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 9

HEARING ON JURISDICTION AND THE MERITS

Tuesday, May 6, 2014

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

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

PROFESSOR IVAN SHEARER, Presiding Arbitrator

SIR CHRISTOPHER GREENWOOD, CMG, QC, Arbitrator

JUDGE ALBERT J. HOFFMANN, Arbitrator

JUDGE JAMES KATEKA, Arbitrator

JUDGE RÜDIGER WOLFRUM, Arbitrator

Permanent Court of Arbitration:

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

Court Reporter:

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

APPEARANCES:

On behalf of the Republic of Mauritius:

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

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

Counsel:

PROFESSOR JAMES CRAWFORD, AC, SC
University of Cambridge

MR. PAUL S. REICHLER
Foley Hoag LLP

PROFESSOR PHILIPPE SANDS, QC
Matrix Chambers, London

MR. ANDREW LOEWENSTEIN
Foley Hoag LLP

MS. ALISON MACDONALD
Matrix Chambers, London

Advisers:

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

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

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

DR. DOUGLAS GUILFOYLE
University College London

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

MR. YURI PARKHOMENKO

Legal Researchers:

MR. REMI REICHHOLD
Legal Assistant, Matrix Chambers, London

MR. FERNANDO L. BORDIN

Assistants:

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

On behalf of the United Kingdom:

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

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

Counsel:

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

SIR MICHAEL WOOD
20 Essex Street Chambers, London

PROFESSOR ALAN BOYLE
University of Edinburgh and Essex Court Chambers

MR. SAMUEL WORDSWORTH, QC
Essex Court Chambers, London

MS. PENELOPE NEVILL
20 Essex Street Chambers, London

MS. AMY SANDER
Essex Court Chambers, London

Legal Researcher:

MR. ERAN STHOEGER

Advisers:

MS. JO BOWYER
Foreign and Commonwealth Office, London

MS. MINA PATEL
Foreign and Commonwealth Office, London

MS. NEELAM RATTAN
Foreign and Commonwealth Office, London

MS. REBECCA RAYNSFORD
Attorney General's Office, London

MR. DOUGLAS WILSON
Attorney General's Office, London

C O N T E N T S

PAGE

P R O C E E D I N G S

PRESIDENT SHEARER: Good morning, ladies and gentlemen.

Just before I ask Mr. Reichler to resume, just a few announcements.

I take it that today we will follow the schedule as laid down, and we take two 15-minute breaks, and we end at around 13:00.

And the second thing is to remind you that we have a photographic session, and I see that some of you have come along with your best ties on, at the end of this morning's session. And the next thing is that, on Thursday, the Tribunal wonders if we should start at half past one, 13:30, between 13:30 and 14:00, if it takes that long for Mauritius to reply to the United Kingdom on documents, if that's all right, and then we continue at 14:00 with the UK Argument Round 2.

And then, the final thing is that the Tribunal would ask both Parties if they could present their final formal submissions in writing before the close of the Hearing, at the end of this week. That is to avoid any possible discrepancy between your formal statement and the Transcript. We would like to have those in writing, if that's possible.

All right. Is there anything else?

(Pause.)

I think not.

No?

All right. Yes, Mr. Reichler.

MR. REICHLER: Good morning, Mr. President, Members of the Tribunal.

First, let me say in response to the President's proposals that everything that you have proposed is perfectly acceptable to Mauritius in terms of scheduling and the written submissions.

Before I resume my presentation this morning, I would like to provide Mauritius' answer to one of the questions that Judge Greenwood put last Wednesday – I believe it was addressed to both Parties. This concerned whether the maritime boundaries drawn by Mauritius and the UK around the Chagos Archipelago are, and if I'm quoting the Judge correctly, "roughly the same or is there any significant difference between the two Parties over what maritime entitlement appertains to these islands." I will be providing Mauritius' answer to this question.

There is one other question that Mauritius has not yet answered from the Arbitrators, and that question will be answered during the presentation of Mr. Loewenstein, which follows mine. I believe with that answer, all of the questions that have been put to Mauritius thus far will have been answered.

In regard to Judge Greenwood's question regarding maritime boundaries, there are some differences between the EEZ outer limit as drawn by Mauritius and the limit of the Environmental Protection and Preservation Zone, the EPPZ, for the "BIOT" drawn by the United Kingdom. These differences can be seen from the map at Figure 9 of Volume 4 of Mauritius' Memorial, where we have superimposed the UK's EPPZ limit on top of the EEZ limit of Mauritius.

The reasons for these differences are substantially the same as those already explained by my good friend Sir Michael Wood in his answer to the question on Thursday last week.

First, no median line had been drawn yet by Mauritius with Maldives.

Secondly, unlike the UK, Mauritius has, in the northeastern sector, relied on outermost base points taken from Blenheim Reef, as supported, in Mauritius' view, by Article 6 of the Convention.

Finally, Mauritius has drawn archipelagic baselines in line with Article 47 of the Convention, unlike, it would seem, the UK. We do wish to point out that we do not have the

base points relied on by the UK for the purpose of drawing its EPPZ limit around the Archipelago, so there is some uncertainty on our part in regard to exactly where their respective outer limits differ.

ARBITRATOR GREENWOOD: Mr. Reichler, thank you.

The real point I wanted to establish, and I think you and Sir Michael Wood have now established it for us, is that each of the two countries has taken essentially the same position about which land features generate what form of maritime entitlement. There is no difference about what is a rock and what is an island in this case.

MR. REICHLER: In terms of that aspect, Judge Greenwood, I think that's correct, but we do rely on base points taken from Blenheim Reef, and the UK appears not to. But I am not sure that differs from the assertion that you have just made about the characterizations under Article 121 of these variety features. They do appear to be the same for both Parties.

THE LEGALLY BINDING CHARACTER OF THE UNITED KINGDOM'S UNDERTAKINGS AND MAURITIUS' STATUS AS A COASTAL STATE

PAUL S. REICHLER

6 MAY 2014

63. Counsel for the United Kingdom argued on Friday that the "MPA" was not a violation of the UK's 1965 undertaking on fishing rights, but a revocation of it.[1] That's an interesting distinction. Where is there an official, or even unofficial, act formally, or even informally, revoking the UK's 1965 undertaking on fishing rights? There is none. The declaration of the "MPA" simply did away with it. Can the UK really argue seriously that a violation of a binding legal obligation, automatically constitutes a lawful revocation of it?

[1] Wordsworth, Day 7, page 860, lines 11-24.

64. But let us assume *quod non* that, even whereas here, there was a *quid pro quo* rather than a unilateral declaration, that a non-arbitrary revocation of the UK's 1965 undertakings could get them off the hook. In the circumstances here, the United Kingdom cannot show that its declaration of an MPA was anything but arbitrary.

65. What was the need for a ban on all fishing within 200 M of the Chagos Archipelago? There was none. One would expect, before such a step were taken, that findings would have been made, based on scientific evidence, that there were dangers to coral reefs and inshore fish species, or that there were dwindling stocks of migratory and other ocean species like tuna. No such findings were made. No such evidence existed at the time the "MPA" was declared. To the contrary, for 19 years, between 1991 and 2010, the "BIOT" Administration had in place a 200 M Fish Conservation and Management Zone. Its purpose was to prevent overfishing by a licensing system, which it enforced during the entire period. The FCMZ was managed by MRAG, which recommended strongly against a no-take MPA. In regard to inshore fishing, MRAG advised in July 2009: "Catches recently have been below a quarter of the level that could be sustained (10.8% in 2007)."[2] In regard to ocean fishing, MRAG explained that: "Fixed maritime protected areas (closed areas) are of limited applicability to highly migratory species such as tunas, which, in the Indian Ocean, follow an annual migration around the ocean and are in abundance in the BIOT FCMZ in the period November to February. Instead of providing protection of tunas, the result of closure is likely to be the displacement of the fishing fleets and concentration of fishing elsewhere."[3]

[2] 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" at p. 8, MR Annex 137, Round 1 Mauritius Arbitration Folder Tab 5.25.

[3] 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" at p. 7, MR Annex 137, Round 1 Mauritius Arbitration Folder Tab 5.25.

66. Last week, Ms. Nevill took you to a document, which I have included for your convenience at Tab 5.[4] of your folders for my presentation yesterday and this morning. This document is the product of an August 2009 workshop including senior FCO officers and environmental scientists on, as you will see on the first page "Marine conservation…" – does everyone have one? I'm terribly sorry. Might I hand you mine, Judge Hoffman? Did I misstate it? Oh, I'm terribly sorry. I'm terribly sorry. I misread it. I intended to say 5.4. As I said, this is the product of an August 2009 workshop which included senior FCO officers and environmental scientists, and all the names are listed toward the end of the document. The subject, as you can see from the first page "Marine conservation in the BIOT: science issues and opportunities." There is a section on "Fishery issues," beginning at our page 97. And in this section, you will see MRAG's objections to the ban on fishing. Because they're rather lengthy, I don't propose to take you through them now, but I am sure the Tribunal will want to read all of this, if you have not already done so. Where I would like to call your attention is to the two concluding paragraphs of the section on fisheries at our page 98. in the right-hand column, at the top of the page, and this follows the discussion of MRAG's criticisms of a no-take Marine Protected Area. And these paragraphs, I quote: "Ultimately the decision on the extent of the open ocean no-take zone within a potential BIOT MPA will be a *political* one." Not a *scientific* one. Not an *environmental protection* one. A *political* one. And then this: "There is undoubted attractiveness in the simplicity – and greater *presentational* impact – of a large, no-take MPA. For either a scaled-down version or an internally zoned one, more subtle justifications would be needed, with the risk that such options might *appear to be* no different from business-as-usual."

67. Then this: "The workshop also considered the issue of Mauritian fishing rights to be a political one, that could only be resolved by negotiation and international agreement."

[4] National Oceanography Centre final report of workshop held on 5-6 August 2009, UKCM Annex 102, UK Arbitration Folder Tab 17.

Mauritian fishing rights are here acknowledged. The recommendation is that they be addressed by negotiation and agreement with Mauritius, not a unilateral declaration of a Marine Protected Area, in violation of Mauritius' rights."

68. And finally, there is this: "Full protection of the BIOT area as a no-take MPA would also need to apply to recreational fishing by visiting yachtsmen and on Diego Garcia."

69. Despite this recommendation, we know that an exception was made, excluding Diego Garcia from the MPA's protections.

70. Now would you please follow me to Tab 5.5.[5] And you will see the words of the British High Commissioner in Port Louis, in his communication of 31 March 2010 – that's the day before the "MPA" was suddenly declared – this is a communication addressed to Joanne Yeadon, Colin Roberts and numerous other FCO officials whose names have been redacted, and I refer you to the second paragraph: "The Foreign Secretary should be made aware that the timing could absolutely not be worse locally than to declare a full no-take MPA today. The only thing that could darken things further would be if any announcement also excluded Diego Garcia from the MPA."

71. This might be an appropriate moment for me to comment on the UK's answer given yesterday to Judge Hoffman's question, whether there were any studies or data supporting the UK's exclusion of Diego Garcia and the water surround it from the "MPA". UK's answer was no, there are no such studies. But, as we have just seen, there was a workshop convened by the FCO which included many environmental scientists and which produced the recommendation that "full protection of the BIOT area as a no-take MPA would also need to apply on Diego Garcia."

[5] 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, MR Annex 156.

72. Mr. Whomersley's invocation of UK environmental laws applicable to the land territory and the lagoon, which is internal waters, does not solve the problem of pollution of the territorial sea and coral reefs by American and British military vessels and personnel.

73. Please turn next to Tab 5.6[6] This is a communication from Ms. Yeadon to Mr. Roberts and to the Private Secretary to the Foreign Secretary, dated 31 March 2010. I call your attention in particular to paragraph 8 of this document, on our page 112, and where Ms. Yeadon writes: "I should stress the point that we have not secured funding and will have no means of enforcing a full no-take MPA."[7] How was this funding obtained? Mr. Roberts supplied the answer in his First Witness Statement, at Annex 70 of the UK Rejoinder, at paragraph 26: "the BIOT Administration would lose the benefit of private sector donations which are conditional on the closure of the fishery."

74. Judge Greenwood asked the UK to comment on Mr. Roberts' statement. They avoided doing so last week, but they were pressed again for an answer yesterday. Mr. Whomersley confirmed that the "MPA" is funded by the Bertarelli Foundation which insisted on a full no-take Marine Protected Area. There is little, if any, other funding because the ban on fishing deprives the "BIOT" of license fees. Mr. Whomersley told us the Contract with Bertarelli postdates the declaration of the "MPA", but surely, when the UK declared the "MPA", it had already negotiated with Bertarelli and was aware of its conditions. Mr. Whomersley admitted this. He said that Bertarelli's insistence on a full no-take MPA as a condition of its financing "did facilitate the choice that was made."

[6] Minute dated 31 March 2010 from Joanne Yeadon, Head of "BIOT" & Pitcairn Section, UK Foreign and Commonwealth Office to Colin Roberts, Director, Overseas Territories Directorate and the Private Secretary to the Foreign Secretary, "British Indian Ocean Territory: MPA: Next Steps: Mauritius", MR Annex 158.

[7] Minute dated 31 March 2010 from Joanne Yeadon, Head of "BIOT" & Pitcairn Section, UK Foreign and Commonwealth Office to Colin Roberts, Director, Overseas Territories Directorate and the Private Secretary to the Foreign Secretary, "British Indian Ocean Territory: MPA: Next Steps: Mauritius", MR Annex 158, page. 151, para. 3.

75. So, here we have another reason for the "MPA". In addition to political and presentational reasons, we now have money. The no-take "MPA" is driven by private funders because this was what they demanded in return for their funding. What we have here is another serious case of detachment. The United Kingdom has detached itself from its own foreign policy-making. It has ceded its sovereign prerogatives to people with deep pockets, however well motivated, allowing them to pursue their own private agendas at Mauritius' expense. Let us all hope sovereignty over the FCO will eventually revert to the United Kingdom and that Bertarelli will not cede it to a third State.

76. But despite these embarrassments, all is put right by the noble democratic exercise of the public consultation, so proudly invoked as the saving grace by Professor Boyle and Ms. Nevill.[8] The consultation document was published in November 2009 and it is there and then that Mauritius first learned that the proposed MPA would include a ban on fishing, in violation of its rights**.** This is at Tab 5.7,[9] and I will just stop on it briefly. On our page 117, you can see that the very first option given to the consultees was a full no-take MPA, a total ban on fishing. We are told by Ms. Nevill that there were more than 250,000 respondents and that the majority favored the total fishing ban. But this only begets the question of who these multitudes of respondents were, and what information they had when they expressed their views. And this calls to mind an article I read last week in the International New York Times, by Nicholas Kristof. An opinion poll was taken of the American people – a form of public consultation. They were asked to identify certain historical figures. An astonishing percentage of the respondents identified Joan of Arc … as the wife of Noah. So this leads me to ask: how many of the two hundred fifty thousand respondents to the UK's public consultation were Americans? How many were aware that there was no scientific evidence to justify a ban on

[8] Boyle, Day 7, page 793, lines 16-20.

[9] "Consultation on whether to establish a Marine Protected Area in the British Indian Ocean Territory", UKCM Annex 111, Arbitration Folder Tab 19.

fishing? How many were aware that the UK had made a legally binding undertaking to Mauritius to respect its fishing rights? How many thought Mauritius was an art museum in The Hague?

