sedentary species on the Continental Shelf. The 297(3) exclusion applies only to the EEZ, it does not apply to the Continental Shelf.

38. Mr. President, members of the Tribunal, this concludes my speech. Thank you very much for your kind attention.

PRESIDENT SHEARER: Thank you very much, Mr. Loewenstein.

Is it right that now we have Mr. Reichler?

MR. LOEWENSTEIN: That's correct.

PRESIDENT SHEARER: Thank you.

THE TRIBUNAL HAS JURISDICTION TO

INTERPRET AND APPLY

ARTICLES 2, 76 AND 300

PAUL S. REICHLER

25 APRIL 2014

Mr. President, Members of the Tribunal: the end is in sight.

I come before you as the last speaker in Mauritius' opening round. On behalf of the Agent of Mauritius, the Deputy Agent, and the entire Mauritius delegation, I want to express our deepest gratitude for your kind and patient attention, for your active engagement with our oral pleadings, for all the hard work you have so obviously put in, during the hearings this week especially, but also in your preparation for them. After an intensive week like this one, I could not blame you if you were already looking forward to, and starting to think about, an enjoyable weekend in this fascinating city.

So I will get right to the point, and be brief. Well, brief for *me,* in any event. And I promise: no more documents or folders. And I can give you even more good news. I intend to speak for no more than 30 minutes, which means that we can finish, subject to any questions from the Members of the Tribunal well before 5:00. I say this, I should add not to discourage you from asking questions. As I would hope you by now appreciate, we have welcomed all of your questions and done our very best to provide you, as promptly as possible, with complete and responsive answers.

It falls to me, now that my esteemed colleagues have addressed all the other bases for your exercise of jurisdiction over Mauritius' claims, to discuss those that remain: your jurisdiction in regard to the aspects of this dispute that require interpretation or application of Article 2, Article 76, and Article 300 of the Convention. Happily for me, I have been assigned three easy arguments to make. So I will do my best not to complicate them, and will simply show that your jurisdiction has been properly invoked in regard to each of these Articles.

a. ARTICLE 2

I begin with Article 2. For the reasons Professor Sands explained yesterday, the United Kingdom has breached Article 2(3) of the Convention, which obligates the UK to exercise its purported sovereignty over the Territorial Sea in compliance with "other rules of international law". As he showed, those "other rules of international law" include, inter alia, the obligation to respect recognized rights to fish and access to other natural resources; and the obligation to comply with binding undertakings. These are not only "other rules of international law" under Article 2(3), there are also other rules of international law not incompatible with the Convention under Article 293(1), which that article says you "shall apply" in resolving the dispute concerning the interpretation and application of the substantive provisions of the Convention, including, of course, Article 2(3). A dispute under Article 2(3) is unquestionably, in the language of Article 288(1), "a dispute concerning the interpretation or application of this Convention submitted in accordance with" Part XV.

None of the exclusions from jurisdiction apply to the dispute under Article 2. The exclusions of Article 297 are not applicable because they do not exclude from jurisdiction disputes over access to resources in the Territorial Sea. The United Kingdom accepts that questions relating to the interpretation and application of Article 2 cannot be excluded by Article 297, that article, by its own terms limits jurisdiction under Part XV only in matters concerning the exercise of sovereign rights in relation to the management of resources in the exclusive economic zone. Nonetheless, the UK seeks to divest this Tribunal of jurisdiction over the dispute that has been raised under Article 2(3). To this end, it makes two arguments, with respect, they are both misconceived.

The UK's first argument, at Paragraphs 6.60 of the Counter-Memorial and 7.59 of the Rejoinder, is that this is not a dispute concerning the interpretation or application of Article 2(3), because whether Mauritius has any rights in the Territorial Sea of the Chagos Archipelago is not a

question relating to the interpretation or application of UNCLOS. This argument simply cannot be right.

The dispute Mauritius has brought before this Tribunal raises numerous questions of interpretation and application of specific articles of the Convention, including the following: Does Article 2(3) impose upon the UK an obligation to respect "other rules of international law" in exercising its purported sovereignty over the Territorial Sea around the Chagos Archipelago? Do those "rules of international law" encompass the obligation to respect, for example, recognized fishing rights, or the obligation to respect legally binding undertakings? Has the UK breached Article 2(3) by failing to respect those rules of international law?

