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 10

HEARING ON JURISDICTION AND THE MERITS

Thursday, May 8, 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:

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C O N T E N T S

P R O C E E D I N G S

PRESIDENT SHEARER: Good afternoon, ladies and gentlemen.

I understand that the program for this afternoon's session will be that we begin with observations by Mauritius on the new material introduced by the UK; that's from 1:30 until 2:00, and then we have three speeches from the United Kingdom with a break between, the first break at around 2:45 and the second short break at around about 4:15, ending at 5:30 and possibly carrying over to tomorrow.

Is that the understanding of the Parties?

MR. WHOMERSLEY: Yes.

PRESIDENT SHEARER: Very well, then. I'll call upon Ms. Macdonald for Mauritius to address us. Thank you.

Mauritius Response

1. (Ms. Macdonald) Mr. President, Members of the Tribunal, Mauritius is grateful for the opportunity to respond to the answers given by the United Kingdom on Monday to the outstanding questions from the Tribunal, and, secondly, to the additional evidence submitted by the United Kingdom last Saturday.

Funding

2. I would like firstly to respond to the United Kingdom's answer to the question from Judge Greenwood about private funding for the "MPA".
3. Judge Greenwood's question arose from paragraph 26 of the document at Annex 70 to the UK Rejoinder. This is the first witness statement of Colin Roberts, filed in the domestic judicial review claim, dated 1 May 2012.[1] A copy of the relevant page is at Tab 3 of the additional documents which you have before you, the little clip behind the blue tab, which we ask you in due course to add at the back of Mauritius' Reply folder, but for now, we can

[1] UKR Annex 70

just work from that little clip. So, if you turn to Tab 3, we have included, just for brevity, the first page of that statement, the relevant page containing paragraph 26, and then the final page, showing the signature and Statement of Truth, and ask you to turn to the middle page, which contains paragraph 26, which, as we understand it, was the source of Judge Greenwood's question.

4. Now, in this paragraph, Mr. Roberts is dealing with the consequences, as you can see from the first sentence, the consequences which would ensue if the English Administrative Court declared the "MPA" to be unlawful. And we see about halfway down that Mr. Roberts says that one of those consequences would be that:

"The BIOT Administration would lose the benefit of private sector donations which are conditional on the closure of the fishery."

5. In answering this question, Mr. Whomersley chose his words with care. He told you that:

"The contract with the Bertarelli Foundation […] was concluded after the announcement of the MPA. At that point, there was a case still pending in the European Court of Human Rights, and the contract had a provision in it which permitted Bertarelli to withdraw its funding if the ECHR found against the UK. So, that is a condition on which the continuation of the funding depended."[2]

6. He went on to say that:

"[T]he Bertarelli funding made the no-take MPA possible. It did not make it necessary, but it made it possible. […] Bertarelli was not able to dictate the policy, but his foundation was able to facilitate the choice that was made."[3]

7. Mr. President, we find it difficult to square this with Mr. Roberts' written evidence that you've just seen, verified by a statement of truth as required for such witness statements, that private sector donations "are conditional on the closure of the fishery." These are clear

[2] Transcript, p. 987/11-16.
[3] Transcript, p. 987/20-23.

words. And as we read them, either there are private sector donations *other* than from the Bertarelli Foundation which are conditional on the closure of the fishery, or the Bertarelli funding *is*, in some way, so conditional.

8. Mr. Whomersley told you only about the terms of the contract with Bertarelli, which was concluded *after* the "MPA" was declared, including of course the decision to close the fishery by imposing a no-take regime. He did not tell you anything about the prior negotiations with the Foundation. What brought Bertarelli to the point of being prepared to sign the contract? There was no need, we would suggest, to include a no-take clause in the contract at that point, of course, because the no-take decision had been taken by then. It was simply the Strasbourg decision which was outstanding. What role did the no-take issue play in prior negotiations and in the Bertarelli Foundation's willingness to sign the contract? We do not know, and the UK has not told us or you. We also note that, from what the UK *has* told us about the contract, that it contained an express link between the "MPA" and resettlement, in the sense that Bertarelli was to be allowed to withdraw its funding if the Chagossians won their case in the European Court of Human Rights. This appears to confirm the evidence before you that the creation of the "MPA" was premised on a policy of no resettlement.

<u>The UK's additional documents</u>

9. Mr. President, I turn now to the documents submitted by the United Kingdom last Saturday, and addressed by Mr. Whomersley again on Monday.

10. As you are aware, Prime Minister Ramgoolam has made a short second witness statement which addresses those documents in so far as they relate to conversations in which he took part personally. We thought it right to deal with the matter in this way, and we are very grateful to the Tribunal for permitting us to adduce this second statement in evidence, and for the constructive approach of the United Kingdom on this matter. I do not propose in this

short session to take you through the documents exhaustively, but I will confine myself to the key points to which Mauritius would draw your attention.

11. A copy of Prime Minister Ramgoolam's second statement is at Tab 1 of the additional documents for this morning. For ease of reference, we have also included at Tab 2 a copy of his original statement, though I don't think we need to look at it in this session.

12. Before I look at that document in some detail, we note that the UK's additional material was adduced in answer to Judge Greenwood's question about the lack of response to the letter of 30 December 2009, and they also touch on the tête-a-tête between the Mauritian and UK Prime Ministers on 27 November 2009. Mr. Whomersley gave no explanation on Monday for why these documents were adduced so late in the day.

13. Dealing first with the tête-a-tête between the two Prime Ministers, the documents shed some light on the nature of what the United Kingdom has termed the "misunderstanding". This can best be understood if we start with Prime Minister Ramgoolam's statement. Mr. Whomersley said on Monday that the documents showed that it was "clear and obvious … that no commitment of any kind was given by Mr. Brown. This was clear to Mauritius at an early stage…" [993/16-18] But in my submission, the documents, taken together with the Prime Minister's two very clear witness statements, do not support any such conclusion.

14. If we look at the statement, it may also be of assistance for you to have in front of you Tab 75 and onwards in the United Kingdom's folder so that you can see – I won't take you back to those UK emails in detail – but so that you can just have alongside the emails to which the Prime Minister is referring in his statement. So we start – I'm going to pick up at paragraph 2 of the Prime Minister's statement which refers to the emails at Tab 75. If the Members of the Tribunal have that email in front of them along with the Prime Minister's witness statement, then I'll pick up from paragraph 2 of the statement.

15. At Tab 75, there's an email dated 8 December 2009, time 12.40, from Ewan Ormiston to Andrew Allen. So that's the email at the second half of the page. And the Prime Minister says, "It records a conversation that I had with Mr. Ormiston at the end of a meeting in my office on that date with a representative of the United Nations Office on Drugs and Crime, which Mr. Ormiston also attended. Mr. Ormiston's account of our discussion is broadly accurate, save that I did not say that Mr. Brown had said that the "marine protected area" ("MPA") was "over" or that "the issue was finished". I said that he had agreed to put the MPA proposal "on hold". In relation to the undated reply to that email from Mr. Allen, I cannot comment on the conversation between the offices of the UK Foreign Secretary and the UK Prime Minister. However, I do note that the Prime Minister's office is reported as saying that Mr. Brown "did not say that the consultation / MPA proposal was over or that the issue had finished." As I have explained, this is correct: Mr. Brown did not say that the MPA proposal was "over" or "finished", but what he did say" – and I break there to remind you that this is set out in the Prime Minister's first witness statement—"what he did say was that he would put the proposal "on hold"". So that's Prime Minister Ramgoolam's comment on that document.
16. And we then turn to the series of emails at Tab 78 and, in particular, the email that starts at the very bottom of the first page behind Tab 78, which is an email dated 20 January 2010, time 15.59, from Mr. Murton to Ms. Yeadon and Mr. Roberts. And the Prime Minister continues in his statement: "This relates to a meeting of the same date which I had with John Murton, the British High Commissioner in Mauritius." He goes on over the page in paragraph 5 to say: "Mr. Murton's record of my account of the conversation with Mr. Brown in the second paragraph of that email" – so that is the paragraph, and we've gone over the page now into the main body of the email; and, again, I'm taking this relatively briefly, but I invite you in due course to do a careful cross-check between the emails and the witness

statement of the Prime Minister. "Mr. Murton's record of my account of the conversation with Mr. Brown in the second paragraph of that email is not quite accurate. As I stated in my previous witness statement dated 6 November 2013, I asked Mr. Brown to "put a stop to" the MPA proposal itself (not simply the consultation), to which he replied "I will put it on hold." The implication of his words was that he would put the project on hold and we would then see how the two States could move forward on the issue, through bilateral discussions." And the Prime Minister moves on in paragraph 6: "In the fourth paragraph of that email, Mr. Murton gives an account of the discussion we had about whether I should write to Mr. Brown on the subject of his undertakings. My recollection of the conversation was that Mr. Murton said that David Miliband was very keen to be seen to be doing something for the environment. I then asked Mr. Murton, in order to ensure that Mr. Miliband does not do anything contrary to what Prime Minister Brown had undertaken at CHOGM 2009, whether I should not write to Prime Minister Brown on the matter. Mr. Murton replied that Mr. Miliband was so keen on the MPA proposal, particularly in light of the forthcoming UK election, that Mr. Murton was not sure that he could be stopped. He said I should leave matters to him for the time being and that he would make enquiries with London. With regard to the "draft letter" to Mr. Boolell that Mr. Murton says he had prepared, he writes that "Ramgoolam undertook to look at it with Ruhee. I was never shown any "draft letter", including the one to which Mr. Murton refers in the subsequent paragraph. I have today spoken with Mr. Ruhee and he has told me too, that he had never seen any "draft letter"."

17. So, Mr. President, Members of the Tribunal, that concludes the Prime Minister's statement on the issue. Again, I take it quickly because of time constraints, and we invite you to look back through these emails in due course along with the statements of the Prime Minister. But, in terms of Mauritius' submissions on the point, what we see here, I suggest, is that the UK officials concerned appear to have thought that Prime Minister Ramgoolam was saying

that Prime Minister Brown had agreed to bring a permanent end to the "MPA" project and/or the public consultation, in other words to kill the whole thing off. Accordingly it seems that the question that they fed back to Number 10, and we see this from the highlighted sentence in the first email at Tab 75, the question that they fed back to Number 10 was whether that commitment had been given, in other words a commitment to kill the whole thing off. We see this from the third-hand information in that email, in which you saw that the Prime Minister's office tells the Foreign Secretary's office to tell Mr. Allen that "The PM did not say that the consultation / MPA proposal was over or that the issue had finished." But, as Prime Minister Ramgoolam explained in his statement, Mr. Brown said, 'I will put it on hold', meaning the "marine protected area". And as you will recall, these are the exact words that Prime Minister Ramgoolam also used for the Brown commitment when he briefed the National Assembly on 18 January 2010.[4] So the emails, in our submission, do not demonstrate in any way that no commitment was given by Mr. Brown. Rather, they demonstrate the misunderstanding on the part of UK officials. In other words, the UK denial appears to relate to a claim which has never been advanced by Mauritius.

18. I now turn to the question of the UK's non-response to the letter of 30 December 2009. At the last two pages of Tab 78, we have the draft letter which Mr. Murton says that he showed to Dr. Boolell when they met on the evening of 13 January 2010, and I'd ask you just to turn that up, the last two pages of Tab 70 –

ARBITRATOR GREENWOOD: It's Tab 77.

MS. MACDONALD: I'm sorry, last two pages of Tab 77.

19. Looking at the draft, the second paragraph states that "It would appear that a number of misunderstandings have arisen concerning the MPA issue. I would like to provide

[4] MR Annex 151

clarification on these since, sovereignty issues aside, I believe our positions are largely compatible."

20. So the stated purpose of the letter is to address the "misunderstandings" which the UK considers to have arisen. If we look at the rest of the letter, we can see what those misunderstandings were, in the UK's view. The letter begins with a paragraph of background narrative under the heading "Discussions prior to the launching of the MPA Consultation." Then the major section of the letter starts on the first page and continues over under the heading "The MPA Consultation and Mauritius." And this addresses the purpose of the public consultation and the issue of the next round of talks. And as you can see, there are then three paragraphs which deal with subsidiary topics.

21. It is striking, we would say, that, while the stated purpose of the letter is to clear up what are described as "misunderstandings", the letter does not in any way refer to the meeting between the two Prime Ministers. It appears that the misunderstanding which the UK thought to have arisen related to the consultation process and its purpose. It is striking, we submit, that the UK does not appear to have had any intention of putting in writing any denial of the commitment made by Mr. Brown.

22. Now, Mr. Whomersley said to you on Monday that this letter "was not sent because Dr. Boolell recommended that it not be sent." And he was referring to the document at Tab 79, relating to the meeting between Mr. Murton and Dr. Boolell on 8 February 2010. The last two lines of that letter, if we turn it up, the last two lines on the first page state that "In discussing the way forward from here, Boolell suggested that we meet with Cabinet Secretary Seeballuck to request bilateral talks. We might do so using a 'short' letter: our earlier draft had been 'too long' and 'open to misinterpretation'." So we see from this that Dr. Boolell was recommending a shorter draft of the letter to which I've just taken you: he was not suggesting that no reply be sent. And, in any event, the decision whether or not to

put something in writing about the very serious claim set out in the letter of 30 December 2009 remained the responsibility of the United Kingdom. No letter was ever sent, nothing was put in writing, and that is a matter for which the United Kingdom alone is responsible.

23. Finally, Mr. President, a word about the Parties' respective approaches to the evidence. Mauritius has provided you with two sworn statements from its Prime Minister. Even at very short notice earlier this week, he was willing to assist the Tribunal by carefully reviewing the UK's new documents and providing you with his written evidence in response. This stands in stark contrast to the approach of the United Kingdom. They have not provided you with any witness evidence at all. Throughout these proceedings, they have attempted to deal with the matter by way of pure assertion. Then these emails came in through a side-wind, by virtue of Judge Greenwood pressing them about the letter of 30 December 2009. They certainly did not provide you with these emails as a direct response to the question of Mr. Brown's undertaking. But they have then used these emails to try to demonstrate that, in Mr. Whomersley's words, "No commitment of any kind was given by Mr. Brown."[5] This is based primarily on the third-hand one-liner in Mr. Allen's email at Tab 75. But for the reasons I have given, there is nothing there to undermine Mauritius' clear and consistent case on this point. A commitment was given to put the MPA "on hold", and there is, we submit, no evidence before this Tribunal to support a different conclusion.

24. Mr. President, unless there are questions from Members of the Tribunal about these matters, then that concludes Mauritius' response.

PRESIDENT SHEARER: Judge Greenwood has a question.

Thank you.

ARBITRATOR GREENWOOD: Ms. Macdonald, I'll be as brief as I can.

MS. MACDONALD: Yes.

[5] Transcript, p. 993/17-18.

ARBITRATOR GREENWOOD: Thank you very much for that explanation, which I found most helpful.

There are two points I just want to try and clear up. The first is, as I understand it, Mauritius accepts that the draft letter was shown to Dr. Boolell, the Foreign Minister, even though it wasn't shown to Dr. Ramgoolam. Am I right on that?

MS. MACDONALD: Yes.

ARBITRATOR GREENWOOD: Thank you.

And then the second point is, going through these papers yesterday, I had assumed that the Note Verbale from the UK High Commission to the Foreign Ministry, which appears as Annex 64 to the UK Rejoinder – now is the time to find out whether my hyperlinking works – Note Verbale 6 of 2010, which asks for a resumption of bilateral talks, rather confusingly, it's sent on the same day as another Note Verbale which talks about the extension of the consultation period.

MS. MACDONALD: Yes, yes.

ARBITRATOR GREENWOOD: I had assumed that those two Notes Verbales were the shorter letter referred to in the bottom two lines of Tab 79. Is that your understanding as well?

MS. MACDONALD: I don't think that we know. We know that Dr. Boolell discussed the sending of a shorter letter. We have the draft that was shown. We have the idea that that was far too long and that something shorter should be sent to get the talks going. So, it may be that ultimately the letters which were sent, I think the date of that from memory, is February, the Note Verbale 6 of 2010, February 2010.

ARBITRATOR GREENWOOD: February 15.

MS. MACDONALD: Yes, two on the day, extension of the consultation time limit and then the one that's material for our purpose is the suggestion of resumption of the

bilateral talks. It may be, though I don't think it can be established definitively, but it may be that that is ultimately the highly condensed response that was sent.

But, in my submission, it might arise causally from those conversations, but the February Note Verbale can no longer be considered to be really any response to the letter of the 30th of December 2009 from Mauritius because it simply doesn't address really any of the issues that arise there, and it certainly doesn't address matter of the Prime Minister.

So, it may be that causally the February letter was finally sent as a result of those discussions, which included discussion of the 30 December letter, but we say it is really stretching it to consider that's – for the purposes that we have been looking at in response to your question – a response to the letter of the 30 December 2009.

ARBITRATOR GREENWOOD: Thank you very much. No doubt UK will address that in their second round. Thank you.

