

PERMANENT COURT OF ARBITRATION

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

In the Matter of Arbitration Between:

THE REPUBLIC OF MAURITIUS,

and

THE UNITED KINGDOM OF GREAT  
BRITAIN AND NORTHERN IRELAND

PCA Reference MU-UK

Volume 11

HEARING ON JURISDICTION AND THE MERITS

Friday, May 9, 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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1 the establishment of the BIOT by the elected representatives of the people of Mauritius, that  
2 their consent was not forced upon those representatives but given by their own choice, that  
3 those who wished not to consent were free not to consent, and did in fact withhold their  
4 consent. Mr. Paturau walked out of the final meeting with the Colonial Secretary on 23  
5 September, making his views clear. Some party members refused to attend the meeting from  
6 the outset, which is why Mr. Koenig was absent. British officials were concerned after the  
7 Conference, there might be a change of heart which would put the UK in a difficult position  
8 politically, since we were already committed to independence. Mr. Crawford addressed none  
9 of these points on Monday.

10 72. I shall now address some of the documents that he did take you to.

11 73. If we go back to September 1965 and the meetings and the related documents, he took you to  
12 the meeting of the morning of 20 September between Mauritian Ministers and the Colonial  
13 Secretary. He pointed out that the Premier and his colleagues stated that they preferred a long  
14 lease of the Chagos Archipelago to the United States rather than detachment. That, he  
15 argued, proved their concern for Mauritius' right to self-determination and territorial  
16 integrity. But we say it proves nothing of the kind.

17 74. Where, during this meeting, did the Ministers express their position in these terms? Mr.  
18 Crawford says of the Ministers that, and I quote:

19 "The 3 million they have claimed is less than half of the annual £7 million that the  
20 representatives of Mauritius had asked for a lease of the Archipelago, less than half of what the  
21 Seychelles received for the excision of the three islands that were later reverted to them. It was  
22 not much more than the £1 million the UK had initially offered, a sum which vexed Sir  
23 Seewoosagur so much that he would prefer to give the islands ex gratia rather than take it".<sup>4</sup>

24 Mr. President, Sir Seewoosagur was indeed upset because of the low figure, in his view,

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<sup>4</sup> Transcript, Day 8, p. 973, para. 40 (Crawford).

1 that the UK was willing to pay for the BIOT. He was upset that the United States, as was made  
2 clear to him, was not interested in a lease. And as Mr. Crawford's own words show, he was upset  
3 because the monetary compensation seemed inadequate. But there is nothing in the minutes of  
4 the meeting to suggest or hint that Ministers refused to negotiate over the BIOT as a matter of  
5 principle, as a matter of law, because they were concerned with territorial integrity or their right  
6 of self-determination. I have no doubt that the Ministers were doing what they believed to be in  
7 the best interests of their country, but these issues were of no concern to them during the  
8 meeting, according to the record. And this is evident from one other simple fact. Four of the five  
9 ministers present agreed that they were happy to give the Chagos Islands to the United Kingdom  
10 for free. But, as the United States were involved, they thought it fair to receive adequate  
11 compensation and benefits for the territory<sup>5</sup>.

12 PRESIDENT SHEARER: Sir Michael, can I just interrupt? I'm just wondering  
13 whether you would like to take a short break, or perhaps one of your – you seem to be slightly  
14 indisposed.

15 SIR MICHAEL WOOD: Well, it's probably lack of sleep and a cold shower, since  
16 there was no hot water. But I'm very happy not to take a break.

17 PRESIDENT SHEARER: You are quite happy to go on?

18 SIR MICHAEL WOOD: Yes.

19 PRESIDENT SHEARER: Yes, very well then.

20 SIR MICHAEL WOOD: I'm very grateful to you. I will take some more water, too.

21 (Pause.)

22 75. Mr. Crawford explained that the Ministers were interested in a lease and that, I quote, "They  
23 did not freely consent to something as to which they were, explicitly, given no choice."<sup>6</sup> That  
24 "Whether or not they agreed, the Archipelago would be detached unilaterally by Order in

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<sup>5</sup> MM, Annex 16, pp. 4, 8, 9.

<sup>6</sup> Transcript, Day 8, p. 973, para. 39 (Crawford).

1 Council. He said that was what Prime Minister Wilson told Premier Ramgoolam on 23  
2 December 1965” he says.<sup>7</sup> But they had a choice. They had a choice to consent or not to  
3 consent. Some consented; others did not, albeit because of what they saw as the inadequacy  
4 of the compensation.

5 76. As I explained last week, and Mr. Crawford did not deny this, Mauritius did not raise the  
6 issue of the BIOT for about 15 years. And, furthermore, Mr. Crawford did not deny that in  
7 the case of Nauru, to which he referred, the local representatives voiced their claims vis-à-vis  
8 Australia both before and after independence. Moreover, you may recall that years later Sir  
9 Seewoosagur Ramgoolam stated that detachment had been agreeable to him because the  
10 Chagos Islands were of no interest to Mauritians<sup>8</sup>. Mauritian interests lay elsewhere, so they  
11 consented to the creation of the BIOT, among other things to better their economic future.

12 77. Mr. President, Members of the Tribunal, let me now take you to the meeting of the Defence  
13 and Oversea Policy Committee of the Cabinet that took place on the afternoon of 23  
14 September. You will find this at Tab 88. I would like to highlight a few things from this  
15 document that, as you will recall, was submitted last week in response to a question from the  
16 Tribunal.

17 78. As you will see from Tab 88, the Colonial Secretary first explained what he intended to say  
18 at the plenary meeting at the end of the Constitutional Conference scheduled for the  
19 following day. That's in the paragraph under the heading “2. Mauritius and defence facilities  
20 in the Indian Ocean”. He said that some progress was made on safeguards for minorities. He  
21 proposed, and I quote, “to inform the conference that the United Kingdom Government could  
22 not agree to communal rolls; that Mauritius should become independent on a date to be  
23 agreed between the United Kingdom Government and Mauritius after the election of a new  
24 legislature and a vote by that body on that issue”.

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<sup>7</sup> Transcript, Day 8, pp. 970-971, para. 33 (Crawford).

<sup>8</sup> Transcript, Day 5, pp. 534-535, para. 57 (Wood); UKCM, Annex 46, para. 25A.

1 79. If you could turn to page 5 of Tab 88, number 5 at the top, the last two lines. The Colonial  
2 Secretary is reported as saying, and I quote: “As regards the Indian Ocean Islands, the Parti  
3 Mauricien had informed him that since they were opposed to independence they could not  
4 agree to the detachment of the islands.” So, they could not agree to detachment, not because  
5 of concerns over sovereignty, but because they were not interested in independence. And this  
6 takes us to the next page. The Colonial Secretary continues his account of the understandings  
7 reached with the majority of Ministers that agreed to detachment and also the view of the  
8 “independent representative”, that is Mr. Paturau, who had yet to agree, in his case because  
9 he thought that the compensation was inadequate.

10 80. And you will see in the next paragraph, in the middle of page 6, that Prime Minister Wilson  
11 spoke of his own meeting with Premier Ramgoolam, and the paragraph reads – I’ll read it  
12 out:

13 “The Prime Minister said that this seemed a very satisfactory arrangement. It would however be  
14 necessary to make it clear that a decision about the need to retain the islands must rest entirely  
15 with the United States and the United Kingdom Governments and that it would not be open to  
16 the Government of Mauritius to raise the matter, or press for the return of the islands, on its own  
17 initiative. He had seen the Prime Minister of Mauritius that morning – this was his bilateral – and  
18 had undertaken that we would also use our good offices with the United States Government  
19 about the supply of wheat under PL450” – Public Law, I suppose.

20 81. Prime Minister Wilson did not refer to any other conditions, or any connection between the  
21 consent given and withdrawing the United Kingdom’s plans for independence, or to any  
22 pressure that had to be brought. In particular, he did not refer to fishing rights, or the benefits  
23 of minerals and oil, et cetera; as we have seen, these were only added a week or so later, as a  
24 result of Sir Seewoosagar Ramgoolam’s handwritten letter on Strand Palace Hotel notepaper.

1 82. Mr. President, as you will have seen from the Colonial Secretary's Report to Parliament on  
2 the Constitutional Conference, this is exactly what the Colonial Secretary did put forward in  
3 plenary the following day, and I'll read from that : "Her Majesty's Government would be  
4 prepared to fix a date and take the necessary steps to declare Mauritius independent, after a  
5 period of six months full internal self-government if a resolution asking for this was passed  
6 by a simple majority of the new Assembly"<sup>9</sup>.

7 83. The Report to Parliament on the Conference is quite a long document, and I won't take you  
8 through it. But I hope you will find time to glance at it. It is at annex 11 of our Counter-  
9 Memorial, and I just want to highlight that it includes two important annexes. Annex A, is  
10 the Communiqué issued after the Constitutional Review Talks of 1961, which laid down the  
11 constitutional framework to be followed up to the Constitutional Conference. And Annex D  
12 is a detailed constitutional framework that was agreed at the Conference and was to be  
13 followed in order to implement the political commitment conveyed by the Colonial Secretary  
14 on behalf of the Government to grant Mauritius independence.

15 84. I would just like to make one point, which goes to timing. The Colonial Secretary's  
16 concluding statement to the Conference was made in September, and the Report on the  
17 Conference was submitted to Parliament in October. This was well before the Council of  
18 Minister's consent to the BIOT being given in Port Louis on 5 November. These documents  
19 recorded – the statement and the report recorded the unconditional and public commitment of  
20 the United Kingdom Government, to Mauritius and to the Westminster Parliament, on  
21 Mauritius' independence. In an era of decolonization, of political pressure on the United  
22 Kingdom and with the United Kingdom's practice and policy of decolonization, that I've  
23 already indicated, it is frankly inconceivable that the UK Government would have simply  
24 reversed this process if Mauritian politicians had changed their minds on the BIOT prior to

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<sup>9</sup> Report, page 7, para. 20.

1 independence. “[T]he very day the London Conference was over, ... the question of  
2 independence of the country was no more in the hands of Her Majesty’s Government; it was  
3 in the hands of the people of Mauritius.”<sup>10</sup> Those are not my words; they are words spoken  
4 in the Mauritius Assembly debate in 1967 to which I took you yesterday.

5 85. And the last document I would like to turn to is the 25 May 1967 minutes of the Defence and  
6 Oversea Policy Committee<sup>11</sup>, and they are at annex 59 to the Reply. Mr. Crawford  
7 recognized that the new Commonwealth Secretary, Mr. Bowden, had not attended the  
8 Constitutional Conference. But he made much of the precise words, the wording of the  
9 report when it recorded Mr. Bowden’s statement, that “unless they [the Mauritian Ministers]  
10 accepted our proposals we should not” – it’s a curious form of words, not "we would not" or  
11 "we could not" – “we should not proceed with the arrangements for the grant to them of  
12 independence”.<sup>12</sup>

13 86. It is helpful, I think, to understand the context. The Committee in 1967 was discussing how  
14 to approach the United States to ensure that it remained silent about the contribution to the  
15 compensation given to Mauritius as this had not been revealed to Mauritian Ministers. Mr.  
16 Bowden stressed that – but first of all, if you look at the report, and I’m sorry, it’s not I the  
17 tabs but it is annexed to the Reply at 59, the Defence Secretary, Mr. Denis Healey, begins by  
18 explaining the issue, which relates to the fact that the contribution, the indirect contribution,  
19 by the United States had remained at secret for a number of reasons including the U.S. wish  
20 not to inform Congress that there was the risk that this might come out, because some  
21 American scientists had discovered about it, so the Defence Secretary takes the lead and  
22 explains what the problem is and how it would be in the interests of the United Kingdom to

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<sup>10</sup> Debates in the Legislative Assembly of Mauritius on “Accession of Mauritius to Independence within the Commonwealth of Nations” on 22 August 1967, Column 898 (Mr Gujadhur).

<sup>11</sup> Minutes of 20th Meeting of Defence and Oversea Policy Committee held on 25 May 1967 (MR, Annex 59).

<sup>12</sup> Transcript, Day 8, p. 975, para. 46 (Crawford).

1 persuade the Americans not to reveal what had happened two years before. So the Colonial  
2 Secretary then stressed that  
3 “a critical election which would determine whether or not Mauritius was to become independent  
4 was due to be held in August [*August 1967, we are already in 1967 by now*] and the question of  
5 the alleged inadequacy of compensation for detachment of the Chagos Archipelago would be  
6 used by the opposition to attack the Premier’s record. We should therefore strongly urge the  
7 United States Government that complete secrecy should be maintained”<sup>13</sup>

8 87. I would like to make four points about this document. Firstly, you'll note its form. It is the  
9 minutes of a meeting; it is not verbatim. That is, it a brief summary account, in reported  
10 speech, of what may have been a long discussion. These minutes would have been prepared  
11 by the Cabinet Secretariat.

12 88. Second, the speaker was a new Secretary of State, in a new post, the Commonwealth  
13 Secretary. He was someone who so far as we know did not attend the Constitutional  
14 Conference of September 1965, and whose functions at that time were quite removed from  
15 foreign or colonial affairs. He was leader of the House of Commons. He was reported to be  
16 summarising what had taken place nearly two years earlier, events in which, so far as we  
17 know, played no role.

18 89. Third, the statement as briefly summarised in reported speech in the record did not in fact  
19 reflect what actually happened in 1965. The text is quite curious in places. For example, it  
20 records Mr. Bowden as recalling “that an agreement for the detachment of the BIOT was  
21 signed in 1965”.<sup>14</sup> As we are all too well aware, after three weeks in Istanbul, no such  
22 ‘agreement’ was ‘signed’.

23 90. And, fourth, the precise course of events in 1965 was immaterial to the matter at hand which  
24 concerned the American contribution and the secrecy thereof. The concern was to persuade

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<sup>13</sup> MR, Annex 59, p. 2.

<sup>14</sup> MR, Annex 59, p. 2.