77. I now come to the final part of my presentation, on Mauritius' rights as a coastal State, deriving from the legally binding undertakings given by the UK to Mauritius in 1965, and the conduct of the United Kingdom in fulfillment of those undertakings. We say that those undertakings and that conduct have vested in Mauritius certain attributes of a coastal State under the 1982 Convention. Counsel for the United Kingdom disagree, pointing out that the words "coastal State" appear in no less than 64 articles of the Convention[10], and stating, with a heavy dose of sarcasm: surely Mauritius cannot claim to be a coastal State for all purposes under all of these provisions.

78. We have two answers to that. First, as Professor Crawford and Professor Sands have argued, Mauritius is *the* coastal State for all purposes because it is the lawful sovereign over the territory of the Chagos Archipelago. The second answer is the one I shall give you. Should you decide, *quod non*, that Mauritius is not sovereign over that land territory, or should you decide not to decide that matter, Mauritius in that case derives its status as a coastal State, at least in regard to certain of the Convention's provisions, from the United Kingdom's legally binding undertakings and its conduct over the past 45 years. These specific provisions include Article 56(1)(b)(iii) and Article 76(8). I turn to both the merits of our "attributes of a coastal State" argument, and your jurisdiction in regard to it.

79. Mauritius does not concede that it is vested with the attributes of a coastal State *only* for purposes of Articles 56(1)(b)(iii) and Article 76(8). Its position is that its specific claims against the United Kingdom in this case only call upon this Tribunal to decide whether it can be considered a coastal State for purposes of those two articles. Mauritius' claims do not

[10] Wordsworth, Day 6, page 672, lines 11-16.

require you to consider whether it enjoys coastal State status in regard to any of the other provisions of the Convention that address the rights or obligations of a coastal State.

80. Article 56(b)(1)(iii), as you know, endows a coastal State with jurisdiction with regard to the protection and preservation of the marine environment in the exclusive economic zone. If Mauritius is *the* coastal State for purposes of this Article, or if Mauritius and the United Kingdom are *both* coastal States for these purposes, then the United Kingdom may not unilaterally impose any measures for the protection or preservation of the marine environment of the Chagos Archipelago; this can only be done with Mauritius' consent and the "MPA" is legally invalid because it was adopted absent that consent. Indeed it was adopted over Mauritius' protest. The legal question of whether two different States may each be regarded as a coastal State for purposes of any of the Convention's provisions, or in respect of the same maritime zones, will be addressed by Professor Crawford this morning.

81. In this case, the principal basis of Mauritius' claim that it is at least *a* coastal State in respect of the Chagos Archipelago, for purposes of Article 56(1)(b)(iii), such that an MPA cannot be declared without its consent, is that it undisputedly has reversionary sovereign interest in the Archipelago and its maritime zones. The basis of its reversionary sovereign interest is the UK's 1965 undertaking that: "if the need for the facilities on the islands disappeared the islands should be returned to Mauritius". In 1976, as you know, the Parliamentary Under Secretary of State gave his "assurances" in these words: the islands "will be returned to Mauritius when they are no longer needed for defence purposes[11] in the same way as the three ex-Seychelles islands are now being returned to Seychelles."[12] As you know, this assurance has been repeated and reaffirmed by the UK at the highest level many times since.

[11] Reichler, Day 3, page 273, lines 16-23 (MM-Annex 78). *See also* Reichler, Day 2, page 156, lines 15-18; page 157, lines 23-24 and page 158, lines 1-2; page 159, lines 1-3, 12-18.

[12] Letter dated 15 March 1976 from Parliamentary Under Secretary of State, UK Foreign and Commonwealth Office, to the Mauritius High Commissioner, London, MM Annex 78, Round 1 Mauritius Arbitration Folder Tab 8.9.

82. It is irrefutable, therefore, that any measures to protect or preserve the marine environment of the Chagos Archipelago over the long term, for the benefit of future generations, affect Mauritius and its ultimate sovereignty over the islands and their surrounding waters and seabed. The United Kingdom itself, in explaining the benefits of the proposed MPA in 2009, repeatedly defended it on the ground that Mauritius would be the long-term beneficiary, because of its reversionary sovereignty. According to the UK's own record of the July 2009 talks, which I have included at Tab 8, and to which I ask respectfully that you now turn, and specifically to paragraph 9, at our page 133, there you will find paragraph 9, which states as follows – again, this is the UK's record of the 21 July 2009 bilateral talks with Mauritius: "There were powerful arguments in the UK to establish a Marine Protected Area. However, many questions still needed to be worked through. The UK delegation explained the advantage to Mauritius that through a marine protected area, the value of the Territory would be raised and this resource would eventually be ceded to Mauritius." Ms. Nevill emphasized this last week.[13] On 22 October 2009, and this you will find in the footnote to my presentation rather than in a tab – on 22 October 2009, the British High Commissioner reported to the FCO on his meeting that day with Prime Minister Ramgoolam, in which he assured the Prime Minister that: "when the islands were eventually ceded to Mauritius, they would be of greater benefit if their unique environmental value had been maintained."[14]

83. The UK went out of its way, repeatedly, to assure Mauritius that the declaration of an MPA would not affect its commitment to return the Archipelago to Mauritius. The public consultation document, which is at Tab 5.7, our page 124 – I'm not encouraging you to turn back. It's a short quote, but of course that is your decision. At page 124 of Tab 7: "The UK has confirmed to the Mauritians that the establishment of a marine protected area will have no

[13] Nevill, Day 5, p. 560, lines 4-8.

[14] Record of meeting between British High Commissioner and Mauritian Prime Minister on 22 October 2009, UKR Annex 60, UK Arbitration Folder Tab 15.

impact on the UK's commitment to cede the territory to Mauritius when it is no longer needed for defence purposes."[15] Even in the announcement of the "MPA" on 1 April 2010, the Foreign Secretary took pains to "emphasise that the creation of the "MPA" will not change the UK's commitment – commitment – to cede the territory to Mauritius when it is no longer needed for defence purposes…"[16]

84. That undertaking standing alone, we say, vests Mauritius with the attributes of a coastal State for purposes of Article 56(1)(b)(iii). But it does not stand alone. It is reinforced by the two other undertakings. Measures to protect or preserve the marine environment in the EEZ inevitably impact Mauritius' fishing rights, which did not await the reversion of sovereignty to Mauritius, but were recognized and respected by the UK immediately and continuously for 45 years, and especially in the entire 200 M maritime zone since it was declared in 1991. It bears emphasis that the progressive enlargement of the "BIOT"'s declared maritime zones, from 3 M to 12 M and then to 200 M was always accompanied, immediately, by the UK's recognition and respect for Mauritius' fishing rights throughout the zone. My friend Sir Michael attempted to belittle Mauritius' fishing rights. He said there is nothing unusual about one State granting another fishing licences under a fishing agreement.[17] But that is not our situation.

85. We don't have a mere fishing agreement. What we have, in the UK's long-held view, is a package of mutually binding commitments. Fishing rights were obtained by Mauritius, along with other rights, in exchange for what the UK regarded as its consent to the detachment of a part of its territory. As I explained yesterday, Mauritius alone enjoyed the right to fish within the Archipelago's 3 M territorial sea, and after a 12 M limit was established, only Mauritian

[15] Consultation on whether to establish a Marine Protected Area in the British Indian Ocean Territory, UKCM Annex 111, p. 7. UK Arbitration Folder Tab 19.

[16] MM Annex 165, UK Foreign and Commonwealth Office Press Release, 1 April 2010, "New Protection for marine life."

[17] Wood, Day 6, page 721, lines 12-16.

vessels could fish within those 12 miles. Only Mauritius has been recognized repeatedly as enjoying historical fishing rights throughout the 200 M "BIOT" maritime zone.

86. By contrast, not even British-flagged vessels have been given licences to fish in this zone. The UK, although the purported sovereign, has shown no interest in the fish or other living resources. Never. The only State with a permanent, perpetual interest in them is Mauritius.

87. And the same is true in regard to the non-living resources of the seabed and the subsoil. Only Mauritius can benefit from these. No other State, not even the UK, can benefit from oil or minerals discovered in the Archipelago or beneath its surrounding waters. And these rights, too, are impacted by measures introduced to protect or preserve the marine environment under Article 56(1)(b)(iii) by preventing all extraction of any oil or minerals under any circumstances.

88. So what we do have here is a completely unique, one-of-a-kind situation. Normally, there is a single State that is sovereign over land territory, and which enjoys exclusive, sovereign rights to the living and non-living resources of its EEZ and continental shelf. Here, by contrast, the UK claims sovereignty over the territory, but recognizes that it is no more than a temporary freeholder, and that sovereignty will ultimately reside in Mauritius. Even my friend Sir Michael ended up agreeing that "temporary freeholder" is, what he called, a pretty apt description of the UK status for a lay person.[18] His effort to identify other situations around the world that are similar to ours does not stand scrutiny. Professor Crawford will address this, and show you how our situation materially differs, in major respects, from the examples presented by Sir Michael. This is a one-of-a-kind situation, calling for recognition of Mauritius as a coastal State under Article 56(1)(b)(iii), to protect its long-term sovereign interests, including its undisputed future sovereign interests in the Chagos Archipelago and its marine environment.

[18] Wood, Day 6, page 724, lines 13-14.

89. I turn to my final point regarding Article 76(8) provides that information on the limits of the continental shelf beyond 200 M "shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf set up under Annex II." We submit that, in the unique circumstances of this case, Mauritius has been vested by the UK with the attributes of a coastal State for purposes of Article 76(8).

90. The same considerations apply here as in my discussion of Mauritius' status as a coastal State under Article 56(1)(b)(iii). First, Mauritius' reversionary sovereignty; the fact that it *will be* sovereign over the Chagos Archipelago, and therefore entitled to the enjoyment of a continental shelf to the full extent permitted by international law. Second, Mauritius' exclusive entitlement to the benefits of the oil and mineral resources embedded in the continental shelf including the extended continental shelf. Although the UK purports to be sovereign, it has already ceded to Mauritius the benefits of all of these resources. The UK, even as it exercises the sovereignty it purports to enjoy, cannot, even now, obtain any benefits from these resources; they have been pledged to Mauritius since 1965. The 1965 undertaking gives Mauritius a present right to prevent the UK from exploiting the benefits of any oil or mineral resources.

91. Moreover, since January 2009, the UK has acted in a manner that reflects its acceptance that Mauritius is a coastal State for purposes of Article 76(8). The facts are recorded in the contemporaneous aide-memoires prepared by both Parties in regard to their bilateral talks on 14 January and 21 July 2009. As we have observed, the respective contemporaneous records are remarkable for their consistency with one another. There appear to be no major discrepancies as to what occurred in either of these rounds of talks. Sir Michael has acknowledged this too.

92. Therefore, it is agreed that at the January talks: the UK said that it had no interest in the outer continental shelf; that it had no intention of making its own submission to the CLCS; that it

proposed a joint submission be made to the CLCS; that Mauritius expressed concern that its rights in the outer continental shelf could be lost permanently if a submission were not made within the requisite 10-year period which would expire on 13 May; and that, in response, the UK advised that only a simple filing of preliminary information was required to stop the clock.[19] That much is undisputed.

93. What the Parties disagree about is whether the UK then encouraged Mauritius to make its own submission of preliminary information to stop the clock. We do agree on the operative language, just not on what it means, so I will focus on that, just as Sir Michael did last week. He pointed you to the Mauritian record of the January meeting, and specifically to page 24 and the comments of Doug Wilson. At Tab 5.9, you will find from that Mauritian record, the cover page, list of participants and page 24 to which Sir Michael referred. The entire document has been presented in the tabs of both States previously. So, to save your effort, I have simply extracted the relevant portions for these purposes. So I ask you to turn to Page 24, which bears our page number 139, and I will do my best to read Mr. Wilson's words with the same emphasis that Sir Michael did – of course without his elegant elocution: "On the deadline, *we* can put an outline submission and following that *we* may proceed." To this, Sir Michael added, with great emphasis: "*We* means *we.*" It means, he said, a joint submission of preliminary information, not one filed solely by Mauritius. Then Sir Michael took you to the comments immediately following, those of Colin Roberts, who was Head of the Overseas Territories Directorate and Commissioner of the "BIOT", and the head of the UK's delegation to these talks, and he followed up on the remarks of Mr. Wilson, and I will read those as Sir Michael did: "Can I just clarify one aspect. We have no expectation of deriving any benefit from what

[19] MR Annex 129, Ministry of Foreign Affairs, Regional Integration and International Trade, Mauritius, "Meeting of the Officials on the Chagos Archipelago/British Indian Ocean Territory held at the Foreign and Commonwealth Office, London, Wednesday, 14 January 2009, 10 am," 23 January 2009 in Round 2 Mauritius Arbitration Folder Tab 5.9; United Kingdom record of meeting of 14 January 2009 dated 15 January 2009, MR Annex 128, UK Folder Tab 40.

we will get. [Now, presumably Sir Michael would agree that, here at least, "we" means the UK]. We have no expectation of deriving any benefit from what we will get. It will flow to Mauritius when the territory will be ceded to you. [You, here, clearly refers to Mauritius, and I don't think Sir Michael would disagree]. It is one of the reasons why we have not invested resources to collect data. We recognize the underlying structure of this discussion. [Again, "we", as used here, can only mean the UK. And then the final sentence]. *You* may wish to take action and *we* will provide political support."

94. Now, what does Sir Michael have to say about this? Well, we already know, "*We* means *we.*" But here, he tells us that when Mr. Roberts says "you," it *also* means "we". And that is the basis of the Parties' disagreement. Now, we may be a bit old-fashioned. But we respectfully submit that "you" does not mean "we". "You" means "you". And this is also clear from the context. By reading the entire comment of Mr. Roberts, it can be seen that he consistently used "we" to refer to the UK, and "you" to refer to Mauritius. In the last sentence, Mr. Roberts told Mauritius, and Mauritius correctly understood him to say, that "you – Mauritius" may wish to take action, by filing preliminary information, and that "we – the UK" will provide political support.

95. Now, this leads us to ask: how could Mr. Roberts encourage Mauritius to file preliminary information with the CLCS, if he, as FCO Director, "BIOT" Commissioner, head of the UK delegation to these talks, was not recognizing Mauritius' status as a coastal State, at least with respect to Article 76(8)?

96. The UK's recognition of Mauritius' status as a coastal State for these purposes was further recognized at the next set of bilateral talks in July 2009. Here again, the Parties' contemporaneous written records are in synch with one another, and there should be no disagreement over what occurred. It is demonstrated that Mauritius advised the UK that it had filed its preliminary information with the CLCS on 9 May; that the UK made no objection

whatsoever; and that the UK proposed to work together with Mauritius on what it called a "coordinated" submission under a sovereignty umbrella.[20] And if you will now kindly turn back to Tab 5.8, at page 132, and this is the UK's contemporaneous aide memoire on the 21 July 2009 bilateral talks, and I refer you to paragraph 7, again at page 132, and here you will note the difference between the "joint" submission proposed by the UK in January,[21] and what in this document in July is proposed as a "coordinated" submission.[22] This was no longer intended, following Mauritius's submission of preliminary information on its own, this was no longer intended by the UK as a submission that both States would make jointly, but one that Mauritius would make, in coordinated fashion, with the UK's support. As you can see, beginning at the eleventh line of paragraph 7: "The UK delegation also explained that we were not proposing UK funding extensive analysis and surveys, which are of course necessary for a full submission, but could facilitate access to the technical sources and help with the legal process."

97. Again, I ask, how could the UK contemplate a full CLCS submission by Mauritius, with its support, without acknowledging that Mauritius has standing to make such a submission as a coastal State for purposes of Article 76(8)? Sir Michael had absolutely nothing to say about this last week. He made no mention whatsoever of the July 2009 meeting and none of the UK's other counsel addressed this aspect of the July 2009 meeting.