PRESIDENT SHEARER: Thank you very much, Ms. Macdonald.

And so now I can call on the United Kingdom to give its second round of submissions and I call upon, yes, Mr. Whomersley.

MR. WHOMERSLEY: Mr. President, thank you.

1. Mr. President, you have now heard the first round of oral pleadings from the UK, two rounds of oral pleadings from Mauritius. It is now my honour to begin the UK's second round of oral pleadings and therefore to signal to you that you are on the final lap of what I am sure has been a gruelling process.
2. I am going to speak, I think, probably for about 20 minutes, and I'm going to make the following seven points.
3. First, Mr. President, I will reiterate that the Tribunal has no jurisdiction over Mauritius's claims.

4. My second point is to emphasise the need for compliance by Mauritius with the obligation to exchange views under Article 283 of the Convention.
5. Third, as requested, I will give the United Kingdom's formal position on the understandings reached in 1965.
6. Fourth, I will say a few words about the importance about the Marine Protected Area.
7. Fifth, I will also deal again with the unfortunate misunderstanding which arose between the two Prime Ministers at their meeting in Trinidad in 2009.
8. My sixth point concerns the alleged US cable posted on the Wikileaks website.
9. And finally, Mr. President, I want to round off by addressing Mauritius's approach to this litigation.
10. So, Mr. President, my first point is this. We have already demonstrated in our written and oral pleadings that the Tribunal has no jurisdiction over the claims made by Mauritius.
11. The formal submissions made by the Agent for Mauritius on Tuesday made it crystal-clear that the real dispute in this case concerns sovereignty over the BIOT. For all Mauritius's attempts to say that this case is *sui generis*, and variations on that theme, that is what Mauritius's case is actually about.
12. We have also heard a lot of arguments based on Mauritius being "a" coastal State or "the" coastal State. But, frankly, these arguments only serve to obfuscate the real dispute raised by Mauritius, which, as I have said, is of course one about sovereignty. We suggest that they are pulling the wool over no one's eyes.
13. Here I wish to remind the Tribunal of the wise words of that distinguished judge of the ICJ, Abdul Koroma, who said in *Georgia v. Russia* that "a link must exist between the substantive provisions of the treaty invoked and the dispute. This limitation is vital. Without it, States could use the compromissory clause as a vehicle for forcing an unrelated dispute with

another State before the Court".[6] This, Mr. President, is precisely what Mauritius is trying to do, *mutatis mutandis*, in this case.

14. Mr. President, Mr. Dabee said in his closing speech that the UK should not have been surprised when we received Mauritius's notification of claim. Well, I can assure you that we were surprised, very surprised indeed. My learned colleagues will be discussing further the requirements of Article 283 of the dispute] by negotiation or other peaceful means". We are confident that if Mauritius had initiated the exchange of views required by Article 283, the two Governments could have had a fruitful discussion about the MPA and Mauritius's views thereon, most likely under a sovereignty umbrella, as was suggested on so many occasions by UK representatives. It is exactly this sort of case for which Article 283 is designed.

15. And that brings me to a related point. Mr. Reichler claimed that there is now a dispute about the possibility of Mauritius making a submission to the CLCS, the Commission on the Limits of the Continental Shelf. Well, if that is so – and I'm not accepting for a moment that it is, the relevant assertions having appeared only in legal argument in these proceedings – but if it were so, then that would be a matter that cries out for an exchange of views under Article 283. And, as the UK has shown as recently as in the last couple of months, we are, as ever, open to such an exchange.

16. Mr. President, there has been a lot of discussion about the understandings reached in 1965. Let me say two things about that. First, it is troubling that Mauritius argued for the first time in the second round of its oral pleadings that the statements made by Mauritius in 1965 are void, but that the statements made by the UK at the same time are legally binding upon it. This is a remarkable analysis and, I submit, it cannot be correct. That Mauritius made this

[6] *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation) (Preliminary Objections)*, Judgment, 1 April 2011, Separate Opinion of Judge Koroma, para 7 (UKCM Authority 37).

argument in the second round of its oral pleadings demonstrates why the UK wanted to hear what Mauritius had to say on this point before we gave our own views.

17. But, Mr. President, we are, quite rightly, asked to set out the UK's position on this issue. Well, it is this. We consider all of the understandings reached in 1965 to be important political commitments on both sides, typical of the friendship our two countries shared at the time they were given.

18. As to the question whether the UK could cede BIOT to a third State, our long-standing position is that the United Kingdom does not recognise the claim by Mauritius to sovereignty over the British Indian Ocean Territory. But, the United Kingdom has previously recognised Mauritius as the only State which has a right to assert a claim of sovereignty when the United Kingdom relinquishes its own sovereignty, and successive Governments have given political undertakings to the Government of Mauritius that the territory will be ceded when it is no longer required for defence purposes.

19. I hope that that makes the United Kingdom's position clear.

20. Mr. President, next I turn to the importance of the MPA. Regrettably this seems to have been mainly the subject of a presentation by Mr. Reichler which was full of inaccuracies and unsupported assertions. For example, repeating selective quotations from certain scientists does not invalidate the overall conclusion about the scientific value of the MPA. And he made no attempt to grapple with the legal consequences of the application of the precautionary principle in international law. As regards the involvement of the Bertarelli Foundation, I will reserve our right to revert on the points made by Ms. Macdonald just now. But I did want to deal with the comments made earlier by Mr. Reichler. If he reads what I said properly, he will see that there is no question of the United Kingdom having ceded its foreign policy-making to the Bertarelli Foundation, whose involvement only dates from after the MPA was declared.

21. But, Mr. President, I don't want to dwell upon these inaccuracies in Mauritius' submissions about the MPA, legion though they are.
22. Nor upon some of the oddities in the presentation by Mauritius, such as that apparently the Tribunal should rule that the United Kingdom should not have declared the MPA until we could satisfy the Tribunal about the sources of funding for it.
23. Instead, Mr. President, I want to make the positive case for the MPA. I cannot match the eloquence of the Attorney General on this point. But I can reiterate the United Kingdom's pride in the MPA, and our strong view that it is an important step in the global process of environmental protection and sustainable use of the living resources of the oceans.
24. It needs to be said that, if this Tribunal were to rule as Mauritius suggests, then that would be a major blow to the protection of the marine environment in the Indian Ocean, as well as to the worldwide efforts to protect the oceans, in particular as enshrined in the Millennium Goals.
25. Mauritius regrettably seeks to belittle this, but nevertheless this is the stark truth.
26. And we note that, despite having had ample opportunity to do so, Mauritius has given no commitment to maintain the MPA, were BIOT ceded to her.
27. Mr. President, you have heard a lot about the meeting between the two Prime Ministers in Trinidad in 2009, and we may need to revert on some of the points made by Ms. Macdonald just now. I would only say that our understanding is that the Note Verbale sent by the British High Commission on 15 February 2010 was indeed intended as the response, the short response, to Mr. Boolell's letter of 30th of December, following the advice which he had given. But I think the main point I want to make, Mr. President, is this, that it is not now disputed that Mr. Ramgoolam has known at least since his meeting with the British High Commissioner on 20 January 2010 – more than four years ago – that his account of the meeting with Mr. Brown is contested by the British Government.

28. Mr. President, my final point is this. Perhaps the most disappointing aspect of Mauritius' presentation is the catalogue of allegations of bad faith that Mauritius has sought to make before this eminent Tribunal. Clearly the Tribunal will draw its own conclusions from the apparent reliance on unsupported statements over facts and logic.

29. To begin with, Mr. President, Mauritius has complained that we are not transparent, but we have produced dozens of documents compared to the Mauritian side's five. We have done this in the spirit of being as open as possible with the Tribunal. Meanwhile Mauritius seems to continue to equivocate on what documents suit the tale they wish to tell.

30. Mr. President, in an apparent attempt to shock the Tribunal, Mauritius raised matters that are not only irrelevant, but which the UK courts have decided were without substance: namely the content of the alleged US cable posted on the Wikileaks website. Frankly this seems to have been introduced simply because it is thought to be prejudicial and has no relevance to the issues before this Tribunal. But, Mr. President, let me say this: Mr. Roberts denied on oath in the domestic proceedings that he had repeated the words in question. Ms. Yeadon corroborated this, and confirmed that she would have reported to her superiors if Mr. Roberts had used the words. And the High Court accepted that the words were not said. I have to say that the UK Government strongly objects to the entirely unwarranted slurs which have been cast upon its officials, and the implication that the Court was not competent to decide the veracity of their statements.

31. Mr. President, in relation to the 1966 internal minuting introduced by Mauritius on Tuesday in, what I have to say is a cynical attempt to bolster their case on bad faith, I will say that we, and I must say I personally, find the comments made, admittedly now nearly fifty years ago, by Foreign Office officials to be deeply unpleasant and offensive.

32. However, Mr. President, we are entirely confident that the Tribunal will not be influenced by Mauritius' misguided efforts to attempt to sow prejudice.

33. Mr. President, on the question of the Chagossians, there is no need for me to add to what the Attorney General has already said about the United Kingdom Government's position. What is less clear is the Mauritian position, and I don't think we are alone in wondering what it is. Despite the implication in the Agent for Mauritius' closing remarks that the interests of the Chagossians are completely aligned with those of Mauritius, it may be that in light of the documents that have now been released, the position is not perhaps as straightforward as the other side would have you believe. As far as the views of the Chagossians themselves, Mr. Bancoult, the leader of the largest group of Chagossians in Mauritius itself – and his name will be familiar to you because he is the claimant in the main proceedings in the UK courts - Mr. Bancoult gave evidence to the Foreign Affairs Committee of the United Kingdom's House of Commons in which he said that Chagossians were the "lowest category of people in Mauritius", and that "Frankly, most of us want to stay British".[7]

34. Finally, Mr. President, Mr. Dabee in his presentation on Tuesday complained that the UK had implied that Mauritius had acted in bad faith. Let me say for the record that the United Kingdom makes no such allegation. But I have to say that we did find this comment ironic, coming as it did just after Mr. Loewenstein had specifically said that the UK "had not acted in good faith", and just after Professor Crawford had been adding the final touches to Mauritius's case that the whole MPA constitutes an enormous abuse of rights. It is obviously unhelpful and disappointing that Mauritius' legal team make such unsupported and factually incorrect accusations of bad faith.

35. In conclusion, Mr. Chairman, let me make it clear, that despite our clear position on sovereignty over BIOT, that the UK has had, until now, a cooperative relationship with Mauritius over the issues raised in this case as well as, indeed, on other issues, such as on piracy, where we already have an excellent and mutually beneficial relationship. But

[7] http://www.publications.parliament.uk/pa/cm200708/cmselect/cmfaff/147/8012301.htm

regrettably the letters exchanged between Mr. Simmonds, the Minister in the FCO, and Foreign Minister Boolell[8] just a matter of weeks ago appear to show beyond doubt that there is no other interest for Mauritius here apart from sovereignty, and that they have no desire to discuss conservation or anything else with us.

36. Mr. President, that completes my opening presentation for the United Kingdom in the second round of oral proceedings. If there are no questions, I would be grateful if you could invite Mr. Wordsworth to the podium.

ARBITRATOR GREENWOOD: I'm sorry, Mr. Whomersley, two questions for you, please. The first is just to clear something up. Amongst the documents you put in on Monday was Tab 76, which is a two-line statement, or it's an email recording a two-line statement from Downing Street to the Foreign Office. Am I right in thinking that this is what is referred to in the other emails as the "readout" of the meeting at CHOGM? Because there is a reference in the email from Mr. Murton saying that he had shown the readout to Dr. Boolell. Is this what he showed him?

MR. WHOMERSLEY: I will check the documents again on that point, if I may. That is my assumption; but, if I may, I will just check that that is a correct assumption.

ARBITRATOR GREENWOOD: Thank you.

And the other thing is just to remind you – if I've missed the answer to this question forgive me. There is a quite a lot of paper here. But on Friday the 25th at Page 372 of the Transcript, I asked about some documents that are referred to in Annex 20 to the United Kingdom Rejoinder. Annex 20 to the United Kingdom Rejoinder is a letter from Mr. Carter at the East African Department to Mr. Brown, dated the 5th of January 1978, and it refers back to – it's commenting on something Sir Seewoosagur Ramgoolam had said, and it refers back to three earlier documents, which are all British Government documents. I wonder if it's possible to see

[8] Letter from Minister Mark Simmonds (UK FCO) to Foreign Minister Boolell (Mauritius MFA) of 4 March 2014 and reply from Foreign Minister Boolell (Mauritius MFA) to Minister Mark Simmonds (UK FCO) of 21 March 2014.

those.

MR. WHOMERSLEY: Yes, I'm sorry, I should have answered that question.

We have checked and all of those documents have been destroyed in accordance with normal archiving policy under the UK's Public Records Act. So I'm afraid I can't answer that further.

ARBITRATOR GREENWOOD: It's always the document that one wants to see that has been destroyed by an enthusiastic archivist, but thank you very much.

PRESIDENT SHEARER: Thank you, Mr. Whomersley.

MR. WHOMERSLEY: Thank you.

PRESIDENT SHEARER: And I give the floor to Mr. Wordsworth.

Absence of jurisdiction over Mauritius' sovereignty claim

Sam Wordsworth QC

Mr. President, Members of the Tribunal,

Mauritius' sovereignty claim

1. You already have fully on board the component parts to the United Kingdom's objection to the alleged jurisdiction over Mauritius' sovereignty dispute, so I'm just going to be replying to such new points as were made by Professor Sands earlier in the week.

2. We do not, of course, contend for the existence of any implicit exclusion of all land sovereignty matters from article 288(1), which is how Mauritius chooses to characterise our argument. We say that Mauritius' 'we are the coastal State' claim is predicated on the determination of a long-standing dispute over a sovereignty that it wishes to be decided by reference to sources exterior to the Convention and, as such, on the ordinary meaning of article 288(1), the dispute is not one concerning the interpretation or application of the Convention. And we support that position by reference to the wording of articles 288(2), 297 and 298(1)(a)(i), and also the Preamble to the 1982 Convention.

3. Professor Sands' opening position was that the 'conversation' that had been taking place earlier on Monday morning should be continued; that was the 'conversation' as to the interplay between the issues on consent and the commitments made by the United Kingdom in 1965, and how the package then agreed might be raised to the level of international law[9]. And the United Kingdom was depicted as using fear tactics, pejoratives, threats and spin, to stop the so-called 'conversation' in its tracks[10].

4. But the simple point remains that Mauritius is asking you to determine that it is the coastal State because it, not the UK, has territorial sovereignty over the BIOT; one sees that from the Notification of Claim that I took you to last week, and also, for example, paragraph 1.3 of the Memorial. You'll recall it reads as follows: "The UK does not have sovereignty over the Chagos Archipelago, is not 'the coastal State' for the purposes of the Convention, and cannot declare an MPA or other maritime zones in the area." And that line of reasoning was, of course, assumed continued into the Reply.

5. And we've also seen it on multiple occasions over the past two weeks, when for example, Mr. Reichler, on day 8, was setting out the claim on the allegedly binding undertaking on fishing rights, but added that this was: "of course, without prejudice to Mauritius' claim of broader, including sovereign, rights in regard to fishing based on its claim of sovereignty over the territory of the Chagos Archipelago."[11]

6. Or, to the same effect, on day 9, Mr. Reichler said, recapitulating the arguments of his two colleagues:

"as Professor Crawford and Professor Sands argued, Mauritius is the coastal State for all purposes because it is the lawful sovereign over the Territory of the Chagos Archipelago …".[12]

[9] Sands, day 8, 995, line 3 and following on to 996.
[10] Sands, day 8, 995, line 21 and following; 1029, line 25.
[11] Reichler, day 8, 1052, lines 7-9.
[12] Reichler, day 9, 1080, lines 12-14.

7. The use of the comfortable, fireside references to continuing the 'conversation' and the like does not disguise the fact that Mauritius' case on your jurisdiction to decide who is sovereign over the BIOT is said to be permitted, indeed mandated, by an interpretation of article 288(1) that would see this 'conversation' continuing in a multitude of other Part XV proceedings involving who is the coastal State. And you'll recall your attention was expressly drawn to the topical examples of Abkhazia, Taiwan and Crimea in the context of submissions on the correct meaning of the term 'coastal State.'[13]

8. And although Professor Sands professed to be making submissions on interpretation, not jurisdiction, it is no part of Mauritius' case that you have jurisdiction to interpret the term 'coastal State,' but must stop there as you would otherwise stray into an impermissible consideration of territorial sovereignty. And so this all appeared to provide a further illustration of how, on Mauritius' arguments, ITLOS judges and Annex VII arbitrators of the future are going to have a very, very full docket, albeit a docket that in substance would cover long-standing disputes over territorial sovereignty and would have nothing to do with the Law of the Sea.