1 the Americans to keep silent over their contribution, because to reveal it might destabilize  
2 efforts in Mauritius to move to independence. The sensitivity at the meeting did not go to the  
3 establishment of the BIOT – or the sensitivity in Mauritius that was being under  
4 consideration did not go to the establishment of the BIOT but to question of inadequate  
5 compensation.

6 91. In short, we would submit that this one sentence in a summary report of a statement made to  
7 a cabinet committee cannot bear the weight placed upon it by Mauritius. The one thing this  
8 meeting does show is that the United Kingdom was determined to ensure that the path to  
9 independence was as smooth as possible. It shows the strong commitment by United  
10 Kingdom Ministers to the independence of Mauritius.

11 *The Nature of the Understandings*

12 92. Mr. President, Members of the Tribunal, I now turn to the questions put to us on Friday by  
13 Judge Wolfrum and Judge Greenwood relating to the nature of the 1965 understandings.  
14 Judge Wolfrum began by questioning our reference to ‘unilateral’ declarations. He saw the  
15 various understandings as involving more of a *quid pro quo*, a ‘package’, an ‘agreement’ –  
16 or, as Judge Kateka put it, a ‘contract’<sup>15</sup>. While Judge Wolfrum said that he understood the  
17 point about the legal status of the understandings as between the Governments in London and  
18 Mauritius in 1965, he suggested that after independence they, and I quote him from the  
19 verbatim record, “remained the package, which, due to the various interventions from both  
20 sides, has been lifted or transferred to the international level as a package”<sup>16</sup>.

21 93. Judge Greenwood expressed it somewhat differently. He said, and I think it's best to recall  
22 his actual words as they appear in the transcript: “You have the Agreement of the  
23 representatives of the people of Mauritius, so at the international level, the United Kingdom

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<sup>15</sup> Transcript, Day 7, p. 861 line 19-p. 862 line 2; p. 862, lines 19-24; p. 863, lines 14-19; p. 864, lines 1-15; p. 864, line 21-p. 865, line 8.

<sup>16</sup> Transcript, Day 7, p. 865, lines 21-23 (Wordsworth).

1 gets the benefit of what was Mauritius' side of the bargain, as it were, but the consideration  
2 for that bargain was a series of undertakings given by the United Kingdom. That is what I'm  
3 grappling with. Is it really right to analyse it in terms that what Mauritius gave was in the  
4 past, and what the United Kingdom continues to give after 1968 has to be seen entirely in  
5 isolation from that?"<sup>17</sup> That was what Judge Greenwood said.

6 94. But he also asked whether he was, and I quote, "to understand ... that the United Kingdom  
7 position is that none of the undertakings given at Lancaster House is legally binding upon the  
8 United Kingdom today so, for example, the United Kingdom would be free to cede the  
9 Chagos Archipelago to a third State. It is not legally as opposed to politically obliged not to  
10 do that."<sup>18</sup> Well, on that last question, the Agent responded yesterday, and I have nothing to  
11 add to what Mr. Whomersley said. Judge Wolfrum also asked a little earlier in the discussion  
12 on Friday whether the commitment on minerals and oil after the islands were no longer  
13 needed for defence purposes was legally binding<sup>19</sup>.

14 95. Mr. President, these are all important questions. The position we have taken in these  
15 proceedings is, of course, in response to those of Mauritius, which is after all the Claimant.  
16 Our discussion of *Nuclear Tests* and 'unilateral' declarations was prompted by the way  
17 Mauritius pleaded the case. Mauritius' case was cast solely as one based on unilateral  
18 undertakings as in *Nuclear Tests*, both in its written and first oral pleadings<sup>20</sup>. There was  
19 nothing else save for its case on preclusion made by reference to United Kingdom internal  
20 documents. For this reason, as we indicated last Friday, we wanted to hear how Mauritius  
21 put its case before putting ours, as Mr. Whomersley also explained. And we heard on  
22 Monday, for the very first time, although only in response to questions from the bench, how

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<sup>17</sup> *Ibid.*, p. 864, lines 10-15.

<sup>18</sup> *Ibid.*, p. 855, line 24-p. 865, line 5.

<sup>19</sup> *Ibid.*, p. 850, lines 7-10.

<sup>20</sup> MM, paras. 7.22-7.27; UKCM, para. 8.18; MR, para. 6.45; UKR, para. 8.16; Transcript, Day 3, p. 254, lines 3-6 (Crawford).

1 Mauritius does in fact put its case on the legal effect of the 1965 understandings, and now it  
2 seems it has nothing to do with *Nuclear Tests*. It is all to do with “the possibility of a reversal  
3 of the situation” between the time the original consent is given and independence, or  
4 “reaffirmation, recognition, acknowledgment of an obligation already existing” at the time of  
5 independence<sup>21</sup>. Mr. Reichler later spoke of an agreement. But there is not one word in  
6 Mauritius’ written pleadings about these hypotheses and as to which there was no suggestion  
7 in its first round of oral argument.

8 96. I will now endeavour to respond to the various points made by Judges Wolfrum and  
9 Greenwood, except in so far as Mr. Whomersley has already done so and, at the same time,  
10 to what Mauritius had to say earlier this week. It seems to me that these questions can be  
11 broken down into three issues, or groups of issues.

12 97. First, did the various understandings in 1965 constitute some kind of a ‘package’, and, if so,  
13 is there still a ‘package’? Or should they be seen in isolation, one from another?

14 98. Second, were all or any of the understandings legally binding as between Mauritius and the  
15 United Kingdom in 1965?

16 99. And, third, whether all or any of the 1965 understandings were transformed to the  
17 international plane after independence, and, if so, what is now their status?

18 100. I’ll turn to the first issue. Did the various understandings in 1965 constitute some kind of a  
19 ‘package’, and, if so, is there still a ‘package’? Or should they be seen in isolation?

20 101. Leaving aside for the moment, the question of their legal status, it seems pretty clear that  
21 there was indeed a package agreed in London in September and early October, and  
22 confirmed by the Council of Ministers on 5 November 1965. The elements of that package  
23 were reflected in the amended minutes of the meeting held at Lancaster House on 23  
24 September at 2.30 p.m., which you are all very familiar with.

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<sup>21</sup> Transcript, Day 8, p. 984, lines 9-11; p. 983, lines 18-22 (Crawford).

1 102. And what are the consequences of this, again leaving aside for the moment the legal status  
2 of the elements of the package? First, it seems clear that all the elements of the package had  
3 a continuing time element. This is self-evidently the case with the understandings on fishing  
4 rights, minerals and oil, and cession. But it is no less the case with the *quid pro quo* for the  
5 United Kingdom, Mauritius' consent to the establishment of the BIOT. In one sense that  
6 consent was a one off matter; once given on 5 November 1965 it was given; it could not be  
7 retracted, and Mauritius does not suggest that it could be. Rather, as we understand it,  
8 Mauritius is now arguing before this tribunal that the consent was void *ab initio*, void for  
9 duress or some such thing. So Mauritius is effectively seeking to withdraw from its part of  
10 the package. If Mauritius were correct, the package would no longer exist, or rather would  
11 never have existed.

12 103. So I turn to the second issue: Were all or any of the understandings legally binding as  
13 between Mauritius and the United Kingdom in 1965? We have already answered this by  
14 reference to a passage from Hendry and Dickson<sup>22</sup>. Our answer is that the understandings  
15 were not and could not have been legally binding in 1965.

16 104. We were asked on Friday particularly whether the United Kingdom regarded its statement  
17 on cession as legally binding. And, Mr. Whomersley, as I've said, has answered this. I would  
18 only add two points. Firstly, the Tribunal will recall that the United Kingdom has, on a  
19 number of occasions, offered to Mauritius to place the statement on a legally binding footing  
20 by including it in a treaty between Mauritius and the United Kingdom. Mauritius has  
21 rejected that offer. Second, the cession of the BIOT, the cession, that is, of territory under  
22 the sovereignty of the United Kingdom, requires an Act of Parliament. The Government is  
23 careful not to pre-empt Parliament by entering into legally binding undertakings without first

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<sup>22</sup> Transcript, Day 7, pp. 846-848, paras. 89-92 (Wordsworth).

1 getting the necessary legislation from Parliament. In short, our position is that all the various  
2 understandings were not, and are not, legally binding.

3 105. The third set of issues that I mentioned is whether all or any of the understandings were  
4 transformed to the international plane, upon, as Mr. Crawford said, or possibly sometime,  
5 after independence in 1968? And if so, how did this come about and what is their status?  
6 Did they remain non-legally binding, ‘gentlemen’s agreements’, albeit now on the  
7 international plane, between, that is, two sovereign States? If they were part of a reciprocal  
8 package, that would, I suppose, be something similar to a memorandum of understanding.  
9 Or did they, and this is what Mauritius has been arguing but only until Monday this week,  
10 become binding unilateral declarations, in the sense of the *Nuclear Tests* cases, perhaps by  
11 virtue of the further statements that were made after independence? That argument now  
12 seems to be ‘on hold’. Or were they transformed into an agreement under international law,  
13 in effect a treaty, albeit not in the usual treaty form and not registered by either side with the  
14 United Nations Secretariat under Article 102 of the Charter. Those seem, to us, to be the  
15 possibilities in theory. Our view is that, as I said, they continue to be nonbinding  
16 understandings, commitments if you like but political commitments by each side.

17 **I. The CLCS issue**

18 106. Mr. President, the last point I want to turn to is the issue of the Commission on the Limits  
19 of the Continental Shelf, the CLCS. I need to return to it briefly and to the *Preliminary*  
20 *Information* and submission in light of what Mr. Reichler had to say on Tuesday<sup>23</sup>.

21 107. Mr. Reichler began by asserting that “in the unique circumstances of this case, Mauritius  
22 has been vested by the UK with the attributes of a coastal State for the purposes of Article  
23 76(8)”<sup>24</sup>, and he drew some far-reaching conclusions from this<sup>25</sup>. In our view, what he said is

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<sup>23</sup> Transcript, Day 9, pp. 1085-1089, paras. 89-99 (Reichler).

<sup>24</sup> *Ibid.*, Para. 89.

<sup>25</sup> *Ibid.*, Para. 90.

1 inexplicable, since at most the understanding concerns the benefits of minerals and gas, not  
2 sovereign rights. Perhaps recognizing this, Mr. Reichler then asserted that “[m]oreover, since  
3 January 2009, the UK has acted in a manner that reflects its acceptance that Mauritius is a  
4 coastal State for the purposes of Article 76(8).”<sup>26</sup> That ignores a lot of things, not least the  
5 fact that everything that was done in since 2009 and in 2009, has been under a watertight  
6 ‘sovereignty umbrella’.

7 108. I have already stressed the diplomatic importance of sovereignty umbrellas. They cannot  
8 simply be wished away or ignored when this is convenient, as Mauritius’ lawyers seem to  
9 think. Their aim is precisely to protect legal positions, to avoid cooperation being held  
10 against you in legal proceedings such as these when you – it’s to avoid that that States operate  
11 under a sovereignty umbrella. The British Government, and no doubt others, rely on such  
12 umbrellas in some of the most sensitive situations, to allow cooperation to be carried  
13 forward. Examples include the Antarctic Treaty, which involves a range of States from all  
14 regions of the world. Others include dealings between the United Kingdom and Argentina  
15 over the Falkland Islands and South Georgia and the South Sandwich Islands. A similar  
16 diplomatic technique is sometimes used in the case of maritime delimitation negotiations,  
17 where the parties may agree that they will not cite positions taken in negotiations if the  
18 matter eventually goes to third-party settlement. The effectiveness of these mechanisms  
19 should be reaffirmed, not undermined as with Mauritius’ argument about the UK acceptance  
20 that they are a coastal State for the purposes of article 76(8) because of activities that took  
21 place under a sovereignty umbrella.

22 109. Mr. President, Mr. Reichler took you back to a sentence by Mr. Roberts’ that is recorded in  
23 Mauritius’ record of the January 2009 bilateral meeting at the FCO, and we have included  
24 that record at Tab 89. You will find the sentence on page 24 of the record, about two-thirds

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<sup>26</sup> *Ibid.*, Para. 91.

1 of the way down, and it reads, as I am sure you will recall, “You may wish to take action and  
2 we will provide political support.”

3 110. According to Mr. Reichler, and I quote: “Mauritius quite rightly interpreted this offer of  
4 cooperation as an encouragement to go ahead and submit preliminary information to the  
5 CLCS to beat the May 2009 deadline and stop the clock so that the two States could work  
6 together on a joint full submission without being time-barred.”<sup>27</sup> Or, as Mr. Loewenstein put  
7 it, ‘Mauritius got the message’<sup>28</sup>. I’m afraid they did not rightly interpret the offer. I’m  
8 afraid they got the wrong message.

9 111. And I apologise for taking you back to the record yet again. I have already explained last  
10 week why their interpretation was mistaken<sup>29</sup>.

11 112. Mr. Reichler on Tuesday made great play of the ‘we’s’ and ‘you’s’. But he passed quickly  
12 over the clear statement by the UK Legal Adviser, though he did not seem to dispute that it  
13 meant what it said. He rather implied that Mr. Roberts had corrected or overruled Mr. Doug  
14 Wilson. Mr. Reichler did not, however, address what I had said about Mr. Roberts’  
15 statement. I actually dealt with it at some length, concluding last week that “what Mr.  
16 Roberts said, taken in context, is entirely consistent with what Mr. Wilson had just said, in  
17 other words that the UK was prepared to assist Mauritius by agreeing to the joint submission  
18 of *Provisional Information*, if Mauritius decided it wished to do so. The UK had no direct  
19 interest, so it was up to Mauritius to decide if it wished matters to be taken forward [‘to take  
20 action’] at the CLCS; but if it did the UK would have to join in order to overcome the  
21 obstacles that would otherwise arise, not least the existence of the sovereignty dispute.”<sup>30</sup>  
22 That's what I said last week, and there was no answer from Mr. Reichler to that.