98. One thing we do hope Sir Michael will clarify in the second round is the UK's position on what they mean by the statement, at paragraph 8.39 of the Rejoinder, that: "Mauritius is not the coastal State in respect of BIOT and as such it has no standing before the CLCS with respect to

[20] UKCM Annex 101, Overseas Territories Directorate record of discussion in Port Louis on 21 July 2009 dated 24 July 2009, Round 2 Mauritius Arbitration Folder Tab 5.8; Information Paper by the Prime Minister of Mauritius dated 12 August 2009, MR Annex 144, UK Folder Tab 41.

[21] MR Annex 128, UK Foreign and Commonwealth Office, Overseas Territories Directorate, "British Indian Ocean Territory: UK/Mauritius Talks", 14 January 2009, Round 1 Mauritius Arbitration Folder Tab 8.10 at page 391.

[22] UKCM Annex 101, Overseas Territories Directorate record of discussion in Port Louis on 21 July 2009 dated 24 July 2009, Round 2 Mauritius Arbitration Folder Tab 5.8.

BIOT." No such statement appears in the Counter-Memorial. We saw this statement of position for the first time in the Rejoinder earlier this year. What does this mean? For Mauritius, it means trouble. If we have no standing before the CLCS, then what is the status of our submission of preliminary information? Is it a nullity, *void ab initio*, in which case it was insufficient to stop the 10-year clock from expiring on 13 May 2009, or from shutting the door forever on Mauritius' right to claim an extended continental shelf in respect of the Chagos Archipelago? If that is the UK's position, then we clearly have a dispute over Mauritius's standing as a coastal State under Article 76(8).

99. Perhaps, because he recognizes this, Sir Michael was uncharacteristically imprecise in how he described, or failed to describe, the UK's position. He told you that *Mauritius* interprets the UK position as to regard the submission of preliminary information as a nullity, and the clock as to have run out. Then he said: "That is not the position."[23] But he never told you what the position is! What is it? If, in the UK's view, Mauritius lacks standing to make submissions to the CLCS, then how, in the UK's view, could our submission be anything other than a nullity? Either we have standing to file or we don't. We say we do. They say we don't. That is a textbook definition of a dispute.

100. And it is one over which you plainly have jurisdiction, as is the dispute over whether Mauritius has the attributes of a coastal State for purposes of Article 56(1)(b)(iii). Professor Sands has already addressed you on the question of your jurisdiction to hear Mauritius' claim that the UK is not the coastal State, and thus not entitled to declare an MPA. Professor Sands invited you not to write an exception into UNCLOS, at the behest of the UK, to preclude jurisdiction over disputes which necessarily involve questions of land sovereignty.

101. But in regard to the aspects of our claim that I have been addressing, you do not have to consider whether Part XV excludes all, or any, disputes related to land sovereignty. These

[23] Wood, Day 6, page 735, line 7.

aspects of our claim do not require you to consider which State is currently exercising sovereignty over the Chagos Archipelago. We are proceeding here on the basis that the Archipelago will be returned to the sovereignty of Mauritius when it is no longer needed for defence purposes and because of the exclusive rights in regard to the living and nonliving resources with which Mauritius has already been vested. Our claims of entitlement to be regarded as a coastal State for purposes of Articles 56(1)(b)(iii) and 76(8), because of the attributes of a coastal State which Mauritius acquired as a result of the UK's undertakings, are indisputably matters calling for your interpretation and application of those two provisions of the Convention, and the meaning of the words "coastal State" under them and, as such, they plainly fall within your jurisdiction under Article 288(1).

102. In closing – and I expect those words are music to your ears – in closing, I will tell you about my sojourn to the Grand Bazaar. I spent the entire time at the book stalls, looking for some light and pleasant reading I could unwind with at night, preferably something with a connection to Turkey. I came across Graham Greene's classic, *Stamboul Train.* As I leafed through it, I knew that it was fate – *kismet* as they say in this country – that I should find this book. It begins with a quote from Santayana: "Everything in nature is lyrical in its ideal essence, tragic in its fate, and comic in its existence." He was describing the "MPA"!

103. "Lyrical", in the ideal sense that preservation of the marine environment, when that is what is truly intended, is a noble objective. It is in fact Mauritius's objective.

104. "Tragic", in the fate of breaching a longstanding, binding legal obligation, eliminating Mauritius's legal rights, violating obligations of good faith consultation under the 1982 Convention, and, to recall the infamous, if not tragic, phrase of Colin Roberts, "putting paid" to any hopes of the Chagossians to resettle in their homeland.

105. And "Comic", in the sense that the UK prefers public consultation with unknown and uninformed multitudes over serious bilateral negotiation and agreement with Mauritius, allows

private parties to control its foreign policy and accepts their demands to violate its international obligations solely to obtain their financing, and executes the "MPA" with a single boat that has been found by the UK's own environmental consultants to cause more pollution than it prevents.

106. Mr. President, Members of the Tribunal, for all of these reasons, Mauritius invites you to "put paid" to the "MPA".

107. It has been a distinct honour for me to appear before each and every one of you in these proceedings. I thank you sincerely for your kind courtesy and generous patience.

I ask that you call Mr. Andrew Loewenstein to the podium, perhaps after coffee break.

Oh, I'm sorry. Even better. I ask that you call Professor Crawford to the podium. Thank you.

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

And so I do call upon Professor Crawford to address us.

Thank you.

PROFESSOR CRAWFORD: Thank you, Mr. President. I won't delay you long for coffee.

PRESIDENT SHEARER: Thank you. You just pause when it's a convenient moment.

PROFESSOR CRAWFORD: I think I'll go straight through. It will only take me 20 minutes.

PRESIDENT SHEARER: All right. Very, very good, then.

Thank you.

Mauritius v United Kingdom

Reply of Mauritius

6. The Interpretation of 'Coastal State': Some Examples

Professor James Crawford AC SC

Introduction

Mr. President, Members of the Tribunal:

1. I have shown you that the United Kingdom is not the coastal State of the Chagos Archipelago as a matter of international law, whereas Mauritius is. Professor Sands has shown you that you have jurisdiction to determine that question. Mr. Reichler has shown you that at any event Mauritius has attributes of a coastal State for this purpose such that the United Kingdom could not declare a no-take "MPA" without the agreement of Mauritius, and that you have jurisdiction to determine that question.

2. The United Kingdom's response to these parts of our case is essentially three-fold: (1) you have no jurisdiction to determine who is the coastal State because that involves questions of land sovereignty; (2) the term 'coastal State' in the Convention is simple and univocal; it refers to the State in actual control. There can only ever be one coastal State with respect to a given coast and it will take you only ten seconds to find out who that is; and (3) the excision being valid, either because the principle of self-determination was inapplicable or irrelevant or because Mauritius consented to the excision, the United Kingdom for all purposes is the coastal State in any event.

3. It is helpful at this stage to consider the second contention, that there can only ever be one coastal State with respect to a given coast. I am going to call that the 'solitary State thesis', perhaps out of deference to Robinson Crusoe. It was put by Mr. Wordsworth last week in the following terms, and I quote:

> "… the term 'coastal State' … means the State with the coast adjacent to the maritime zone with which the given provision of UNCLOS is concerned".[24]

[24] Transcript, Day 6, p. 665, lines 14-16.

He qualified this in one respect, and I quote again:

> "One can conceive of very limited exceptions where there is an openly and expressly agreed sharing of the jurisdiction of a coastal State, such as in a condominium, or in the very special case of the European Union… But even if Mauritius' case were taken at its highest – that it somehow" – I emphasise the word 'somehow' – "had a reversionary interest in the BIOT – there is nothing in the Convention to suggest it may establish a situation where there are two coastal States vying over the assertion of rights in a somehow shared maritime zone".[25]

4. Now there must be a question whether this second passage with its reference to an 'openly and expressly agreed' sharing of jurisdiction, and the qualification it contains does not contradict the first passage. For if you have no jurisdiction to determine who is the coastal State beyond looking for ten seconds of actual control, then you have no jurisdiction to decide, and it will take you a lot more than ten seconds to decide, whether the terms of what I may call a divided coastal State jurisdiction arrangement are settled or not, let alone 'openly and expressly agreed'. All the State in actual occupation has to do is to assert its exclusive authority, to assert that it is the solitary State, and then a Part XV court or tribunal must lay down its pen. The actual occupier can do this whatever it may have earlier expressly agreed. That is the black hole – or the 64 black holes in the Convention. You saw the black hole in operation last Friday when the usually fluent Mr. Wordsworth was quite unable to answer a simple question – can the UK cede the Archipelago to a third State? If that was 'expressly agreed', as we thought it was and HM's Attorney-General thought it was in opening the British case, then either Mr. Wordsworth's concession about the exception to the solitary State thesis is wrong or you have jurisdiction to determine whether our right of reversion is inconsistent with the international

[25] Transcript, Day 6, p. 694, lines 22-24 and p. 695, lines 1-5.

establishment of an MPA. And if that is the position for right of reversion, it is the position equally for the other agreed rights based on the continuing conditions linked to excision.

Mr. President, Members of the Tribunal:

5. International law is not a thing of shreds and patches, of ballad songs and snatches: you are entitled, in considering whether to grant a remedy for actual or threatened breach of the Convention, to apply the whole of international law including the international law relating to sovereignty. The only remedy we seek in this part of our case is a determination that the "MPA" is unlawful because Mauritius has the attributes of a coastal State and must be treated as such, together with certain consequential rulings. And the validity or the legality of the "MPA" is a law of the sea matter, governed by the constitutional instrument of the law of the sea, the 1982 Convention. True, like other constitutions, the Convention has to cover a multitude of situations, and the phrase 'coastal State' assumes the normal case of a State in undisputed, undivided sovereignty over the relevant coast. The normal situation is that there is a single State in relation to any issue. But like other constitutions, the 1982 Convention has to be adapted to deal with special situations across the wide world, and doing so is always an exercise of interpretation or application of the Convention. It's true that the land governs the sea, but the Convention also governs the sea and in interpreting and applying the Convention you are allowed to know and apply the law of the land as well as the law of the sea.

6. It may assist you in assessing these contentions if I take you briefly to a number of cases of divided coastal jurisdiction, where more than one State has coastal State rights in respect of a given coast. I do this for two purposes, first to show there are no floodgates because there are not a large number of cases out there waiting to disturb the tranquillity of Part XV tribunals, but also to show you that the word "coastal State" can't support the solitary State thesis. I am going to cite three examples, but I could have cited more, for example, the 'bare' coast that appears to exist in the vicinity of the Peru-Chile maritime boundary, where Peru arguably has the land up to

the – well, whatever point would remain to be determined, and Chile has the sea from that point onwards. In those situations, both would be *pro tanto* coastal States in relation to that very short stretch of coast. But together the three cases I will deal with show definitively that the solitary State thesis is wrong.

The UK's Sovereign Base Areas in Cyprus

7. The first situation concerns the two Sovereign Base Areas (SBA) retained by the UK when Cyprus became independent in 1960, Akrotiri and Dhekelia. I can't go into much detail and unfortunately the literature on the Sovereign Base Areas is rather minimal, but I've given you references to it. The essential position is as follows, and there are eleven propositions:[26]

(1) By virtue of the Treaty of Establishment, a multilateral treaty concluded at the time of Cyprus's independence, the UK retains sovereignty over the SBAs.[27]

(2) The UK agreed at the same time to use the SBAs for military purposes only, and affirmed that it has no intention of ceding the SBAs to any third State,[28] affirmation Mr. Wordsworth was unable to make.

(3) Cyprus has a right of reversion, although it is not called that: it is referred to as 'transfer' in the Exchange of Notes.[29] That makes the repeated use of the word 'reversion' in relation to the Chagos Archipelago later than the treaty establishment even more significant. They could

[26] See 'Territorial Sea Boundary. Cyprus-Sovereign Base Area (UK)', *Limits in the Seas* No 49 (1972); A Jacovides, *International Law and Diplomacy: Selected Writings* (Martinus Nijhoff, 2011) 108-111; A Pellet, 'The British Sovereign Base Areas' [2012] *Cyprus YBIL* 57-72; T Scovazzi, 'Maritime Boundaries in the Eastern Mediterranean Sea', GMF Policy Brief, June 2012, available at http://www.gmfus.org/archives/maritime-boundaries-in-the-eastern-mediterranean-sea/ (accessed 3 May 2014); A Gurel, F Mullen & H Tzimitras, *The Cyprus Hydrocarbons Issue: Context, Positions and Future Scenarios* (Peace Research Institute, Oslo, 2013) 9-26.

[27] Treaty (with annexes, schedules and detailed plans) concerning the Establishment of the Republic of Cyprus, Nicosia, 16 August 1960: 382 UNTS 10. See also Treaty of Accession, Athens, 16 April 2003, Protocol 3; S Shaelou, 'The principle of territorial exclusion in the EU: SBAs in Cyprus: a special case of *sui generis* territories in the EU' in D Kochenov (ed), *EU Law of the Overseas: Outermost Regions, Associated Overseas Countries and Territories, Territories* Sui Generis (Kluwer, 2011) 153-175.

[28] Exchange of Notes between the United Kingdom of Great Britain and Northern Ireland and Cyprus Concerning the Future of the Sovereign Base Areas referred to in Article 1 of the Treaty of 16 August 1960 Concerning the Establishment of the Republic of Cyprus. Nicosia, 16 August 1960: 382 UNTS 172.

[29] Ibid, at 174.

have used other language and they didn't. They only started using other language more recently.

(4) In the Treaty of Establishment, lines are drawn delineating the lateral limits of the territorial seas of the SBAs,[30] the lateral limits, not the outer limit.

(5) Cyprus agrees not to claim a territorial sea between those lines, in other words, it agrees not to enclave the territorial sea of the SBAs, but it has made no equivalent commitment with respect to the Exclusive Economic Zone in the continental shelf.

(6) In 1964, Cyprus extended its territorial sea to 12 M without reference to the SBAs.[31]

(7) In 1993, Cyprus declared a straight baselines system around its coast which was objected to by the United Kingdom insofar as it impacted on the SBAs.

(8) In 2004, Cyprus declared an EEZ around its entire coastline; of course it also has a continental shelf and there is continental shelf legislation.

(9) The United Kingdom has never extended the SBA's territorial sea areas beyond 3M, although it has apparently reserved the right to do so. Nor has it declared an EEZ or asserted continental shelf rights off the SBAs. And indeed, it must be very doubtful whether it has the capacity to do so in view of its undertaking, not to use the SBAs for non-military purposes.

(10) Cyprus has concluded delimitation agreements with Egypt[32] and Israel[33] which cover areas off the SBAs; in other words, they're close to those – those boundaries are closer to the coastline of the SBAs than they are to the coastline of what I will call "the rest of Cyprus".

(11) The 1982 Convention is in force for Cyprus and there is no declaration with respect to Article 298(1)(a)(i). By contrast, the UK has not extended the Convention to the SBAs, so

[30] Treaty of Establishment, Annex A, Section 3.
[31] Territorial Waters Law, No 45 of 1964 (Cyprus).
[32] Cyprus-Arab Republic of Egypt, Agreement on the Delimitation of the Exclusive Economic Zone, Cairo, 17 February 2003.
[33] Cyprus-Israel, Agreement on the Delimitation of the Exclusive Economic Zone, Nicosia, 17 December 2010, 2740 UNTS 1.

there is no immediate problem so far as the United Kingdom is concerned as to litigation. The floodgates are dry – or the area below the floodgates is dry, I should say, more accurately.