The answers to these three questions, we submit, are blindingly obvious: Yes, yes and yes. But, you need not answer them to determine that you have jurisdiction to answer them. All you have to decide is whether these questions call for the interpretation or application of the Convention, Article 2(3) in particular. And that is a matter that is even more blindingly obvious. Of course they raise questions of interpretation and application of Article 2(3)! How can you determine whether "other rules of international law" have been violated, in respect of access to the living resources of the Territorial Sea, *without* interpreting or applying Article 2(3)? We say: the UK has violated Article 2(3) by its unilateral declaration of an MPA abolishing all of Mauritius' recognized fishing rights in the Territorial Sea of the Chagos Archipelago. The UK says: the "MPA" does not violate Article 2(3). That is a dispute, plain and simple, over whether Article 2(3) has been violated, and that dispute cannot be resolved without interpreting and applying Article 2(3).

The fact that the rules of international law governing recognized fishing rights and legally binding undertakings are invoked does not alter the character of the dispute as one essentially involving the interpretation and application of the Convention, as the UK argues. Not when these "other rules of international law" are expressly brought into the rubric of the Convention by

A*rticle 2(3*). What "other rules of international law" are included within Article 2(3)? That is surely a question that calls upon you to interpret and apply Article 2(3). And interpretation, Mr. President, of that Article is indisputably a matter over which your Tribunal has jurisdiction under Article 288(1).

The United Kingdom's argument against jurisdiction in regard to our Article 2(3) claims is defeated by its own written pleadings. At Paragraph 4.33 of the Counter-Memorial, the UK recognizes: "other rules of international law may be relevant to the court or tribunal's decision as regards a dispute concerning the interpretation or application of UNCLOS where the specific provisions of UNCLOS that form the basis of the complaint themselves expressly require that other non-UNCLOS rules of international law be taken into account or applied." That is precisely our case, in regard to our claims under the specific provisions of Article 2(3), which, to quote the Counter-Memorial, "expressly require that other non-UNCLOS rules of international law be taken into account or applied". At Paragraph 8.6 of the Counter-Memorial, the UK acknowledges that: "the reference in 2(3) to "other rules of international law" is correctly interpreted as a reference to general rules of international law…" But we appreciate that concession. However: the Counter-Memorial continues, "other rules of general international law do not include specific bilateral treaty obligations (still less …alleged undertakings of the type alleged in the current case)." But to reach that conclusion – with which we, of course, disagree – requires an interpretation of Article 2(3) to determine what "other rules of international law" it encompasses and whether or not it includes the rules of international law that we have invoked. The UK has made our case for jurisdiction under Article 2(3)!

The second argument the UK raises to challenge the Tribunal's jurisdiction over the dispute concerning interpretation and application of Article 2(3) is that "the Convention reaffirms the sovereignty of the coastal State over the Territorial Sea and by implication its absolute right to control fishing in the Territorial Sea". Of course, we disagree that the Convention implies such an

absolute right in regard to the Territorial Sea. But why isn't that a dispute between the Parties calling for interpretation for Article 2(3)?

As Professor Sands demonstrated yesterday, the right to control fishing in the Territorial Sea is not absolute, but expressly limited by Article 2(3), which obligates a coastal State to comply with the Convention "and other rules of international law" in exercising its sovereignty over the Territorial Sea. This is well settled. In *Eritrea/Yemen II*, the tribunal held that the exercise of sovereignty over the Territorial Sea by each parties was subject to the obligation to respect traditional fishing rights of the other Party's Nationals, which included not just the right of free access to fisheries in the Territorial Sea, but also the right of each States' fisherman not to be subject to unilateral regulation by the other State. As that arbitral tribunal made clear: "Insofar as environmental considerations may in future require regulation, any administrative measure impacting upon these traditional rights shall be taken by Yemen only with the agreement of Eritrea [and] vice versa."

Here, as well, having expressly recognized that Mauritius enjoys historic fishing rights in the waters adjacent to the Chagos Archipelago, and having given Mauritius a legally binding undertaking to respect those rights, the United Kingdom cannot credibly argue that it has absolute rights in the Territorial Sea of the Chagos Archipelago; its rights, if it has any, are limited by the rules of international law. Whether the UK has complied with these rules, as Article 2(3) expressly mandates, is a question calling for the interpretation and application of Article 2(3), and this inevitably falls within the jurisdiction of the Tribunal under Article 288(1).

The UK argues that, because of its so-called implied absolute right, access to fishing in the Territorial Sea "*could only be by agreement* and *Article 288(2) of the Convention would apply where States wished to secure Part XV jurisdiction over such disputes*." This argument fails for at least two reasons.

First, the UK's argument is circular. It assumes its own conclusion. It assumes that the UK has an implied absolute right to control access to Territorial Sea fisheries, and that nothing short of an international agreement could provide the basis for any other State to claim fishing rights in the Territorial Sea. That assumption is plainly wrong and in any event is disputed by Mauritius, and that is a dispute calling for interpretation and application of Article 2(3).