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<sup>27</sup> Transcript, Day 3, p. 277, lines 1-4 (Reichler).

<sup>28</sup> Day 3, p. 345, line 16 (Loewenstein).

<sup>29</sup> Transcript, Day 6, pp. 728-730, paras. 76-79 (Wood).

<sup>30</sup> *Ibid.*, pp. 730, para. 78.

1 113. But Mr. Reichler also ignored other parts of Mauritius' own record that make what was  
2 under discussion abundantly clear. And if I could ask you please to look at the third  
3 paragraph on page 24 - it is Mr. Seeballuck speaking; he starts on page 23. He was the Head  
4 of the Mauritius delegation. And he said in the third paragraph on page 24:

5 "With regard to the Continental Shelf, we have a deadline of 13 May to make our submission.  
6 The deadline is there. We welcome your suggestion for a joint submission and possibly we have  
7 to work to achieve it. We have, on our side, some basic data. We are prepared to exchange same  
8 with the UK side for the joint submission."

9 114. And he went on: "In making our joint submission with Seychelles, we received support  
10 from the Commonwealth Secretariat." And in the next paragraph he said, "However, we  
11 would like to point out that Mauritius will be favourable for a joint submission on condition  
12 that there should be an equitable sharing of the resources which the extended Continental  
13 Shelf will generate." I think that reference to an "equitable sharing of resources" is  
14 something of a red herring because the United Kingdom was never suggesting that it would  
15 be sharing these resources. It had been recognized that the benefits would go to Mauritius.

16 115. Mr. President, the interventions of Mr. Wilson and Mr. Roberts followed immediately after  
17 this statement by the head of the Mauritius delegation, with its repeated references to a joint  
18 submission. It is very hard to understand how Mauritius could have come to the  
19 interpretation that it did.

20 116. Mr. Reichler also referred you to the July 2009 bilateral talks in Port Louis<sup>31</sup> - that's in  
21 Mauritius' Reply at annex 128 - but I do not think you need turn to it. He quoted parts of  
22 paragraph 7 of the United Kingdom's record. And he tried to read a great deal into the use of  
23 the word 'coordinated', as opposed to 'joint', 'a coordinated submission under a sovereignty  
24 umbrella'. He did not read out the concluding sentence, which is: "It was agreed that the best

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<sup>31</sup> Transcript, Day 9, pp. 1087-1088, para. 96 (Reichler).



1 way forward” – this is in July 2009 – “would be a coordinated submission under a  
2 sovereignty umbrella and that technical experts from both sides should get together.” And the  
3 UK comment at the end of the record, in paragraph 14, is also worth noting. It concluded  
4 with the words, “a way forward on [the issue] of an ECS [extended continental shelf] appears  
5 to be possible.”

6 117. Mr. Reichler also made much of the fact that the United Kingdom did not protest the  
7 *Preliminary Information* at the July meeting. Mr. President, there was no reason to protest at  
8 that time. Everything was under a sovereignty umbrella. Mauritius has clearly stated in the  
9 *Preliminary Information* that there was a land and maritime dispute. I took you to paragraph  
10 6 of the *Preliminary Information* last week. Mauritius was not, as it is now in these  
11 proceedings, seeking to evade the sovereignty umbrella and argue, that by not protesting the  
12 United Kingdom was accepting Mauritius is a ‘coastal State’. The United Kingdom had no  
13 alternative but to react as it did in the Rejoinder, faced with the arguments now being  
14 advanced by Mauritius in these proceedings.

15 118. Which brings me back to paragraph 8.39 of the Rejoinder. Mr. Whomersley indicated our  
16 position yesterday, and there is no need for me to add anything. I would only say this:  
17 Mauritius does not seem to have really listened to what we said last week on this. They do  
18 not seem to acknowledge a genuine attempt to be constructive. I can only assume that this  
19 reflects a misplaced litigation strategy, a strategy to elevate this into yet another artificial  
20 UNCLOS dispute between the Parties. I was accused of imprecision, of not stating what the  
21 position was<sup>32</sup>. I should like to repeat precisely what I said then. I said last week, “as the  
22 Agent [of Mauritius] said yesterday [that was on Wednesday last week], we now hear that  
23 Mauritius may be in a position to make a full submission later this year. If so, we look  
24 forward to discussing with Mauritius how this might be taken forward. If a State puts in an

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<sup>32</sup> Transcript, Day 9, p. 1089, para. 99 (Reichler).

1 objection to another State's submission to the CLCS, that is not the end of the matter.  
2 Objections can always be lifted. In fact, the practice of the CLCS suggests that an objection  
3 can be the start of a dialogue, part of an ongoing diplomatic process between the States  
4 concerned. Moreover, the CLCS's backlog is so great that many years are likely to elapse  
5 before the Commission would be ready to proceed to consider a new submission and the  
6 situation then might be very different. During this period it would be incumbent on the  
7 United Kingdom and Mauritius to discuss how to take the matter forward, as the Agent  
8 indicated yesterday<sup>33</sup>

9 119. In short, I was drawing attention to the Agent's offer of cooperation, an offer that was  
10 repeated yesterday. In these circumstances, there can be no basis whatsoever for Mauritius'  
11 new final submission (3), read out by the Agent of Mauritius on Tuesday. Even if this new  
12 claim were within the scope of the Notification and Statement of Claim, which in our  
13 submission it is not, there is no way that Mauritius can show that it has complied with the  
14 requirements of section 1 of Part XV, in particular, article 283.

15 120. Mr. President, Members of the Tribunal, that concludes my statement. Unless there are  
16 question, I thank you for your attention, and I ask that you invite Mr. Wordsworth to address  
17 you on article 283. I thank you.

18 PRESIDENT SHEARER: Thank you very much, Sir Michael.

19 Just before I call Mr. Wordsworth to the podium, I note that the room has become  
20 somehow uncomfortably warm. If counsel, or indeed any others in the room, would be more  
21 comfortable removing their ties, jackets, et cetera, stopping at jackets, I think, they should feel  
22 free to do so.

23 Thank you very much, Sir Michael.

24 MR. WORDSWORTH: Mr. President, Members of the Tribunal, I'm aware that a

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<sup>33</sup> Transcript, Day 6, p. 735, para. 89 (Wood).

1 break is shortly approaching, so perhaps I'll just make some introductory comments on Article  
2 283 and then pause before moving briefly on to submissions on the law and on the facts.

3 **Article 283**

4 **Sam Wordsworth QC**

5 **A. Introduction**

6 1. Mr. President, Members of the Tribunal, there has been an increasing focus on article 283  
7 and its jurisdictional requirements in recent years. As to this, I wish to make four introductory  
8 points.

9 2. First, that focus derives from, and is merited by, the plain meaning of the words of this  
10 provision. It establishes certain pre-conditions to the exercise of jurisdiction under Part XV by  
11 ITLOS or an Annex VII tribunal (or indeed the ICJ) such that, whatever the threshold that it  
12 establishes, there is a threshold to be met. The jurisdictional requirements cannot just be brushed  
13 aside, and the Parties appear to be agreed on that in principle, and so it is evidently appropriate to  
14 focus on the question of precisely what is required.

15 3. Secondly, the attention that is being paid to article 283 is consistent with a broader trend in  
16 international law so far as concerns pre-conditions to jurisdiction in other contexts. One sees that  
17 in the ICJ jurisprudence with the *Georgia v Russia* and *Belgium v Senegal* cases, and one sees it  
18 also in the investment treaty arbitration world, which Professor Sands was alluding to on  
19 Monday in the different context of nationality requirements.

20 4. And that is worth a mention because there has been a gradual shift towards ensuring that  
21 investors cannot just commence costly and compulsory arbitral proceedings, but instead must  
22 comply with any prior conditions, whether to negotiate or to refer matters for a limited 12- or 18-  
23 month period to domestic courts, albeit that chances of final decision in that limited period may  
24 be extremely limited. The names of the presidents of the tribunals in recent important cases will

1 be familiar – for example, Judge Simma in the *Ambiente v. Argentina* case<sup>34</sup>, and Professor  
2 Dupuy in the *ICS v. Argentina* case<sup>35</sup>.

3 5. And this leads to my third point which is that, as one can see from these differing sources  
4 of jurisprudence, as well as the specific consideration of article 283, the procedural rights that  
5 pre-conditions to jurisdiction accord to States are rightly regarded as very important. As the  
6 tribunal of Professors Stern, Kaufmann Kohler, and Orrego Vicuña put it in the 2010 *Burlington*  
7 *v Ecuador* case, in relation to a 6-month notice period in the Ecuador-USA investment treaty  
8 which was then at issue: [Judges’ Folder, tab 91] and we’ve actually put the relevant citation in,  
9 tab 91 of your Judges’ Folder, if you wish to refer to it. You’ll see from page 1 of this tab, that is  
10 beginning of the decision, and if I can ask you to turn to page 8, paginated in the bottom right-  
11 hand corner, reading from the top, and you’ll see that the relevant provision in this case is in  
12 respect to a six-month negotiation period, but the principle is of course the same. “However, the  
13 Request for Arbitration is too late a time to apprise Respondent of a dispute. The six-month  
14 waiting period requirement of Article 6 is designed precisely to provide the State with an  
15 opportunity to address the dispute before the investor decides to submit the dispute to arbitration.  
16 Claimant has only informed Respondent of this dispute with the submission of the dispute to  
17 ICSID arbitration, thereby depriving Respondent of the opportunity accorded by the Treaty to  
18 address the dispute before it is submitted to of the opportunity accorded by the Treaty to address  
19 the dispute before it is submitted to arbitration.”.

20 And one sees also at Paragraph 315 something similar: Second, “... by imposing upon  
21 investors an obligation to voice their disagreement at least six months prior to the submission of  
22 an investment dispute to arbitration, the Treaty effectively accords host States the right to be  
23 informed about the dispute at least six months before it is submitted to arbitration. The purpose

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<sup>34</sup> *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9 (formerly *Giordano Alpi and others v. Argentine Republic*), Decision on Jurisdiction and Admissibility, 8 February 2013, from para. 577.

<sup>35</sup> *ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina*, UNCITRAL, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012, from para. 243.

1 of this right is to grant the host State an opportunity to redress the problem before the investor  
2 submits the dispute to arbitration. In this case, Claimant has deprived the host State of that  
3 opportunity. That suffices to defeat jurisdiction.”<sup>36</sup>

4 6. Sir Michael has already taken you to equivalent statements made in the context of article  
5 283<sup>37</sup>, and I should also mention that in the investor-State cases one sees a careful consideration  
6 of assertions of futility<sup>38</sup>, and the jurisprudence in that area may also provide a useful point of  
7 reference for this Tribunal.

8 7. And this leads to my fourth introductory point. Regardless of how Mauritius now wishes to  
9 depict matters, the United Kingdom was never given the opportunity to consider its position  
10 following some form of notification from Mauritius that it considered that there was a dispute  
11 under the 1982 Convention, and then to engage in an exchange of views. And of course, one  
12 doesn’t know what would have happened had the United Kingdom been given that opportunity,  
13 and it is no part of applying this pre-condition to jurisdiction to require satisfaction of some form  
14 of ‘but for’ test, that is, to require a State to show that the time and cost and testing of relations  
15 that accompany high-profile litigation would most likely have been avoided had the State been  
16 given the opportunity to discuss respective positions.

17 8. But we have already made the point last week that alleged failures to consult are  
18 particularly well-suited to potential settlement, and the more one sees of the misunderstanding  
19 over what former Prime Minister Brown is said to have said, the more productive it appears  
20 identification of the dispute and an exchange of views would have been. That applies all the  
21 more so with respect to the new dispute that Mauritius is seeking to establish with respect to the

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<sup>36</sup> *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 (formerly *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*), Decision on Jurisdiction, 2 June 2010, para. 315.

<sup>37</sup> Wood, Day 6, pp. 745-747.

<sup>38</sup> *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9 (formerly *Giordano Alpi and others v. Argentine Republic*), Decision on Jurisdiction and Admissibility, 8 February 2013, from para. 597; *ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina*, UNCITRAL, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012, from para. 263.

1 CLCS issue. An exchange of views, were Mauritius willing to engage in one, would appear  
2 likely to resolve the issues without difficulty, assuming Mauritius was willing to proceed under  
3 the sovereignty umbrella.

4 9. And there is an oddity in the current case, in that it is not as if Mauritius was not very well-  
5 advised when it made its Notification of Claim in December 2010. Its legal advisers of course  
6 knew about article 283, and knew that States took such procedural protections very seriously.  
7 After all, members of the Mauritian legal team had in separate roles been listening to and seeking  
8 to respond to oral submissions from Russia in the *Georgia v Russia* case in September 2010 on  
9 related issues under Article 22 of CERD; that is just three months before the Notification of  
10 Claim in this case.

11 10. And so one comes to wonder why there was no attempt to give the UK warning of this  
12 claim. There was no urgency; this is not a case where it could be said that proceedings had to be  
13 commenced right away in order to constitute a tribunal for the purposes of provisional measures  
14 and, as to that, one can contrast many of the other UNCLOS cases. Likewise, the case that is now  
15 being put forward on futility is an afterthought, inconsistent with actual meetings that took place  
16 in the summer of 2010 where Mauritius considered it worthwhile to raise the MPA issue, albeit  
17 of course without for one moment indicating that it had UNCLOS proceedings in mind. It may  
18 even be that Mauritius positively wanted proceedings, that it did not want any exchanges, seeing  
19 compulsory arbitration as the best means of airing its case on sovereignty. We don't know. But  
20 the point is, having consciously elected to pursue these arbitral proceedings, without seeking to  
21 meet the jurisdictional requirements of article 283, it should not now expect this Tribunal to  
22 approach those requirements as if they were a formality.

23 Mr. President, I see it may now be time for the break. And if this is a convenient  
24 moment for the Tribunal, I will pause.

1                   PRESIDENT SHEARER: Thank you, Mr. Wordsworth, yes. Well, we will take our  
2 15-minute break now.

3                   (Brief recess.)