8. Now the situation is far from being fully defined, but it seems to be the case that Cyprus' EEZ lies off SBA territorial seas, and that Cyprus is the relevant coastal State for EEZ and continental shelf purposes whereas the UK is the relevant coastal State for the territorial sea. It is also quite clear that, assuming the Convention had been applied to the SBAs, a court or tribunal sitting under Part XV would have jurisdiction to determine disputes as to the allocation of maritime authority as between the SBAs and Cyprus, including but not limited to delimitation disputes. In doing so the court or tribunal would have to apply the *lex specialis* of the 1960 Treaties and any relevant undertaking or practice of the parties, *lex specialis* would prevail over the *lex generalis* or general international law. It would also have to have regard to the character of the authority, and the limits upon it, exercisable by the UK over the SBAs in accordance with those sources of obligation. All of this would take much longer than ten seconds.

The Closing Line in the Gulf of Fonseca

9. My second example concerns the closing line of the Gulf of Fonseca. In 1917 the Central American Court of Justice, as it then was, held that the Gulf…'qualified … as a "historic bay,"... with a "littoral marine league" territorial sea internally'.[34]In 1992, a chamber of the International Court in the *El Salvador/Honduras Case,* between different parties, with Nicaragua maybe as an intervenor.[35] It confirmed that 'the Gulf waters, other than that 3-mile zone were historic waters, subject to the joint sovereignty of the three States'.[36]

It further held that in the closing line, because it's a historic bay and the closing line is the Gulf of Fonseca beyond 3 miles from each of the points on which the closing line is drawn, is

[34] See *El Salvador v Nicaragua*, Central American Court of Justice' (1917) 11 *AJIL* 674, p. 715.
[35] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* [1992] ICJ Rep 351.
[36] Ibid, p. 404.

jointly held, and I quote: "Since the legal situation on the landward side of the closing line is one of joint sovereignty, it follows that all three of the joint sovereigns must have entitlement outside the closing line to territorial sea, continental shelf and exclusive economic zone. Whether this situation should remain in being is a matter for the three States to decide. Any delimitation of the maritime areas beyond the closing line will fall to be effected by agreement on the basis of international law.[37]

10. So, as to the closing line across the Gulf, beyond 3 miles from each coast, the three States are joint holders. This is a maritime condominium. So they're each, either individually coastal States or collectively a coastal State with respect to the territorial baseline – and the maritime zones attributable to that territorial baseline. Again, the solitary State thesis doesn't work.

Land Condominium: The New Hebrides

11. My third example is The New Hebrides. It is a historic example and it concerns a condominium involving land sovereignty. Of course until independence, the New Hebrides, which is now Vanuatu, was governed by condominium of France and the UK pursuant to a Protocol of 1914 between the two States.[38] It is authoritatively described in a classic article by DP O'Connell.[39]

12. The basic principle was that France and the UK each retain jurisdiction, or 'sovereignty', over its own subjects, and the other functions were committed to the high commissioners jointly and were 'condominium' functions.[40] For internal purposes, there was a joint court for condominium matters along with separate British and French courts.[41] Coastal State jurisdiction and third State fisheries would have been a condominium matter—in other words, there were simultaneously two coastal States with respect to the coastline of New Hebrides. But the

[37] Ibid, p. 420.
[38] Protocol between Britain and France respecting the New Hebrides, 6 August 1914, 114 *British Foreign and State Papers* 212.
[39] DP O'Connell, 'The Condominium of the New Hebrides' (1968–9) 43 *BYIL* 71.
[40] Ibid, pp. 92–93.
[41] Ibid, p. 122.

Protocol of 1914 was very far from regulating the whole gamut of maritime issues: there was, for example, nothing about fishing. The main general provision in the protocol was Article XXX. It dealt with vessels and it provided that, and I quote:

(1.) The High Commissioners shall jointly prescribe general rules applicable to all vessels with regard to the conditions under which these vessels may use the ports and harbours of the Group.

(2.) And rather quaintly: They shall jointly enforce these rules, either personally or through the Resident Commissioners.

The idea of the personal enforcement of rules by the high commissioners conjures up an idea of men in pith helmets carrying batons.

This is a long way from being the 'openly and expressly agreed sharing of the jurisdiction of the coastal State' to which Mr. Wordsworth referred, yet there were two coastal States with respect to the same coastline – or were.

Conclusions: Rights of Reversion can qualify the Authority of a Coastal State

13. In each of these cases, the attributes of a coastal State are distributed between several States; in each of them disputes could arise which would be justiciable before a court or tribunal having jurisdiction over Law of the Sea matters. Indeed there were in the case of the New Hebrides and are, in the other two cases, simmering disputes or areas of disagreement; in none of them is there any comprehensive or complete divided coastal State jurisdiction arrangement yet there are two coastal States – or in one case three.

14. Let's get closer to the facts of this case. I don't suggest that these cases are directly the same as ours but they show that the solitary State thesis doesn't work. Assume that State A has actual authority over a coastal territory but State B has a valid and admitted claim to reversion of the territory after a defined period. It doesn't matter whether the definition of that period is fixed by reference to years – for example, 20 years – or events, for example, the closure of a

military base: the principle must be the same. State B also has certain rights over the territory concerning access to or use or benefit of its marine and submarine resources during the pre-reversion period and that too is agreed or, at least, appears from the documents; assume that these rights derive from earlier understandings or undertakings given by State A as part of the price for control of its territory during the interim period. Assume further that State B claims that the circumstances in which State A acquired or retained its control over the coastal territory were legally defective or unlawful under the international law at the time.

15. Now let us assume that State A acts in some maritime matter in a way which, according to State B, disregards or annuls its claim to maritime rights in relation to the territory; or is inconsistent with its claim to the territory; or is capable of affecting the value of its reversionary interest in the territory or of its rights over the territory during the defined period. When challenged, State A denies that State B is a coastal State or has any justiciable rights under the Convention. Neither State has made a declaration under Article 298(1)(a)(i). Can it be right in such a case to say that, just because, in determining the legality of State A's action, you have to apply the law of the land – general international law – alongside the Convention, a Tribunal under Part XV is impotent? Can it be right to say that such a Tribunal in the exercise of its jurisdiction would have to determine that there is only one State holding all the attributes of a coastal State? It is not right. But that has always been our case.

16. Of course, it is not the whole of our case. We also say that in declaring the "MPA" the UK was in breach of various provisions of the Convention irrespective of coastal State status. Unless there are any questions, Mr. President, I would ask you to call, after the break, on Mr. Loewenstein to deal with that aspect of our case.

PRESIDENT SHEARER: There appear to be none.

Thank you very much, Professor Crawford.

We'll take the 15-minute break now, return at 11:00, and we will hear Mr. Loewenstein at that time.

Thank you.

(Brief recess.)

PRESIDENT SHEARER: Thank you, Mr. Loewenstein. You have the floor.

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

Before proceeding, I have one small housekeeping detail. My speech will run approximately 75 minutes, and I propose, with the Tribunal's permission, that I push through without taking a break. But, of course, if at any point the Tribunal wishes to take a break during the speech, I would be more than happy to do so.

PRESIDENT SHEARER: Yes, Mr. Loewenstein. You will be followed, I think again by Professor Crawford again.

MR. LOEWENSTEIN: That's correct.

PRESIDENT SHEARER: And Mr. Dabee for the final closing remarks.

Well, I'm also conscious of the need for the Transcript writer to take a break. Perhaps we will see if we get to a point around about an hour in, we might take a short break. I think it would be a good idea, but just choose your moment for that.

MR. LOEWENSTEIN: Certainly.

PRESIDENT SHEARER: Thank you, Mr. Loewenstein.

MR. LOEWENSTEIN: Certainly.

The U.K. Breaches of the Convention:

Merits and Jurisdiction

Mr. Andrew Loewenstein

6 May 2014

1. This morning it will be my task to address the third limb of Mauritius' case. This is the alternative argument that Mauritius makes in the unlikely event you were to decide that Mauritius is neither "the coastal State" nor "a coastal State" in relation to the Chagos Archipelago. Except for Article 76, which Mr. Reichler already addressed, and Article 300, which will be addressed by Professor Crawford, I will respond to the United Kingdom's arguments regarding its breaches of the Convention, as well as the Fish Stocks Agreement, and will show why this Tribunal has jurisdiction over these claims. I will begin with the merits and conclude by addressing jurisdiction.

2. Before proceeding, I will answer Judge Greenwood's question regarding the internal British correspondence referred to in Annex 20 of the United Kingdom's Rejoinder. These are not our documents, and Mauritius does not have copies of them. With respect to the statement of the Prime Minister of Mauritius that is the subject of Annex 20, we believe this refers to the reply given by Sir Seewoosagur Ramgoolam to Parliamentary Question B/634 on the 29th of November 1977, a copy of which was produced as Annex 83 to the Memorial.

3. I shall begin my discussion of the Merits by addressing the undertaking given by the United Kingdom in 1965 that it would respect Mauritian fishing rights in the waters of the Chagos Archipelago, and examining the relevant provisions of the Convention in light of this undertaking. Mr. Reichler has already responded to the United Kingdom's claims that the undertaking is not binding, so I can be brief. I will not repeat what he said about why those claims are wrong, and will confine myself to showing that the undertaking is enforceable in both the territorial sea and the EEZ by operation of Articles 2(3) and 56(2).

4. In the territorial sea, Article 2(3) provides that a coastal State's sovereignty "is exercised subject to this Convention and to other rules of international law." Mauritius has explained that this requires coastal States to comply both with the Convention and with other rules of international law when exercising rights in the territorial sea. As Mr. Wordsworth states,

there are two points of disagreement – over the meaning of 'is exercised,' and over the scope of 'other rules of international law.'

5. On the first point, Mr. Wordsworth's submissions that this is "merely descriptive of an element of legal status,"[42] and that it does not impose an obligation of compliance, if accepted, would eviscerate not only Article 2(3) but also the many other provisions of the Convention that use similar grammatical constructions to impose positive obligations.

6. Nor was Mr. Wordsworth correct in suggesting that interpreting 2(3) as establishing an obligation of compliance would be redundant because States are already under this obligation. The reference to "other rules of international law" cannot be redundant. The words in 2(3) serve the important function of confirming the requirement that States must comply with rules of international law when exercising rights in the territorial sea. Professor Sands showed this is a long-standing obligation of general international law; the UK did not attempt to suggest otherwise. The UK often suggests the Tribunal may only refer to rules of general international law when there is a plain *renvoi* in the text referring to such rules. Yet when confronted with a clear example of such a *renvoi*, the UK denies it has any operative effect. It clearly does. By codifying the obligation to comply with international law in the territorial sea, Article 2(3) subjects these other rules of international law to the dispute settlement procedures set out in Part XV. Thus, if a dispute over their alleged breach cannot be resolved by peaceful means, it may be settled in accordance with section 2.

7. On the second point – the scope of 'other rules of international law – I refer you, in response to the UK's brief arguments, to paragraph 6.17 of Mauritius' Reply. You will find there confirmation of the interpretation by Mauritius – that the words are wider than simply rules of general international law - by reference to the work of Birnie, Boyle and Redgwell. I need not detain you by reading the specific reference, which the Tribunal can do at its leisure.

[42] Wordsworth, Day 7, p. 868, line 23 and p. 869, line 1.

8. I turn now to Article 56(2). The undertaking to respect Mauritian fishing rights applies in the EEZ, and the Tribunal will have noticed that the United Kingdom made no attempt to deny that the undertaking, if binding, applies beyond the territorial sea. It did not respond to the evidence showing that whenever the UK extended the maritime zones of the Chagos Archipelago, it automatically, and out of a sense of legal obligation, treated Mauritius as "a coastal State," respecting Mauritian fishing rights in those zones as well. The United Kingdom did so first to the limit of the 9 mile fisheries zone that it established contiguous to the 3 mile territorial sea, and later, to the 200 mile limit of the EEZ. Thus, when Mr. Wordsworth states that "We do not see Mauritius' case on Article 56(2) as raising any discrete issues on facts so far as concerns fishing rights,"[43] we understand him to accept that if the undertaking is binding, it must pertain throughout *all* the waters of the Chagos Archipelago, to the EEZ's 200 mile limit.

9. We are left, then, with the question of whether Article 56(2) requires coastal States to respect the rights of other States in the EEZ. The answer surely is that it does. As you know, 56(2) requires a coastal State to "have due regard to the rights and duties of other States" when exercising its own rights in the EEZ. I explained during the first round that both the Virginia Commentary and the ILC interpret this language, or very similar language in the 1958 Convention, to mean that a coastal State must *refrain* from acts that will *interfere* with the rights of other States. You will also recall that in its written pleadings, the United Kingdom made no attempt to provide its own interpretation of this obligation. After Mauritius in the first round challenged the UK to explain what it thinks the obligation actually requires, Professor Boyle – finally – gave the United Kingdom's answer. Due regard, he said, means "take account of, give consideration to."[44] Under these definitions, the obligation would appear to entail nothing more than being aware of the rights of other States. Yet Professor Boyle also

[43] Wordsworth, Day 7, p. 874, lines 11-12.
[44] Boyle, Day 7, p. 822, line 12.

said that it could mean "do not ignore," which suggests a more demanding obligation, and the evidence shows that is precisely what the UK did, when, without meaningful consultation, it purported to extinguish the fishing rights of Mauritius in the EEZ.

10. Regardless, it cannot be right that Article 56(2) has as limited a scope as the UK suggests, and you will note that unlike Mauritius, the United Kingdom did not support its interpretation by reference to the ordinary meaning of the words, as defined in standard dictionaries. Nor did the United Kingdom explain why the interpretation given by the Virginia Commentary and the ILC is wrong.

11. Significantly, when it comes to *applying* the obligation to have due regard, the United Kingdom appears to concede that it imposes at least some substantive obligation beyond mere awareness of other States' rights. Professor Boyle said "If there are *good reasons* for overriding the rights of other states in the EEZ, then Article 56(2) allows that." Now, as I said, Mauritius rejects this interpretation of "due regard," which is contrary to its ordinary meaning as elucidated by the Virginia Commentary and the ILC, both of which require States to *refrain* from acting in ways that interfere with the rights of other states *regardless* of the strength of the reasons for doing so. But it is important to note that, even under the standard posited by the United Kingdom, the obligation plainly has been breached. The United Kingdom did *not* – to use Professor Boyle's formulation – have "good reasons for overriding the rights" of Mauritius to fish in the EEZ. It had no reasons at all, and the evidence before you shows there is no indication that Mauritius' entitlement to fish, or its exercise of fishing rights, had any adverse environmental impacts.

12. Professor Boyle said that applying this standard involves a balancing test under which the United Kingdom's reasons for abrogating the rights of Mauritius' should be weighed against the rights of Mauritius. Were such a balancing test to be employed, the result would be clear; termination of the Mauritian right to fish is not warranted. Here, I can be brief.

13. On the Mauritian side of the scale is the commitment made by the United Kingdom to respect the right of Mauritius to fish in the waters of the Chagos Archipelago. This is a right the UK undertook to give to Mauritius as one of the conditions for detachment, and the UK's conduct thereafter proceeded to allow Mauritius to fish initially up to three miles, and eventually up to 200 miles. It was one of the reasons why Mauritius supposedly consented. As such, in any balancing exercise, it must be accorded great, if not decisive, weight. This is all the more so given that the supposed consent was attached, was connected to negotiations over whether Mauritius would attain independence. The UK's subsequent actions confirm the importance of the Mauritian right to fish, which it treated with the utmost seriousness. To cite only one example, on the 8th of February 1966, an official from the Colonial Office observed in connection with the undertaking "[w]e are ... anxious to avoid anything in the nature of blanket restrictions on activities by Mauritian fishermen."[45] For 45 years this remained the case.