Mauritius' purported focus on issues of interpretation

9. The context for this line of submission was to say that there are many interpretative issues that may arise under the Convention as to the meaning of the term 'coastal State,' and that I had been wrong last Thursday to say that these issues could be resolved in 10 seconds. That, of course, is a mischaracterization of what we were saying. I was making the point that the real issues in this case turned on the application of non-UNCLOS sources of international law, not the interpretation of what is meant by 'coastal State.' As of last week, there was no dispute at all between the parties as to the meaning of that term so far as concerns Mauritius'

[13] Sands, day 8, 1003, line 21 to 1004, line 8.

'we are the coastal State' argument and, as I said, we parted company where it comes to Mauritius' case that it, not the UK, is the coastal State.

10. And that parting of the ways on the 'who is the coastal State argument' did not and does not stem from a dispute as to interpretation of limited provisions of the Convention; it stems from a dispute as to the application of such provisions as a convenient conduit for the interpretation and application of exterior sources of law that regulate issues of territorial sovereignty. And again, on Monday, Mauritius was trying to do the same thing, to say to you that this is all about interpretation. But it is not.

11. One can see that very easily by actually looking at Mauritius' written pleadings. In Mauritius Memorial of 156 pages, you will find not a single sentence on the correct interpretation of the term 'coastal State' as it appears in articles 2(3), 55 and 76 of the 1982 Convention; that is, the three provisions on which Mauritius relies for the purposes of its sovereignty argument, or indeed in respect of any other provision. The analysis is simply not there. And precisely the same applies so far as concerns the 239 pages of Mauritius' Reply.

12. Now, we have very usefully been provided with searchable copies of these pleadings, and so one can search the words as 'coastal State' or 'interpret' or 'means,' 'meaning,' or 'defined,' 'definition,' and the like in a short time. But we have found nothing; no statement of what the term 'coastal State' is said to mean; no issues raised as to whether Taiwan or Abkhazia might be coastal States; and instead one sees multiple repetitions of broad statements that this Tribunal has jurisdiction to interpret and apply the words 'coastal State.' And precisely the same must be said with respect to the first round submissions of Mauritius on the issue of jurisdiction, and indeed the merits. No case was put forward as to what is meant by the term 'coastal State.'

13. And so, although this may disappoint my friend Professor Sands, I feel no regret for saying it would take the Tribunal 10 seconds to resolve the issues of interpretation. Yes, Mauritius can

seek to find a hook in its final round to say that there are lots of difficult issues of interpretation around the term 'coastal State,' but the United Kingdom can be forgiven for seeking to respond to Mauritius' case as actually pleaded; and we trust that the Tribunal will have noted that, despite seeking to throw as much mud as it could at our formulation of the term 'the coastal State,' Mauritius still did not come up with its own formulation.

14. We were told that a coastal State is not a lobster[14], but that negative definition might seem of rather limited use. We were told that: "the words 'State' and 'coastal State' require interpretation in accordance with international law if their meaning is to be established in a particular case," [15] and Sir Michael was hauled over the coals for saying that the Convention treats sovereignty over land as a question of fact. And yet there was no positive case on interpretation in what followed.

15. And even when it came to submissions on Mauritius' case that it is 'a' coastal State, there was no joining of the dots. It was said that we were wrong to say that there could only ever be a solitary coastal State, when that was not in fact what had been said, and Sir Michael will be returning to this later this afternoon. But, in any event, all that Professor Crawford did was to refer to his three examples of where there could be more than one coastal State. He didn't explain how Mauritius' 'attributes of a coastal State' argument, through the asserted undertakings, could then be tied into a correct interpretation of the term 'coastal State,' as positively advanced by Mauritius, in respect of any of the provisions that it relies on to make out its claim.

16. And we do not see how the Tribunal is in any way assisted by Mauritius plucking out of the air a number of provisions that are quite irrelevant to this case and saying that they may involve complex legal issues of interpretation. Well, of course they may. Article 91 on nationality of ships does indeed say "There must exist a genuine link between the State and

[14] Sands, day 8, 1004, line 12.
[15] Sands, day 8, 1006, lines 3-4.

the ship" as to which, of course, determining the existence of the requisite link is a question of fact and law, which may indeed be a difficult one[16]. Had it been an issue in the case, we would not have suggested otherwise. Our focus has been on the extent of this Tribunal's jurisdiction.

17. If Mauritius wishes to suggest that difficult and legal issues on interpretation may arise as to whether Taiwan is a flag State within article 91, or whether Russia is allowed to engage in hot pursuit off Crimea under article 111, then, fine[17]. We do not see the relevance of that unless, as part of its case on jurisdiction Mauritius is also saying that a Part XV court or tribunal could resolve such issues, such that you can also resolve whether Mauritius is sovereign over the Chagos Archipelago and hence the coastal State.

Application of sources of law exterior to the 1982 Convention

18. It was likewise said that we were wrong to say that, in making the determination that is central to the primary relief sought by Mauritius, you are asked to apply a broad range of questions of general international law that have nothing to do with the Convention. And, in this respect, you were referred to articles 140, 162, 305 of the Convention, and also to resolution III of the Final Conference[18].

19. But those provisions do not feature anywhere in Mauritius' argument that it is the coastal State. Not one of those provisions is mentioned in either its Memorial or its Reply; none, of course, establishes substantive rules as to when a right to self-determination exists, or when it has been violated.

20. Sir Michael will be returning to these provisions later as submissions were also made on them in the context of the merits, but the Tribunal will already have the point that Articles 140 and 162 concern the benefit of mankind in the Area. They do not detract from the basic

[16] Sands, day 8, 1004, line 17 to 24.
[17] Sands, day 8, 1004.
[18] Sands, day 8, 923, lines 7 to 9; also 960, line 11 and following.

point that, in making the critical determination that Mauritius, not the UK, is sovereign over the BIOT, you are being asked to apply sources of law on territorial sovereignty that are exterior to the Convention.

21. A specific point on jurisdiction was made on Article 305, which establishes who can sign the Convention. And your attention was drawn to paragraphs 1(c) and 1(e), and it was said that a tribunal would have to decide the effect of resolution 1514 in proceedings[19].

22. Well, it's certainly the case that both provisions refer to resolution 1514, but the only issue under 1(c) could be whether a self-governing associated State had chosen that status "in an act of self-determination supervised and approved by the United Nations in accordance with General Assembly resolution 1514 (XV)." It's difficult to see how any issue for arbitral decision could arise there. And precisely the same point applies with respect to article 305(1)(e), which accords a right of signature to "all territories which enjoy full internal self-government, recognised as such by the United Nations, but have not attained full independence in accordance with General Assembly resolution 1514 (XV)." The issue would be one of identification, but in any event here one has a specific *renvoi* to resolution 1514, and, of course, there is no such renvoi that Mauritius can point to in its case on who is the coastal State.

23. As to Resolution III, this is not, of course, part of the Convention, though a text was originally included in early drafts of the Convention. Its development was highly political and its inclusion in the Final Act very controversial. And the *Virginia Commentary* gives the flavour, and we have put the relevant commentary in tab 80 of your Judges' Folder. And you'll see there if you turn to page 481 in the top right-hand corner, right in the middle, you can see the Chairman, in fact, the Chairman of the Second Committee, Ambassador Aguilar of Venezuela, writing his introductory note, "the article dealing with territories under foreign

[19] Sands, day 8, 1007, lines 1-3.

occupation or colonial domination resulted in a long debate in the committee. After reflecting on the debate, I did not feel that I should make either major additions or deletions from the existing text except to redraft paragraph 2 in less absolute terms. On the other hand, it must be recognised that the article raises issues which go beyond the scope of the law of the sea." And if I can ask you to turn back to page 480, you'll see that again the authors of the *Virginia Commentary* make basically the same point, page 480, under commentary R III.1, "This resolution, unlike resolutions I and II, carries no title. It deals with territories under foreign occupation. Though, strictly speaking, the topic covered by this resolution is not relevant to a Convention on the Law of the Sea, and even less to participation in such a Convention, it became a highly charged issue politically at UNCLOS III."

24. Now, in light of this, it's notable that Mauritius has made reference to the resolution, taking you to declaration 1(a), but without taking you to the second part of the resolution, which is declaration 1(b). And you can see that the authors of the commentary put this on page 478, and reading that one sees declared that, (a), you were taken to that, (b), not taken to, "where a dispute exists between states over the sovereignty of a territory to which this resolution applies in respect of which the United Nations has recommended specific means of settlement, there shall be consultations between the parties to that dispute regarding the exercise of the rights referred in subparagraph (a). In such consultations, the interests of the people of the Territory concerned should be of fundamental consideration. Any exercise of those rights shall take into account the relevant resolutions of the United Nations and shall be without prejudice to the position of any Party to the dispute. The States concerned shall make every effort to enter into provisional arrangements of a practical nature and shall not jeopardize or hamper the reaching of a final settlement of the dispute."

25. And the point here is that where there is an express reference to disputed issues of territorial sovereignty in the context of Resolution III, there is no suggestion that a court or tribunal under Part XV might somehow have compulsory jurisdiction over such a disputed issue of sovereignty.

Article 293(1): Applicable law

26. I move on to the issue of applicable law and a number of points made by Mauritius on applicable law, although I do wish to note in passing that it was suggested for the first time on Monday that it was sufficient for Mauritius' purposes that there be a 'genuine connection' or 'genuine link' between its MPA case and the sovereignty claim[20]. That is not a test that is suggested in either the Memorial or the Reply, and when it came on Monday it was not supported by any reference to case-law, doctrine or any other source. And I should emphasize that a non-specific 'genuine connection' test is in no sense the same as a test as to whether a matter of land sovereignty is "closely linked or ancillary to maritime delimitation," or whether the prevailing issue is one of maritime delimitation, which is how the question has been formulated by Judges Wolfrum[21] and Treves[22].

27. As to applicable law, Professor Sands reiterated a case that there are two issues under article 293(1) – first, is there a dispute under the Convention, second, are there other sufficiently closely linked issues that are necessary to resolve the case? You already have our case on the meaning of article 293(1) from Sir Michael and from a detailed treatment in our written pleadings. I'm not going to repeat that case, other than to recall that we say, in brief terms, that this provision enables a court or tribunal having jurisdiction under part XV to apply rules of international law where these arise incidentally in the course of a dispute, that is

[20] Sands, day 8, p. 1000, lines 2-6; 1016, lines 9 to 13.

[21] R. Wolfrum, Statement to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, New York, 23 October 2006, UKCM Annex 79.

[22] T. Treves, "What have the United Nations Convention and the International Tribunal for the Law of the Sea to offer as regards maritime delimitation disputes?" in R. Lagoni and D. Vignes (eds.), *Maritime Delimitation* (2006), 77. UKCM Annex 104.

principally in the form of secondary rules, or where there is a *renvoi*, or where they arise in the context of interpretation, such as through the prism of Article 31.3.c of the Vienna Convention[23] on the Law of Treaties. And so we do not accept Professor Sand's test.

28. We also take issue with the next step in his argument, which was to say that "In this dispute, the term 'coastal State' cannot be interpreted except by reference to general rules of international law, including the rules on the self-determination of peoples." [24] And again, what one sees is happening here in Mauritius' presentation of its case is this attempt to merge interpretation into the primary issue of sovereignty.

29. The rules on self-determination that you are asked to apply do not go to the definition of the term 'coastal State.' Mauritius is a State. It says it is the coastal State with respect to the BIOT. It says that, because it considers itself to be sovereign over the BIOT. Mauritius is not saying that the term coastal State, correctly construed, means the State including any parts of that State that may have been unlawfully exercised prior to independence contrary to a right of self-determination. If that were its case, that would not get it home. This is a sovereignty dispute, not a dispute over interpretation, precisely because Mauritius is asking you to determine – by reference to sources of law exterior to the Convention – that it is the coastal State because a part of its State has been unlawfully exercised prior to independence contrary to the asserted right of self-determination.

And Article 293 does not expand your jurisdiction to do that, whether through the guise of interpretation or otherwise.

Now, Mr. President, at this juncture, I'm just going to go through a list of the examples that Professor Sands gave you of other international courts and tribunals and different fora saying how they frequently reach out to other rules of international law, and I was just going through that list just to tick off the examples that he gave you, but it may be it's a convenient

[23] UKCM, paras. 4.33-4.37.
[24] Sands, day 8, 1009, lines 10-12.

time for a break now before I go through that exercise.

PRESIDENT SHEARER: Yes, I think it would be, Mr. Wordsworth.

Well, we will take the short break until 3:00.

Thank you.

(Brief recess.)

PRESIDENT SHEARER: Thank you, Mr. Wordsworth.

30. (MR. WORDSWORTH continues) Mr. President, Members of the Tribunal, we were told on Monday that, in interpreting the provisions of a treaty in respect of which they have jurisdiction, international courts and tribunals 'frequently reach out to other rules of international law.'[25] A slightly curious formulation one might think.

31. Reference was made both to *MV Saiga (2)*, and *Guyana and Suriname*, and you already have our arguments that these are not on point, both from Sir Michael and in our written pleadings[26].

32. As to *ARA Libertad*, Sir Michael has already highlighted the Joint Separate Opinion in that case, and we would add that ITLOS was not, of course, having to grapple with the issue of whether customary international law rules on immunity could be applied to make any final determination of the respective rights of Ghana and Argentina. It was, of course, engaged only at the provisional measures phase.

33. As to the *Oil Platforms* case that was referred to, the recourse there to use of force was based on article XX(1)(d) of the 1955 Treaty of Amity, establishing that the provisions of the Treaty did not preclude measures "necessary to protect [the] essential security interests" of one of the parties. The Court held that, where this provision was invoked to justify actions involving the use of armed force, allegedly in self-defence, its interpretation and application necessarily entailed an assessment of the conditions of legitimate self-defence under

[25] Sands, day 8, p. 1009, lines 21-23.

[26] Rejoinder, paras. 4.26 to 4.27; Wood, Day 6, 658 at paras. 31 and 32.

international law[27]. And you may recall that that finding was also supported by reference to Article 1 of the 1955 Treaty, where there's the reference to the parties saying that there shall be firm and enduring peace between the parties. The reasoning may have been controversial, but the point for now is that the application of laws on the use of force was firmly grounded in specific provisions of the treaty.

34. Reliance was also placed on the regard that ICSID tribunals have to the rules of international law governing nationality in interpreting the ICSID Convention or bilateral investment treaties, and you may recall that reference was made to the *Soufraki* case[28]. Well, as part of establishing its jurisdiction under Article 25(1) of the ICSID Convention, an ICSID tribunal must ascertain whether there is a dispute between a Contracting State and the national of another Contracting State. And there is then a specific set of rules in article 25(2) that define what is required in order to establish nationality – both of individuals and of companies.

35. The rule applied in *Soufraki* was article 25(2)(a) of the ICSID Convention, on nationality of individuals, and the relevant bilateral investment treaty, as is almost universal in such treaties, also had its own specific rules on nationality. In order to test whether Mr. Soufraki had the requisite nationality, which was Italian nationality, the tribunal then applied Italian law. But that we would have thought could not be further away from Mauritius' current case. Insofar as general international law rules enter into the reasoning in *Soufraki* at all, which I have to say the reasoning is absolutely typical of all BIT cases, it was simply to confirm that it is for a State to determine its own rules as to nationality, and hence precisely that it was domestic law that was to be interpreted and applied by the tribunal in any given case[29].

36. As to the *Shrimp Turtles* case, the WTO Appellate Body merely made a passing reference to UNCLOS, having already come to the conclusion that the term 'exhaustible natural

[27] At para. 40.
[28] Sands, day 8, p. 1011, lines 9 to 1012, line 4.
[29] *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7 at para. 55.

resource' in Article XX(g) of GATT 1994 was evolutionary in nature. It did no more than refer to a number of examples of where "modern international conventions and declarations make frequent references to natural resources as embracing both living and non-living resources."[30] It was in no sense applying provisions of UNCLOS.

37. Reference was also made to the *ICAO Council* case[31], but likewise, this does not assist Mauritius at all. Pakistan was saying that there had been a breach of the Chicago Convention and the Transport Agreement through India's suspension of overflights. India objected to jurisdiction on the basis that, in effecting the suspension, it had been acting outside these Conventions, and hence they were not engaged. One might not think that was not a particularly strong line of argument, and clearly the Court thought so, too. Naturally enough it considered that a mere unilateral assertion of that position, which was of course contested by Pakistan, could not deprive it of its jurisdiction. And one sees that developed at paragraphs 31-32 of the judgment, and that later passage develops paragraph 27, which you were taken to.

At Paragraph 27, the Court said that the question jurisdiction clearly depends on whether Pakistan's case considered in the light of India's objections to it discloses the existence of a dispute of such a character as to amount to a disagreement relating to the interpretation or application of the Chicago Convention or of the related transit agreement, and so that is entirely unexceptional.