4                   PRESIDENT SHEARER: Yes, thank you, Mr. Wordsworth.

5 **B. Mauritius' response**

6 11. Mr. President, against that backdrop of those four introductory observations, I turn to the  
7 submissions made by Ms. Macdonald in reply on Monday, dealing first with what she said on the  
8 law, and then her notably brief response on the facts.

9 **Law**

10 12. On the law, Ms. Macdonald made three points – first, that we had failed to engage with the  
11 actual case law on article 283; second, that the hurdle established by article 283 was low and one  
12 that could be stepped over lightly; and third, by reference to the *Georgia v Russia* case, that there  
13 was no requirement on Mauritius to refer specifically to UNCLOS, and likewise to individual  
14 provisions<sup>39</sup>.

15 13. As to this first point, Sir Michael did of course engage with the case law. The focus of  
16 Mauritius' criticism was our comment that the case law on article 283 was not entirely  
17 satisfactory, but we stand by that, and also the position that it could benefit from further  
18 consideration. And, in this respect, Sir Michael pointed to a number of important separate or  
19 dissenting opinions, and also the article by Judge Anderson<sup>40</sup>.

20 14. As to that article, there was no criticism from Mauritius, and indeed you were positively  
21 referred to it. In this respect, Judge Anderson does indeed conclude that article 283 does not  
22 require lengthy discussion, or even genuine attempts to reach a compromise over the means of  
23 settlement. However, we were surprised to hear Mauritius relying on Judge Anderson's

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<sup>39</sup> Macdonald, Day 8, 949.

<sup>40</sup> D. H. Anderson, "Article 283 of the UN Convention on the Law of the Sea", in T.M. Ndiaye, R Wolfrum (eds.) *Liber Amicorum Judge Thomas A. Mensah*, pp. 847-866, reproduced in D. Anderson, *Modern Law of the Sea. Selected Essays* (2008), pp, 591-608.

1 conclusion that: “So long as the applicant can produce some evidence of relevant exchanges,  
2 article 283 is unlikely to act as a bar in proceedings.” Well, that is not a test that Mauritius can  
3 meet in this case, as was demonstrated last week by a run through the clip of documents that  
4 Mauritius relied on in its first round presentation.

5 15. And looking back to its first round presentation, Mauritius relied on three part XV cases,  
6 *Guyana v Suriname, Land Reclamation* and *M/V Louisa*. And Sir Michael has already looked at  
7 *Guyana v Suriname*, so I just add a word on the other two cases.

8 16. As to *Land Reclamation*<sup>41</sup>, Mauritius’ position is that ITLOS held here that Malaysia was  
9 not required to invoke the Convention at all, still less its provisions<sup>42</sup>. The reference was to  
10 paragraphs 39 and 41 of the Order of 8 October 2003, but these merely outline in short form the  
11 position of each State in the stand-off that presented itself before the Tribunal, as opposed to  
12 containing any statement as to the legal requirements of article 283. It may be that in its  
13 approach, ITLOS was influenced by the ICJ jurisprudence on compromissory clauses that do not  
14 have the specific features of article 283, and as Judge Anderson comments at page 603 of his  
15 article: “It is not entirely clear from the recitals whether the parties had ever exchanged views  
16 about the specific matter of the means of settlement, as distinct from the dispute itself.”

17 17. But, in any event, this was a provisional measures hearing, and the Tribunal was concerned  
18 only with the question of its *prima facie* jurisdiction. If it had been seeking to make a final  
19 determination of its jurisdiction, it would presumably have been looking much more closely at  
20 the specific requirements of article 283, and also the documents relied on by the parties. And  
21 here the *Georgia v Russia* case provides a good example. In the provisional measures order of  
22 October 2008, the Court found that it had *prima facie* jurisdiction. In the April 2011 judgment on  
23 Russia’s preliminary objections, once the Court had had the benefit of full argument on the  
24 meaning of Article 22 of CERD, and also an opportunity to work closely through all the

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<sup>41</sup> *Order of 8 October 2003, Case concerning Land Reclamation by Singapore in and around the Straits of Johor.*

<sup>42</sup> Macdonald, Day 4, 401, lines 1-6.



1 documents relied on by Georgia, it found that the pre-conditions in Article 22 had not been met,  
2 in particular because the required negotiations had not taken place.

3 18. The same underlying point may be made as to the provisional measures order in *M/V*  
4 *Louisa*, although this is not, in any event, a case that assists Mauritius. As is clear from  
5 paragraphs 59-61 of the Order of 23 December 2010<sup>43</sup>, prior to commencement of proceedings,  
6 Saint Vincent and Grenadines had at least informed Spain by Note Verbale of 26 October 2010  
7 of its plans to pursue an action before ITLOS absent immediate release of the ships and  
8 settlement of damages. And on sees from the order that Spain did not respond. So, at least, Spain  
9 is on notice. There is no equivalent pattern of behaviour for Mauritius to rely on in this case.

10 19. However, even if there were, and there is not, we do not consider that it would be sufficient  
11 to meet the requirements of article 283. As explained at paragraph 28 of the Dissenting Opinion  
12 of Judge Wolfrum in that case:

13 "... the Note Verbale of 26 October 2010 by its very content did not invite to exchange views but  
14 rather announced the initiation of proceedings before the Tribunal. It should further be noted that  
15 the Applicant had appointed its Agents even before this Note Verbale which also is a clear  
16 indication that it intended to initiate proceedings without prior exchanges of view. As reflected in  
17 the jurisprudence of this Tribunal the obligation under article 283 of the Convention is not  
18 formality. As Judge Treves points out in his Dissenting Opinion, ... the inclusion of the  
19 obligation to exchange views prior to the institution of proceedings as set out in article 283 of the  
20 Convention deviates from the procedural law under general international law. The way this  
21 provision has been applied in this case renders it meaningless."<sup>44</sup> And we submit that must be  
22 correct in the underlying position that article 283 is not like the standard compromissory clause  
23 that one might see in a provision like article 22 of CERD.

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<sup>43</sup> *The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain), Provisional Measures case, Order of 23 December 2010.*

<sup>44</sup> *The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain), Provisional Measures case, Order of 23 December 2010, Dissenting Opinion of Judge Wolfrum, para. 28.*

1 20. And consistent with that approach, and consistent with the specific and different wordings  
2 of article 283, one notes how at paragraph 73 of the Order of 22 November 2013 in *Arctic*  
3 *Sunrise*, it is recorded that: “The Netherlands and the Russian Federation have exchanged views  
4 regarding the settlement of their dispute as reflected in the exchange of diplomatic notes and  
5 other official correspondence between them since 18 September 2013, including the note verbale  
6 dated 3 October 2013 from the Ministry of Foreign Affairs of the Netherlands to the Embassy of  
7 the Russian Federation in the Netherlands.”<sup>45</sup>

8 21. And Sir Michael has already referred you to the Declaration of Judge Anderson in that  
9 case<sup>46</sup>, which makes clear that the Netherlands was expressly proposing submitting the dispute to  
10 arbitration under UNCLOS as soon as feasible.

11 22. I move on to Ms. Macdonald’s second point, the height of the threshold, and I can deal  
12 with this rather more briefly. It is one thing to say that the hurdle of article 283 can be stepped  
13 over lightly, and certainly Judge Anderson in the passage now adopted by Mauritius does not  
14 suggest that it takes a very great deal to fulfill the precondition. What matters for the purposes of  
15 article 283 is that the respondent State is on notice of the potential UNCLOS claim, that it has  
16 the opportunity to redress the issues and to even modify its behavior, and that views are  
17 exchanged on the appropriate means of settlement. That indeed may not take much, and certainly  
18 does not require exhaustive negotiations, and we’ve never suggested otherwise. But Mauritius’  
19 case is ultimately that it can walk around the hurdle, not jump over it. And there is no support  
20 for that at all in the jurisprudence or the commentary.

21 23. And as the investor-State tribunal chaired by Judge Simma explained in the *Ambiente* case,  
22 in relation to a provision that required that claims be brought first before the local courts for a  
23 limited period of time, even though there was little or no prospect of them finally being  
24 determined in that time, and this is, again, at tab 91 of your Judges’ Folder at page 31 in the

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<sup>45</sup> *The Arctic Sunrise Case (Kingdom of the Netherlands v. Russian Federation), Provisional Measures, Order of 22 November 2013.*

<sup>46</sup> *Arctic Sunrise*, Declaration of Judge Anderson, para. 3.

1 paginated pages there, and if you care to turn to that, to page 31, in the bottom right-hand corner,  
2 it's an interesting passage because, again, the Tribunal there is very conscious of the debate that  
3 has been going on in the investor-State world as to giving jurisdictional teeth to requirements to  
4 negotiate and the like. Paragraph 593: "This Tribunal is not called upon to interpret similar  
5 provisions in other treaties, but at least an application to the specific rulings regarding Article  
6 VIII of the BIT, the Tribunal is, for the above reasons, not convinced by the concerns and  
7 criticisms raised vis-à-vis clauses providing for a mandatory attempt at settling the dispute in the  
8 host State's domestic courts for a certain period of time inasmuch as this has prompted  
9 investment arbitration tribunals or distinguished scholars in the field to challenge the binding  
10 character of such clauses. The Tribunal cannot ignore the fact that such clauses are commonly  
11 found in investment treaties, and they are typically drafted in a manner that manifests their  
12 binding nature." Just so Article 283, we would say. "These characteristics are clear indications  
13 that the contracting Parties of the respective BIT intended to give such clauses some effect.  
14 "Treaty provisions should not be construed in a way that takes away from them all useful effect  
15 (*ut res magis valeat quam pereat*). It is thus necessary for a tribunal called to interpret such a  
16 clause to duly acknowledge its binding character and to identify which purposes it may serve in  
17 the context of the applicable BIT."<sup>47</sup> "This also holds true in the present case", of course  
18 referring there to *Ambiente*, but we say it also holds true in this case when it comes to article 283.  
19 And you will recall that Sir Michael took you last week to the various opinions and materials and  
20 cases that amply explain the purpose that article 283 serves in Part XV of UNCLOS.  
21 24. As to Mauritius' third point on Monday, it was said that there was no need to refer  
22 expressly to UNCLOS or to specific provisions, as followed from paragraph 30 of the *Georgia v*  
23 *Russia* case. It was sufficient merely to refer to the subject-matter of the treaty with sufficient

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<sup>47</sup> At para. 593.

1 clarity to enable the State against which a claim is made to identify that there is, or may be, a  
2 dispute with regard to that subject-matter.

3 25. Now that is not the right test for article 283, as it has been developed by the ICJ with  
4 respect to dispute settlement mechanisms with different requirements. Article 22 of the CERD  
5 concerned disputes between two or more States Parties with respect to the interpretation or  
6 application of the Convention, which were not settled by negotiation. There was no requirement  
7 in CERD, parallel to article 283, of “an exchange of views regarding settlement by negotiation or  
8 other peaceful means”. And, as Sir Michael pointed out last week, that wording is very specific,  
9 and we do not see how there could be an exchange of views with respect to settlement without  
10 identifying that this was a dispute under UNCLOS and also the substantive provisions engaged,  
11 i.e., the object of the exchange of views. And that is consistent with the passage from *Southern*  
12 *Bluefin Tuna* that Sir Michael took you to last week<sup>48</sup>.

13 26. But, even if it were applicable, the test in *Georgia v Russia* would not be met. There, it was  
14 for Georgia to identify the existence of a racial discrimination claim that Russia could positively  
15 oppose, such that there could be a dispute under CERD and such that there could then be the  
16 requisite negotiations. Now, even if the same approach were to be followed here, Mauritius  
17 would still have to identify that, prior to the commencement of proceedings, it had made a claim  
18 in respect of the law of the sea that the United Kingdom could oppose, and Mauritius cannot do  
19 that.

## 20 **Facts**

21 27. I move then to the facts, and Ms. Macdonald said that “the real question is the application  
22 of the principles that Mauritius has identified to the facts”<sup>49</sup>. And naturally we would agree with

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<sup>48</sup> *Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan (Award on Jurisdiction and Admissibility)* (“*SBT*”), Decision of Annex VII Arbitral Tribunal, 4 August 2000, RIAA, Vol. XXIII, p. 1, para. 55 (MR, Authority 16).

<sup>49</sup> Macdonald, Day 8, 950, lines 7-8.

1 that, save that it is of course the test as identified by the Tribunal that must be applied to the  
2 facts.

3 28. Now, it was noticeable that there was no attempt at all to go back through the documents  
4 that Ms. Macdonald had identified in her first round, which we had put in a clip at tab 56 of our  
5 Judges' Folder. No response at all to the specific points we had made on the documents, and a  
6 curious dismissal of what was referred to as 'the UK's selection of documents'. But, of course,  
7 the selection had been made by Mauritius, in its first round presentation on article 283 which you  
8 will remember from the transcript was also replete with footnotes that weren't read out during the  
9 course of the presentation. Now, apparently our approach of seeking to pull all the documents  
10 together so that the Tribunal could work through them in order would have been sensible if the  
11 written pleadings did not exist, and if Mauritius had not already made extensive speeches on the  
12 facts before the article 283 speech<sup>50</sup>.

13 29. Well, it might be thought that Mauritius was putting forward its best case on article 283 in  
14 the first round, and it is not of course correct to suggest that documents that go to factual matters  
15 are generally relevant to the question of fulfillment of article 283, that is establishing the  
16 existence of a dispute and the required exchange of views.

17 30. But we have gone back through Mauritius' written pleadings, that is the sections in the  
18 Memorial and the Reply on article 283, and we have pulled out all the communications from  
19 Mauritius to the UK that are relied on there. They are now in tab 90 of the Judges' Folder, and  
20 we have numbered them so they can, if you so wish, be inserted in chronological order into tab  
21 56. Now I'm informed in actual fact that when you look at your electronic version of tab 56,  
22 those documents will already be inserted there electronically, but we've numbered them so that  
23 you know where to add them in.