14. Never, during all that time, did Mauritius exercise its rights in a manner that could justify their restriction, even assuming *quod non* that the UK had any right to impose restrictions beyond those connected to defence purposes, which it did not. Nothing in the UK's submissions contains any hint that Mauritius ever did anything improper in exercising its rights. In fact, the FCO's 1996 research paper, which Ms. Yeadon endorsed in 2009, confirmed the UK view that the right of Mauritian vessels to fish in the waters of the Chagos Archipelago had "never been abused by them."[46] And as I have said, there is no evidence of environmental harm.

15. Let's turn now to the UK's side of the scale, and see whether the environmental objectives it has cited could provide a "good reason" for "overriding" Mauritian fishing rights. In this regard, it is sufficient to note that Mauritian fishing did not present any plausible danger to the fish stocks in the waters of the Chagos Archipelago. To the contrary, the evidence shows the

[45] MM Annex 41, Letter dated 8 February 1966 from K.W.S. MacKenzie, Colonial Office to A. Brooke-Turner, UK Foreign Office, FO 371/190790.

[46] MR Annex 101, "British Indian Ocean Territory" Proclamation No. 1 of 1991.

fish stocks were stable and *not* at risk. The fish stocks certainly were not endangered by Mauritian fishing. Professor Boyle referred to the United Kingdom's press release announcing the public consultation. This press release said that the "fish stocks" of the "waters of the Chagos Archipelago" are "amongst the least damaged in the world."[47] Although Mauritian vessels fished in the EEZ for decades, the amount of fish they caught was relatively small, especially when compared to the much greater tonnage caught by non-Mauritian vessels licensed by the United Kingdom. This is a point upon which the Parties agree, as indicated by the chart the Attorney General showed. Thus, even on the United Kingdom's own case, Mauritian vessels would *not* threaten any plausible environmental objectives.

16. This is confirmed by the fact the United Kingdom *allows* recreational fishing to continue throughout the EEZ, and exempts from the "MPA" the territorial sea of Diego Garcia, where fishing is permitted. According to UK reports to the IOTC, fishing in the territorial sea of Diego Garcia alone involved the landing of 28.4 tonnes of tuna and tuna-like species in 2010;[48] 21.29 tonnes in 2011;[49] and 10.79 tonnes in 2012.[50] These statistics do *not* reflect the full tonnage of fish taken, just the species reported to the IOTC. Nor do they include the tonnage caught by recreational fishing throughout the EEZ. If fishing on this scale is acceptable to the United Kingdom – where an undertaking to respect the rights of another State is *not* implicated – how can the United Kingdom possibly claim by reference to environmental objectives that it had "good reasons" for "overriding" the fishing rights of Mauritius?

17. On these facts, we would submit, the United Kingdom has plainly breached the obligation to have due regard for the rights of Mauritius *even if* the standard posited by the United Kingdom were applied, rather than the proper standard set out by the ordinary meaning of those words.

[47] UK Folder Tab 57.
[48] UK IOTC-2011-SC14-NR28.
[49] IOTC-2012-SC15-R[E].
[50] UK IOTC-2013-SC16-NR29.

18. Before leaving the 1965 undertaking, I will say a few words about the breach of Article 78 in regard to the United Kingdom's prohibition on Mauritius from harvesting sedentary species. I can be brief because the United Kingdom had almost nothing to say about this. Its only defence was to argue that in 1965 there was no harvesting of sedentary species and that licences for doing so were not issued.[51] Even if true, neither of these assertions are relevant, for the reasons Mr. Reichler explained in connection with the scope and nature of the undertaking. It was *not* intended to be limited to the fishing practices in 1965, and it was *not* implemented that way. As I showed in the first round, the United Kingdom took for granted that the undertaking applied to sedentary species, including specifically mollusks and crayfish, and accepted that it safeguarded the rights of Mauritius to harvest such species in the future. The fact that sedentary species had not previously been exploited was irrelevant: what is crucial is that the right to exploit such species was available if Mauritius wished. Now that right has been extinguished.

19. I turn now to the United Kingdom's breach of its obligation to consult with Mauritius, which applies to the territorial sea and EEZ by virtue of Articles 2(3) and 56(2). With regard to the territorial sea, I have already shown that 2(3) imposes on coastal States the obligation to comply with the rules of general international law. The obligation to consult when a State's rights can be affected is such a rule. The precedents all support Mauritius. This is a constant that runs from *Lac Lanoux*, where the riparians shared the right to make equitable use, to *Pulp Mills*, where there was a shared watercourse, to the *Fisheries Jurisdiction* cases, where competing fishing rights were at issue. Professor Boyle sought to narrow this principle by suggesting it applies only where there is a possibility of transboundary harm. This is not correct. The consultation required in these cases were specific applications of the more general requirement to consult when the rights of another State may be affected. As the

[51] Boyle, Day 7, p. 897, lines 10-11.

Tribunal in *Lac Lanoux* held: "communications [...] cannot be confined to purely formal requirements, such as taking note of complaints, protests or representations made by the downstream State. The Tribunal is of the opinion that, according to the rules of good faith, the upstream State is under the obligation to take into consideration the various interests involved, to seek to give them every satisfaction compatible with the pursuit of its own interests, and to show that in this regard it is genuinely concerned to reconcile the interests of the other riparian State with its own."[52]

20. Of course, transboundary harm was also not an issue in the *Fisheries Jurisdiction cases*, which involved the duty to consult in relation to competing rights over access to fish stocks. There, the ICJ made clear that the obligation to consult in such circumstances is derived from the UN Charter, including important principles relating to the peaceful settlement of disputes. The obligation is plainly *not* limited to circumstances where there is a risk of transboundary harm.

21. The United Kingdom has also sought to minimize the content of the obligation, suggesting it requires only "prior and timely notification and relevant information," and that consultations need only occur at "an early stage" and be conducted "in good faith." The evidence shows the UK did *not* provide timely information, as Ms. Macdonald outlined yesterday morning, and has *not* acted in good faith. But, in any event, the United Kingdom's approach falls short of what the ICJ required in the *Fisheries Jurisdiction* cases, where it ruled that the parties' exchanges should seek the delimitation of their respective rights and interests and the achievement of an equitable balance concerning such matters as catch limitations, share allocations, and restrictions on closed areas.

22. Regardless, under any relevant standard, the United Kingdom failed to consult with Mauritius. Ms. Macdonald has addressed you in detail on the unilateral manner in which the United Kingdom proceeded, so I can be brief. As she explained, the United Kingdom kept the

[52] *Lac Lanoux Arbitration* (Spain v. France), (1957) XII UNRIAA 281, 315 at para. 22; 24 ILR 101, 139 at para. 22.

proposal from Mauritius until the Foreign Secretary had formally decided to pursue the project. It did not consider that Mauritius counted as an 'interested stakeholder' deserving of early involvement. It did not mention the issue at the January 2009 talks, although it raised the idea surreptitiously. Professor Boyle advanced the surprising argument that in the *July 2009* talks that those talks were, themselves, sufficient to fulfill any obligation to consult. And following that, the United Kingdom pursued the public consultation, a development which, as you have heard, made it impossible for Mauritius to continue with bilateral dialogue on the subject.

23. For the same reasons, the United Kingdom breached its coordination and cooperation obligations under Articles 63 and 64 of UNCLOS and Article 7 of the 1995 Fish Stocks Agreement. The United Kingdom's principal defense is to contend that they aren't applicable to Mauritius because of the location of Mauritian fishing activities. This is wrong as a matter of fact, and the Tribunal need only refer to Professor Boyle's map to see why. Mauritian vessels clearly *do* fish in areas adjacent to the EEZ of the Chagos Archipelago. Professor Boyle made no attempt to explain why the areas fished by Mauritian vessels are too far away to count. Nor did he respond to the point I made in the first round that the relevant species can quickly traverse the distance between the EEZ of the Chagos Archipelago and areas fished by Mauritian vessels. And, in regard to Article 64, the 2013 report relied upon by Professor Boyle notes that 47 percent of the chilled fish landed in Mauritius by its fishing vessels were swordfish, a highly migratory species listed in Annex I.

24. The United Kingdom is not saved by citing its participation in the activities of the IOTC. This says nothing about whether it has complied with the obligations set out in 63 and 64 and Article 7 in specific regard to the "MPA". Those articles do not require general participation in regional organizations. They impose specific coordination and cooperation obligations when a State contemplates measures that may impact the relevant stocks. The "MPA" is

clearly such a measure. The UK's notification to the IOTC stated that the "MPA" could impact the Commission's work. So the UK is left with the argument that it discharged this obligation by notifying the IOTC of its planned consultation exercise. I explained in the first round why these are not articles on notification, but rather impose much more demanding obligations. In its oral pleadings, the UK did not explain why mere notification of the IOTC would discharge its obligations, other than to stand these obligations on their head by suggesting that the onus was on the *IOTC* to engage with the UK. The UK's view is plainly inconsistent with the ruling of the WTO Appellate Body that, in cases involving measures undertaken for environmental purposes, but which may impact other States' rights under a treaty regime, there must be "ongoing serious, good faith efforts to reach a multilateral agreement."[53]

25. This brings me to the United Kingdom's breach of the undertaking its Prime Minister gave to the Prime Minister of Mauritius in November 2009. For the reasons I have already explained, this undertaking is applicable to the rights of Mauritius in all areas, both in the territorial sea and the EEZ, rights that are protected by Articles 2(3) and 56(2). The question for the Tribunal is essentially one of fact. Did Prime Minister Brown give a commitment to put the "MPA" on hold? We say the evidence is clear and unchallenged. On the one side, you have an unambiguous statement by the Prime Minister of Mauritius, a signed statement the contents of which are confirmed by a raft of contemporaneous materials. On the other side, you have nothing that can properly be called evidence. The record before you points only in one direction, that Mr. Brown gave the undertaking, and that it was violated. The United Kingdom is responsible for this breach.

26. The Tribunal can determine the answer to this dispute of fact by performing its ordinary fact-finding function; that is, by weighing the evidence presented by each side, and

[53] United States - Import prohibition of certain shrimp and shrimp products (Report of the Appellate Body, 22 October 2001), WT/DS58/AB/RW, paras. 152-3.

determining whether Mauritius has sustained its burden of proof. The fact that Heads of Government are involved does not alter the basic task, but as Judge Greenwood noted, the fact that the undertaking was between two Heads of Government makes it all the more significant in its consequence.

27. With this in mind, let's review the evidence before the Tribunal. On the one hand, Mauritius has provided clear evidence as to the commitment given by Mr. Brown. The evidence in support has been presented in various forms, all consistent. Prime Minister Ramgoolam has been crystal clear about what Prime Minister Brown promised him during their meeting. He said it before the Mauritian Legislative Assembly. And he said it in the Witness Statement he submitted to this Tribunal for your consideration, made knowing that it would subject him to cross-examination by the United Kingdom. Prime Minister Ramgoolam has been consistent each time: Prime Minister Brown promised the "MPA" would be put on hold.

28. In contrast, the United Kingdom has tendered *no* evidence to contradict this declaration. The UK did not provide any written statement in response to when the matter was raised at the Foreign Ministerial level in Mauritius' letter of 30 December 2009. As the Tribunal has noted, there was no British response to the very serious allegation made in that letter that the United Kingdom had breached a commitment given by one Head of Government to another. The draft letter, apparently prepared by Mr. Murton and which was never sent that was attached to one of the emails put in by the UK last weekend makes no mention of the commitment and did not refer to any misunderstanding in relation to it. The United Kingdom elected not to cross examine Prime Minister Ramgoolam, and Mauritius does not understand the statement by the United Kingdom's Agent that it would have been "fanciful" to try to do so.[54]

[54] Whomersley, Day 5, p. 502, line 18.

29. The record, we would submit, is clear: Prime Minster Brown gave a commitment to Prime Minister Ramgoolam that the "MPA" would be put on hold. That commitment was not fulfilled. The United Kingdom has tendered no evidence upon which it could be concluded otherwise. It has belatedly supplied some fragmentary emails that we will address on Thursday, which we say do not advance its case on this point, and only throw into sharper relief the absence of any statement from Mr. Brown.

30. I turn now to Article 194. First, the UK has breached the obligation under 194(1), which requires it to endeavour to harmonise its policies to prevent, control and reduce pollution of the marine environment with Mauritius and with other States. At a minimum, this requires the UK to make pollution-related policies for the Chagos Archipelago "consistent or compatible" with those of regional States. Of necessity, this requires the UK to consult with Mauritius. There was no such effort. The UK proceeded unilaterally and without proper notice. Professor Boyle's rhetorical demand for evidence of *Mauritius'* efforts to cooperate is counter-intuitive. It was not Mauritius that purported to change the legal regime applicable the entirety of the Chagos Archipelago's EEZ.

31. Further, the UK is in breach of Article 194(4), which requires it, in taking measures to prevent, reduce or control pollution, to refrain from unjustifiably interfering with the activities carried out by Mauritius in exercise of its rights. The "MPA", on its face, is intended to provide comprehensive environmental protection for the waters of the Chagos Archipelago, including its marine environment. This would, by necessity, include marine pollution measures. The United Kingdom does not suggest otherwise. Article 194(4) is therefore applicable. And accordingly, any measures to "prevent, reduce or control" marine pollution must not unjustifiably interfere with Mauritius' rights in the Chagos Archipelago. Mauritius is entitled, at the least, to declaratory relief that the UK – which keeps insisting new regulations are pending – that it may not use pollution control measures to interfere with those rights. The

fact that, as Professor Boyle suggests, pollution has been the subject of prior regulatory measures, is immaterial. Leaving aside the lack of notice to Mauritius about such acts, they say nothing about regulations that are currently being drafted.

32. Mr. President, Members of the Tribunal, I turn now to address your jurisdiction over the United Kingdom's breaches of the articles I just mentioned.

33. Both Parties are in agreement about one thing: Part XV is the product of prolonged negotiations, and its final form reflects hard-won compromises. Professor Boyle referred to the "inter-related package deal on which the Convention text rests." We agree. The question for the Tribunal is: what is the content of the package? Is it, as Mauritius submits, to be found in the text of Part XV, including most relevantly, Article 297, a complicated provision that grants jurisdiction over some issues and, in discrete circumstances, limits them as well. Or is it, as the United Kingdom maintains, a blanket exclusion of any disputes that touch upon fishing in the exclusive economic zone?

34. The UK's approach is encapsulated by Professor Boyle's telling response to a question from Judge Wolfrum when he said that "297(3) takes EEZ fishery disputes out of compulsory jurisdiction – full stop."[55] This perfectly describes both the UK position, and why it is wrong. This is *not* what the text says. The drafters could have written, to use Professor Boyle's formulation, that there is no jurisdiction over EEZ fisheries disputes, full stop. But this is *not* what they wrote. The Convention says there *is* jurisdiction over claims for alleged contravention of international rules relating to the protection and preservation of the marine environment. It says there *is* jurisdiction over EEZ fisheries disputes, unless the 297(3) exception applies. That exception applies to some disputes, but not all of them. To maintain that *all* disputes touching upon fishing in the EEZ are excluded, full stop, is to denigrate the

[55] Boyle, Day 7, p. 816, lines 7-8.

carefully crafted compromise achieved by the drafters of the Convention and embodied in Article 297.

35. It is beyond argument that 297 does not exclude all such disputes. Professor Boyle conceded in his answer to Judge Wolfrum that there are, to use Professor Boyle's word, "*gaps*" in what he thinks should be the total exclusion from jurisdiction of disputes touching upon fisheries in the EEZ. But, inverting the famous London tube announcement, Professor Boyle seemed to say, "*don't* mind the gaps."