The Court then continued: "If so, then prima facie, the council is competent. Nor could the council be derived of jurisdiction merely because considerations that a claim to lie outside the treaties may be involved if, irrespective of this, issues concerning the interpretation or application of these instruments are nevertheless in question. The fact that a defense on the merits is cast in a particular form cannot affect the competence of the Tribunal or other organ

[30] *United States - Import Prohibition Of Certain Shrimp And Shrimp Products,* WT/DS58/AB/R, at para. 130.
[31] Sands, day 8, 1012, line 20 and following.

concerned; otherwise, Parties would be in a position themselves to control that competence, which would be inadmissible. As has already been seen in the case of competence of the Court, so with that of the council, its competence must depend on the character of the dispute submitted to it and on the issues thus raised, not on those defenses on the merits." So, the Court is very much coming back to the question of what is the character of the dispute that is being submitted before it, and notably that last sentence was not read out to you.

38. Now, that is a passage that in fact assists the UK. Put very crudely, India was trying to shift the goalposts by saying – 'we in suspending these flights were acting under general international law so the two treaties you, Pakistan, have invoked could not be breached, and in any event it said they have been suspended.'

39. Now, that is nothing like the United Kingdom's arguments on jurisdiction in this case. The United Kingdom's position that this is a sovereignty dispute is, by contrast, based precisely on Mauritius' own pleadings. It is Mauritius that is saying that, in order to declare that it is the coastal State, you must first find that it, not the UK, is sovereign over the Chagos Archipelago.

40. And the same need to establish the character, the true character of the dispute submitted is also reflected in the Court's subsequent jurisprudence, namely *Nuclear Tests*,[32] *Qatar and Bahrain*, and *Fisheries Jurisdiction (Spain and Canada).* There the court said:

"The Court will itself determine the real dispute that has been submitted to it (see *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, pp. 24-25). It will base itself not only on the Application and final submissions, but on diplomatic exchanges, public statements and other

[32] *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 466, para. 30; see also *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand *v.* France) *Case (New Zealand* v. *France), Order of 22 September 1995, I.C.J. Reports 1995*, p. 304, para. 55; *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 448, paras. 29-30.

pertinent evidence (see *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, pp. 262-263)."[33]

41. And the point that follows is that you are not in any way restricted to Mauritius' formulation of its claim for the purposes of these proceedings as merely being about who is the coastal State, with some incidental issue as to who is sovereign over the BIOT. We look at the real dispute.

Mauritius' *a contrario* argument, and other aspects to article 298(1)

42. The remainder of Professor Sands' argument was made by reference to his third issue as to whether the UK is right to say that there is some form of implicit inclusion of sovereignty disputes raised where the contention is based in a claim that State A, not State B, is the coastal State.

43. And, of course, again, that is not how we put our argument. We don't make implicit inclusion arguments.

44. As to the individual points that were made, first it was said that there was no need to dwell on what we had said in the first round on Mauritius' *a contrario* argument because that has already been dealt with in the Reply at paras. 7.24-7.27[34]. But that is not correct. The argument in Mauritius' Reply is based on the *a contrario* reasoning made in the context of mixed disputes over maritime delimitation disputes, and specific reference is made in those paragraphs to the writings of Professor Treves and Judge Rao.

45. I explained last week how that *a contrario* reasoning does not apply in the current context. And, in fact, there was no attempt to engage with that argument on Monday, simply a reference back to what had been said in the Reply. Whether or not one ultimately agrees with it, one can certainly see the force of an argument that because issues of land sovereignty can be excluded in the context of maritime delimitation in article 298(1)(a)(i), these must

[33] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 448, para. 31.
[34] Sands, day 8, 1015, lines 14 to 18.

otherwise be included when it comes to land sovereignty issues that arise in a maritime delimitation dispute that is within Part XV jurisdiction under article 288(1). That is the *a contrario* argument of, for example, Judge Treves and Judge Rao.

46. But that is not Mauritius' *a contrario* argument. It seeks to argue that because land sovereignty issues can be excluded in the context of maritime delimitation in article 298(1)(a)(i), these must otherwise be included when it comes to land sovereignty issues that arise in the quite different context of a claim as to who is a coastal State. But there's no force in that argument; Mauritius, unlike Professor Treves and Judge Rao and, of course others, is not comparing like with like. So far as concerns Mauritius' argument, the more obvious conclusion by far is that disputed land sovereignty issues simply do not fall within Part XV jurisdiction under article 288(1), at least outside the maritime delimitation context.

47. And there is no *effet utile* argument for Mauritius to fall back on, as was suggested on Monday[35]. If the judicial and other voices that favour an *a contrario* interpretation in true mixed disputes are correct, then article 298(1)(a)(i) serves to permit a vital opt-out in respect of land sovereignty issues that arise in the maritime delimitation context. If they are incorrect, then article 298(1)(a)(i) serves to clarify that, even in the rather different context of land sovereignty issues that arise in the context of conciliation, issues of land sovereignty are still excluded[36].

48. I move to our argument on the significance of the absence of an equivalent opt-out to article 298(1)(a)(i) for land sovereignty issues that arise in the context of disputes as to who is the coastal State, which also got short shrift. Again, it was said, all is answered at Reply, paras. 7.24-7.27[37]. Well, there is nothing there on our opt-out argument, and I think the reference

[35] Sands, day 8, 1016, lines 1-2.
[36] UKRej. para. 4.39
[37] Sands, day 8, 1015, lines 16 to 17.

was intended to be to para. 7.38 of the Reply because there the UK argument is recapitulated, and then the following answer is given:

49. "The failure of negotiators to create a separate automatic exclusion from jurisdiction under Part XV, despite the question being directly raised in negotiations should be fatal to this line of reasoning. No broader opt out was included because no consensus could be reached that such an opt out was desirable or necessary beyond the very limited concession in Article 298(1)(a). Indeed, many negotiating States desire that there precisely be such an incidental jurisdiction for fear that legitimate disputes would be excluded from the scope of the system merely because they included a territorial element."

50. It's important to break that down into its three stages, the three sentences that you see there.

51. Now, the first point is to emphasize the supposed importance of the absence of an automatic exclusion, but you already have our submissions on that from last Thursday, and I refer you in particular to paragraphs 5-6 of the President's report at Reply, Annex 81.

52. The second sentence deals more squarely with our opt-out argument or our no opt-out argument. It says no broader opt out was included because no consensus could be reached that such an opt out was desirable or necessary beyond the very limited concession in Article 298(1)(a). So, that implies that a broader opt out along the lines that we think would have been necessarily proposed was proposed, but was not agreed to because no consensus could be reached, but that's not a fair depiction of the negotiating history. There was never at any stage any opt out considered other than in the context of maritime delimitation so far as concerns land sovereignty issues, of course. And you have our basic argument on opt out, I'm sure, fully on board. The basic point is, if Mauritius is right as to the existence of this jurisdiction over land sovereignty disputes, wherever a coastal State acts and another State says you are not entitled to act because you are not sovereign, if that had truly been the case, there would precisely have been an equivalent opt out to what one sees in 298(1)(a) for the

purposes of maritime delimitation, but, of course, there is no such opt out. It's suggested here that no broader opt out was included because no consensus could be reached, that such an opt-out was desirable or necessary, but as I say, that is not a fair depiction of what happened.

53. Now, the final sentence is indeed many negotiating States desired that there be precisely such an incidental jurisdiction for fear that legitimate disputes would be excluded from the scope of the system merely because they included a territorial element. And again, that is not a fair portrayal of the negotiating history. Notably, the supporting reference is to a statement of Chile, which I'm going to come to in a moment, and to the Adede monograph, which has fallen out of favour since I took you to what is actually said there last week.

54. Now, to deal first with what Adede is in fact saying in this reference, to which Prof Sands also took you in week 1[38], he merely states that that there was also the view that the exclusion of any claim to sovereignty would be used as a pretext for completely excluding from the compulsory procedures all legitimate delimitation disputes.

55. So, again, clearly in the context of maritime delimitation, not some consideration of any broader application of a jurisdiction to consider land sovereignty.

56. I might add in passing that, when Professor Sands took you to this same passage in week 1, he said: "Andrew Adede has written on this, and as he puts it, numerous States during the negotiations of the Convention feared that the automatic exclusion from Part XV of any dispute involving a 'claim to sovereignty' "would be used as a pretext for completely excluding from compulsory procedures all legitimate delimitation disputes."[39] Well, one might raise the question as to whether that was, in fact, what Mr. Adede is saying here at page 175 of his monograph.

The *travaux* to article 298(1)

[38] Sands, day 4, 451, line 22 to 452, line 1.
[39] Sands, day 4, 451, lines 22 to 452 to 1.

57. As to Prof Sands' new position that the Adede monograph cannot generally be relied on, having himself relied on it in the first week, it is difficult not to raise a quizzical eyebrow at any submission that an account of a negotiating history is worth citing and reliable, but only as long as it supports one's own position[40]. We used it as a useful source last week precisely because it appeared to be an uncontroversial source. Mauritius itself had relied on it, and that particularly important in light of what Mauritius had said in its Reply about the writings of Professors Sohn and Oxman. That's Reply 7.47.

58. And when Professor Sands referred to a "paucity of referencing" on the part of Mr. Adede[41], saying that this was the difficulty with the book and perhaps also Mr. Adede's memory, he didn't provide a single demonstration of Mr. Adede being incorrect in any of the passages that we cited. And that is despite the impressive back up team that Mauritius has, at least one of whom is expert in the *travaux*. As for his criticism of the editing of the book, that was a feature of many of the international law books published at that time, and probably resulted from reasons of cost before modern technology.

59. But I leave the Adede commentary to one side, and note that, of course, we didn't only refer to Adede last week, but also to each of the specific statements from delegates attending the Third Conference that had been relied on by Mauritius in its oral submissions: Peru[42], Greece[43], Malta[44], Pakistan[45], and Chile[46].

60. Now, I don't understand Professor Sands to have been able to find fault in what we were saying in each one – which is that, in each case, the delegate relied on had been making a statement on land sovereignty issues in the specific context of maritime delimitation

[40] Sands, day 8, 1017, lines 7 to 10, and 1021, line 6 and following.
[41] Sands, day 8, 1021, line 12.
[42] 58th meeting of Second Committee 24 April 1979, para 4, at Reply Annex 80.
[43] 58th meeting of Second Committee 24 April 1979, para 11, at Reply Annex 80.
[44] 58th meeting of Second Committee 24 April 1979, para 13, at Reply Annex 80.
[45] 58th meeting of Second Committee 24 April 1979, para 14, at Reply Annex 80.
[46] 112th meeting, 25 April 1979, para 28; 57th meeting 24 April 1979 48, at Reply, Annex 80.

disputes. That submission was intended to address Mauritius' contention in week 1 that "it simply cannot be contended that the issue [of sovereignty over territory] only arose in connection with delimitation disputes."[47]. Well, we sought to respond to that.

61. Now, as part of the re-characterisation of our argument as being dependent on the existence of an implicit exclusion of all land sovereignty matters from article 288(1), we are also said to argue in relation to the *travaux* that, "there was a clear consensus on such an implicit exclusion in the negotiations."[48] And thus it is said that the *travaux* form a fundamental part of our case. Well, that, of course, is not how we have ever put matters. The extended treatment of the *travaux* came in Mauritius' Reply; and we addressed that in our Rejoinder; and now we are seeking to address such *travaux* excerpts as are deployed by Mauritius in these hearings.

62. So, as to the further batch of references to the *travaux*, introduced on Monday, the materials are all at Reply, Annex 80, and we have actually put this for convenience into tab 81 of your judges' folder, but no absolute need to turn it now. Two points were made by Professor Sands.

Prof. Sands' first point, citing Canada, Columbia and Finland

63. First, it was said as to the *travaux* at Annex 80 that: "these are general debates; they're not the records of a narrowly focused working group. The record is replete with the parties noting the close linkages between the issue of maritime delimitation and other issues" and he continued that, "typically the references are to the work of" Negotiating Group 4 (which deals with landlocked and geographically disadvantaged states), Negotiating Group 5 (dispute settlement regarding the exercise of sovereign rights in the EEZ) and Negotiating Group 6 (the outer limits of the continental shelf and revenue sharing)."[49]

[47] Day 4, Sands, 454, lines 5-7.
[48] Day 8, Sands, 1017, line 21.
[49] Sands, Day 8, 1018, lines 13 to 18 (paragraph 43 of his speech).

64. And to support his point, Professor Sands cited Canada's statement at paragraph 18 of the 112th plenary meeting on 25 April 1979[50], reading the first sentence from that paragraph as follows: "the settlement of disputes on maritime boundary issues could not be treated in isolation but had to be considered as a part of a comprehensive package." And the suggestion of Mauritius appeared to be that the settlement of disputes on maritime boundary disputes could be tied back to other issues, such as the work of Negotiating Groups 4, 5 and 6.

65. But one needs to read the preceding paragraph, paragraph 17, and the full statement from Canada to understand the matter then under consideration. This reads as follows: "[the President] invited the Conference to consider the report of the Chairman of Negotiating Group 7." And pausing there, the Tribunal will recall that Negotiating Group 7 was established to deal with maritime delimitation, both the substantive standard and the settlement of disputes.

66. The full paragraph states "that it was the considered view of [the Canadian] delegation that procedures for the settlement of disputes on maritime boundary issues could not be treated in isolation but had to be considered as part of a comprehensive package. It was essential that objective delimitation criteria should be included in the convention so that States could settle their maritime boundaries in a manner free from subjective considerations."

67. It's crystal clear that where the Canadian delegate refers to the "comprehensive package", he was not referring to, somehow, the work of Negotiation Groups 4, 5 or 6. He was referring to the substantive standard for delimitation criteria as being considered by Negotiating Group 7. And so Canada's comment simply reflects the fact that, as I said in the first round, maritime delimitation was a most sensitive issue, with the substantive standard and the

[50] Sands, Day 8, 1018, lines 18-21 (paragraph 43 of his speech).

settlement of disputes closely intertwined, and it was in that maritime delimitation context alone that Mauritius' *travaux* extracts are located.

68. And the views of Colombia and Finland that were cited as supporting Canada's view only serve to reinforce the fact that Canada's comments were made in the context of Negotiating Group 7's work on maritime delimitation. They too were solely focused on Negotiating Group 7 and, of course, maritime delimitation[51].

69. I note in passing that Colombia had made clear in an earlier session discussing what was then Article 18 (the predecessor to Article 298) that: "Certainly any matter which manifestly affected the sovereignty of a State could not be contested before international tribunals."[52]

Prof. Sands' second point, citing Israel and others

70. Professor Sands' second point was to say that "States spoke for and against the idea that sovereignty disputes could or should fall within the Convention". The point, as we understood it, was to say that despite the conflicting positions, the majority was in favour of jurisdiction over land sovereignty disputes even outside the maritime delimitation context[53].

71. But, again, all the references relied on by Mauritius comprise statements made in the context of maritime delimitation, not any general debate as to whether there should be some form of general jurisdiction over land sovereignty issues.

72. The first passage from the *travaux* cited by Professor Sands under this second point was a statement from Israel at the 112th plenary[54]. And again, one has to read the whole statement rather than just the sentence quoted. The statement starts in the preceding paragraph of the record, paragraph 25, where Israel made clear that it was referring "to the dispute settlement

[51] As to Colombia, see para 31, 112th plenary meeting, cited by Sands at fn. 151, and para 73, 57th second committee meeting, cited by Sands also at fn. 151; as to Finland, see paras. 43-45, 57th second committee meeting, cited by Sands at day 8, fn 152.

[52] 60th plenary session 6 April 1976, UKCM Annex 29

[53] Sands, Day 8, 1019, lines 2-4 (paragraph 43 of his speech).

[54] Annex 80, para 26, 112th plenary, cited by Sands at fn 153.

aspect of the report of the Chairman of Negotiating Group 7." It was advocating the removal of the issue of settlement of disputes from Negotiating Group 7's terms of reference.

73. In paragraph 26 it sets forward the view that, "there was no inherent difference between disputes relating to maritime boundaries and disputes relating to land frontiers, since both dealt with the spaces over which sovereignty or sovereign rights might be exercised." And Professor Sands noted that it was therefore against compulsory dispute settlement at all.

74. And indeed that passage demonstrates, as we observed in the Rejoinder at paragraph 4.44, that the negotiating history shows how many States were extremely sensitive to matters relating to sovereignty in the context in which these had arisen, i.e. in the context of maritime delimitation disputes, and it likewise supports our submission that they could not somehow have been agreeing to the determination of land sovereignty issues in other (and far more pervasive) contexts.

75. The same point applies to the positions of Venezuela and the USSR, to which reference was made on Monday, and both of whom expressed sovereignty concerns and their antipathy to compulsory dispute settlement of maritime delimitation.[55] And there are various other examples where States emphasised their sensitivity so far as concerns their sovereignty, and we set them out at footnote 338 of the Counter-Memorial.

76. But the simple point is that whether a position was being taken for or against the settlement of disputes that might involve a State's sovereignty, the position was being taken in the context of maritime delimitation.