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<sup>50</sup> Macdonald, Day 8, 950, lines 21-23.

1           ARBITRATOR GREENWOOD: Mr. Wordsworth, I don't have an electronic  
2 version of Tab 56. I haven't been sent electronic versions of any of the binders that the Parties  
3 have put in.

4           MR. WORDSWORTH: I will have to take instructions on that. I'm simply repeating  
5 something that I was told – oh, sorry, it's the PCA that has them. It may be that they haven't yet  
6 reached the Tribunal.

7           ARBITRATOR GREENWOOD: I'm told the PCA do have them, and they are en-  
8 route to us, so I apologize for the interruption.

9           MR. WORDSWORTH: Thank you.  
10 When you work through these additional documents, and again what we respectfully ask you to  
11 do is work through them in a chronological run, so you can see precisely what these documents  
12 show, what, if anything, was being notified to the United Kingdom, what could conceivably be  
13 said to be an exchange of views.

14 31. When you look at the further documents that we've taken from the written pleadings of  
15 Mauritius, unsurprisingly, they add very little indeed, and of course Mauritius would have  
16 deployed them in its second round, as we expressly invited them to do so, saying 'please do add  
17 this to your tab 56', if they really had anything significant, instead of seeking to criticize a *bona*  
18 *fide* attempt to put all the relevant documents in one convenient place.

19 32. And it is all very well to say that the Tribunal must approach the record as a whole, but  
20 Mauritius cannot expect to be treated in some unique way, requiring the Tribunal to identify the  
21 documents relevant to its article 283 case. One certainly does not see claimants in other part XV  
22 cases acting in that way, and Mauritius has, after all, had several years to collect the documents it  
23 considers relevant to supporting its case on this point, and indeed, of course, it did precisely that  
24 in the relevant sections in its Memorial, in its Reply, and in its first round submissions.

25 33. Three other points were made on the facts.

1 34. First, it was said that we were being highly formalistic, saying that all documents prior to 1  
2 April 2010 could be disregarded<sup>51</sup>. Well, we did not say that, although we did ask how the  
3 multiple documents relied on which pre-date the UK's consideration of the MPA could establish  
4 the existence of a dispute that would naturally follow on from the declaration, as would an  
5 exchange of views. But we did nonetheless go through all the documents that had been relied on,  
6 even those pre-dating the UK's first consideration of the MPA in May 2009.

7 35. Secondly, Ms. Macdonald pointed once more to the documents where Mauritius  
8 specifically said that the UK was not the coastal State for the purposes of UNCLOS<sup>52</sup>. The  
9 relevant document, which is MM Annex 127, a letter of 20 April 2004, is at page 4 of tab 56, and  
10 we took you to it last week. The point that we then made was this was many years before the  
11 discussion of the proposed MPA in July 2009, and obviously still more so before the actual  
12 announcement of the MPA in April 2010. The UK could not then have known, and was not  
13 being told, that an UNCLOS 'coastal State' claim was going to be made under Part XV, and Ms.  
14 Macdonald did not seek to show otherwise.

15 36. Thirdly, some short points were made on futility<sup>53</sup>. It was said that, by the time Mauritius  
16 initiated these proceedings, the MPA had been unilaterally imposed on it, in violation of a  
17 commitment given by Gordon Brown, rushed through, and with the new Government keeping it  
18 in place. Thus, it was said, Mauritius' assessment was that further exchanges were futile.

19 37. Now, there are three points to make here.

20 38. It is first important to separate out matters that go to the merits, and matters that go to the  
21 question of compliance with article 283. For the purposes of the jurisdictional debate, the  
22 allegations as to the arbitrary or unilateral nature of the MPA, and the like, are by the by. It is of  
23 course the case that, as is perfectly usual, the existence of a dispute is preceded by some act by a  
24 given State considered to be unlawful. There may well appear to be limited prospect of the

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<sup>51</sup> Macdonald, Day 8, 950, lines 9-11.

<sup>52</sup> Macdonald, Day 8, 951, lines 9-11.

<sup>53</sup> Macdonald, Day 8, 951, line 21 to 952, line 3.

1 allegedly unlawful act being reversed. But that has no impact at all on the need to comply with  
2 pre-conditions to jurisdiction such as article 283. The complaining State has no means of  
3 knowing how the State allegedly in breach will respond when confronted with the threat of legal  
4 proceedings, in this case, arbitration under Part XV. It is not for the claimant State in effect to  
5 decide on the respondent State's behalf that identification of the UNCLOS dispute and an  
6 exchange of views will go nowhere. That would precisely be to empty article 283 of all content  
7 so far as concerns the respondent State.

8 39. And I note how Judge Anderson explains with respect to *Land Reclamation*, and that's at  
9 603 of his article<sup>54</sup>: "Finally, Malaysia's argument recorded in paragraph 44 that an exchange of  
10 views could not be held while the dispute activity was continuing cannot be correct since the  
11 whole purpose of the exchange is to open the way towards finding some means for settling the  
12 on-going dispute." And precisely the same point applies with the argument made by Mauritius  
13 on Monday.

14 40. And the second point here is that the case on futility, as a matter of the facts, does not get  
15 off the ground. Mauritius cannot just ignore the fact that it met twice with Ministers of the new  
16 UK Government in the summer of 2010 and patently did consider it worth raising the issue of the  
17 MPA and putting forward its case. I refer to the meeting of 9 June 2010 with the new British  
18 Foreign Secretary<sup>55</sup>, and the meeting of 22 July 2010 with the new British Minister for Africa  
19 and Overseas Territories<sup>56</sup>. What Mauritius did not do, however, was to accord to the United  
20 Kingdom any insight into its plan to commence UNCLOS proceedings, a key factor that would  
21 have allowed the UK to consider its position and to have an opportunity to redress the issues  
22 before the dispute was submitted to arbitration.

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<sup>54</sup> D. H. Anderson, "Article 283 of the UN Convention on the Law of the Sea", in T.M. Ndiaye, R Wolfrum (eds.) *Liber Amicorum Judge Thomas A. Mensah*, pp. 847-866, reproduced in D. Anderson, *Modern Law of the Sea. Selected Essays* (2008), pp, 591-608.

<sup>55</sup> Reply, Annex 161.

<sup>56</sup> As referred to in Prime Minister Ramgoolan's remarks of 27 July 2010, Reply, Annex 163. See also the reply on 9 November 2010, Reply Annex 165.



1 41. And, as a final point on futility, one asks whether it is somehow being said that an  
2 exchange of views on the new-minted CLCS claim would be futile, given that it is manifest that  
3 the required exchange of views has not taken place. One is left with the impression that  
4 Mauritius wants the claim, rather than an exchange of views that could lead to the resolution or  
5 to the solution of a joint approach to the Commission.

6 **Conclusion**

7 42. Mr. President, Members of the Tribunal, having sat through a three-week hearing on  
8 jurisdiction and the merits, any court or tribunal will take a good deal of persuading that it is  
9 appropriate to dismiss a case, at least in its entirety, because of a failure to comply with pre-  
10 conditions to jurisdiction. But article 283 is an important provision and, had it been complied  
11 with, it may be that the proceedings and this hearing could have been avoided altogether.

12 43. Mr. President, Members of the Tribunal, I thank you for your kind attention, and, if there  
13 are not questions on this topic, I ask you to call Professor Boyle to the podium.

14 PRESIDENT SHEARER: It appears not. Thank you very much, Mr. Wordsworth.

15 And I give the floor to Professor Boyle.

16 Thank you.

17 PROFESSOR BOYLE: Thank you, Mr. President.

18 I'm hoping probably to finish around 10 to 12:00, which might be a convenient  
19 moment for a break, but if I turn out to be a little slower, I will find an alternative moment for a  
20 break. In fact, all being well, I'll actually finish by 10 to 12:00.

21 **Speech 17**

22 **Jurisdiction Under Article 297**

23 **Professor Alan Boyle**

24 1. Mr. President, members of the tribunal, my task in this speech is simply to respond to  
25 Mauritius' arguments on jurisdiction over the alleged breaches of the Convention. The task is not

1 very difficult since Mauritius' counsel said little in the second round that differed from their first  
2 round argument. Fundamentally we remain divided on whether article 297(1)(c) creates a broad  
3 environmental jurisdiction that covers this dispute, as Mauritius would argue, or, alternatively,  
4 whether there is a broad exclusion from compulsory jurisdiction of disputes relating to EEZ  
5 fisheries and living resources, as the United Kingdom has argued. Both parties also have a very  
6 different view of the relevance of article 288(2) with regard to disputes concerning agreements  
7 relating to the purpose of the convention.

8 *a. Characterising the dispute*

9 2. But before turning to these matters of interpretation, I'd invite you to stand back and  
10 consider what this dispute is really about. Mauritius' characterisation ebbs and flows according  
11 to the context. Professor Crawford and Mr. Reichler ask you to disregard the UK's  
12 characterisation and to focus on what they say is the MPA's real, if perhaps hidden, purpose.<sup>57</sup>  
13 They told you the MPA is a political tool, whose aim is perhaps to deprive Mauritius of its rights,  
14 or the Chagossians of their land. On their view the MPA's declared environmental purpose is  
15 merely a facade.

16 3. Well, that leaves my good friend Mr. Loewenstein high and dry because he then comes on  
17 and asks you to take literally, very literally, BIOT Proclamation No. 1, which, he points out,  
18 refers to protection of the marine environment, but not fisheries conservation or living  
19 resources.<sup>58</sup> He, of course, has to say the dispute is environmental as otherwise you have no  
20 jurisdiction, so he can't agree with his colleagues' views on the purpose of the MPA. But on one  
21 point, everyone on the other side agrees. They all want you to ignore the obvious fact that,  
22 whatever their purpose, the only implementation measures actually adopted so far are the ban on  
23 commercial fishing and the new regulations on illegal fishing. To a fisherman armed with a copy

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<sup>57</sup> Crawford, Friday, April 25<sup>th</sup>, pp. 376-8, paras 11-15.

<sup>58</sup> Loewenstein, Tuesday 6<sup>th</sup> May, p. 1122, para 53.

1 of UNCLOS these must look remarkably like fisheries conservation measures, adopted not under  
2 article 56(1)(b)(iii), but under article 56(1)(a). Certainly they do stop him fishing.

3 4. But if this is a multipurpose enterprise, as Prof Crawford so memorably put it last week,<sup>59</sup>  
4 according to Mauritius its purposes do not extend to conservation of coral reefs, endangered  
5 species, or fish stocks. The fishermen, the scientists and the NGOs may think that's what the  
6 MPA is for, but Mauritius knows better: a ban on fishing is not relevant to fisheries conservation.  
7 It's an environmental protection measure. So they say.

8 5. Well, this is not a serious argument. It's inconsistent with the plain language of articles 56,  
9 297(1)(c), and 297(3); with the *Barbados/Trinidad* case, with the UN Fish Stocks Agreement,  
10 and with everything ever written about UNCLOS fisheries disputes. On its own logic Mauritius  
11 might just as well argue that delimitation of an exclusive economic zone boundary is subject to  
12 compulsory jurisdiction under 297(1)(c) because an EEZ involves the exercise of jurisdiction to  
13 protect and preserve the marine environment under article 56(1)(b)(iii).

14 6. This is not fantasy. In the *Gulf of Maine Case* the United States argued for a single  
15 maritime boundary whose declared purpose was to protect the unity of the marine ecosystem by  
16 keeping the fish stocks and the living resources under US jurisdiction.<sup>60</sup> This looks to me like an  
17 environmental case on Mauritius' argument. Would it also be an environmental case if the  
18 boundary were not between Canada and the US but between BIOT and Mauritius? But where  
19 does that leave article 298? In the dustbin. It has been superseded by your new super-jurisdiction  
20 over environmental disputes.

21 7. Far be it from me of all people to argue against expansive interpretation of jurisdiction over  
22 environmental disputes, but I don't have to. I merely have to invite the tribunal to apply the plain  
23 and unambiguous wording of article 297 and indeed the plain and unambiguous wording of  
24 article 298. A boundary dispute is a boundary dispute, and a fisheries dispute is a fisheries

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<sup>59</sup> Crawford, Friday, April 25<sup>th</sup>, p. 380, para 15.

<sup>60</sup> *Gulf of Maine Case*, 1984 ICJ Reports 246.

1 dispute, whatever may have motivated those who declared the Exclusive Economic Zone, or the  
2 fisheries zone, or the environmental protection zone, giving rise to the dispute. If you categorise  
3 the dispute in accordance with the language of the text the jurisdictional consequences as  
4 negotiated and agreed by all parties to UNCLOS will follow.

5 8. Save that it assists its own case, Mauritius last week and this week provided no coherent  
6 argument for transferring disputes over fisheries and living resources from article 297(3) to  
7 article 297(1)(c). But let's just look at what its creativity would achieve. This is evolutionary  
8 interpretation for you. Well, there is more than a ban on commercial fishing in the BIOT MPA.  
9 There is also a ban on whaling, since "fish" are defined by the relevant legislation to include all  
10 living marine creatures. Mauritius is, in effect, now challenging that ban. And it's challenging  
11 the ban on taking sharks or dolphins. And it's challenging the ban on harvesting sedentary  
12 species. And it's challenging the ban on harvesting coral.

13 9. We say that all of these bans still fall within the exclusion from compulsory jurisdiction of  
14 disputes relating to living resources in 297(3)(a). Any other view will compel coastal states to  
15 justify all of those bans by reference to specified international rules and standards, and Mauritius  
16 would no doubt say they cannot be based on extraneous political considerations and must be  
17 supported by adequate scientific studies. Mr. President, Members of the Tribunal, with respect,  
18 this is exactly what article 297(3) was designed to avoid.