36. Mr. President, Members of the Tribunal, I have had the great privilege of working with Professor Boyle on several cases, and the even greater privilege of learning from him while doing so. But I am forced, with the greatest of respect, to disagree. We submit that you *must* mind the gaps. What Professor Boyle calls the gaps are not the product of sloppy drafting, a mismatch between text and intention. They reflect deliberate decisions by the Convention's drafters to bestow upon Part XV courts and tribunals jurisdiction over important matters concerning the interpretation or application of UNCLOS. To disregard these gaps, to close them, to read them out of the Convention, in furtherance of the mistaken view that all disputes touching upon fishing in the EEZ are necessarily excluded from jurisdiction, would be a disservice to the drafting achievement that is Part XV and Article 297 in particular.

Mr. President, this might be an opportune time for a break, if that suits you and the Tribunal.

PRESIDENT SHEARER: Yes, I think that is very well. We will break for 15 minutes at this time.

Thank you.

(Brief recess.)

PRESIDENT SHEARER: Mr. Loewenstein, just before you begin, I want to say something about the arrangements for the photograph. If at the end of this morning's session, if

you would all remain in this room in your places, the photographer wants to take some sort of action shots that will be posed or fake, but look as though we are in session.

And then after he's done that, we'll move to the lobby of the hotel, and we'll take a group photograph around the steps in the lobby, so, anyway, we will be guided by the photographer. He'll give the signal what he wants us to do and what we do afterwards.

Thank you very much, Mr. Loewenstein.

37. Mr. President, Members of the Tribunal, I will now turn to Mauritius' primary submission, that the Tribunal has jurisdiction over all of its claims relating to breaches of the Convention because they alleged contraventions of specified international rules or standards for the protection and preservation of the marine environment, and thus fall within the grant of jurisdiction provided in Article 297(1)(c). The United Kingdom has taken a curious approach in responding to this claim. It seems to accept that if 297(1)(c) is applied as drafted, it would give jurisdiction over Mauritius' claims, assuming that Mauritius has alleged contravention of such rules, a matter to which I will return later. So the United Kingdom is forced to look *outside* the text of 297(1)(c) to find a limitation. It finds this alleged limitation in 297(1)(a) and (1)(b), which, as Professor Boyle points out, grant jurisdiction over disputes concerning navigational rights, overflight and the laying of submarine cables and pipelines. This is accurate, as far as it goes, but Professor Boyle fell into error when he said that the references in (1)(a) and (1)(b) to navigational rights, overflight and the laying of submarine cables and pipelines, also limit a court or tribunal's jurisdiction under a different paragraph: *297(1)(c).*

38. This cannot be right. The limitation appears *only* in (1)(a) and (1)(b). It does *not* appear in (1)(c). What accounts for these different texts? Is it, as Professor Boyle appears to suggest, poor draftsmanship, an unexpressed intention to apply the limitations of (1)(a) and (1)(b) to (1)(c) without actually saying so in the text of (1)(c)? Or is it that (1)(c) means exactly what it says: that a Part XV court or tribunal has jurisdiction over *all* disputes concerning the alleged

contravention of specified international rules for the protection and preservation of the marine environment? The answer, we submit, is obvious: there is no implied, extra-textual limitation in (1)(c) restricting its application to disputes over navigational rights, overflight, or the laying of submarine cables and pipelines.

39. Professor Boyle attempts to re-write the text of 297(1)(c) in another way as well. He says it is exclusively concerned with rules and standards regulating *marine pollution*. But that is *not* what is said in the text. A broader category is mentioned: the "protection and preservation of the marine environment." The two are not synonymous. To be sure, marine pollution may fall within the general category of environmental protection and preservation, but there is no textual basis on which to conclude that 297(1)(c) is confined solely and exclusively to marine pollution. The text says otherwise.

40. Nor is there any textual basis on which to conclude that 297(1)(c) concerns only MARPOL and SOLAS rules. That is not the view of Judge Mensah, about whom Professor Boyle had little to say. [pp. 797-798] I won't belabor the point by taking you back to Judge Mensah's article. Suffice to say he addresses these very issues, including specifically 297(1)(c) and the meaning of specified international rules and standards for that purpose. He does not share the view that only MARPOL and SOLAS rules are covered. And Judge Mensah should know: before his elevation to ITLOS he was the Director of Legal Affairs for the IMO.

41. Professor Boyle also misunderstands Mauritius' position when he attributes to Mauritius the view that the articles the UK are alleged to have breached are specified international rules or standards for purposes of 297(1)(c) "simply because they are part of the Convention." [p. 798]. This is *not* Mauritius' position. These articles are specified rules within the meaning of 297(1)(c) because they establish binding obligations relating to the protection and preservation of the marine environment. This is the view of Judge Mensah, who specifically includes Article 56 among them.

42. The views of Professor Oxman offer the UK no assistance. To begin with, the article cited by Professor Boyle does *not* address how international rules or standards should be understood within the meaning of Article 297(1)(c). The section quoted by Professor Boyle is not concerned with UNCLOS. Nor does Professor Oxman address the definition of a *rule*. He was concerned with "standards." Professor Boyle quotes Professor Oxman as suggesting that "the duty to respect international standards ... is 'typically expressed in connection with a duty (or right) to adopt national laws or regulations governing a particular matter."[56] Now, putting to one side the fact that Professor Oxman was addressing standards, not rules, Professor Boyle elides over the qualification in what Professor Oxman wrote. He said "typically." This means there are *other* circumstances where standards are not connected to the enactment of national laws. The rules set out in the Convention are good examples. They establish binding legal obligations in relation to the protection and preservation of the marine environment that do not concern the adoption of national laws.

43. The Tribunal now has had the benefit of the parties' written and oral pleadings on whether the articles of UNCLOS alleged to have been contravened by the UK are specified rules within the meaning of 297(1)(c). I do not propose to go over this well-worn ground again. I will simply say that each of the articles alleged to have been contravened by the UK – Article 194 stands out in particular – establish a binding obligation and each relates to the protection or preservation of the marine environment. Nothing more is required.

44. I turn now to the question of whether, even if the UK were correct that Mauritius' claims do not fall within the 297(1)(c) grant of jurisdiction, you may still exercise jurisdiction because 297(3) also grants jurisdiction over fisheries disputes and the disputes Mauritius has raised do not fall within that paragraph's exclusion.

[56] Boyle, Day 7, p. 800, lines 13-15.

45. As with 297(1)(c), it is important to pay close attention to the text of 297(3) to determine precisely what is excluded from jurisdiction. It is clearly *not* all disputes touching upon fishing in the EEZ. If that was the intention, the drafters would have said so. There would have been no need to provide for a general grant of jurisdiction and then a narrower exception.

46. Professor Boyle objected to the argument that 297(3) excludes only disputes concerning the sovereign rights of coastal States, and does not exclude disputes concerning the rights of *other* States. Let's test this view by reference to the text. We begin with what appears to be common ground: there is a correlation between Articles 56 and 297.[57]Disputes concerning some aspects of Article 56 are clearly subject to jurisdiction under 297, while others are not. Now let's examine Article 56. There is a distinction between two sets of rights: the rights of coastal States, on the one hand, and the rights of other states, on the other. To be specific: paragraph 1(a) of Article 56 provides that in the EEZ the coastal State has "sovereign rights for the purposes of," among other things, "conserving and managing" living resources. On the other hand, Article 56(2), in language with which the Tribunal is very familiar, addresses the obligations of coastal States in regard to the rights of *other* States.

47. With this distinction in mind, we can return to the text of 297(3). It excludes only disputes over the *sovereign rights* of a coastal state. It does *not* exclude disputes concerning the rights of *other* states. The United Kingdom's only response is to argue that "the two go together" and that "any assertion of sovereign rights over living resources in the EEZ will impact on the ability of foreign States to exploit those resources and vice versa."[58]

48. This is where the Tribunal's duty to characterize the dispute becomes paramount. Is this, as the United Kingdom suggests, a dispute over its putative sovereign rights as a coastal State, or is it a dispute over the rights of Mauritius under the 1965 undertaking? This is a matter for the Tribunal to decide. As the ICJ held in the *Fisheries Jurisdiction* case (Spain against Canada):

[57] Boyle, Day 7, p. 814, lines 18-19.
[58] Boyle, Day 7, p. 804, lines 15-16.

"The Court will itself determine the real issue that has been submitted to it.[59] It will base itself not only on the Application and final submissions, but on diplomatic exchanges, public statements and other pertinent evidence."[60]

49. The Arbitral Tribunal in *Barbados v. Trinidad*, a case Professor Boyle mentioned, performed this characterization exercise. And in doing so, it distinguished between the sovereign rights of coastal states and the rights of other States in the EEZ. In that arbitration, there was no preexisting agreement or undertaking committing the coastal State – Trinidad and Tobago – to respect the fishing rights of Barbados in the Trinidadian EEZ. Rather, Barbados sought a declaration that would have granted it access to fisheries in the Trinidadian EEZ as a *remedy* for the Tribunal's disadvantageous boundary delimitation. The Tribunal characterized Barbados' claim this way at paragraph 277 of the Award: "Barbados stated clearly that its submissions in respect of its claim to a right to fish within the EEZ of Trinidad and Tobago were made on the basis that such a right could be awarded by the Tribunal as a *remedy* infra petita in the dispute concerning the course of the maritime boundary."[61]

50. The Tribunal ruled that 297(3) did not allow it to exercise jurisdiction over a claim to *establish* a right of access to the fisheries where none already existed. It held, at paragraph 283, that it "does not have jurisdiction to make an award *establishing* a right of access for Barbadian fishermen to flyingfish within the EEZ of Trinidad and Tobago." But the Tribunal emphasized that this is *not* the same as a claim to enforce what it called a "pre-existent traditional fishing regime in the region which included a right of access."[62] Exercising jurisdiction over *that* type of claim, the Tribunal said, "is very different from saying that a Tribunal has an inherent power to *create* a right of access by way of a remedy in a boundary

[59] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, pp. 24-25.
[60] *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, pp. 262-263.
[61] Barbados v. Trinidad and Tobago, Award of 11 April 2006, XXVII RIAA, p. 147, para. 277.
[62] *Id.*, para. 277,

dispute."[63] To underscore the point, the Tribunal italicized the word "create." In other words, disputes relating to pre-existing fishing rights are not excluded by 297(3); disputes that seek to create or establish such rights are. And the Tribunal may find of interest the historical footnote that this distinguished Tribunal included Sir Arthur Watts, the author of the UK note which concluded that Mauritius has "fishing rights" in the waters of the Chagos Archipelago.[64]

51. Let us now turn to another reason why 297(3), the exclusion found therein, does not cover the claims Mauritius has raised. The drafters were careful to provide that the exclusion applies only to disputes concerning a coastal State's "sovereign rights" with respect to the living resources in the EEZ or their exercise. As Judge Wolfrum pointed out in his questions to Professor Boyle, this is a reference to specific provisions in Part V. So let us return to the text of Article 56. It establishes in the EEZ the distinction between a coastal State's sovereign rights, on the one hand, and its jurisdiction, on the other. These are addressed in *different* paragraphs. Subparagraph (1)(a) concerns a coastal State's "sovereign rights," including sovereign rights for the purpose of conserving and managing living resources. *Jurisdiction* in the EEZ, on the other hand, is addressed in subparagraph (1)(b), including specifically "jurisdiction" concerning "*the protection and preservation of the marine environment*," as set out in subparagraph (1)(b)(iii).

52. Article 297(3)'s exclusion mentions only sovereign rights. It does not mention *jurisdiction.* This must have been deliberate. When the drafters of 297 intended a jurisdictional clause to cover both "jurisdiction" *and* "sovereign rights," they did so expressly. This was done in paragraph (1)(a). It makes Part XV procedures available for disputes concerning the interpretation or application of the Convention "with regard to the exercise of a coastal state of

[63] *Id.*, para. 277.

[64] MR Annex 83, Minute dated 13 October 1981 from A.D. Watts to [name redacted], "Extension of the Territorial Sea: BIOT".

its sovereign rights *or jurisdiction.*" We thus see in (1)(a) the choice to include both sovereign rights and jurisdiction. This contrasts with 297(3). There, the drafters referred *only* to "sovereign rights." "Jurisdiction" is not mentioned. This, we submit, is a clear indication that the drafters intended only disputes over "sovereign rights" under Article 56(1)(a) to be covered by the exclusion. Disputes relating to "jurisdiction" under 56(b)(iii) were not. The latter category of disputes thus falls within the general grant of jurisdiction over fisheries disputes, not the exclusion. This is important for the present case because the "MPA" is alleged to be an exercise of the UK's purported *jurisdiction* in the EEZ in relation to the protection and preservation of the marine environment. As such, even if characterized as a fisheries dispute, it does *not* fall within the 297(3) exception.

53. This brings me to why nothing the UK has argued undermines the conclusion that its declaration of the "MPA" was done pursuant to its alleged *jurisdiction* over environmental protection and preservation, not as an alleged exercise of sovereign rights in relation to the conservation or management of living resources. As has been emphasized, the United Kingdom has consistently described the "MPA" as an environmental protection and preservation measure, not as a fisheries conservation or management measure, including most relevantly, in the 2010 proclamation establishing the "MPA". Professor Sands made this very clear in the first round, and Professor Boyle was not able to rebut the conclusions that flow from what he said. This is reflected as well in a great many documents we have reviewed in these oral proceedings. These documents contrast with other documents that do, in fact, address conservation and management. An example can be seen at Tab 7.1**.** And you will see at 7.1 the first page of BIOT Ordinance No. 1 of 1991, which extended the fisheries regime to the 200 mile limit of the EEZ. The document describes itself as "An Ordinance to make fresh provision for the *regulation, conservation and management of the fishing waters* of the British Indian Ocean Territory and matters incidental thereto." This contrasts with the

"MPA"'s proclamation, which referred expressly to the protection and preservation of the environment. The contrast could not be plainer.

54. Nor, it is clear, did the United Kingdom in adopting the "MPA" undertake the sorts of actions that are required of States exercising sovereign rights in relation to living resources in the EEZ, pursuant to Articles 61 and 62. It did not, for instance, take into account the "best scientific evidence available to it" in determining the "allowable catch." It did not design measures to achieve the "maximum sustainable yield." It did not promote the "optimum utilization" of the EEZ's living resources. And it certainly did not take into account the "need to minimize the economic dislocation in States whose nationals have habitually fished" in the EEZ of the Chagos Archipelago. The reason why the United Kingdom did not do any of these things is plain: it was not acting to conserve or manage living resources. It was, instead, purporting to exercise jurisdiction over the protection and preservation of the marine environment.

55. Turning now to Articles 63 and 64 of UNCLOS and Article 7 of the Fish Stocks Agreement, the United Kingdom persists in suggesting that Articles 281 and 282 preclude this Tribunal from exercising jurisdiction. The United Kingdom made no effort to engage with the arguments made by Mauritius in the first round, including that the dispute before you is plainly *not* a dispute over the interpretation or application of the IOTC Agreement, and that the dispute resolution provision in that Agreement cannot deprive you of jurisdiction because it does not mandate referral to any other dispute resolution procedure for a binding decision. Professor Boyle mentioned conciliation,[65] but that could not result in a binding decision.

56. The United Kingdom also argues that you should follow the *Southern Bluefin Tuna* case. I will be brief. As the Tribunal is aware, when ITLOS considered the 281 argument in the provisional measures phase of that case, albeit on a *prima facie* basis, it was resoundingly rejected. No court or tribunal has ever followed the later Annex VII award. It has, to put it

[65] Boyle, Day 7, p. 819, line 9.

mildly, been the subject of critique. A good example is UK Authority 54, which is an article by Professor Churchill that the UK submitted with its Counter-Memorial. Professor Churchill writes:

57. This is a strained and artificial reading of Article 16(2), and one that appears contrary to Article 281. The latter requires States to opt out of the normal rule that disputes relating to the Law of the Sea Convention are to be settled in accordance with the procedures of that Convention: as an exception to a general rule it should be strictly construed, which therefore suggests that an agreement must state clearly and explicitly that the Law of the Sea Convention procedures are excluded.