Second, Article 288(2) has no application to this case. Article 288(2) applies only to cases submitted pursuant to the provisions of a dispute settlement clause of an international agreement other than the Convention itself. Mauritius' claims were not submitted in accordance with the dispute settlement provisions of any other agreement. They were submitted by Mauritius in accordance with the dispute settlement provisions of Part XV of the Convention itself, invoking the Tribunal's jurisdiction expressly under Article 288(1), because they arise directly under various substantive articles of the Convention, including Article 2(3), whose interpretation or application is clearly called for.

Mr. President, this Tribunal plainly has jurisdiction, under Article 288(1), over the dispute Mauritius has raised calling for the interpretation or application of Article 2(3).

I can be even more succinct in addressing the Tribunal's jurisdiction over the aspects of this dispute calling for interpretation or application of Articles 76 and 300. Not because there is less to say, but because there is no need to say much. Your jurisdiction is plain as day.

b. Article 76

2. The dispute over the interpretation and application of Article 76(8) is this. As you have seen in the documents tabbed in your folder and heard in our pleadings this week, Mauritius filed preliminary information with the CLCS in regard to the extended Continental Shelf in the area of the Chagos Archipelago on 9 May 2009, four days before the 10-year deadline for Mauritius expired. This was after the UK's 10-year deadline had expired. The UK had encouraged Mauritius to file its preliminary information, and later offered to support it with a coordinated effort to make

a full submission, and to supply technical, legal and political support. That was as of July 2009. Although the coordinated effort never materialized, the UK made no objection or protest in regard to Mauritius' preliminary submission or its standing to make a full submission. That was the situation until last month.

3. The UK then changed position when it filed its Rejoinder on 17 March. As set out in Paragraph 8.39: it has now decided that "*Mauritius is not the coastal State in respect of BIOT and as such it has no standing before the CLCS with respect to BIOT.*"

4. There can be no question then that we have a dispute concerning interpretation or application of Article 76(8). Mauritius argues that it is the coastal State in respect of the Chagos Archipelago, or at least that it has been recognized as having the attributes of a coastal State, including by the UK, in respect of rights in the Continental Shelf appurtenant to the Archipelago, including the Extended Continental Shelf. As you have heard, with the support of the Commonwealth Secretariat, Mauritius is nearing completion of its full submission so that it can be filed this year. It claims, both before the CLCS, and in these proceedings, to have standing under Article 76(8) to make that submission. There is thus a dispute between the Parties as to whether or not Mauritius has standing under that article to submit information to the CLCS in respect of the Chagos Archipelago area. The resolution of that dispute requires that the Tribunal interpret or apply Article 76(8).

5. Another way to look at it is that there is a dispute as to whether the filing by Mauritius was effective, whether or not the clock has stopped, and whether or not Mauritius can make a full submission. There is thus a dispute as to whether the conditions exist for the CLCS to give effect to its role under Article 76(8) and Annex 2 in relation to Mauritius and the Chagos Archipelago. This is not an exhaustive list. But it is more than sufficient, Mr. President, to establish your jurisdiction in regard to the issues raised under Article 76(8).

6. Disputes concerning rights in the Continental Shelf, including the Extended Continental Shelf, are not subject to any of the exclusions of Section 3 of Part XV. *A fortiori* the Tribunal has jurisdiction to resolve the aspects of this dispute that concern Article 76(8).

c. **Article 300**

7. And finally, Mr. President, the Tribunal is also vested with jurisdiction to resolve Mauritius' claims against the UK concerning the UK's violations of Article 300.

As Professor Crawford has demonstrated, by establishing the "MPA" in the manner it did, the United Kingdom failed to act in good faith and abused Mauritius' rights in at least two respects: (i) the United Kingdom exercised its purported sovereign rights and jurisdiction in a manner that prevents Mauritius from exercising its fishing rights in blatant contradiction of the rules of international law including legally binding undertakings that were repeatedly renewed and reconfirmed and recognized over a 45-year period; and (ii) in unilaterally declaring the "MPA" without consultation with Mauritius, and in breach of the British Prime Minister's undertaking to put the "MPA" on hold pending consultations with Mauritius, and in so doing, failed to discharge its obligations owed to Mauritius under the Convention to coordinate, consult and cooperate in establishing the "MPA" – the procedural obligations which guarantee that the rights, jurisdictions and freedoms recognized by the Convention are exercised with due regard for the rights of others.

Mauritius claims in these proceedings that this conduct by the UK constitutes an abuse of the substantive rights recognized in Articles 2(3), 56(2) and 78, and as well as a failure to fulfill in good faith the obligations imposed by Articles 63, 64, and 194 of the Convention.