77. That applies to the two statements from Chile to which reference was made by Professor Sands[56]. In both Chile was concerned with the formulation of Article 297(1)(a) which at that stage had included for the first time an exclusion from the competence of the default forum

[55] Annex 80, as to Venezuela, see para 35, 112th meeting, cited by Mr. Sands at 1019, lines 5-8, paragraph 43 of his speech; as to the USSR, see Annex 80, para 39, 112th plenary meeting, cited by Mr. Sands at fn 154.
[56] Sands, day 8, at fn 155.

"the determination of any claim to sovereignty or other rights with respect to continental or insular land territory."[57]

78. And Professor Sands you may recall also referred (at footnotes 155 to 159) to statements from the delegates of Pakistan (112th meeting para 43), Spain (112th meeting para 21 and 57th meeting, para 59), Chile (57th meeting, para 49), Greece (58th meeting, para 11) and Malta, and you'll find all the references to those specific paragraph numbers in Annex 80 at the footnotes to Professor Sands' speech, footnotes 153-159. (58th meeting, para 13).

79. But it's the same basic point again. All the statements are made in the context of discussing Negotiating Group 7's report and in support of compulsory settlement of maritime delimitation disputes. Those statements do not somehow show that a majority of States supported compulsory dispute settlement system full stop. They merely show certain States supporting compulsory dispute settlement for maritime delimitation disputes. And that is all.

80. Professor Sands also asked the question – "why was a majority prepared – even on the UK's preferred narrow view of what was being discussed – to rule such mixed disputes in." Well, this must be a tease. It's so far away from a fair characterization of our argument that I leave matters there, but I do refer you again to what Mr. Adede is saying at page 159 of his monograph.

81. Finally, it was said that: "The debates do not reflect any consensus that the concept of 'coastal State' is an *a priori* fact beyond legal interpretation. A majority would clearly have allowed such questions to be asked, at least in the context of maritime boundary disputes."[58] The correct position is as follows. The debates do not reflect any consideration of any kind of the possibility that a justiciable dispute as to land sovereignty could be raised in the context of the who was the, or indeed a, coastal State. The supposed majority does not exist, because no one was considering what Mauritius is now proposing.

[57] 112th plenary meeting at paragraph 28, 57th committee meeting at paragraph 49.
[58] Day 8, Sands, 1020, lines 14-17.

Commentary etc. relied on by Mauritius

82. I move on to the issue of the reasoning behind the statements and commentary with respect to jurisdiction over true mixed disputes. Mauritius appears reluctantly to accept that there are three strands of reasoning, and it elected not to challenge our submission that, in each case, the strand is tied back exclusively to maritime delimitation disputes, and does not transfer to Mauritius' case on jurisdiction over disputes as to who is the coastal State[59].

83. Instead, it was said that there was one commentator at least in favour of Mauritius' contentions, namely, of course, Professor Boyle[60]. Well, you will read the 1997 and 2007 papers for yourself and make up your own mind as to what they say, and how they weigh in the debate over jurisdiction. Brief reference was also made to views expressed by Judge Rao and Professor Treves, as if their views on jurisdiction over mixed disputes in the specific maritime delimitation context were intended to be of entirely general application[61]. Certainly from the materials relied on, that does not appear to be the case.

State practice; Mauritius' new reliance on the 1944 Chicago Convention

84. I move on to State practice, as to which Professor Sands did not respond at all to the points I made last week on the 1982 Convention, but did profess to find the practice relating to the 1944 Chicago Convention extremely revealing. The point we made last week was that, on Mauritius' argument, a Chicago Convention State could complain that a given exercise of rights over airspace was ill-founded and subject to challenge because the State in question was not in fact sovereign over the underlying territory. And the particular point that we made was that the Chicago Convention dispute settlement mechanism has <u>not</u> been used to decide such territorial issues. And indeed it has not.

[59] Sands, day 8, 1022, lines 19 to 20.
[60] Sands, day 8, 1022, line 20 to 1023, line 3.
[61] Sands, day 8, 1023, lines 15-19.

85. The two instances that Prof Sands referred you to do not suggest otherwise. You may recall the first of these was an English court decision, the *Kibris*[62] case. Now, in the *Kibris* case, the jurisdiction of the English courts was not, of course, founded on the dispute settlement mechanism of the Chicago Convention. In that case, an application had been made by the claimants to the UK Secretary of State for Transport for a licence permitting them to fly passengers directly from UK airports to airports in the so-called Turkish Republic of Northern Cyprus, the TRNC. The issue arose because the UK does not recognise the TRNC as a State, and the Republic of Cyprus had not designated the airport to which the claimants wished to fly, pursuant to rights of designation that the Republic of Cyprus alone has under article 68 of the Chicago Convention.

86. In exercising the powers of licensing, and as established by previous English case law, the UK Secretary of State was required to act in conformity with the fact that the United Kingdom, as a party to the Chicago Convention, is under an obligation to respect the rights of other States party to the Convention. In other words, as a matter of English law, the Secretary of State was obliged to give effect to the rights of Cyprus under the Convention. The claimants said that such rights – that is the right to designate airports – had been suspended so far as concerned airports in northern Cyprus, and the courts had to deal with the arguments to that effect which were put under the Vienna Convention on the Law of Treaties and more generally.

87. The English courts did not, of course, have to address the issue of whether the TRNC was sovereign. It could not be. As I said, it is not recognised as a State by the United Kingdom. Further, the claimants positively accepted that, for the purposes of customary international law, the Republic of Cyprus retained exclusive sovereignty over the whole of the island of

[62] [2009] EWHC 1918 (Admin) (first instance); [2010] EWCA Civ 1093 (Court of Appeal).

Cyprus[63]. At first instance, they had argued that the term 'sovereignty' in the Chicago Convention had a special meaning, but that argument was dropped on appeal[64].

88. Now, Professor Sands said that it was "plain that that is a case which could have gone to the 'Chicago Convention dispute settlement' system, used to rule on a territorial dispute between Republic of Cyprus, on the one hand, and Turkey, perhaps, on the other hand, or, perhaps, the Turkish Republic of Northern Cyprus". But that is mere assertion. It is plain that no such case could or would ever be brought. The TRNC is not a party to the Chicago Convention; it is recognised as a State only by Turkey and one or two others. It has no rights under article 84 of the Chicago Convention, the dispute settlement mechanism. It cannot bring a claim. And for Turkey to bring a claim on behalf of the so-called TRNC would be quite inconsistent with Turkey's long-standing recognition of the TRNC as a State.

89. But the more important and more general point is that the English courts are not the ICJ, and there is indeed no State practice under the Chicago Convention to suggest that States consider that they can refer disputed issues as to land sovereignty for final determination pursuant to the compulsory dispute settlement mechanisms in the Convention, that is article 84.

90. To be clear, *Pakistan v India*, that is the *ICAO Council* case, is not such a case, and I do not think the contrary was being suggested on Monday[65]. There, Pakistan had complained that India was failing to permit Pakistan's aircraft to fly over Indian territory, whereas there was a right to such effect flowing from Article 5 of the Chicago Convention. There was no dispute of any kind over whose territory it was.

91. And Mauritius is not assisted by the one example of State practice that it did provide, that is the complaint lodged by Nigeria against Portugal with respect to certain flights to Biafra

[63] See at first instance, para. 39.
[64] See at first instance, paras. 39-41; see on appeal at para. 26.
[65] Sands, day 8, 1012, line 20 and following.

in 1967[66]. For a start, Portugal's position was not that Nigeria lacked sovereignty over the relevant airspace, but rather that the aircraft involved were not Portuguese aircraft, and so it was not responsible for the aircraft of other States. So, no disputed sovereignty issue – and we have put the ICAO document stating Portugal's position in your Judges' Folder at tab 82[67].

92. And even if there had been such a sovereignty dispute, Nigeria had not invoked the dispute settlement provision of the Convention, that is article 84. Pursuant to articles 54(e), (j) and (n) of the Convention, the ICAO Council has powers with respect to establishing an Air Navigation Commission, reporting on any infraction, and "consider[ing] any matter relating to the Convention which any contracting State refers to it". Nigeria invoked these provisions, none of which accords to the Council any power to make any final determination on a dispute as to the interpretation or application of the Convention.

93. By contrast, article 84 deals with, and is headed, 'settlement of disputes'. It provides that the Council may there decide disputes as to the interpretation or application of the Convention, but that is always subject to appeal, either to an agreed ad hoc tribunal or to the ICJ. That is consistent with the point I was making last week on State practice: even if there had been a dispute as to sovereignty, which there was not, Nigeria was not invoking article 84 to seek its final determination.

Mauritius' 'a coastal State' argument

94. Finally, I move on to the question of the Tribunal's jurisdiction to make a determination that Mauritius is 'a' coastal State. This was not dealt with by Professor Sands, save to say that we had only dealt with the matter in the first round in no more than three minutes[68]. And that didn't appear to be a very substantial point, particularly when Mr. Reichler, who

[66] Sands, day 8, 1029, lines 5-18.
[67] ICAO Doc. C-WP/4747 (R), 22/1/68.
[68] Sands, day 8, 926, lines 8-9.

dealt with the matter for Mauritius, spent rather less time than that in his submissions on the topic[69].

95. Now, Mr. Reichler sought to distance the jurisdictional issues on the 'a coastal State' argument from all matters of sovereignty over land territory, obviously sensitive to our first round argument that if this was just about identifying a form of sovereignty, albeit some sort of reversionary rather than actual sovereignty, then the jurisdictional issues would be substantially the same as for the 'we are the coastal State' claim.

96. But at the same time, and before he got to his short discussion on jurisdiction, Mr. Reichler did pin his 'attributes of a coastal State' argument on Mauritius enjoying a reversionary interest in sovereignty so far as concerns the two provisions he identified, articles 56(1)(b)(iii) and 76(8)[70].

97. Now, Sir Michael will be trying to unpick Mr. Reichler's argument in a moment, but for the purposes of jurisdiction he appeared to be saying –

a. Mauritius has the attributes of a coastal State because of certain undertakings that establish a reversionary interest in sovereignty;

b. It is therefore a coastal State for the purposes of articles 56(1)(b)(iii) and 76(8); and

c. The Tribunal has jurisdiction because there is a dispute as to whether we are right about (a) and (b), and there is no impediment because the question does not turn on issues of who is sovereign.

98. But, if the 'attributes of a coastal State' argument does not come down to issues of sovereignty, we do not understand how it gets off the ground in the first place. The only basis for saying that Mauritius is 'a' coastal State is understood to be that it has what are said to be certain attributes of a coastal State, i.e., some reversionary interest in sovereignty.

[69] Reichler, day 9, 1089, lines 17-22.
[70] Reichler, day 9, 1080, lines 18-20 and 1090, lines 5-6.

99. And, as to that, our position is that the only difference from the land sovereignty case is that you are not being asked to interpret and apply the laws on self-determination, but instead other sources of alleged international law exterior to the Convention, which sources are said to establish the form of reversionary sovereignty, but so the basic underlying jurisdictional objection remains the same.

100. And, stepping back, one has to ask what this is all about. It is not as if Mauritius is engaging, or indeed can engage, in any detailed interpretation of any given provisions of the Convention to say that here, the drafters used the term 'a' coastal State, and by this they meant a State that had certain reversionary interests in land territory and the maritime areas that would go with them. The difficulty for Mauritius is that there are of course no such provisions. And it is not as if Mauritius does not know how to make a case on interpretation where it thinks it's got an argument – and one thinks, for example, of the time that Mauritius has spent both in writing and orally on article 298(1)(a)(i), or, for example, on article 2(3) when it comes to the merits, looking at these very fine issues, what's meant by "general international law" general rules – sorry, what's meant by rules of international law"; what is meant by "is exercised", but where is the analysis of what is meant by "coastal State" in that provision or "a coastal State".

101. And, in light of this, it appears that this is again all a legal construct, not an attempt to interpret and apply provisions which might offer a substantive basis for Mauritius' claims. Mauritius wishes you to interpret and apply the 1965 understandings, in one way or another, and it looks for some hook in the 1982 Convention. So far as concerns the understanding on fishing rights, it evidently now considers that the best hook is article 2(3) in its application to the three-mile territorial sea around the islands of the BIOT and there the reference to other rules of international law, and so we see that the 'a' coastal State argument, or line of argument, seems to have been dropped quietly so far as concerns that

understanding. But that leaves the other understandings, as to which Mauritius does not hesitate to assert the existence of a dispute on the basis of one line in our Rejoinder and as to which the United Kingdom is saying let us talk, and as to which we have not taken any steps before the CLCS.

102. Finally, I should add that in the context of his submissions on whether there could be more than one coastal State, Professor Crawford did touch on issues of jurisdiction, saying that where there was a condominium, or as to a putative dispute involving the UK, Cyprus and the Sovereign Base Areas, it was quite clear that a Part XV court or tribunal would have jurisdiction as to the allocation of authority[71].

103. Now, we really did not follow this. Why is it clear? No explanation was given, nor was it identified what the dispute might be, whether it would involve third parties, or was purely a matter between the States sharing the alleged condominium or parties to the Treaty of Establishment. But to take the example of the New Hebrides, our understanding is that any difference concerning the internal distribution of competences as between France and the United Kingdom in relation to offshore areas would have depended upon on the terms of the 1914 Protocol between the two States and perhaps related bilateral instruments and practice. Any disputes as to that would be a matter for those two States, and not somehow a matter for determination by a Part XV court or tribunal.

104. Mr. President, Members of the Tribunal, that concludes my remarks on jurisdiction over sovereignty disputes, and I thank you for your kind attention and ask you to call Sir Michael to the podium.

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

And I call Sir Michael to the podium.

15. Mauritius' various 'sovereignty' claims

[71] Crawford, day 9, 1094, line 19 and following.

Sir Michael Wood

Mr. President, Members of the Tribunal,

I. Introduction

1. I should like to begin with two preliminary matters. First, Mr. Reichler pointed out on Tuesday that Mauritius "[did] not have the base points relied on by the United Kingdom 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."[72] I'm afraid I too do not have the base points, but the coordinates of the Environment (Protection and Preservation) Zone may be found in the *Law of the Sea Bulletin No 58*[73]. I do not think anything material turns on this in the present case.
2. Second, Mr. President, if my words about the concerns of Mauritius Ministers in 1965 were taken badly, I regret that. It was not my intention to cast aspersions on the Mauritian leaders of the time. It was, however, Mauritius that introduced the question of the motivations of Mauritian's Ministers. I was explaining to the tribunal our reading of the record. I would note that, in the course of these proceedings, Mauritius, as our Agent said, has launched what we regard as grave, unfounded and unfair accusations against British Ministers and officials.
3. Mr. President, in this speech I shall return to the self-determination issues in light of what we heard from Counsel for Mauritius at the beginning of the week, and also to what they said about their 'attributes of a coastal State' argument, as they now seem to call it. In the course of doing this, I shall answer some of the questions put by Members of the Tribunal towards the end of our first round pleading last Friday afternoon.
4. I'd like to recall at the outset that, as I explained last week[74], we are entering upon questions of territorial sovereignty not because we think you should or will reach them, but to

[72] Day 9, p. 1073, line 25 - p. 1074, line 3 (Reichler).
[73] http://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin54e.pdf
[74] Transcript, Day 6, p. 696, para. 4 (Wood).

demonstrate just how far from the interpretation or application of UNCLOS Mauritius is seeking to lead you.

I. Understanding Mauritius case

5. I've entitled the first section of my speech "Understanding Mauritius' case," but perhaps a better title would have been "Not understanding Mauritius' case." The first point I would like to touch on is the nature of what are now said to be the three strands or approaches or limbs of Mauritius' case[75] as were set out by Mr. Sands on Monday. They are still far from clear to us. They continued to shift throughout the second round and right up to this morning. And this is unsatisfactory, and puts the Respondent, and indeed, with respect, the Tribunal, in quite an awkward position. Still, at the end of two rounds of written pleadings and two rounds of oral pleadings from Mauritius, we still do not really understand the case we are supposed to be answering.

6. This is particularly so with the second strand, and Mr. Wordsworth has just touched on this, the '**a** coastal State' or 'attributes of a coastal State' strand. I would like to spend a few minutes trying to sort this out. I was going to start with the final submission read out on Tuesday by the Solicitor-General and Agent for Mauritius. Point (2), as we read it out, had remained unchanged since the Memorial. However, today we received the final submissions in writing and Point(2) has changed, only the article numbers, we were told but article numbers can be important. Point(2) now reads:

"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 56(1)(b)(iii) and 76(8) of the Convention;"[76].

[75] Transcript, Day 8, pp. 920-921, para. 2 (Sands).
[76] Transcript, Day 9, p. 1140, line 24-p. 114, line 2 (Dabee).