58. Professor Boyle is among those who say that the *Southern Bluefin Tuna* case was wrongly decided, a position he elaborated upon in an article on that case. I will not further detain the Tribunal with this issue, and have placed a copy of Professor Boyle's article into the folder at Tab 7.2, in case the Tribunal wishes to review his views at its leisure.

59. I turn now to jurisdiction over the UK's remaining breaches of UNCLOS. I can be even briefer here. The United Kingdom accepts that Article 288 grants a Part XV court or tribunal jurisdiction over all disputes concerning the interpretation or application of the Convention, subject only to the limitations found in section 3. In connection with Article 2(3), the UK accepts that nothing in 297 prevents this Tribunal from exercising jurisdiction over a territorial sea dispute. This has to be the case, because 297 is concerned exclusively with the EEZ. 297 says nothing about the territorial sea. So the United Kingdom is forced to invent a new jurisdictional limit that is *not* found in the Convention.

60. Where does the UK locate this new limitation? Not in section 3, which is the section that sets out the limitations on jurisdiction, but in Article 288(2). This cannot be right. Article 288(2) is a provision that *extends* a Part XV court or tribunal's jurisdiction beyond the interpretation or application of UNCLOS to *other* agreements when the parties to those agreements so agree.

It is difficult to see how this extension of jurisdiction to other agreements limits a Part XV court or tribunal's jurisdiction to interpret or apply UNCLOS.

61. Finally, your jurisdiction over Article 194 is also plainly established. The United Kingdom does not argue it is excluded by 297. Its only argument is that the UK has not yet enacted new laws or regulations on marine pollution. The UK seems to be saying there will be jurisdiction, but *not yet*. I explained in the first round why you need not wait until the UK enacts its long-promised laws before exercising jurisdiction. It is worth making another point as well. Article 194(1) obligates States to "endeavour to harmonize their policies" in connection with marine pollution. This is an obligation that, self-evidently, attaches *prior* to the enactment of such rules since it is concerned with the development of regulatory policies. The UK avers that the "BIOT" administration is drafting these laws, so the dispute is ripe.

62. Mr. President, Members of the Tribunal, this concludes my presentation. I thank you very much for your kind attention, and invite you to call to the podium Professor Crawford, who will address Article 300.

PRESIDENT SHEARER: Thank you very much, Mr. Loewenstein, and I give the floor to Professor Crawford.

Thank you.

Mauritius v United Kingdom

Reply of Mauritius

8. Abuse of Rights

Professor James Crawford AC SC

Introduction

Thank you, Mr. President.

1. In this presentation I will respond briefly to Professor Boyle's after-hours presentation on Friday on Article 300. I will only make five points.

2. First, Professor Boyle says we are in agreement that 'abuse of rights is not an independent basis of claim'.[66] That is not our position exactly. Article 300 establishes an independent obligation under the Convention and, to that extent, it is an independent basis of the claim. What the Convention requires, as construed by the tribunal in the *Virginia* case, is that the abuse be linked with the exercise of one of the substantive rights provided in the Convention. The same way that the rule about equality in the European Convention has to be linked to one of those substantive rights, it is still an independent obligation.
3. Second, Professor Boyle does not dispute our interpretation of Article 300 to the effect that there is abuse when a right is intentionally exercised for a purpose different from the one it was meant to fulfil, or where the measure implementing the right is unreasonable in relation to its stated objectives.[67] Relying on Alexandre Kiss' entry in the *Max-Planck Encyclopedia*, what he proposes is a third element – 'clear and convincing proof of injury' – He criticises me for not mentioning this requirement.[68] The reason I did not do so is simple. We do not agree with that reading of Professor Kiss' article, and if it's right, we don't agree with Professor Kiss. The point appears to be that abuse of rights depends on actual proven material injury and there is nothing in Professor Kiss' approach to support that view, nor is there anything in the relevant scholarship or in the text of Article 300 or in the practice. The Appellate Body of the WTO cited the other day does not recognise that proposition.
4. What we do accept is that abuse of rights presupposes an element of detriment, which may comprise material injury, legal injury or a combination of both. The notion that a State can act in bad faith or abuse its rights just so long as material injury is not proved is an unattractive one. It is reminiscent of the line of French doctrine – rejected by the ILC – to the effect that there is never a delict without material injury, a doctrine that would play havoc

[66] Transcript, Day 7, p. 900, lines 1-2.
[67] Transcript, Day 7, p. 901, lines 4-8.
[68] Ibid, p. 900, lines 7-14.

with environmental claims. The rationale of the prohibition in the 1982 Convention is to ensure that the broad sovereign and jurisdictional rights under the Convention are not exercised in a way that unjustifiably impairs the collective enjoyment of the world's oceans. Professor Boyle's extremely restrictive view of injury has no place in that system.

5. Third, Professor Boyle denies the accuracy of the evidence we presented on Mr. Roberts' remarks about the 'No Man Friday policy'. He noted, and I noted in the first round, Mr. Roberts' denial under cross-examination of the use of that phrase.[69] But even if his American interlocutor used it, it must have come from somewhere. Indeed it did come from somewhere, as I will shortly show you.

6. Moreover, Professor Boyle could not rebut the deeper implications of the *Wikileaks* document – the strong suggestion of an ulterior motive. In the cable – this is at Page 149 of the folder, Tab 8.1 – Mr. Roberts is recorded as saying, and I will take the Man Friday reference out: 'according to HMG's current thinking on a reserve, there would be "no human footprints" … on the BIOT's uninhabited islands'.[70] 'In effect', he adds, 'establishing a marine park would... put paid to resettlement claims of the former residents'. Even without the Robinson Crusoe touch, that is a remarkable statement to fabricate.

There is indeed a regrettable element of continuity in the policy of the Government. A Foreign Office telegraph from 1966 reveals how the United Kingdom then described the inhabitants of the Archipelago.[71] This note is at Tab 8.2 of your Folder. It was quoted in full in the *Bancoult Number 2* Case, which is where we got it from. There is a copy of that document online and the

[69] Transcript, Day 7, p. 901, lines 19-20.

[70] 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.

[71] The note dated 24 August 1966 is quoted in full in *R v. Secretary of State for Foreign and Commonwealth Affairs ex parte Bancoult* [2006] EWHC 1038 (Admin) para. 27, available at: http://www.bailii.org/ew/cases/EWHC/Admin/2006/1038.html. A scanned copy of the original document is also available online: http://upload.wikimedia.org/wikipedia/commons/6/6d/Diplomatic_Cable_signed_by_D.A._Greenhill%2C_dated_August_24%2C_1966.jpg.

link is in a footnote. The Permanent Under-Secretary of the Foreign Office is said to have said in relation to the eviction of the Chagossians, and I quote:

'[w]e must surely be very tough about this. The object of the exercise was to get some rocks which will remain ours; there will be no indigenous population except seagulls who have not got a Committee (the Status of Women Committee does not cover the rights of Birds).'The link between Birds and females is one which my generation was familiar with, but I'm not sure that's true of everyone.

A handwritten annotation adds: "[u]nfortunately along with the Birds go some few Tarzans or Men Fridays." I interpolate that I didn't know about the existence of lianas on the Chagos Archipelago. Perhaps Tarzan would have felt out of his league… 'whose origins are obscure, and who are hopefully wished on to Mauritius…" Those 'few Tarzans or Men Fridays' amounted to more than 1000 souls 'wished on to Mauritius'.

7. Fourth, although Professor Boyle was rhetorically dismissive of the Article 300 claim, he failed to engage with most of our points demonstrating that the design and implementation of the "MPA" is unreasonable in relation to its stated objectives. He ignored our criticism of the lack of legislation, of the completely inadequate enforcement mechanisms, of doubts regarding financing, and the exclusion of Diego Garcia – the combination of fact that has lead me to describe this as a Clayton's MPA. Instead of engaging with those arguments, he referred us back to Ms. Nevill's presentation and to the written answers given to Judge Wolfrum.[72]

8. So, let's take a closer look at those. As to the lack of implementing legislation, the claim is that the no fish zone is being implemented via the no-concession of fishing licenses. In this respect, as in others, the "MPA" compares unfavourably with other similar protection areas. And we haven't got any explanation of how the "MPA" is to be implemented and its

[72] Transcript, Day 7, p. 903, lines 15-16.

environmental purposes fulfilled, other than by the non-issue of fishing permits. No regulations, no budget or next to no budget, no evidence as to enforcement.

9. As to the necessary regulations, Professor Boyle sounds just like the prototypical parade drill sergeant – 'wait for it, wait for it'. We've been waiting quite a while.

10. Concerning financing, Ms. Nevill has only told us that the "MPA" will be funded until 2015 by a private-public partnership with the Bertarelli Foundation. Professor Greenwood asked a supplementary question, which was answered in part yesterday. But, again, you were largely left waiting. We will reply in full to that answer on Thursday. All I would say is that the Bertarelli contract has not been made available to the Tribunal.

11. What Mr. Whomersley provided yesterday was a figure for the "MPA"'s budget for the first time, £1.2 million which 'includes the funding for the patrol vessel, fuel, and a Fisheries Protection Officer'.[73] Again, it's no wonder that the UK waited so long. The Northwestern Hawaiian Islands Marine National Monument, which covers less than half the area of the "MPA", has a budget of over $358 million for the 15 years in question. The US is spending $66 per square kilometre per year on that MPA, the UK is spending $2 per square kilometre per year. This is environmental protection on the cheap and in particular when it takes into account that more than half of that funding comes from the Bertarelli Foundation. It is privatized public policy.

12. As to the exclusion of Diego Garcia, we have heard hardly a word. We have already commented on that through Mr. Reichler. The UK still fails to explain the inherent contradiction in having a robust no take-zone combined with the exclusion of the only place where there is evidence that pollution is occurring.

13. Fifth, a quick word on science, the only point which Professor Boyle touched upon when he replied to our Article 300 claim. I'm not going to repeat what other counsel have said. I

[73] Transcript, Day 8, p. 987, line 25, and p. 988, line 1.

will simply take the point on precaution. Of course, a precautionary approach is fully consistent with the Convention. But the UK's reliance on precaution to justify its use of science is put into question by the not-so-precautionary approach that has been taken in relation to design and implementation of the "MPA". We cannot infer any commitment to conduct the scientific studies that would be expected to go ahead with a conservation project of this size. Very little concrete evidence has been provided. Mostly the evidence which Professor Boyle snuck in the side door on the last instant is scientific report in disguise. Precaution should not be turned into a cover for abuse.

14. For all these reasons, it remains highly doubtful that the design and implementation of the "MPA" are reasonable in regard to its much vaunted purposes. After rushing through to proclaim it just before closing time prior to the General Election, in breach of what we say is a commitment given by one Prime Minister to another, without consulting Mauritius, without even consulting its own Parliament, the UK appears to be in no hurry to implement it (or to provide this Tribunal with much by ways of detail about it). Towards the end of his presentation, Professor Boyle said, to dramatic effect: '[d]estroy this [MPA] and you destroy all of them'.[74] That is simply not true. This MPA is not comparable to others, which are well regulated, well financed and which meet demonstrable environmental needs. Destroy this MPA, speaking of it as an experiment in isolation, and you will put it out of its misery. That would be a good thing for conservation, quite apart from the claims of Mauritius.

Mr. President, Members of the Tribunal, unless there are any questions, that ends my presentation on Article 300.

I now ask you to call upon the Agent.

PRESIDENT SHEARER: Yes, indeed. Thank you very much.

Mr. Dabee.

[74] Transcript, Day 7, p. 906, line 2.

ARBITRATION UNDER ANNEX VII TO 1982 UNCLOS

Republic of Mauritius

v.

United Kingdom

SPEECH 9: CLOSING REMARKS AND SUBMISSIONS

Mr. Dheerendra Kumar Dabee GOSK, SC

Solicitor-General and Agent of the Republic of Mauritius

Tuesday 6 May 2014

1. Thank you, Mr. President. Mr. President, distinguished Members of the Tribunal, it is an honour and a privilege for me to appear before you, as Agent of the Republic of Mauritius, to conclude Mauritius' oral presentation.

2. Mauritius' claim arises out of the United Kingdom's decision on 1 April 2010 to unilaterally declare a "Marine Protected Area" around the Chagos Archipelago which forms an integral part of the territory of Mauritius. Our claim is that the United Kingdom, which is not the coastal State under the 1982 Convention on the Law of the Sea, cannot declare an "MPA" or any other maritime zones in the waters of the Chagos Archipelago. We also claim that the purported establishment of the "MPA" is in any event unlawful under the 1982 Convention.

3. For over 45 years, any attempt by Mauritius to assert its rights over the Chagos Archipelago has been met by stock responses from the United Kingdom. It says it has no doubt about its sovereignty, but has undertaken to return or cede the Territory to Mauritius when it is no longer needed for defence purposes.

4. As a result of these proceedings, and for the first time, the United Kingdom is having to provide a legal justification for the excision of the Chagos Archipelago and the establishment of the "MPA". This is, Mr. President, a historic event whose outcome is eagerly awaited by all Mauritians back home. And this includes Mauritians of Chagossian origin who were forcibly

removed by the United Kingdom from the Chagos Archipelago. The outcome is also being awaited by the international legal community generally, and by many scholars and observers.

5. After two rounds of written pleadings and two rounds of Mauritius' oral pleadings, we are still in the dark as to the United Kingdom's position on key issues that go to the heart of Mauritius' case. When counsel was asked by Judge Greenwood on Friday whether it is the United Kingdom's position that "none of the undertakings given at Lancaster House … is legally binding upon the United Kingdom today…",[75] the response – if one can call it that – was: "we would like to be seeing what Mauritius' position is in terms of which specific statements [Mauritius] is relying on."[76] We were equally surprised that counsel for the UK was unable to confirm that the Chagos Archipelago would not be ceded to a third State.

Mr. President, Members of the Tribunal,

6. Over the past three and a half years, and in the course of these hearings, you have been provided with very detailed submissions by Mauritius and by the United Kingdom. We are most grateful for the continuous patience, attention and interest that has been shown by the Tribunal.

7. Now bringing Mauritius' submissions to a close, I do so by reflecting on the eight points addressed by Professor Sands exactly two weeks ago in the introductory remarks of Mauritius.

8. *First* in defence against Mauritius' claim, the United Kingdom is inviting the Tribunal to apply the 1982 Convention in a way which would ratify a legacy of British colonialism – and perpetuate it. The United Kingdom was still the colonial master when it excised the Chagos Archipelago from the territory of Mauritius in 1965. Four and a half decades later, the conduct and attitude of the United Kingdom appear, in that regard, to have hardly changed.

9. This morning Professor Crawford took you to the infamous note of 1966 in which the United Kingdom Permanent Under-Secretary at the Foreign Office described the residents of the Chagos Archipelago as "Tarzans" and "Men Fridays". Mr. President, it was with a huge sense of

[75] Transcript, p. 855, line 25 and p. 856, lines 1-2 (Arbitrator Greenwood)
[76] Transcript, p. 856, lines 7-8 (Mr. Wordsworth).

disappointment that we saw this language again, this time in the 2009 US cable, that Professor Crawford also took you to, and in which Colin Roberts, the then Director of Overseas Territories at the FCO, is reported to have said: "there would be 'no human footprints' or 'Man Fridays' on the BIOT's uninhabited islands."[77]

10. Against this background, it is a matter of considerable regret that the United Kingdom's tone in these proceedings has, on occasion, reflected the attitude adopted by its officials in the 1960's and early 1970's. In his introductory observations last Wednesday, the Agent for the United Kingdom dismissed large swathes of Mauritius' case as "background noise."[78] This is an unfortunate characterisation of our claim.