19 10. What then is the BIOT MPA? Mauritius nowhere asks this elementary question. One  
20 answer is that it brings together the Environmental Protection and Preservation Zone and the  
21 Fisheries Conservation Management Zone to provide a more comprehensive framework for  
22 additional measures of marine environmental protection and resource conservation in future. But  
23 let's look at the content of this maritime zone and we can see immediately that it is various  
24 things, as Professor Crawford presciently observed. It covers regulation and control of marine  
25 pollution, and there are laws for that purpose. It also covers fisheries and living resources

1 conservation and management. Laws exist for that purpose too. Then there are protected areas  
2 where wildlife and biodiversity enjoy special protection, and there are laws on that. And other  
3 laws control the mooring of vessels and regulate what they may or may not do within the MPA.<sup>61</sup>  
4 And new laws may regulate other things. In this respect, the MPA is just like an exclusive  
5 economic zone. It brings together a bundle of rights, powers and duties covering all, or most, of  
6 the matters referred to in article 56.

7 11. So to say, as Mauritius does, that the MPA has an environmental purpose and that this  
8 dispute is therefore within your compulsory jurisdiction over environmental dispute is like  
9 saying that an Exclusive Economic Zone has an environmental purpose and that all EEZ disputes  
10 are therefore within compulsory jurisdiction. But that makes no sense. We all know that is not  
11 what article 297 says. The situation does not change just because the BIOT Exclusive Economic  
12 Zone in typical British fashion is called something else, a Marine Protected Area.

13 12. So we would say that the only rational way to approach the application of articles 297 and  
14 298 to the MPA is to disassemble the issues and to look at them individually. And that's what  
15 articles 56 and 297 already do. On that basis a dispute about marine pollution from ships in the  
16 EEZ is within your jurisdiction under 297(1)(c), while a dispute about fishing in the MPA is  
17 most likely to be excluded under article 297(3). And on any view a ban on commercial fishing  
18 addresses conservation and management of living resources regardless of whether it forms part  
19 of some larger environmental objective. And because it does, the unambiguous wording of  
20 article 297(3)(a) we maintain excludes it from your jurisdiction.

21 ***b. Article 297(3)***

22 13. Mauritius tried at somewhat greater length earlier this week to persuade you that its other  
23 argument was tenable – the one that says that disputes about coastal state sovereign rights over  
24 EEZ fishing are excluded by 297(3)(a) but that disputes about the fishing rights of Mauritius or

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<sup>61</sup> Boyle, speech 20, Friday 9th May 2014.

1 indeed other states are not excluded. But it is true that article 297(3)(a) is focused in terms on the  
2 exercise by the coastal state of its sovereign rights, and it does not mention the rights of other  
3 states. And we would probably accept that a dispute about fishing rights of other states in the  
4 EEZ that does not involve the exercise by the coastal state of its sovereign rights over living  
5 resources would not be excluded from jurisdiction under 297(3)(a). So, this could be one of those  
6 gaps that Mr. Loewenstein tried so hard to fall into, but he did fail to identify any of them.<sup>62</sup>

7 14. But this is not our case. It's not remotely our case. Our case is about a ban on fishing by  
8 vessels from other states, including vessels from Mauritius, that had previously been licensed to  
9 fish in the BIOT Fisheries Conservation and Maritime Zone. It seems self-evident that the grant  
10 or denial of a licence to fish in the EEZ involves the exercise of sovereign rights over  
11 conservation and management of living resources, conferred on the coastal state by article  
12 56(1)(a), and that it will do so even if the rights of other states are thereby terminated. I would  
13 say the same about a ban on whaling or shark-finning or the use of driftnets.

14 15. Let me put the point another way. Article 297(3) makes no jurisdictional distinction  
15 between an exercise of sovereign rights that affects other states and one that does not affect other  
16 states. There is no textual or policy reason for reading such a limitation into that article, nor does  
17 Mr. Loewenstein offer you one, nor does he cite any authority – apart from *Barbados/Trinidad*  
18 case, which does not support his argument, and I'll come back to that in a moment. So we would  
19 say that the regulation of foreign fishing in the MPA or the EEZ is not one of those gaps that  
20 might, on Mr. Loewenstein's theory, fall outside the jurisdictional exclusion. Indeed why should  
21 stopping other people from fishing or whaling or finning sharks be within compulsory  
22 jurisdiction when article 297(3) offers no basis for Mr. Loewenstein's creative reading of the  
23 text? Stopping these things is after all the most obvious way to conserve marine living resources.  
24 Why else do most coastal states ban whaling in their Exclusive Economic Zones?

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<sup>62</sup> Loewenstein, Tuesday 6<sup>th</sup> May, pp. 1116-7, paras. 37-40.

1 16. And if you are in any doubt about the sovereign right of coastal states to regulate foreign  
2 fishing in their EEZs, just look at articles 61 and 62. I'll come back to those in a little bit more  
3 depth this afternoon. But Article 61 obliges the coastal state to ensure "through conservation  
4 management measures" that "the maintenance of the living resources in the EEZ is not  
5 endangered by over-exploitation." You will also note that it does not say the "maintenance of  
6 fish stocks" but maintenance of "living resources." It goes on to say the coastal state must "take  
7 into account the best scientific evidence available to it." Ms. Nevill will show, later this morning  
8 or this afternoon, that the United Kingdom did indeed take into account the best science available  
9 to it when it adopted the ban on fishing.

10 17. But Article 62(4) then goes on to confirm the obligation of nationals of other states fishing  
11 in the EEZ to comply with coastal state conservation measures. So, despite my prompting last  
12 week, in its 2<sup>nd</sup> round Mauritius has still said nothing about articles 61 and 62. It is as if they  
13 didn't exist. But they plainly empower the coastal state to regulate foreign fishing and  
14 conservation of living resources and I will come back to that point this afternoon.

15 18. So, where does all of this leave Mr. Loewenstein on jurisdiction? Somewhat lost, we would  
16 suggest. He tries to rely on *Barbados/Trinidad*.<sup>63</sup> But that case is about maritime boundary  
17 delimitation. It decides nothing relevant to the present dispute. Since Mauritius has persisted in  
18 the point however, let me simply summarise the two key passages, at paragraphs 276 and 277.  
19 They say:

20 276. "The pattern of Barbadian fishing activity is relevant to the task of delimitation"— I will cut  
21 one or two bits out, I won't read the whole thing—"as a relevant circumstance, and as such it is  
22 plainly a matter that must be considered by the Tribunal. Taking fishing activity into account in  
23 order to determine the course of the boundary, however, is not at all the same thing as  
24 considering fishing activity in order to rule upon the rights and duties of the Parties in relation to

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<sup>63</sup> Loewenstein, Tuesday 6<sup>th</sup> May, pp. 1120-21, paras 49-50.

1 fisheries within waters that fall, as a result of the drawing of that boundary, into the EEZ of one  
2 or other Party.....Disputes over such rights and duties fall outside the jurisdiction of this  
3 Tribunal because 297(3)(a) stipulates that a coastal State...”—and you know what it stipulates, I  
4 won’t read out the rest. They go on in paragraph 227.

5 277. “Furthermore, no dispute of that kind was put as such before the Tribunal” - I mean as a  
6 fisheries dispute..... “neither were the pleadings of the Parties directed to a dispute over their  
7 respective rights and duties in respect of the fisheries in the EEZ of Trinidad and Tobago.” And  
8 finally the Tribunal says “Barbados stated clearly that its submissions in respect of its claim to a  
9 right to fish within the EEZ of Trinidad and Tobago were made on the basis that such a right  
10 could be awarded by the Tribunal as a remedy *infra petita* in the dispute concerning the course of  
11 the maritime boundary.”

12 19. I would suggest those paragraphs do not support Mauritius’ case on article 297(3).

13 ***c. Article 297(1)(c)***

14 20. Mr. Loewenstein is then left struggling with his final argument about article 297(1)(c) and  
15 the meaning of “specified international rules and standards for the protection and preservation of  
16 the marine environment.”<sup>64</sup> But this argument too is in trouble. First he misunderstands the  
17 United Kingdom’s case, which is not that article 297(1)(c) would cover the dispute but for  
18 articles 297(1)(a) & (b). What we do say is that read in context, the wording of 297(1)(c) no  
19 more covers this dispute than the other sub-paragraphs do. It’s about international rules and  
20 standards for the prevention of marine pollution, and it’s not about fisheries disputes.

21 21. Then he misunderstands Professor Oxman’s article on international rules and standards by  
22 saying that it refers only to standards and not to rules. He goes on to say that Articles 55, 56, 63,  
23 64 and 194 are not standards, but rules, but Professor Oxman wasn’t talking about them. He  
24 [Mr. Loewenstein] says these [articles] are “for the protection and preservation of the marine

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<sup>64</sup> Loewenstein, Tuesday 6<sup>th</sup> May, pp. 1116-18, paras 37-44.



1 environment.” But again, his only support for this proposition is Judge Mensah. I have to say  
2 having reread Judge Mensah, I still don’t see that he really addresses the point.<sup>65</sup>

3 22. At least Mr. Loewenstein does accept by implication that the UNCLOS articles he relies on  
4 are not international standards for the reasons given by Professor Oxman. But can they then be  
5 the international rules specified in 297(1)(c)? Well, Mr. Loewenstein is wrong if he thinks so.  
6 My own view is that nothing turns on the omission of the word ‘rules’ at this point in Professor  
7 Oxman’s analysis. He wasn’t trying to make a deep jurisprudential distinction between two  
8 fundamentally different concepts. But perhaps to show why, I should take you back very briefly  
9 to the relevant articles.

10 23. Article 55 as I said in the first round really is no more than a description of the Exclusive  
11 Economic Zone. It says nothing about protection and preservation of the marine environment.  
12 Describing it either as an international rule or a standard is meaningless.

13 24. Article 56 in our view is also not a specified international rule for protection and  
14 preservation of the marine environment. It’s true, of course, that article 56(1)(b)(iii) confers  
15 jurisdiction over marine environmental disputes, but article 297(1)(c) merely mirrors that  
16 terminology. A reference back to article 56 at that point gets us nowhere. It tells us only that  
17 disputes about matters falling within article (1)(b)(iii) are subject to compulsory jurisdiction. But  
18 it doesn’t tell us what matters fall within article 56(1)(b)(iii), and of course we say there is no  
19 basis for including fisheries disputes within that jurisdiction. Now, you will recall my reply to a  
20 question from Judge Wolfrum last week: I argued then that regulation of fisheries is covered by  
21 article 56(1)(a), not by 56(1)(b)(iii), and it would follow that it is then subject to jurisdiction as  
22 provided for in 297(3), not 297(1)(c).<sup>66</sup>

23 25. Articles 63 and 64 we would suggest are also inapplicable on the facts as we argued last  
24 week, but they also regulate fishing; they are about cooperation in the management of migratory

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<sup>65</sup> Loewenstein, Tuesday 6<sup>th</sup> May, p. 1117, para 40.

<sup>66</sup> Boyle, Friday 2<sup>nd</sup> May, pp. 814-186.

1 and straddling fish stocks. They are not in any meaningful sense international rules (or standards)  
2 for protection and preservation of the marine environment. And treating them as such will simply  
3 subvert the Fish Stocks Agreement, which implements articles 63 and 64 in far greater detail,  
4 and reaffirms the UNCLOS deal on fisheries disputes.

5 26. That leaves article 194. This article fails all of Professor Oxman's tests for identifying a  
6 rule or standard,<sup>67</sup> and Mr. Loewenstein did not seriously argue otherwise. Although there are  
7 international rules and standards on fishing vessels – the revised Torremolinos Convention and  
8 various protocols – that Convention and its protocols are not in force, the UK and Mauritius  
9 aren't parties, and Mauritius has made no reference to it.<sup>68</sup>

10 *d. Article 288(2) and the territorial sea*

11 27. So that brings me, Mr. President, to article 288(2) and the territorial sea. I think I will just  
12 about finish on time. Mr. Loewenstein largely gave up at this point. Certainly he had no counter  
13 argument to the proposition that article 288(2) applies to arrangements to fish in the territorial  
14 sea. It must do so, since article 2(3) gives states no right of access to territorial sea fisheries. If  
15 there were an agreement on access to fish stocks in the territorial sea, article 288(2) would  
16 obviously apply. So, why should the analysis be any different if territorial sea fishing is  
17 permitted not by agreement, but under a binding undertaking as Mauritius now argues. That  
18 inevitably means there is no compulsory jurisdiction over territorial sea fishing in this case  
19 because there is no agreement on dispute settlement as required by 288(2).

20 28. And if agreements relating to the purposes of UNCLOS were meant to be read into articles  
21 2(3) and 56, then article 288(2) would be redundant. Taking into account the principle of  
22 effectiveness,<sup>69</sup> it must have some purpose. But on Mr. Loewenstein's analysis it would appear

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<sup>67</sup> Boyle, Friday 2<sup>nd</sup> May, pp. 800-803, paras 31-40.

<sup>68</sup> International Convention for the Safety of Fishing Vessels, adopted Torremolinos, 2 April 1977; superseded by 1993 Torremolinos Protocol; Cape Town Agreement of 2012 on the Implementation of the Provisions of the 1993 Protocol relating to the Torremolinos International Convention for the Safety of Fishing Vessels.

<sup>69</sup> *Territorial Dispute (Libya/Chad)* 1994 ICJ Reports 6, pp. 23, 25-6, paras 47, 51-52.

1 to have none. And this cannot be correct. Indeed, if it were correct you would have no  
2 jurisdiction in this case to interpret and apply the UN Fish Stocks Agreement. Jurisdiction to do  
3 so, we would submit, depends on article 288(2). Or is Mr. Loewenstein suggesting that you  
4 should read the entirety of the Fish Stocks Agreement into UNCLOS? His argument, with all due  
5 respect, makes no sense at all. That brings me finally—I will be finished within five minutes—  
6 to the remaining issues.

7 *e. Other issues*

8 29. On abuse of rights, Mauritius nowhere responds to the argument that an UNCLOS tribunal  
9 has no jurisdiction to decide an article 300 claim with respect to fisheries. Such claims, we  
10 maintain, must be taken to conciliation in accordance with 297(3)(b). Mauritius does not appear  
11 to argue otherwise.