7. Mr. Reichler, on Tuesday, foreshadowed this. He sought to explain what he termed his ""attributes of a coastal State" argument"[77]. And it is worth looking at his words with some care. (You will find references in the footnotes to my speech to the transcript. And I apologize if the transcript references don't always correspond exactly to the latest transcript. That's a problem which you've no doubt noticed and it seems to be insoluble for the time being. But I hope they tell you enough to guide you to the actual quote.[78]) To return to Me Reichler. He referred, and I quote, to "Mauritius' rights as a coastal State, deriving from the legally binding undertakings given by the United Kingdom to Mauritius in 1965, and the conduct of the United Kingdom in fulfilment of these undertakings. We say [he continued] that those undertakings and that conduct have vested in Mauritius certain attributes of a coastal State under the 1982 Convention."[79] End of quote. He went on to say, and I quote again: "Mauritius … 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)."[80] He then, however, explained this as follows: "Mauritius does not concede that it is vested with the attributes of a coastal State *only* for the 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 the purposes of these two articles." He went on: "Mauritius' claims do not 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."[81] So the attributes argument now relates only, according to Mr. Reichler, to Article 56(1)(b)(iii),

[77] Transcript, Day 9, p. 1080, para 78 (Reichler).
[78] Transcript, Day 5, p. 524, para. 31 (Wood).
[79] Transcript, Day 9, p. 1080, para. 77 (Reichler).
[80] Transcript, Day 9, p. 1080, para. 78 (Reichler).
[81] Transcript, Day 9, p. 1081, para. 80 (Reichler).

which concerns 'jurisdiction as provided for in the relevant provisions of this convention with regard to … the protection and preservation of the marine environment'; and Article 76(8), which provides that "Information … shall be submitted by the coastal State to the [CLCS]." But if that is so, why do we find the words "inter alia" in the amended formal submission? It's all still, I'm afraid, very unclear to us.

8. Mr. Reichler put forward another argument on Tuesday. He said, and I quote, "[w]e don't have a mere fishing agreement. What we have, in the United Kingdom'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 United Kingdom regarded as its consent to what the United Kingdom regarded as its consent to the detachment of a part of its territory."[82] End of quote. Well, even if that were the case, it is hard to see how that turns 'fishing rights' into the 'sovereign rights' of a coastal State under Article 56 of the Convention, but it seems from the passages from Mr. Reichler's speech that I have just quoted that this is no longer argued. I leave it to those who will follow, in particular Ms. Sander, to comment on what Mr. Reichler then went on to say about the fishing rights[83]. Suffice it to say at this stage that we do not recognize his description.

9. Mr. President, in light of Mr. Reichler's explanation, it is difficult to see what Mauritius' reference to a "coastal State" is intended to add to the rights that Mauritius claims to have as a result of what it likes to refer to as the 'undertakings' of 1965. To suggest that these rights, if they exist, are rights enjoyed by Mauritius as a "coastal State" is hard to follow, for the reasons I sought to explain last week[84], and to which Mauritius has made no response. I pointed out then that the statement on cession at some point in the future cannot make Mauritius the, or a, coastal State now, though it would of course be once the islands have

[82] Transcript, Day 9, p. 1083, para. 85 (Reichler).
[83] Transcript, Day 9, pp. 1083-1084, paras. 85-88 (Reichler).
[84] Transcript, Day 6, pp. 720-736, paras. 57-90 (Wood).

been ceded. To say that the benefit of any minerals or gas discovered at or near the Chagos Archipelago will revert to Mauritius does not make Mauritius the, or a, coastal State now, though it will have sovereign rights over the continental shelf once the islands have been ceded. And to extend to Mauritius 'fishing rights' does not make Mauritius the, or a, coastal State now, though again it will have sovereign rights in relation to the living resources of the islands once they have been ceded. References to a "coastal State", or to "rights as a "coastal State" (as in final submission (2)), or to being endowed or vested by the United Kingdom with "the attributes of a coastal State" or with "certain attributes of a coastal State", all these various terms have been used by our friends. Such references seem to do no more than attach a misleading label to the rights claimed, perhaps this is some vain attempt to link the undertakings to the Convention. They tell us nothing about the nature or the substance of the rights claimed.

10. Mauritius made no response to what I said last week on these matters, yet you heard Mr. Reichler on Tuesday repeat his position that "[t]he principal basis of Mauritius' claim is that it is at least *a* coastal State in respect of the Chagos Archipelago, for the purposes of Article 56(1)(b)(iii), such that an MPA cannot be declared without its consent."[85] He repeated this a few minutes later, drawing support from the fishing and minerals understandings. He said that, "That understanding alone *[the statement on cession]*, we say, vests Mauritius with the attributes of a coastal State for the purposes of Article 56(1)(b)(iii). But it does not stand alone. It is reinforced by the two other undertakings."[86] He did not explain how a statement by State A that territory will be ceded to State B in the future vests State B now with jurisdiction as provided under UNCLOS with regard to the protection and preservation of the marine environment.

[85] Transcript, Day 9, p. 1081, para. 81 (Reichler).
[86] Transcript, Day 9, p. 1083, para. 84 (Reichler).

11. Mr. Reichler made no attempt to explain how "a reversionary sovereign interest", as he called it, whatever it may mean, could make Mauritius a coastal State here and now. It would not and it could not. Mr. Reichler's references to "Mauritius and its ultimate sovereignty"[87] and to "the fact that it *will* be a sovereign State in the Chagos Archipelago"[88] seem to admit as much.

12. So where does that leave us? In my submission, it has now become clear, in light of Mauritius' second round of oral pleadings, that the "attributes of a coastal State" argument adds nothing to the claim to be the beneficiary of certain rights by virtue of the 1965 understandings. It adds nothing to the nature or substance of those rights. To argue otherwise is both elliptical and circular. 'I have certain rights, therefore I am a coastal State for the purposes of certain provisions of UNCLOS; and since I am a coastal State for the purposes of certain provisions of UNCLOS, my rights are the sovereign rights or jurisdiction of a coastal State under the provisions of UNCLOS.' It seems that the law of the sea is now a legal regime that bestows sovereign rights over land on those who could not possess them otherwise. "The sea dominates the land" it would now appear.

13. The conclusion that I invite you to draw is that there are in reality only two strands to Mauritius' argument: that it is now a coastal State because it has, as of now, territorial sovereignty; or that it has particular rights flowing from the understandings.

II. The sovereignty claim: self-determination

14. Mr. President, in the course of these oral hearings, it has become clear that Mauritius' case on sovereignty is based exclusively on an alleged breach by the United Kingdom in 1965 or 1968 of the right of self-determination of the people of Mauritius.

15. You will recall that we said there were five reasons why this argument fails[89]:

[87] Transcript, Day 9, p. 1082, para. 82, lines 1-3. (Reichler).
[88] Transcript, Day 9, p. 1086, para. 90, lines 7-9 (Reichler).
[89] Transcript, Day 6, p. 702, paras. 13-15 (Wood).

(i) There was no legal right of self-determination in 1965.

(ii) There was no such right accepted by and binding on the United Kingdom at that time.

(iii) Even if the right had developed in 1965 and was binding on the United Kingdom, its content was not as asserted by Mauritius.

(iv) On the facts, it is plain that the BIOT was not part of Mauritius for the purposes of any rule of self-determination.

(v) Even if this were not so, it is plain that the people of Mauritius, through their elected representatives, agreed in 1965 to the formation of the BIOT, an agreement that was not seriously questioned until years after independence; the *ex post facto* argument alleging duress does not correspond to reality.

16. I shall not say much on the second, third and fourth points. We stand by what we said in the written pleadings and in the first round. And Mauritius had remarkably little to say about these points earlier this week.

17. For example, Mr. Crawford did not say much earlier this week about the many examples I gave, in response to a question from Judge Wolfrum, where the boundaries of British colonies had been changed over the years[90]. All he said was that there was a distinction between "administrative rearrangements [as he called them] during the long course of colonial rule" and "the division of colonial territories for such purposes as the removal of the entirety of their population for the creation of military bases in the run-up to independence".[91] Of course the long list of examples I gave was not a list of mere "administrative rearrangements" of colonies any more than the creation of the BIOT was. These "rearrangements", as Mr. Crawford called them, altered boundaries of what became independent States; or led to the creation of independent States with territory from various former colonies; or the incorporation of former

[90] Transcript, Day 6, pp. 643-645 (Wood).
[91] Transcript, Day 8, p. 962, para. 24 (Crawford).

colonial territories into other independent States, and so on[92]. These examples were, I believe, relevant to Judge Wolfrum's question; they showed widespread practice and discretion of the colonial power to alter the composition of its colonies prior to independence. To this Mr. Crawford provided no answer. And he offered no comment on the French practice, which was described by the International Court in *Burkina Faso/Mali.*

18. The learned author of *The Creation of States in International Law*, is rather more forthcoming. We have included the relevant passage at Tab 83 in your folders for today. You will see on Page 336 of Tab 83, and it's four lines from the bottom of that page, and I'll quote it:

"Practice has not, however, been particularly consistent. For example, the transfer by the United Kingdom of the Cocos (Keeling) Islands and Christmas Island in 1955 and 1957 respectively from the Straits Settlement to Australia was at least tacitly accepted by the United Nations, despite the absence of formal consent by any indigenous government in the Straits Settlement, still less by the people affected by the transfer".[93]

But then, as you see, the passage continues: "Separation of the Chagos Archipelago from Mauritius as the 'British Indian Ocean Territory' though from time to time contested by Mauritius, appears also to have been accepted, at least as a temporary measure".[94] And you will see a footnote 30, a footnote that rather clearly and concisely sets out the United Kingdom's position as explained in these proceedings. I won't read it out but I think it is worth reading.

ARBITRATOR GREENWOOD: Sir Michael, I'm sorry to interrupt you. I think Judge Wolfrum has a question for you first, and then.

ARBITRATOR WOLFRUM: Sir Michael, can we briefly stay on Page 336 of Professor Crawford's book, and go to the beginning of where you quoted from the end, prima facie, self-determination units must be granted self-determination as a whole. Only if the

[92] Transcript, Day 6, pp. 644-645 (Wood).
[93] J. Crawford, *The Creation of States in International Law* (2006), pp. 336-337.
[94] *Ibid*., p. 337.

continued unity of the Territory is clearly contrary to the wishes of the people or to international peace and security with schemes for the opposition to meet with the approval of the United Nations organs. Could you be so kind also to comment on this part of this page. Thank you.

SIR MICHAEL WOOD: Well, indeed, Judge Wolfrum. It's not the part I quoted.

I think at this point, if my memory serves right, the learned author of this book is summarizing the law of self-determination as it has evolved over the years and as essentially it's stated, for example, in the Friendly Relations Declaration. Point 1 starts "prima facie", and the point that we have been making all along in any event is that the Chagos Islands were not part of Mauritius for the purposes at least of rules of, any rules of self-determination. That was our essential point there, and we say that's so because they were very distant, they were attached to Mauritius for administrative convenience, I think the point was they were treated as essentially a separate part of the area as a dependency. Laws were extended to them, just as laws were extended to Berlin in the days of, in the views of some people, that Berlin was not part of the Federal Republic of Germany. Special provision was made for the Government to act in relation to Mauritius for Magistrates to act in relation to the Chagos Archipelago, and Magistrates were sent, et cetera. So, that would be my initial answer to this point.

ARBITRATOR WOLFRUM: Sir Michael, I'm not, as you are, such an expert on Berlin. I'm not at your level of competence in this respect. Therefore, I won't engage in any discussion on Berlin with you but we have had a discussion on that point before, and it has been pointed out that, for example, the Notification of the United Kingdom to the European Court on Human Rights, only referred to Mauritius but not to the Chagos Islands. How do you really harmonize this statement with what you just said that it was only attached Chagos Islands to Mauritius for administrative purposes – actually, it was already detached, you wanted to say, I believe, this doesn't really fit so far.

SIR MICHAEL WOOD: Well, I think I tried anyway to explain in the first round the positions regards treaties, as I understand it, and it is that, indeed, the reference when treaties – when Territories were listed, which wasn't always the case, but when they were listed, the term Mauritius was used, and that was taken as extending the treaty also to the Dependencies, in particular the Chagos Archipelago.

And I think I also quoted the only relevant paragraph from the United Kingdom's observations in the recent Chagos Islanders case that Judge Greenwood asked about, when they stated rather clearly that for the avoidance of doubt, they wanted to make it clear that the reference to Mauritius included Mauritius and its Dependencies. So, that was a statement of the positions with regard to treaties. I think for internal purposes, over the years, since 1814, I have not been able to find out what the position was under French rule when they were also *dépendences*, but since 1814, as we showed I think mainly in the Counter-Memorial, but also in the Rejoinder there were one or two extra laws, specific provision was generally made, say this applies to Mauritius and to the Dependencies and special provision was made, there were different legal rules applicable, the Dependencies, the Chagos Islands, for example, were effectively ruled by the private interests who organized the plantations, but there was some control by limited nature from Port Louis. It was a long distance. People went from time to time to try and make sure that those on the islands were being treated properly. That was my understanding, that that was a special arrangement, it wasn't an automatic application of the whole legal system.

ARBITRATOR WOLFRUM: Sir Michael, may I summarize what you just said in one sentence. You argue that Mauritius and Chagos were not to be considered as one self-determination unit as a whole. You would see them separated somehow.

SIR MICHAEL WOOD: That is the position that I would argue if this rule were applicable at the relevant time, if, if, if. A number of if's.

ARBITRATOR WOLFRUM: That's what I understood. Thank you.

ARBITRATOR GREENWOOD: Sir Michael, my questions are on very much the same point, or least the first question is.

In the years before 1965 when the United Kingdom reported to the United Nations on the subject of Mauritius, did it report separately on the Dependencies, or did it simply treat the report as covering both Mauritius and its Dependencies?

SIR MICHAEL WOOD: Well, we will try and check that overnight. I don't have that information at hand. I would imagine that it was done in a single report. As I said earlier, I think for international purposes, they were generally treated together when it came to extending treaties, and I would think the same would apply to the reporting to the United Nations, but we will try and check that.

ARBITRATOR GREENWOOD: Thank you.

SIR MICHAEL WOOD: And give you an answer tomorrow.

ARBITRATOR GREENWOOD: My second question is, if you look at Footnote 30 on Page 337 of the Creation of States, perhaps you could help me by telling us what the learned author will now think what he ought to have thought when he wrote this. It's the quotation from the Minister's statement about two-thirds of the way down the footnote, which reads: "The UK has undertaken to cede the islands to Mauritius "when they are no longer needed for defense purposes."" Well, that, I understand. And then "and subject to the requirements of international law."

What does that mean? What requirements of international law would affect the subsequent cession of Diego Garcia to Mauritius?

SIR MICHAEL WOOD: It's my understanding that the statements that have been made over the years have not always been identical, and there was a time when those words appeared. Why they appeared is an interesting question. It might have been a reference, and I

think I will stop there.

No, I had better not stop there. It might have been, for example, a reference to the right of self-determination.

ARBITRATOR GREENWOOD: Well, I find that a bit difficult to understand because this statement is from 2001, and by that stage there weren't any inhabitants on any of the BIOT islands, so how could the right of self-determination have applied? Could it not perhaps mean, subject to the requirements of international law in the sense of the international law requiring the cession because there was a binding undertaking to make that cession?

SIR MICHAEL WOOD: I certainly have never, and I have seen this expression before, never understood it in that sense. It would be a very strange way of doing that. If it had said in accordance with the requirements, it might have meant that, but subject to the requirements of international law doesn't mean that.

And I suppose what may have been in mind would be a situation if there were inhabitants again.

I will take instruction.

PRESIDENT SHEARER: Perhaps the answer might be contained in the reference to the House of Commons debates that immediately follows that quotation. It may have been explained there, but it may be possible to get that information over night or sometime before tomorrow.

SIR MICHAEL WOOD: I suspect this was a Written Answer, but we could try to check, but I have been reminded that, in 2002, there was already a review on whether it would be feasible to resettle people on the outer islands of the Archipelago, so this would – could – this may have been in people's minds when they put this expression in.

Thank you.

PRESIDENT SHEARER: I think that might be a convenient point to take the

break, Sir Michael.

Have you got very much more for us?

SIR MICHAEL WOOD: Only about 40 more pages. I'm not likely to finish this evening. I may have to take about half an hour tomorrow morning.

PRESIDENT SHEARER: Yes. Very good. Well, I think we will take our 15-minute break now, and we will be back at 20 to 5:00.

(Brief recess.)

PRESIDENT SHEARER: Thank you, Sir Michael.

19. SIR MICHAEL WOOD: Mr. President, there was another point that Mr. Crawford did not address earlier this week, that is: the limited relevance of General Assembly resolutions and of statements by what Mauritius calls 'the international community' expressing views on the establishment of the BIOT. I noted last week that the language of the General Assembly resolutions on which they place such reliance are in reality quite soft when one looks at their actual words and compares them with others from the same period. And I also indicated our view of the value of the various political statements made by the so-called "international community."