Mr. President, Members of the Tribunal,

11. By appearing before you in these proceedings, Mauritius has the opportunity for the first time to assert its legal rights under the Law of the Sea Convention against the United Kingdom, and this before an independent adjudicative body. We say that you have jurisdiction to address all of Mauritius' claims. Before you, the Parties appear as equal States. We do not, as the United Kingdom has done, tell you what is, and what is not, acceptable to us. We trust that you will interpret the law and apply it to the facts. We can ask no more than that.

12. On the *second* point I can be very brief. The Chagos Archipelago has always been an integral part of Mauritius and the United Kingdom's argument to the contrary reflects the weakness of its position. Professor Crawford dealt with this point yesterday morning and I will not repeat what he said. This argument was first used to circumvent criticism at the United Nations after the excision of the Chagos Archipelago in 1965 and then resuscitated after four decades in hibernation for the purposes of these proceedings. The argument was not accepted by the international community when it was first conjured up, and we do not see how this Tribunal could any more accept it today.

[77] Mauritius Application, Annex 2 and MM Annex 146.
[78] Transcript, p. 500, line 1 (Whomersley).

13. *Thirdly*, the UK continues to be unwilling to confront the evidence. On the facts of this case, the United Kingdom simply has no answer to the historical record. It cannot deny what happened. In the face of clear evidence, we have been met with silence. Counsel for the United Kingdom went to great lengths to diminish the significance of the documents at Annex 17 of Mauritius' Memorial. You will recall, this is the Note to the Prime Minister Harold Wilson from his Private Secretary, in which he was told that the object of his meeting with Premier Ramgoolam was to "frighten him with hope: hope that he might get independence; Fright lest he might not unless he is sensible about the detachment of the Chagos Archipelago."[79] We are now told by the United Kingdom that the note is of "strictly limited significance" and that those words were merely "scribbled on top of the considered brief in order to get the attention of the … Prime Minister."[80]

Mr. President, Members of the Tribunal,

14. The United Kingdom has provided no answer, or explanation for these words. It cannot be the United Kingdom's position that those words are not true, that they do not mean what they say, and that the threat was invented by the Prime Minister's Private Secretary merely to get his attention. We say that the document makes clear that the United Kingdom obtained the so-called "agreement" of Mauritian Ministers to the detachment of the Chagos Archipelago, in contravention of the right to self-determination, by threatening to withhold independence, and to detach the Archipelago unilaterally in the event if Mauritius did not "consent".

15. This is confirmed by another document. It is the record of a meeting of the Defence and Oversea Policy Committee in May 1967, attended by Prime Minister Harold Wilson, and the then Secretary of State for Commonwealth Affairs, the Rt. Hon. Herbert Bowden. You will recall that the Commonwealth Secretary summarised what happened in September 1965 and is

[79] MM Annex 17.
[80] Transcript, p. 525, lines 19-23 (Sir Michael Wood).

recorded to have said that Mauritian Ministers were told "unless they accepted our proposals we should not proceed with the arrangements for the grant to them of independence."[81]

16. This document was annexed to our Reply[82] and Professor Crawford has taken you to it in our first round, and again yesterday morning. Yet the United Kingdom seems unwilling to address it. Not in the Rejoinder, nor in its presentations last week. If it does, finally, address this document during the second round, Mauritius will not have an opportunity to respond to what they say. The United Kingdom's approach to the evidence in this case, we say, leaves much to be desired. The United Kingdom's own internal documentation reveals the true nature of the "MPA" and the unfortunate circumstances in which it was unexpectedly declared by Mr. Miliband on 1 April 2010.

17. Last Friday the United Kingdom complained that "the Tribunal has no insight into the internal workings of Mauritius" and the views of Mauritian officials. The United Kingdom told you: be "wary of placing weight on the partial picture it had through sight of just the UK internal documentation".[83]

Mr. President, Members of the Tribunal,

18. Up to 1968, Mauritius was a colony of the United Kingdom and the Council of Ministers was presided over by a British Governor. There can be no doubt that the United Kingdom is in possession of all the relevant records and documents relating to issues concerning the detachment of the Chagos Archipelago, and the activities subsequent. Given the extensive records maintained by the United Kingdom, it should be in possession of internal documentation that we ourselves do not have.

19. Mauritius made clear in its letter of 7 April 2014, in reply to the United Kingdom's letter of 18 March 2014, that it had reviewed to the fullest extent possible its own internal documents for the preparation of its pleadings in this case. Mauritius offered to consider and respond to

[81] MR Annex 59, p. 2.
[82] MR, Annex 59.
[83] Transcript, p. 860, lines 3-7 (Wordsworth).

any request for discovery of any internal documentation which the United Kingdom considered supportive of its case. The United Kingdom has made no such request.

20. The *fourth* point – that the "MPA" is the product of policy-making "on the hoof" and one that the UK undertook to put on hold – has hardly been refuted by the UK. The evidence of hasty decision-making by the Foreign Secretary, against the advice of so many of his advisers and the British High Commissioner in Mauritius, and in breach of the commitment given by Prime Minister Gordon Brown to the Prime Minister of Mauritius remain compelling.

Mr. President, Members of the Tribunal,

21. The UK complains that these proceedings were a surprise. The only real surprise in this case came on the 1st of April 2010, with the sudden announcement of the "MPA". Just 6 days earlier, on the 26th of March 2010, the British High Commission in Port Louis wrote to the Mauritian Ministry of Foreign Affairs, confirming that "the United Kingdom should like to reiterate that no decision on the creation of an MPA has been taken yet."[84] On 31 March 2010, the British High Commissioner warned numerous high-ranking officials at the FCO that: "to follow the course of action that you are […] proposing risks a political reaction that will significantly increase the eventual chance of a legal challenge to the MPA (and sovereignty itself) from the next Government of Mauritius."[85] It is hard to see how the UK can now say it was taken by surprise by Mauritius' Application. Mr. Miliband's announcement on the 1st of April, which the UK referred to as the "last possible date he could do so before the election",[86] came despite the warning from the British High Commissioner and despite Prime Minister Gordon Brown's promise to the Prime Minister of Mauritius on 27 November 2009 that the "MPA" project would be put on hold.

[84] MM, Annex 164.
[85] MR, Annex 156.
[86] Transcript, p. 889, lines 2-3 (Boyle).

22. Mauritius is in no doubt about the firm commitment made by Prime Minister Gordon Brown. The United Kingdom tells us it was a "misunderstanding",[87] that this was just a "confusion".[88] We have looked closely at the emails submitted to the Tribunal over the weekend. This material was tendered 21 months after we filed our Memorial, in which the tête-a-tête between the two Prime Ministers is referred to at Annex 157. Ms. Macdonald will address this new material on Thursday – but in the meantime, I would just note that there is nothing from Mr. Brown to contradict Prime Minister Ramgoolam's witness statement.

Mr. President, Members of the Tribunal,

23. Mr. President, Members of the Tribunal, moving on to the *fifth* point – the stated purpose of the "MPA". It was disappointing to hear the United Kingdom's Attorney General say that "Mauritius doesn't appear to recognise the importance of maintaining the pristine environment of the [Chagos] archipelago and has currently given no commitment to protecting the vulnerable eco-system" around it.[89] We also heard that by acceding to Mauritius' claim, this Tribunal would threaten the continued existence of all other Marine Protected Areas. As was said earlier by James Crawford, "[d]estroy this one and you destroy all of them" you were warned.[90]

24. That is most unfair. Mauritius is strongly committed to the protection and preservation of the marine environment throughout the territory of Mauritius, including the Chagos Archipelago. It is difficult to see how the Attorney General could have made the comment that he did, given the firm commitment that we made in our Memorial,[91] in the Reply[92] and in our response to Judge Wolfrum's questions on Friday the 25th of April.[93] Mauritius is deeply committed to the protection and preservation of the marine environment and is conscious of the extraordinary diversity of the waters of the Chagos Archipelago. As we explained in our responses to the

[87] Transcript, p. 55, line 12 (Grieve); p. 502, line 15 (Whormersley); p. 577, line 1 (Nevill); p. 591, lines 8-9 (Nevill).
[88] Transcript, p. 577, line 4 (Nevill).
[89] Transcript, p. 51, lines 18-20 (Grieve).
[90] Transcript, p. 906, line 2 (Boyle).
[91] MM, para. 1.2.
[92] MR, para. 3.3.
[93] Transcript, p. 421 lines 6-21 (Sands).

written questions from Judge Wolfrum, Marine Protected Areas for mainland Mauritius cover a total of 7,190 hectares, encompassing six fishing reserves and two marine parks.[94] Mauritius is equally proud of its contribution to the Law of the Sea and is mindful of its rights and obligations under the 1982 Convention. It was one of the first two African States to make a submission to the UN Commission on the Limits of the Continental Shelf on 1 December 2008. That was a joint submission with the Seychelles, relating to the region of the Mascarene Plateau.[95]

25. This takes me neatly to the *sixth* point: the "MPA" manifestly violates the requirements of the Convention. The UK was not entitled to declare the "MPA" and, as Messrs Reichler and Loewenstein have explained, it violated the requirements of the Convention. The UK's characterisation of Mauritius having no relevant rights under the Convention underscores the generally dismissive attitude it has adopted in these proceedings.

26. The UK implies that Mauritius is acting in bad faith by asking this Tribunal to construe as binding international obligations the UK's supposed gratuitous acts towards Mauritius since 1965. We are accused of being "allerg[ic]" to the word "understandings" and of, instead, preferring the word "undertakings" to artificially strengthen our case.[96] This is in stark contrast to the views expressed by Ministers and by senior UK officials, including the British High Commissioner to Mauritius on 19 and 26 March 2010, that "the United Kingdom has undertaken to cede the Territory to Mauritius when it is no longer needed for defence purposes". We note that while Mr. Wordsworth was unable to answer Judge Greenwood's question, whether the United Kingdom would be free to cede the Chagos Archipelago to a third State, the Attorney General reiterated the UK's commitment that – as he carefully put it – the Chagos Archipelago will be "ceded to Mauritius when it's no longer needed for defence purposes."[97]

[94] Transcript, p. 422, lines 12-13 (Sands).
[95] See: http://www.un.org/Depts/los/clcs_new/commission_submissions.htm.
[96] Transcript, p. 851, line 17 (Wordsworth).
[97] Transcript, p. 51, line 21 (Grieve).

27. Moving on to point *seven*, the Tribunal's jurisdiction over the dispute. The UK continues to argue that you have jurisdiction over none of Mauritius' claims – you cannot interpret the words "coastal State", and you cannot determine whether the purported creation of an "MPA" over 640,000 square kilometres violates even a single provision of the Convention on the Law of the Sea. Professor Sands demonstrated yesterday why this argument fails.

28. When Mauritius filed its Application on 20 December 2010, it did so as a last resort. Despite being an independent State with sovereignty over the Chagos Archipelago, as defined in its Constitution, and a State which the UK acknowledges has at least a reversionary sovereign interest in the Chagos Archipelago, Mauritius was asked during the public consultation process on the "MPA" to what amounts to being allowed to simply line up alongside a quarter million of consultees and to submit just another view on the "MPA". And yet, Mauritius is accused of walking away from the consultations and of "putting a gun to the Foreign Secretary's head"![98]

29. Finally, coming to *eighth* point – the *sui generis* character of this dispute. You will recall, Mr. President and Members of the Tribunal, that you were cautioned by the United Kingdom about the floodgates being opened – the heavens falling – if the Tribunal were to hold that it has jurisdiction in this case.

30. When Judge Wolfrum asked counsel for the UK about whether the 1965 undertakings or understandings constituted a quid pro quo for Mauritius' "consent" to the excision of the Chagos Archipelago, and whether it was right to refer to "unilateral" undertakings, Mr. Wordsworth replied "But sir, I absolutely understand the point because this is a slightly unusual situation because what you have is the 1965 record which reflects undoubtedly some form of arrangement".[99] Indeed it is, we say. We say that this is a unique case, one that directly engages the right of self-determination and General Assembly resolution 1514. The Article 76(8) issue alone is surely unique, as very precisely explained by Mr. Reichler this morning.

[98] Transcript, p. 884, line 5 (Boyle).
[99] Transcript, p. 863, lines 1-3.

31. Mr. President, in conclusion, I wish to express our sincere appreciation, on behalf of Mauritius, to you and the Members of the Tribunal, for according us your patient attention and for your commitment to resolution of this dispute within the framework of Part XV of the 1982 Convention. We shall remain available to the Tribunal for any outstanding matters on which assistance from Mauritius would be helpful. We also extend our sincere gratitude to the Permanent Court of Arbitration – to Mr. Brooks Daly, Mr. Garth Schofield, Ms. Fiona Poon – for the exemplary way in which they have ensured the smooth conduct of the hearings and the excellent arrangements put in place here in Istanbul, and for their continued efforts in the Hague, and in Dubai during the hearing on Bifurcation. We are also grateful to Mr. David Kasdan, the Court Reporter, for his excellent work, and the technical staff who have been on hand to assist us. We also wish to thank the UK team for their cooperative attitude on a number of procedural matters that arose during these proceedings.

32. Thank you, Mr. President. With your permission, all that remains is for me to read out the final submissions of the Republic of Mauritius.

FINAL SUBMISSIONS OF THE REPUBLIC OF MAURITIUS

Mr. President, Members of the Tribunal,

On the basis of the facts and the legal arguments presented in its Memorial, Reply, and during these oral hearings, Mauritius respectfully requests the Arbitral Tribunal to adjudge and declare, in accordance with the provisions of the 1982 Convention, in respect of the Chagos Archipelago, that:

(1) the United Kingdom is not entitled to declare an "MPA" or any other maritime zones because it is not the "coastal State" within the meaning of *inter alia* Articles 2, 55 and 76 of the Convention; and/or

(2) having regard to the commitments that it has made to Mauritius in relation to the Chagos Archipelago, the United Kingdom is not entitled unilaterally to declare an "MPA" or other

maritime zones because Mauritius has rights as a "coastal State" within the meaning of *inter alia* Articles 2, 55 and 76 of the Convention; and/or

(3) the United Kingdom shall take no steps that may prevent the Commission on the Limits on the Continental Shelf from making recommendations in respect of any full submission that Mauritius may make to the Commission regarding the Chagos Archipelago under Article 76 of the Convention;

(4) The United Kingdom's purported "MPA" is incompatible with the substantive and procedural obligations of the United Kingdom under the Convention, including *inter alia* Articles 2, 55, 56, 63, 64, 194, 300, as well as Article 7 of the 1995 Agreement.

Mr. President, in accordance with your request this morning, we will provide a hard copy of Mauritius' submissions to the Tribunal.

I thank you, Mr. President.

PRESIDENT SHEARER: I thank the Agent for Mauritius for his final submissions, and with that, I think we formally adjourn, but remain behind for the photographs, just in case any of you are unaware, we have no hearing tomorrow, but we will reconvene on Friday at the earlier time of 1330 for half an hour's opportunity for Mauritius to reply to the young on documents. From 1400 onwards, we will hear the second round of argument from the United Kingdom.

So, with that, with thanks to everybody, I declare the Hearings adjourned until towards, and I think now the photographer will shortly be with us, and he will tell us what poses to adopt, I imagine.

(Whereupon, at 1:00 p.m., the hearing was adjourned until 1:30 p.m., Thursday, May 8, 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

Index

A

B

C

D

E

F

G

H

I

J

K

L

M

N

O

P

Q

R

S

T

U

V

W

X

Y

Z