12 30. I will conclude this speech by taking you back to the Indian Ocean Tuna Commission. Mr.  
13 Loewenstein is rightly critical of the *Bluefin Tuna* decision.<sup>70</sup> I don't propose to stand here and  
14 attempt to defend it, particularly with Professor Crawford sitting behind me. It has few  
15 defenders. But that easy point does not address the harder point which lies behind it, and it's a  
16 point that Mauritius has not addressed. Mauritius has seriously argued that the United Kingdom  
17 breached its obligation to cooperate with the IOTC, yet this allegation, as I pointed out in the  
18 first round, and Mauritius had no answer to this point, has never been voiced in the IOTC, or by  
19 the IOTC, let alone taken through the IOTC's conciliation procedure. It has never even been  
20 discussed or mentioned in bilateral meetings. It simply appeared as if by magic from nowhere  
21 among the list of complaints made by Mauritius in this case. And this cannot be right.

22 31. The United Kingdom does not mind whether you rely on articles 281, 282, or 283 to  
23 explain why such a case cannot be pleaded in this way, but there is no reason why an UNCLOS  
24 tribunal should have jurisdiction over a case about non-cooperation with the IOTC unless that

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<sup>70</sup> *Southern Bluefin Tuna Arbitration*, 39 ILM (2000) 1359.

1 case has first been brought to the attention of the other party and aired within the appropriate  
2 organs of the IOTC. The object of section 1 of Part XV as Mr. Wordsworth said is to keep such  
3 cases out of court unless those elementary preconditions are met. And I would also refer back in  
4 this context to what Mr. Wordsworth has just said a few moments ago in his submissions on  
5 article 283.

6 32. Mr. President, members of the tribunal, it is not necessary to agree with the award in  
7 *Bluefin Tuna* to acknowledge that, in the words of paragraph 62 of that award that: “UNCLOS  
8 falls significantly short of establishing a truly comprehensive regime of compulsory jurisdiction  
9 entailing binding decisions.” It is never easy to argue for limits on the jurisdiction of an  
10 international court or tribunal. For obvious reasons judges prefer to decide real questions on their  
11 merits. And that’s understandable. But part XV of UNCLOS is a carefully crafted scheme in  
12 which the principle of compulsory jurisdiction is moderated, in certain respects, by considered  
13 and deliberate exclusions from that jurisdiction. In the United Kingdom’s view those exclusions  
14 remain necessary and are justified in the law of the sea today. They were reaffirmed recently in  
15 1995 in the Fish Stocks Agreement, a treaty to which both Mauritius and the United Kingdom  
16 are parties. And they reflect in our case the very extensive discretion conferred on coastal states  
17 by Part V of UNCLOS and the articles of the fish stocks agreement.

18 33. In our submission nothing that Mauritius has said in these proceedings alters our view that  
19 you lack jurisdiction under part XV to decide the merits of Mauritius’ arguments with respect to  
20 articles 2(3), 55, 56, 63, 64, 78, 194 or 300.

21 Mr. President, unless there are any questions, that concludes my presentation, and I  
22 would now ask you to call Ms. Sander to the podium. But perhaps this is the moment for a break  
23 in any event.

24 PRESIDENT SHEARER: I think that this would be the time for the break.

1 Thank you very much, Professor Boyle, and we will rise now until 5 past 12:00.

2 Thank you.

3 (Brief recess.)

4 PRESIDENT SHEARER: Ms. Sander, thank you very much.

5 **The fishing rights understanding of 1965**

6 **Amy Sander**

7 **8.5.14**

8 **Purpose of this oral submission**

9 1. Mr. President, Members of the Tribunal, I shall be responding to the arguments made by  
10 Mauritius earlier this week regarding the fishing rights understanding.

11 2. My submission is divided into seven parts:

12 a. *First*, I will begin by recalling what is common ground between the parties as to how  
13 “fishing rights” appeared in the final record of the meeting of 23 September 1965.

14 b. *Second*, I will address Mauritius’s submissions regarding what the Mauritian Premier was  
15 seeking when he proposed the insertion of the reference to “fishing rights” in that final record.

16 c. *Third*, I will consider the subsequent practice, in particular Mauritius’s response to the  
17 United Kingdom’s submission in the first round that when Mauritius was informed that the  
18 ability of Mauritians to fish in BIOT waters was restricted, indeed excluded, Mauritius did not  
19 protest with reference to the 1965 understanding on fishing rights.

20 d. *Fourth*, I will reiterate the United Kingdom’s position as to the relevance of the limited  
21 fishing carried out in 1965 in Chagos waters.

22 e. *Fifth*, I will then respond to the submission that it was not “goodness of heart”, or  
23 “goodness of faith”, that prompted the United Kingdom to extend Mauritius’ fishing rights to  
24 200 miles.

1 f. *Sixth*, I will make some brief comments on the reference to the 1965 understanding in the  
2 January 2009 bilateral talks that were cited by Mr. Reichler on Monday.

3 g. *Seventh*, I will make some final observations on the repeated reference to internal  
4 documents on the issue of fishing rights.

5 3. Some of these points I do intend to deal with quite briefly, and you will see that in the  
6 folder before you, there is only one additional document that I have included. However, the  
7 references to the documents to which I do not take you will appear in the transcript<sup>71</sup>, and the  
8 vast majority of these documents are ones to which you were taken in the first round. And I  
9 should say that we are not coming back to Article 2(3); no new points were raised and as regards  
10 the one authority cited, that is addressed at paragraph 8.6 of the Rejoinder.

11 **(1) Common ground regarding how “fishing rights” appeared in the final record**

12 4. So, turning to my first point, this is simply to recall what now appears to be common  
13 ground between the parties as to how “fishing rights” appeared in the final record of the meeting  
14 of 23 September 1965.

15 5. That common ground is as follows:

16 a. the original record of the meeting of 23 September 1965 did not include a reference to  
17 fishing rights<sup>72</sup>;

18 b. it was the Mauritian Premier who, on mulling over the original record from his room at  
19 The Strand Hotel, proposed the insertion of a reference to “fishing rights”<sup>73</sup>. His handwritten  
20 note of 1 October 1965 with which the Tribunal are now very familiar, set out the two words  
21 “fishing rights” on the final page of his note, listed as item (viii) of items (vii) to (x)<sup>74</sup>;

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<sup>71</sup> Transcript references are references to the electronic versions of the transcripts circulated 18 June 2014.

<sup>72</sup> Rejoinder, Annex 8.

<sup>73</sup> UKCM, Annex 9.

<sup>74</sup> Reichler Day 8: 1035:2-5 para. 10 “What I want to underscore now is that this, and particularly the list of conditions on the final page, page 71, is the source of the undertakings given by the United Kingdom on fishing rights (that is item viii in 22 the Premier’s list) and on mineral and oil rights (item x) on this list. About this the Parties are in agreement”.

1 c. that handwritten note did not seek to add in points that had inadvertently been left out of  
2 the record; it was not a correction of a deficient minute, but a renegotiation of the package<sup>75</sup>;

3 d. the reference to fishing rights was subsequently inserted into the final record of the meeting  
4 of 23 September 1965<sup>76</sup> at paragraph 22(vi) as follows “*The British Government would use their*  
5 *good offices with the US Government to ensure that the following facilities in the Chagos*  
6 *Archipelago would remain available to the Mauritius Government as far as practicable ...*” And  
7 then at subparagraph (b) we see the two words, “*fishing rights*”;

8 e. that final record was enclosed with a telegram dated 6 October 1965 from the Colonial  
9 Office to the Governor of Mauritius<sup>77</sup> and on 5 November 1965 the Council of Ministers  
10 confirmed their agreement<sup>78</sup>;

11 f. And the final point of common ground is that there is an absence of any negotiating record  
12 as to “fishing rights” between the Mauritian Premier’s handwritten note of 1 October 1965 and  
13 the telegram of 6 October 1965<sup>79</sup>.

14 6. Two points flow from that common ground.

15 7. First, although it was the two words proposed by the Mauritian Premier that were inserted  
16 into the final record<sup>80</sup>, it was not simply as “fishing rights” as appears in item (viii) of the final  
17 page of his handwritten note. The Mauritian Premier’s numbering was not adopted; the two

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<sup>75</sup> Wordsworth Day 7, 840:4-5 “Is it a correction of a deficient minute or renegotiation of the package, and we say it must be the latter”: Reichler Day 8, 1037:6, paras. 14 to 15 “[Mr. Wordsworth]said that these were new items added by Mr. Ramgoolam as conditions for Mauritius’ purported “consent” to the detachment of the Archipelago. We agree with the UK on this, but not exactly for the reasons given. We agree with them because we do not consider it likely that the UK drafters either deliberately or inadvertently left out of the original version of the Lancaster House record any items that had been accepted by the UK and the Mauritian Ministers on 23 September”.

<sup>76</sup> MM, Annex 19.

<sup>77</sup> MM, Annex 21.

<sup>78</sup> UKCM, Annex 46, Appendix O and Appendix P.

<sup>79</sup> Cf Reichler, Day 8, 1033: 16 to 17, considering how the undertaking on reversion of sovereignty to Mauritius came to be included in the agreement that was eventually reached. See Wordsworth, Day 7: 854:19-20 “the absence of any negotiation [on fishing rights] is consistent with the absence of any intent to be bound”.

<sup>80</sup> Reichler, Day 8, 1036: 8-10 “And here I would refer you again to paragraph 22. And I simply wish to point out that item (vi) (a and b) are the same conditions as those set forth as items (vii and viii) of Mr. Ramgoolam’s note, in exactly the same language”

1 words “fishing rights” were instead placed at subparagraph (vi)(b), and were deliberately<sup>81</sup>  
2 placed under the chapeau that (i) the British Government would use their good offices with the  
3 US Government<sup>82</sup> (ii) to ensure that facilities would remain available<sup>83</sup> (iii) as far as is  
4 practicable<sup>84</sup>. Mauritius assumes that the term “fishing rights” in the 1965 record was intended to  
5 be given the broadest conceivable meaning<sup>85</sup>, but that is at odds with the express wording. And  
6 as regards the United Kingdom’s submissions in round one as to the terms “use of good offices”,  
7 “facilities” and “so far as is practicable”, Mr. Reichler on Monday and Tuesday did not respond.

8 8. The second point that flows from the common ground is that in trying to ascertain what the  
9 two words “fishing rights” refers to, what the Mauritian Premier had in mind on 1 October 1965  
10 is of particular importance in light of the absence of any negotiating record on this matter.

11 **(2) Intention of the Mauritian Premier: preference for fishing rights**

12 9. This leads me to the second part of my submission which is to address Mauritius’s  
13 response to the United Kingdom’s submission regarding what the Mauritian Premier was seeking  
14 when he proposed the insertion of the reference to “fishing rights”.

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<sup>81</sup> See Reichler, Day 8 1036: 14-16 “... the UK was paying careful attention, and not blindly accepting the Premier’s conditions; when they accepted them, they did so knowingly and deliberately”

<sup>82</sup> See Wordsworth Day 7, 841: 18 to 842:7 “Mauritius contends for the existence in these words of the grant of an absolute and perpetual right to fish. But such words are absent. They are not suggested by a commitment to use ‘good offices,’ and the actual words cannot be read out of existence...there is nothing to suggest that the United Kingdom was handing away its own discretion in terms of granting fishing rights...”

<sup>83</sup> See Wordsworth Day 7, 842: 9-16 “the Tribunal will have noted that it may appear odd to refer to ‘fishing rights’ as a form of facility, and one sees that the reference to ‘fishing rights’ has been slotted in with what are more obviously facilities, i.e. navigational and meteorological facilities, and use of an airstrip. You can obviously see that at the top of the following page. But, on closer inspection, this is nonetheless a good fit for the reference to ‘fishing rights.’ What was being sought by the Mauritian delegation was in no sense absolute or sovereign rights, but a permission to use or have access to certain aspects of what was to remain UK territory and under UK sovereignty”.

<sup>84</sup> Sander, Day 5, 608: 8-13, para 59, commented that under the 1971 Ordinance, there was not only a modest restriction on fishing rights in the near vicinity of Diego Garcia, but an entire exclusion in the territorial sea. Defence and security preferences may have been reflected in the legislation, but in any event Mauritius appears to have accepted that the United Kingdom had a complete discretion as to the extent to which its fishermen were excluded from BIOT waters and how the understanding of “so far as practicable” applied in practice. Cf Reichler Day 2 153: 2-5.

<sup>85</sup> Reichler, Day 8, 1051: 10-13, para. 45 “There is also an agreement on another point. As reflected in the contemporaneous documentation, via a consistent and uninterrupted subsequent practice over 45 years, Mauritius’ “fishing rights” pursuant to the 1965 undertaking came to be understood by both parties as the right to fish in all the BIOT waters, out to 200 miles”.



1 10. Mr. Reichler spent some time trying to undermine the United Kingdom's submission that  
2 the Mauritian Premier was seeking preferential fishing rights if granted.

3 ***Records cited by UK***

4 11. He began by referring to the two documents from 1965 that I had referred to in the first  
5 round.

6 Telegram of 30 July 1965

7 12. The first document was the telegram dated 30 July 1965<sup>86</sup>. The Tribunal will recall that this  
8 is a telegram from the Governor of Mauritius to the Secretary of State for the Colonies. The  
9 Governor is referring to a meeting held earlier that same day at which the Mauritian Premier,  
10 speaking for the Ministers as a whole, is stated as saying that they were "sympathetically  
11 disposed to the request" but as detachment "would be unacceptable to public opinion" they  
12 wished also that provision should be made for "ensuring preference for Mauritius if fishing or  
13 agricultural rights were ever granted".