20. Mr. President, Mr. Crawford devoted an entertaining speech on Tuesday to the exam question: can there only ever be one coastal State with respect to a given coast?[95] He was tilting at windmills, since for our part we had not embraced his pure 'solitary State" thesis. He quoted, but then appeared to ignore, what Mr. Wordsworth actually said last week. As you will recall, Mr. Wordsworth defined the term 'coastal State' as meaning "the State with the coast adjacent to the maritime zone with which the given provision of UNCLOS is concerned"[96], adding that "[o]ne can conceive of very limited exceptions where there is an openly and

[95] Transcript, Day 9, pp. 1092-1093, para. 3, (Crawford).
[96] Transcript, Day 6, p. 665, para. 21 (Wordsworth).

expressly agreed sharing of the jurisdiction of a coastal State, such as a condominium, or in the very special case of the European Union..”[97]

21. Having mischaracterised our case, Mr. Crawford then gave three examples of what he called ‘divided coastal State jurisdiction’. He did not, however, attempt to give us his definition of a coastal State, or contest ours. Instead, after a brief and rather confusing – to me, at least, passage in which he appeared to return to issues of jurisdiction[98], he devoted the rest of his speech to his three examples, roaming the world like a Wandering Minstrel. Perhaps W.S. Gilbert is now going to replace Lewis Carroll as the primary inspiration for international litigators. We could probably agree that international law is not ‘a thing of shreds and patches’, not for example an accumulation of sui generis instances. But neither is it ‘a dreamy lullaby’, as Professor Crawford and certain of his colleagues seem to think[99]. These references are annotated in the footnote for those that are not fans of Gilbert and Sullivan operas, Mr. President.

22. First, Mr. Crawford returned to the Sovereign Base Areas of Akrotiri and Dhekelia, which together form a British overseas territory on the Island of Cyprus, which we also had mentioned. Most of his propositions were unexceptional, though his hesitant conclusion is perhaps open to question. In any event, he says that “the situation is far from being fully defined” [100]. We could probably agree with our friends opposite that this at least is not a matter for this tribunal.

23. The *Gulf of Fonseca* case, according to Mr. Crawford[101], involved ‘a maritime condominium’, the ICJ finding that part of the internal waters in the Gulf were under ‘joint sovereignty’, with consequences for the closing line across the mouth of the Gulf and waters beyond. This

[97] Transcript, Day 6, pp. 694-695, para. 104 (Wordsworth).
[98] Transcript, Day 9, pp. 1093-1094, para. 4 (Crawford).
[99] *Ibid*., para. 5; W. S. Gilbert, The Wandering Minstrel’s Song, from *The Mikado* by Gilbert and Sullivan.
[100] Transcript, Day 9, p. 1097, para. 8, (Crawford).
[101] *Ibid.*, pp. 1097-1098, paras. 9-10.

probably was, to borrow Mauritius' terminology, 'one of a kind', but that was because of the geography of the Bay, the history of Spanish colonialism in the region, and the terms of the judgment of the Central American Court of Justice. There is nothing comparable in our case.

24. The New Hebrides is the classic case of a condominium, established by bilateral treaty, and about which Professor Daniel O'Connell wrote so masterfully, as Mr. Crawford recalled. It is in fact the very example that the United Kingdom team had in mind when we included a reference to condominium last week. I do not think Mauritius has ever claimed, nor has it to my knowledge ever been proposed, that the Chagos Islands are a condominium, and there is no treaty or other instrument that establishes any agreement of the parties to that effect. Indeed, Mauritius' own written pleadings are dismissive of the relevance of condominium. In its Reply, at Paragraph 5.36 we read:

"Mauritius is not claiming that there should be a form of condominium over the Chagos Archipelago, as has been exercised in relation to various other territories. Nor is it claiming that a form of sovereignty akin to the reversion of a lease should be envisaged. The position here is unique, and there is no analogy which can be found."[102] Unique and no analogy which can be found. It didn't stop Mr. Crawford from taking us through a number of cases last week.

Self-determination

25. I now turn to self-determination. In his speech on Monday, Mr. Crawford sought to conflate two quite different matters: self-determination as a political principle and self-determination as a legal right under customary international law. At one point he implied that the only reason why the United Kingdom, and presumably other States like France and the Netherlands, granted independence to their overseas territories was because they were under an international law obligation to do so. "[I]independence was granted ex gratia", he said somewhat sarcastically, "because the right that everyone recognises today did not form part

[102] MR, para. 5.36.

of the actual process of granting of independence to the great majority of non-self-governing territories."[103] That's the way he put it.

26. I would submit that Mr. Crawford was being uncharacteristically ahistorical. Is he really suggesting that the United Kingdom agreed to the independence of the Dominions in the first half of the twentieth century because it felt it was under a legal obligation to do so? Australia, New Zealand, Canada, apparently in 1926, according to the very useful table in Mr. Crawford's book on *The Creation of States*[104], beginning at page 727. We have included the table also at Tab 83**,** just for information, it's starting on the fourth page of the tab; India and Pakistan in 1947; Sri Lanka and Burma in 1948, the latter, it will be recalled Burma having been separated from British India in 1937 to form a separate colony. The Gold Coast became independent as Ghana in 1957, followed by Nigeria in 1960, Tanganyika in 1961, et cetera, et cetera. You will see in the list a not dissimilar pattern in the case of former French territories[105].

27. Mr. President, in his 'Wind of Change' speech, which was first delivered in Accra in January 1960, and repeated a month later in South Africa, Prime Minister Harold Macmillan said: "The wind of change is blowing throughout this continent."[106] And he continued, "the growth of national consciousness in Africa is a political fact, and we must accept it as such. That means, I would judge, that we've got to come to terms with it. I sincerely believe that if we cannot do so, we may imperil the precarious balance between East and West on which the peace of the world depends… What Governments and Parliaments in the United Kingdom have done since the war in according independence to India, Pakistan, Ceylon, Malaya and

[103] Transcript, Day 8, p. 957, para. 11 (Crawford).
[104] J. Crawford, *The Creation of States in International Law* (2006), pp. 727-739.
[105] Decolonization: French Territories, Makane Moïse Mbengue, paras. 17-20, http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e926?rskey=BUikyV&result=2&prd=EPIL.
[106] Speech by British Prime Minister Maurice Harold Macmillan, 3 February 1960, http://mercury.ethz.ch/serviceengine/Files/ISN/125398/ipublicationdocument_singledocument/84f64b5e-2fd9-43ac-9336-5b37ec81feb7/en/1158_macmillanwinds.pdf.

Ghana, and what they will do for Nigeria and other countries now nearing independence, all this, although we must take and do take full and sole responsibility for it, we do it in the belief that it is the only way to establish the future of the Commonwealth and of the Free World on sound foundations."

28. Harold Macmillan was acknowledging political change, political pressures and necessities, not obligations under international law. Put in terms of international law, there may have been practice, but it seems to have been practice without *opinio juris*.

29. You have probably heard enough from both Mr. Crawford and me about General Assembly resolution 1514 of 1960 and General Assembly resolution 2625 of 1970, the Friendly Relations Declaration. We will undoubtedly remain at odds, at least during these proceedings this week, on when the legal right of self-determination crystallized as a rule of customary international law.

30. I dealt last week with two issues: what for want of a better term I might call the relevant date, and the evolution of the right of self-determination under customary international law. I would refer you to what I said then[107]. I don't need to return to it in depth. Instead, I will respond to a few points made by Mr. Crawford on Monday.

31. Mr. Crawford seemed uncertain as to the relevant date; and he was remarkably unclear as to the date on which, according to Mauritius, a right of self-determination became a rule of customary international law. In response to questioning, he came up with the extraordinary suggestion that "the proposition that the law has to be applied at the date at which an event takes place assumes that you know for certain on the day that an event takes place what the law is. But customary international law, because it evolves on a continuing basis, you can't know for certain what it is on the same day".[108] Well, it may sometimes be quite difficult to identify the exact point in time at which a legal rule becomes part of customary international

[107] Transcript, Day 6, pp. 704-714, paras. 19-41 (Wood)
[108] Transcript, Day 8, p. 966, lines 1-4 (Crawford).

law, and it is not normally necessary to do so. But sometimes it has to be done and such a point must exist in principle. And it must, since this was pointed out on Monday, because the acts of a State are to be judged by the law applicable at the time those acts occur[109]. This is set out with great clarity in article 13 of the International Law Commission's 2001 Articles on State Responsibility. Article 13 states that "For responsibility to exist, the breach must occur at a time when the State is bound by the obligation[110]. The commentary to Article 13 notes that the intertemporal principle is a "generally recognized principle" applicable "to all international obligations"[111]. Customary law, though not always easy to identify, is a positive source of law and cannot to be applied retroactively. While it may be difficult to pinpoint the exact date of its formation, it has to be possible to identify a point in time when it is clear that a rule has already crystallized. And for our purposes that, we suggest, cannot be said to be earlier than the consensus adoption by the UN General Assembly of the Friendly Relations Declaration.

32. Mr. Crawford dismissed the significance of the positions taken by States in their written statements in the *Wall* Advisory proceedings, a position that the Friendly Relations Declaration is the expression of the necessary *opinio juris* for a legal right to self-determination. He suggested that that case focused on foreign occupation, not decolonization[112]. That was not really the case; many States saw the issue as one of colonization as central to the case. I refer you back to my comments last week.

33. In our view, the formation of the legal right to self-determination, as reflected, for example, in the written statements of States in the *Wall* case, and the other sources I presented last week, is clear. The rule emerged through the practice of States over several years and can be said to have existed as positive law from the 1970s onwards. The distinguished authors of

[109] Transcript, Day 8, p. 965, lines 22-23 (Crawford).
[110] Yearbook of the International Law Commission, 2001, vol. II, Part Two, p. 57, para. (1).
[111] *Ibid*., p. 58, paras. (4)-(6).
[112] Transcript, Day 8, p. 957 - 958, para. 13 (Crawford).

the *Max Planck Encyclopaedia on Public International Law*'s entry on "Self-determination", Daniel Thürer and Thomas Burri, view resolution 1514 as "[t]he first significant contribution made by the UN in developing the concept of self-determination"[113]. By contrast, the entry says that in the Friendly Relations Declaration, "the UNGA worked out the most authoritative and comprehensive formulation so far of the principle of self-determination"[114].

34. Mr. President, a point was raised for the first time in Mauritius' second round. Both Mr. Sands and Mr. Crawford referred to four provisions of UNCLOS as they put it, "all of which place "self-determination" and General Assembly resolution 1514 into the fabric of the Convention."[115] That is something of an exaggeration. They referred to just three provisions in the Convention, and added for good measure Resolution III annexed to the Final Act of the Conference.

35. The first provision that our friends opposite referred to was Article 140, paragraph 1. They also referred to the related Article 162.2(o)(i), which concerns recommendations of the Council of the International Sea-bed Authority; that provision does not refer to 1514, or indeed to the right of self-determination. Likewise the corresponding provision concerning the powers of the Assembly, which I think our friends did not mention, Article 160.2(f)(i). These provisions, Article 140 and the provisions dealing with the powers of the Assembly and the Council, are concerned with a very specific matter, the sharing of benefits from deep sea-bed mining. Article 140 is among the 'General Provisions' at the start of Part XI of the Convention, dealing with the regime of the deep sea-bed beyond national jurisdiction. It provides that 'activities in the Area', defined in article 1 as essentially deep sea-bed mining,

[113] MPEPIL, Daniel Thürer, Thomas Burri, "Self-determination", para. 9, http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e873?rskey=9n9xZ2&result=1&prd=EPIL.

[114] MPEPIL, Daniel Thürer, Thomas Burri, "Self-determination", para. 10, http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e873?rskey=9n9xZ2&result=1&prd=EPIL.

[115] Transcript, Day 8, pp. 922-923, para. 6 (Sands); pp. 959-961, paras. 18-20 (Crawford).

are to be carried out 'for the benefit of mankind as a whole', taking into particular consideration the interests and needs of developing States, and then it continues "and of peoples who have not attained full independence or other self-governing status recognized by the United Nations in accordance with General Assembly resolution 1514 (XV) and other relevant General Assembly resolutions." And this is to be done, as article 140 says right at the outset, "as specifically provided for in Part XI". Part XI, as we have seen, provides for the Assembly to adopt rules, regulations and procedures[116], but I think this has not yet happened. The reference to resolution 1514 does not stand alone, it is followed by "other relevant General Assembly resolutions". More importantly, the article refers to the process of recognition by the United Nations under resolution 1514 and other resolutions, and that is the way it identifies the peoples who are to benefit particularly from deep sea-bed mining. This provision tells us precisely nothing about the status of that resolution as customary international law.

36. It is the same with article 305.1(c) and (e) of UNCLOS, the other provisions upon which Mr. Crawford relied on Monday. The references here are likewise, as Mr. Wordsworth has explained, to UN procedures in accordance with resolution 1514, and the purpose is simply to identify entities that may become parties to the Convention. Again, it tells us precisely nothing about the status of that resolution as customary international law.

37. Professor Crawford then referred you to Resolution III in the Final Act of the Third United Nations Conference on the Law of the Sea, and he quoted part of it. And we have included the full text of that resolution at Tab 84 in your folders. It is really not clear to me what point Mr. Crawford was making here. The resolution is not part of the Convention. As you can see, it does not refer to resolution 1514; it simply states in paragraph 1(b), which Mr. Crawford did not take you to, that any exercise of certain rights shall "take into account the

[116] Art. 160.2(f)(i).

relevant resolutions of the United Nations". Mr. Wordsworth has drawn attention to other aspects of this resolution, including statements to the effect that its subject matter has nothing to do with the Law of the Sea Convention. So I will leave it at that.

The Constitutional Framework

38. Mr. President, I now turn to the facts relating to the question of Mauritian consent to detachment. I would like to begin by responding to Judge Kateka's questions last Friday, for which we are very grateful. Judge Kateka drew attention to the fact that the understandings were, as he put it, "made with the then Colony of Mauritius, and they were approved by the Council of Ministers". I understand his questions to be whether, as members of a Colonial government, Mauritian Ministers were 'free to represent the people of the colony', particularly when the Governor could appoint members of the Legislative Council, and when he presided over the Council of Ministers[117]. The answer, as I shall seek to explain, is a firm 'Yes', both in law and in practice.

39. I will first make some general points, and then look at the specific case of Mauritius in the period 1965 to 1968.

40. Before I do, let me say that I do of course understand the very deep resentment that is still felt about many aspects of colonialism. But we are not here to reach general conclusions or pass judgment on colonialism in general, however often and however crudely Mauritius' lawyers may have invited you to do so[118]. Instead, what you would have to do, if you were to get to the question of consent, which of course we would say you do not do, is to assess the particular facts surrounding the detachment of the Chagos Archipelago.

41. In that connection, it may be helpful to recall, as background, the approach of the British Government to the granting of independence to its overseas territories. I said something about this last Thursday, when I quoted a statement by the United Kingdom representative at

[117] Transcript, Day 7, p. 864, line 21-p. 865, line 8 (Wordsworth).
[118] Transcript, Day 1, pp. 17, 8-19 (Sands).

the United Nations[119]. But by 1965 the British decolonization process was well under way. The following territories, among others, had been granted independence: India, Pakistan, Ceylon, Burma, Ghana, Malaya, Nigeria, Sierra Leone, Tanganyika, Zanzibar, Uganda, Kenya, Malawi, Zambia. The central tenet was that Independence would be granted in accordance with the wishes of the people of the territory. Those wishes could be expressed by referendum or as in the case of Mauritius, at a general election where the question of independence was part of the manifesto or electoral programme of those standing for election.

42. We have included at Tab 85 in your folder, two chapters from the book on *British Overseas Territories Law* by Ian Hendry and Susan Dickson, I referred you to this book last week. Tab 85 contains two chapters, Chapter 3 and 5. If I could ask you to turn to page 37, which is in Chapter 3 on the Governor, you will see the page number at the top, and it's the third page in this tab I believe. And if you look at the third full paragraph on page 37, in the middle of the page, it describes the position of the Governor of an overseas territory as follows:

"It is often said that Governors 'wear two hats', because they head the governments of the territories but are appointed on the advice of, and report to, the Secretary of State. Governors are charged by Ministers in London with endeavouring to ensure good government in their territories, as well as representing to local politicians the policies of the United Kingdom Government. But a Governor must at the same time represent and explain the views of the territory governments to London. These different roles can no doubt sometimes present difficulties. But constitutionally a Governor has only one position, and that is to be the representative of the Queen as Queen of the territory concerned. So, constitutionally speaking, no

[119] Transcript, Day 5, pp. 519-520, para. 29 (Wood), quoting United Nations General Assembly, Fifteenth Session, Official Records, 947th Plenary Meetings, Wednesday, 14 December 1960, 3 p.m., New York paras. 53-54.