The UK argues that Article 300 "does not purport to give rise to an independent basis for the compulsory settlement of disputes", and that "if the Tribunal lacks jurisdiction to decide the dispute [concerning other provisions of the Convention], invoking Article 300 will not rectify the problem."[122] We agree with both statements. We do not argue otherwise. The *Virginia* case

[122] UKCM, paras. 6.63 and 6.64; UKR, para. 7.79.

provides a recent authority for the view that Article 300 cannot constitute an independent base for jurisdiction, in the absence of jurisdiction under any other of the Convention's substantive provisions. Since we do not invoke Article 300 as an independent basis for the Tribunal's jurisdiction, our position is unaffected by the *Virginia* decision.

We accept that, for the Tribunal to have jurisdiction to address our Article 300 claims in regard to abuse of rights and failure to fulfill obligations in good faith, it must have jurisdiction to address our claims in regard to one or more of the other provisions of the Convention that establishes the rights that we claim to have been abused. That is the case here, and that is why the Tribunal has jurisdiction to address Mauritius' abuse of rights and lack of good faith claims under Article 300.

To that end, I have already explained how the Tribunal has jurisdiction to address our claims of violation of Articles 2(3) and 76(8). It follows that the Tribunal must also have jurisdiction to determine whether the UK has violated Mauritius' rights in the Territorial Sea of the Chagos Archipelago in an abusive manner under Article 300; and it follows as well, that if the UK were to object to Mauritius' preliminary or full submission to the CLCS on grounds of lack of standing, and thereby prevent the Commission from considering Mauritius' rights to an Extended Continental Shelf, there would be jurisdiction to determine if this, too, constituted not only a violation of Mauritius' rights under Article 76(8), but also whether it is an abuse of rights under Article 300.

Mr. President, my colleagues, Professor Sands and Mr. Loewenstein have today demonstrated that your Tribunal has jurisdiction in regard to Mauritius' claims requiring the interpretation or application of Articles 56(2), 63, 64, 78, and 194. *A fortiori*, the Tribunal has jurisdiction to determine whether the UK has violated any of these provisions of the Convention in a manner that constitutes an abuse of rights or a failure to fulfill obligations in good faith under Article 300.

In conclusion, and I have now arrived at my conclusion, the Tribunal has jurisdiction to consider Mauritius' claims against the UK in regard to violation of Article 2(3), Article 76(8), and Article 300. Mr. President, Members of the Tribunal, this completes my presentation and the opening round for Mauritius. I want to thank you again on behalf of the Mauritius delegation for your kind and courteous attention. And I want to wish you all, again, a very enjoyable weekend. We extend the same wishes to our good friends and distinguished colleagues on the UK delegation, to our tireless and indispensable reporter and to our colleagues and friends at the PCA who have done such a marvelous job in organizing these hearings.

Thank you very much.

PRESIDENT SHEARER: Thank you very much, Mr. Reichler.

Are there any questions from the Tribunal? No? Well, thank you very much for your presentation, and also the counsel have spoken in this first round for Mauritius. We look forward to next week with the beginning of the UK first round.

Before we adjourn, I wanted to ask a question of the United Kingdom side – and there is no need for an answer to be given now; it can be given later, and preferably in written form – and I preface my question by apologizing in advance if the answers are to be found somewhere in the pleadings that I have overlooked, but it relates to the pattern of treaty application to Mauritius and to the Dependencies of Mauritius, and to what extent the formula was used in applying or extending a multilateral treaty or a bilateral treaty to Mauritius? Was it always to Mauritius and to the Dependencies of Mauritius? Or were there some occasions in which the application was just to the main islands of Mauritius excluding the Dependencies, or perhaps the other way around?

Just to shorten the task, I recall from previous work I have done on State secession that it has been the practice of the United Kingdom and I suppose it was so in relation to Mauritius that when approaching independence, the United Kingdom would give a treaty list to the

about-to-become independent State of all the treaties that had been applied prior to independence so that the newly independent country could make decisions as to secession. And I would further shorten it by saying that I think we could focus on the period from 1945 up to independence because the formulae for applying or extending treaties was fairly well-established. So, I hope I've made myself clear, but if I have that material preferably by the end of that proceeding.

Are there any other matters that any member wants to raise?

(No response.)

PRESIDENT SHEARER: Well, Mr. Reichler has wished us a pleasant weekend. I think some of us probably will be working hard through this weekend, but to the extent that you can, I hope you are able to enjoy the pleasures of this city.

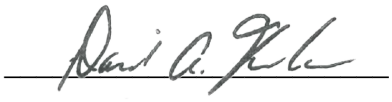
I therefore wish you a productive weekend in whatever way you wish to interpret that, and the Tribunal now stands adjourned until – it's more than a weekend. We meet again next Wednesday that 09:30. So, with that, thank you very much, and the Tribunal stands adjourned.

(Whereupon, at 4:50 p.m., the hearing was adjourned until 9:30 a.m., Wednesday, 30 April 2014.)

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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