Governor is an officer of the United Kingdom Government. The Governor is the senior officer of the government of the territory."[120]

43. The actual role of the Governor depends on the stage of development of the overseas territory and the specific terms of the constitution in force. Where there is a representative government, the Governor's position was similar to that of the Queen under what is often referred to as the 'Westminster' model. In other words, the Governor acts on the advice of his Ministers. There are certain reserved areas, in particular foreign affairs, defence and internal security.

44. The key points about the role of a Governor of a British overseas territory, for present purposes, are:

- First, the Governor is the representative of Her Majesty the Queen as Queen of the territory concerned. The Governor is therefore the head of the government of the territory concerned.
- Second, no Governor is an officer of the United Kingdom Government.
- Third, the Governor only has the powers conferred on him or her by the Constitution or other laws of the territory concerned, or assigned to him or her by Her Majesty.
- Fourth, no Governor has power to detach any part of the territory concerned.

45. Mr. President, the Constitution that was in force in Mauritius in 1965 was the Constitution of Mauritius 1964, which had entered into force on 12 March 1964. You will find a copy of the Order in Council by which the Constitution was adopted, and the Constitution itself, annexed to the Order, at Tab 86 of your folders.

46. If I could ask you to look at the table of contents which is on the fourth page of the tab. You will see that the Constitution begins with Chapter I, Fundamental Rights and Freedoms of the Individual. Chapters II, III, and IV deal respectively with the Governor, the Legislature, and

[120] Hendry and Dickson, *British Overseas Territories Law* (2011), p. 37.

the Council of Ministers, and I will return briefly to these provisions in a minute. Chapters V and VI concern the Judicature and the Public Service. The executive system is a classic 'Governor in Council' system, which is described in Chapter 5 of the Hendry and Dickson book that you also have in Tab 85**,** though I don't ask you to turn to that at the moment.

47. In 1965, the Council of Ministers of Mauritius consisted of the Premier, the Chief Secretary, and "appointed members" (collectively known as "Ministers"). The Governor was not a member of the Council of Ministers, but he chaired it. In the absence of the Governor, the Council of Ministers was chaired by the Premier. Accordingly, decisions of the Council of Ministers were then those of its members, not including the Governor. The role of the Governor, as chairperson, was confined to advice.

48. The Premier was appointed by the Governor, but he was required to appoint the person most likely to have the support of a majority in the Legislature. You will find that at section 60 of the Constitution. The appointed members were appointed by the Governor after consultation with the Premier (section 61). While the provisions for the appointment of the Premier reflected what was common practice in an overseas territory ministerial system, those for the appointment of the other Ministers (the appointed members) were not; nowadays, the Governor would be required to appoint the other members on the advice of the Premier. In any event, no doubt in practice the Premier would usually have had his way in selecting his other Ministers under the 1964 Constitution, as the Governor would be reluctant to cause a political row by refusing him or insisting on someone the Premier did not want. You may recall Mauritius accepts that the pro-independence bloc led by the Premier held the majority of the seats in the Council of Ministers during the period in question.[121]

49. A key provision in the 1964 Constitution was section 59, which deals with the exercise of the Governor's executive powers, and if I could ask you just to look at that please? Section 59

[121] Transcript, Day 2, pp. 101-102, para. 59, (Macdonald).

of the Constitution. The general rule was that the Governor must consult with the Council of Ministers in the exercise of all his powers and must act in accordance with the Council's advice. The exceptions to the requirement to consult the Council were limited to the traditional ones of urgency, triviality and prejudice to Her Majesty's service. These are very restricted exceptions. And the Governor is not required to consult the Council where he is required by law to consult some other person or body or to act in his discretion. Where the Governor was required to consult the Council, he had to act in accordance with its advice except in the interests of public order, public faith or good government, and then only with the prior approval of a Secretary of State in London. That's section 59 (8). These exceptions were fairly standard in the constitutions of overseas territories falling short of full internal self-government, and are still reflected in several such constitutions, but the key point is the general rule was consultation and compliance with the Council's advice, with only limited, prescribed exceptions.

50. I have described in general terms the most relevant provisions of the Constitution of Mauritius that was in force in 1965. As we have seen, in the exercise of his powers, the Governor was to a very great extent bound by the advice of the Council of Ministers, the exceptions being expressly prescribed and limited.

51. The question of the detachment of the Chagos Islands was not a matter within the powers of the Governor under the Constitution or any other law. It was a question put to the Council of Ministers for their independent consideration. The Council of Ministers had power to take an autonomous decision on this question; the Governor was not himself a member of the Council, as I've said, and as chairman his role was limited to advice.

52. If the Council had declined to consent to the detachment of the Chagos Islands, the Governor would have had no power to overrule it; this is because, as I have said, the question did not involve any constitutional or legal power of the Governor. The Council of Ministers was

therefore free, both constitutionally and politically, to consent or to decline to consent to detachment.

53. The constitutional position in Mauritius, and the constitutional developments in the lead up to and at the Constitutional Conference in September 1965, were summarised in the Counter-Memorial, and are described in the article by Professor de Smith that we annexed. Certain steps towards internal self-government were agreed at the 1961 Constitutional Conference[122], but this had not been fully achieved by 1965, and only came about with the subsequent pre-independence constitution. Judge Kateka is correct that the Governor still chaired the Council of Ministers, but it is clear from the record which you've seen and from the documents which you have before you that this did not mean that discussions were not open and frank. In no sense could the fact that the Governor was the chair amount to duress, or otherwise affect the genuineness of the consent that was given.

54. Judge Kateka also referred to the fact that there were nominated members of the Legislative Assembly. That did not of course affect the Council of Ministers. And the reason for having nominated members of the Legislative Assembly was to ensure the representation of special interests which would otherwise have no chance of obtaining representation through election[123].

55. Mr. President, negotiations for the independence of a British overseas –

ARBITRATOR WOLFRUM: Sir Michael, sorry for interrupting. Since you're leaving the Constitutional Order of 1964, may I draw your attention to Chapter 7, Section 90, totally at the end of that Order. It contains a list of, let's say, definitions.

SIR MICHAEL WOOD: Yes.

[122] Annex I to MR, Annex 11.
[123] UKCM, para. 2.42.

ARBITRATOR WOLFRUM: It says "Mauritius means the island of Mauritius and the Dependency of Mauritius." Could you kindly comment on this particular short sentence. Thank you.

SIR MICHAEL WOOD: I think the comment is similar to the comments I made earlier, Judge Wolfrum. The fact that it was necessary to add "and the Dependencies of Mauritius" makes it clear that this was something distinct, why was there a need for a definition. For the purposes of this Constitution, Mauritius was defined in that way.

ARBITRATOR WOLFRUM: Thank you.

PRESIDENT SHEARER: Sorry, there are two things there, Sir Michael. The first one is the "Island of Mauritius includes," but then go down two more entries, "Mauritius means the Island of Mauritius and the Dependencies of Mauritius." So, there must have been some occasion for legislative purposes where, say, Parliament was only legislating for the Island of Mauritius and not for the other islands, perhaps.

SIR MICHAEL WOOD: Well, I think we included in the Counter-Memorial some of the Orders or Letters Patent from the 19th Century – the very early ones, I think they were about 1850 or 1851 – where it expressly said the Governor of Mauritius also has functions relating to the Dependencies of Mauritius, and that was expressly included in those early Orders, and I think that continued from time to time. So, I regard this as essentially a drafting technique to ensure that the Dependencies were not forgotten.

ARBITRATOR KATEKA: Sir Michael, I thank you for the explanation, and now my question is: Do you wish to create an impression that this was a democratically elected government and that the people are free to decide whatever they wanted? Was there universal suffrage, for example?

SIR MICHAEL WOOD: What's that?

ARBITRATOR KATEKA: Universal suffrage.

SIR MICHAEL WOOD: Well, Mr. President, I'm not an expert on the electoral laws of Mauritius. Perhaps I should be, but my answer, I think, is that this was a democratic constitution. I think there had been moves to expand the electorate over the years. And so far as I'm aware, the electorate by this time was very broad. I'm not sure I included all of the Dependencies – I think that was one of the complaints of Rodrigues at a certain point or perhaps at this point – but, essentially, it was a democratic election, the legislature was democratically elected, although with a number of appointed members as you have pointed out, and I explained the reason for that, and the Premier was chosen as the person who could have the support of the majority in the legislature, so that's very much the Westminster approach to selecting a government.

I think it was to a very large degree a democratic arrangement. Of course, it became more so after the 1965 Conference with the 1966 pre-Independence Constitution, which was a full self-government, internal self-government constitution, and it was under that constitution that a new Legislative Assembly was elected, which actually, as I will take you to later, voted for Independence, the final decision, democratic decision, that the people of Mauritius were taking in August 1967 with full knowledge of the terms and conditions of Independence.

I hope that answers your question, Judge Kateka.

ARBITRATOR GREENWOOD: Sir Michael, I think you might find the answer in Section 37 of the Constitution which defines who is an elector. As far as I can see, it's universal suffrage for anyone who is 21 and over and is a British subject. But ironically, it seems to apply to anyone 21 or over in Mauritius which would include the Dependencies, but as the Dependencies weren't in an electoral district, they wouldn't have been able to vote, or if he was resident in one of the Dependencies wouldn't be able to vote.

SIR MICHAEL WOOD: As we say in the English courts, "I'm very grateful to the Judge." Thank you for pointing that out.

If there are no further questions, I could move on to a slightly different point.

56. Mr. President, negotiations for the independence of a British overseas territory have traditionally taken place between representatives of the United Kingdom Government and representatives of the territory concerned. In practice, the bulk of such negotiations focused on the content of the independence constitution, but several other matters were often negotiated, for example treaty succession, financial assistance, and defence arrangements. And you will be aware in the particular case of Mauritius in 1965, a major issue dividing the representatives of Mauritius was whether to opt for independence as the majority wanted or for association with the United Kingdom, which was another concept at the time as other parties, but not the majority wanted.

57. And the representatives of the territory seeking independence were entirely free to negotiate if they wished. The independence constitution would be the first constitution of the newly independent State, and the interest of the United Kingdom was principally to ensure that the independence constitution met international standards, particularly as regards the protection of human rights and rule of law issues more generally.

58. Also, the attitude of the United Kingdom Government was determined by what it calculated would be acceptable to the United Kingdom Parliament because, while the content of the Independence Act was limited to a few necessary provisions such as nationality, the whole independence settlement needed to be acceptable to the United Kingdom Parliament if it was to pass the Act, and they would be looking for some of these international standards that I referred to.

59. I think, I would submit, that you can see the role actually played by the Governor of Mauritius in the documents which you have before you. And I would note in passing that

the Governor in question, Sir John Rennie, evidently had a very great affection for Mauritius, and he was asked to stay on after independence as the acting Governor-General. The details of his career can be found in an obituary in the Telegraph newspaper; and we have included a reference to the webpage in the footnote[124].

Mauritius' Consent to the Creation of BIOT

60. Mr. President, I will now turn to the issue of consent. Both parties agree that the Mauritius Council of Ministers consented to the establishment of the BIOT in 1965, and that consent was not put into question in the years that followed, in the years leading up to independence and thereafter. We saw last week that, even at the time, in 1965, some Mauritian politicians thought that consent should not have been given on the terms agreed. They believed that Ministers should have insisted on a more favourable deal, in particular that more compensation should have been given. But the validity of the consent was not questioned at the time. Nor was it questioned during the pre-independence elections for the Legislative Assembly that took place on 7 August 1967, and it was not questioned at the time of the vote on independence that took place in the Legislative Assembly on the 22nd of August 1967, to which Mauritius did not take you. It was not, in fact, questioned until fifteen years after the event, in the 1980s. And, moreover, there was correspondence that we have shown you from Mauritius positively affirming the existence of the understandings reached in 1965[125].

61. We have seen that Mauritian Ministers had the question of detachment of the Chagos Archipelago under consideration between July 1965, when it was first raised with them, and 5 November 1965, when the Council of Ministers gave its consent. Over a number of months. Detachment was raised in the Legislative Assembly later in November. Thereafter, as I've said, there was a general election that took place in 1967, followed by a vote on independence in the newly elected Legislative Assembly.

[124] http://www.telegraph.co.uk/news/obituaries/1409428/Sir-John-Rennie.html.
[125] MM, Annex 54, paras. 1-2.

62. And it's worth spending a few minutes, if I may, looking at the debate that took place in the Legislative Assembly on 22 August 1967. It's at Tab 87, and I apologize for the length of this tab and the fact that it's quite faint. I hope it's legible. It was the best we could do. I propose only to take you to a couple of passages. You will recall that the need for a vote in the Legislative Assembly had been foreshadowed by the Colonial Secretary at the meeting of the Defence and. Oversea Policy Committee on 23 September 1965, which[126]; and in the British Government's report to Parliament on the 1965 Constitutional Conference[127].

63. If you look at the official record of the Legislative Assembly record at Tab 87 you will see that each page is divided into two columns, and I will be referring to the numbers of the columns at the top left and right of the page. So, on the first page, in the left hand column, column 856, you can see the motion before the Assembly, and the motion begins:

"That this Assembly requests Her Majesty's Government in the United Kingdom to take the necessary steps to give effect, as soon as practicable, to the desire of the people of Mauritius to accede to independence …."

Sir Seewoosagur Ramgoolam explained that this motion, though standing in his name, immediately after the motion, "is but the expression of the collective will of the people of Mauritius as expressed at the recent general elections that our country should now become an independent State within the Commonwealth …."

64. The debate is well worth looking through. I found it quite moving. And two things in particular stood out for me.

65. First, the detachment of the Chagos Islands was raised at one point. It was mentioned at Column 903. It was mentioned in French by Mr. Ollivery, who was the First Member for Rodrigues. As you will see at column 903, it begins with the passage which has been highlighted, and he said (it is in French, but I shall do my best to translate it), "When one gave

[126] Tab 88: Meeting of the Defence and Oversea Policy Committee, Document added on 2 May 2014, p. 6.
[127] MR, Annex 11, para. 20.

the Chagos Islands – I say 'gave' because one did not sell – when one accepted that bases could be installed vis-à-vis our African and Asian friends – when one accepted the facilities would be given at Plaisance to the British authorities, when one accepted that *HMS Mauritius* could continue to dispose of certain facilities here, one ought to have expected to receive in exchange certain economic benefits." That so far as I can tell is the only reference to the detachment of the Chagos Islands in this debate, and the point that Mr. Ollivery seems to have been making is to contrast the position that was reached in 1965 with the advantages that would have followed from association as opposed to independence. The people of Rodrigues, according to Mr. Ollivery, had voted unanimously, I think he says, for association and against independence. Other speakers made that same point about voting. The first point I noted is the Chagos Islands was mentioned by one speaker, and only in that rather brief way.

66. The second point that I took from this long debate, and I already mentioned it, is that there were many voices, the official opposition in fact, that would have strongly preferred some status other than independence, in particular they would have preferred association with the United Kingdom. The motion for independence was nevertheless adopted at the end of the debate[128]. And with its adoption, independence was finally assured – it was indeed "an historic and solemn occasion", as Sir Seewoosagur said[129]. In his peroration Sir Seewoosagur quoted the poet William Wordsworth, who as it happens is a great-uncle of Mr. Sam Wordsworth, QC: "Bliss it was in that dawn to be alive."[130]

67. Mr. President, what this debate shows it that, at this critical moment, and not for the first time, but most decisively, the democratically elected representatives of the people of Mauritius opted for independence, in clear knowledge of the detachment of BIOT. And they did so

[128] *Ibid.*, Columns 1001-1002.
[129] *Ibid.*, Column 857.
[130] W. Wordsworth, *The Prelude*.

without a word of complaint or recrimination. It is clear, if you glance through the debate, that there were many more important issues on their minds.

Mr. President, I think we are due to stop at 5:30; is that correct?

PRESIDENT SHEARER: Yes, we are, Sir Michael, and if that would be a convenient point to stop, then we will resume tomorrow morning. Thank you very much.

I've just got one announcement to make before we adjourn until tomorrow morning, and that relates to the pleasant matter of the reception tomorrow afternoon following the conclusion of these proceedings. For the Parties and their representatives and assistants, together with any spouses or partners who are present with us in Istanbul, they're all cordially invited to the reception immediately following the closure – well, it will take place from 6:00 p.m., if we finish before then, 6:00 to 7:00 p.m. in the Pasha Room on the ground floor of this hotel, and I have been informed that the Pasha Room – I don't think I have been there yet, but it's approached through the library, if you know where that is, but if you don't know where either of those places are, there will be PCA staff on hand to direct you to the appropriate place, and there will be drinks and canapés, but it's not a dinner party – it's just nibbles to go with the drinks – and it will terminate at 7:00 p.m.

Is there anything else? I think not.

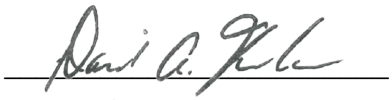
We will rise until tomorrow at 9:30. Thank you very much.

(Whereupon, at 5:33 p.m., the hearing was adjourned until 9:30 a.m. the following day.)

CERTIFICATE OF REPORTER

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

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



DAVID A. KASDAN

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