14 13. Mr. Reichler dismissed this document as "hearsay"<sup>87</sup>. Now, the fact that the telegram is  
15 from the Governor of Mauritius to the Secretary of State for the Colonies relaying what the  
16 Mauritian Premier had said earlier that same day, is clear from the face of the document, to  
17 which the United Kingdom took you in round one<sup>88</sup>.

18 14. But it is also apparent from the text of the telegram that the Governor of Mauritius was  
19 present at the meeting held earlier that day, and the penultimate paragraph of that telegram  
20 (paragraph six), states that the Governor of Mauritius told the Ministers that he would report  
21 their views to the Secretary of State for the Colonies.

22 15. Mauritius has not provided any evidence that the telegram is in any way inaccurate, and no  
23 suggestion to the contrary was made until Monday of this week.

24 Internal note of November 1965

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<sup>86</sup> MM, Annex 13.

<sup>87</sup> Reichler, Day 8, 1057: 12 para 52.

<sup>88</sup> At tab 30 of the UK's Judges Folder.

1 16. The second document referred to was the note of November 1965<sup>89</sup>.

2 17. Mr. Reichler observed that the note is a draft, it has handwritten cross-outs and insertions,  
3 and that we don't know who authored it, or for what purpose<sup>90</sup>.

4 18. In fact, the note appears to have been most carefully drafted to ensure accuracy. For  
5 example, at page three of the note it quotes from a telegram dated 19 July 1965. The Tribunal  
6 will find that telegram at Memorial Annex 10 (and the relevant paragraph is paragraph 6). The  
7 handwritten cross-outs and insertions at page three of the note are to ensure the quote is very  
8 precise, crossing out "the unofficials" and marking it as "your unofficials" in accordance with  
9 the telegram.

10 19. The part of the note that I drew the Tribunal's attention to is at page 5 of the note. There it  
11 refers to a meeting of the Mauritian Premier with the Secretary of State for the Colonies at the  
12 Colonial Office on 13 September 1965. The Mauritian Premier is quoted as stating at that  
13 meeting that "*they [the Mauritian Government] would like preference in any fishing rights in*  
14 *Diego Garcia waters*".

15 20. Mr. Reichler sought to make something of the "absence of the phrase: "if fishing rights  
16 were ever granted"<sup>91</sup>. But the term "any fishing rights" is consistent with "if fishing rights were  
17 granted", and the focus, consistent with the July 1965 telegram remains one of preferential  
18 fishing rights.

19 21. I also note in passing that Mr. Reichler commented that I did not read out a later passage  
20 on a subsequent page of the document that referred to the handwritten note of 1 October 1965,  
21 but of course Mr. Wordsworth did expressly refer to that passage<sup>92</sup>.

22 ***Mauritian Premier's knowledge of the documents***

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<sup>89</sup> Rejoinder, Annex 13.

<sup>90</sup> Reichler, Day 8, 1035:9 para 11 setting out "some reasons to be cautious about this document". See also Day 8, 103:10 to 11.

<sup>91</sup> Reichler, Day 8, 1057:23 to 1058:1, para 53.

<sup>92</sup> Wordsworth, Day 7, 840: 17-18 "And another third point for your record is also a reference to these matters being added on 1st October 1965, and that's at Tab 60 of your Judges' Folders at Page 6".

1 22. So turning to the Mauritian Premier’s handwritten note of 1 October 1965, the Tribunal  
2 will recall it referred to the “original requirements submitted to HMG”.

3 23. Mr. Reichler asserted that “we know.....that [the Mauritian Premier] could not have been  
4 referring to either of the two documents cited by the United Kingdom”, stating that the Mauritian  
5 Premier “could not have been aware of them”<sup>93</sup>. He noted in particular that the November 1965  
6 note is dated subsequent to the Premier’s handwritten note of 1 October 1965<sup>94</sup>.

7 24. But the point is that the two documents relied upon by the United Kingdom, are relaying  
8 two statements previously made by the Mauritian Premier himself, and both those statements are  
9 dated prior to 1 October (namely 30 July and 13 September respectively). The November 1965  
10 note was written, of course, subsequent to the handwritten note of 1 October 1965, but the  
11 statement which it sets out and to which the United Kingdom refers, was dated 13 September.

12 25. Mr. Reichler proceeds to comment that, “neither of these documents were submitted to  
13 HMG”<sup>95</sup>. I understood him to be saying that neither the 30 July 1965 telegram nor the November  
14 1965 internal note were submitted by Mauritius to HMG. And if I have understood him  
15 correctly, then the point goes nowhere. The United Kingdom’s case is that those two documents  
16 evidence the requirements that the Mauritian Premier had communicated on 30 July and 13  
17 September respectively.

18 26. Based on the documentary record that we have before us, it is to those requirements that  
19 the Mauritian Premier was referring to in his handwritten note. This is not, I quote, “idle and  
20 partisan speculation”<sup>96</sup>. The United Kingdom’s position is based on a careful analysis of the  
21 documents that we have before us.

22 27. And what does Mauritius say the Mauritian Premier had in mind in 1965? What documents  
23 does Mauritius take us to evidencing the “original requirements submitted to HMG”? It does not

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<sup>93</sup> Reichler, Day 8, 1058: 24 to 1059:1, para 54.

<sup>94</sup> Reichler, Day 8, 1059: 3, para 54.

<sup>95</sup> Reichler, Day 8, 1059: 4, para 54.

<sup>96</sup> Reichler, Day 8: 1059:5, para 54.

1 advance a positive case. Mr. Reichler simply says “we don’t know”<sup>97</sup>; the United Kingdom is  
2 criticised for “trying to squeeze too much juice out of this lemon”<sup>98</sup>, but at least we are bringing  
3 lemons to the table.

4 ***Contemporaneous documentation***

5 28. Looking to events beyond 1965, Mr. Reichler asserts that “Over the next 45 years, neither  
6 the words [“preferential” rights] nor the concept appear in the contemporaneous  
7 documentation.”<sup>99</sup>

8 29. That is not correct. I don’t propose to take the Tribunal to it now, but at Tab 92 of the  
9 folder<sup>100</sup> is a telegram from the British High Commissioner to the Foreign and Commonwealth  
10 office dated 1991 which states that “*our most recent demarche in your tel no 153 states that we*  
11 *had given Mauritius ample notice of our intention to declare a 200 mile fishing zone around*  
12 *BIOT and we gave preferential access to Mauritian vessels to fish in BIOT waters”*.

13 30. But the more important point is that all that happened over the 45 years following the  
14 record of the 23 September 1965, is consistent with preferential fishing rights if such rights were  
15 granted, and not with absolute or perpetual rights, and that is a point which I will come back to in  
16 a moment. Mr. President, just for the record, the quote from the document at Tab 92 to which I  
17 referred is on the second page towards the middle of the page.

18 ***Evidence of what Mauritius officials said***

19 31. Mr. Reichler also commented that “There is no direct evidence that *any Mauritius official*  
20 *ever described the fishing rights that Mauritius sought, or obtained at Lancaster House, as*  
21 *‘preferential’*”<sup>101</sup>.

22 32. But how are we supposed to show what Mauritius officials were thinking when we have  
23 not been provided with Mauritius’s internal documentation?

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<sup>97</sup> Reichler, Day 8, 1058: 22, para 54.

<sup>98</sup> Reichler, Day 8, 1057: 10-11, para 52.

<sup>99</sup> Reichler, Day 8, 1059: 9-10, para 55.

<sup>100</sup> Reply, Annex 100.

<sup>101</sup> Reichler, Day 8, 1057: 1-3, para 52.

1 33. And as I will now proceed to consider under my third point, by Mauritius’s response, or  
2 absence thereof, to notification of restriction and exclusion of its fishermen to BIOT waters, the  
3 evidence that is before us as to how Mauritius’ officials understood their fishing rights is entirely  
4 consistent with preferential rights.

5 **(3) Subsequent practice**

6 ***Introduction***

7 34. So, turning now to my third point, I will now consider Mauritius’s response to the United  
8 Kingdom’s submission in the first round that the British Government always informed Mauritius  
9 as to new measures impacting on fishing in BIOT waters, and when the ability of Mauritian  
10 fishermen to fish in BIOT waters was restricted, excluded, Mauritius did not protest with  
11 reference to the 1965 understanding on fishing rights.

12 35. In the first round, the Tribunal will recall that I set out five examples to illustrate that  
13 submission.

14 ***Examples not addressed***

15 36. But Mauritius did not engage with the vast majority of those examples.

16 37. It appears to gloss over the fact that pursuant to the 1971 Ordinance, Mauritians were  
17 entirely excluded from the territorial sea and were not in fact even designated to fish in the  
18 contiguous zone, instead repeating its submission from round one that Mauritius was given  
19 fishing rights “throughout the entire 12 miles”<sup>102</sup> and asserting that “between 1968 and 1984,  
20 Mauritian-flagged vessels fished freely throughout the 3 mile territorial sea and the 9 mile  
21 contiguous zone”<sup>103</sup>.

22 38. No reference was made to the lack of protest with reference to the 1965 understanding in  
23 1984 when a new fisheries Ordinance came into effect establishing a *licensing* system which

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<sup>102</sup> Reichler Day 8, 1053: 18-20, para 47 “When a 9 mile fishery zone contiguous to the territorial sea was adopted, the UK used its good offices with the US to ensure Mauritius’ fishing rights throughout the entire 12 miles”; see from Round One, Day 3, Sands, 303: 21 to 23.

<sup>103</sup> Reichler, Day 8, 1053:20-22, para 47.

1 required fishing boats to hold a licence to fish<sup>104</sup>, or in 1999 when licences were reduced from 6  
2 to 4.

3 ***Closure of section of waters in July 2003***

4 39. Mr. Reichler did address the letter of July 2003<sup>105</sup>. The Tribunal will recall that was the  
5 letter sent by the Foreign and Commonwealth Office to the Mauritius High Commissioner  
6 referring to discussions of “plans for a closed area management (marine protected areas) in the  
7 Chagos Archipelago”, and informing it of the decision to proceed to *close* a section of the BIOT  
8 waters for conservation reasons.

9 40. The Tribunal will also recall the chart unveiled twice by Mr. Reichler illustrating that the  
10 area that was closed was a small area<sup>106</sup>.

11 41. But the area that was closed was not presented by the United Kingdom in its submissions  
12 as a “massive area”<sup>107</sup> as Mr. Reichler suggested, and in any case the size of the area is beside  
13 the point. It tells us nothing about the significance of that area for fishing; presumably if the  
14 effort was made to close it and to send a formal letter of notification to Mauritius it was of some  
15 significance.

16 42. But more importantly the submission that Mauritius did not protest its exclusion from  
17 BIOT waters is not refuted.

18 43. Mr. Reichler asserted that the 1965 understanding came to be understood by both parties as  
19 the “right to fish” in all the BIOT waters out to 200 miles<sup>108</sup>. That is a very broad statement.  
20 What the subsequent practice in fact shows is consistent<sup>109</sup> with an understanding of the 1965

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<sup>104</sup> Rejoinder, Annex 27.

<sup>105</sup> MM, Annex 119.

<sup>106</sup> Reichler, Day 8, 1061: 18-20, para. 60.

<sup>107</sup> Reichler, Day 8, 1061: 20-21, para. 60 “This is the massive area closed to Mauritian fishing in Chagos waters”

<sup>108</sup> Reichler, Day 8, 1051: 10-13, para. 45 “There is also an agreement on another point. As reflected in the contemporaneous documentation, via a consistent and uninterrupted subsequent practice over 45 years, Mauritius’ “fishing rights” pursuant to the 1965 undertaking came to be understood by both parties as the right to fish in all the BIOT waters, out to 200 miles”.

<sup>109</sup> See Wordsworth, Day 7, 835: 22-24 “that subsequent practice could just as easily have been done by reference to a non-binding political commitment as it could have been done by reference to a binding legal obligation” and 857:12-17, para. 120 “subsequent practice is a tool used in the interpretation of treaties. It is of a quite different and reduced utility

1 understanding as preferential access to fishing rights when granted pursuant to a legislative  
2 regime, a regime that is a restricted and conditional access. And when the rights were restricted  
3 and even excluded, met with no protest with reference to the 1965 understanding.

4 **(4) Relevance of fishing practised in 1965**

5 44. My fourth point is a very brief one, and this is to clarify the United Kingdom’s case on the  
6 relevance of the very limited fishing practised in 1965 in the Chagos waters.

7 45. Mr. Reichler said on Monday afternoon that “Ms. Sander says “Mauritius got no more than  
8 the right to fish as fishing was practiced in 1965”<sup>110</sup> and he footnotes a reference to the first of  
9 my eight points in the first round.

10 46. But my first point in round one was to address as a matter of fact the nature of fishing  
11 practised in 1965. And I stated in round one as follows “Turning to my first point: In 1965,  
12 fishing in Chagos waters was limited to fishing for the domestic needs of the then inhabitants of  
13 the islands. [I’m continuing the quote] I begin with this point as it is important for appreciating  
14 the context of discussions between the British Government and the Mauritian Council of  
15 Ministers in 1965 as to fishing, [I’m still quoting] in particular for understanding why the issue  
16 of fishing rights received only *very* limited attention”.

17 47. Similarly as to my reference to Mr. Forget’s response before the Mauritius Legislative  
18 Assembly that “So far as I am aware, the only fishing that now takes place in the territorial  
19 waters of Diego Garcia is casual fishing by those employed there”<sup>111</sup>, I cited that response as

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where it comes to the question of whether a given document establishes political commitments or binding legal obligations. The fact of subsequent performance in line with that document is consistent both with the existence of a political commitment, which one assumes will be taken seriously, and with the existence of a legal obligation”.

<sup>110</sup> Reichler Day 8, 1052: 17-18, footnote 217 citing Day 5, 594. Cf Wordsworth, Day 7, 834: 5-12 “there is a tension, if the interpretation is correct, that this is for preferential rights if ever granted whatever those rights are going to be in the future, there is a tension there between what one sees in Paragraph 22(6) of the September record.....use of the term “would remain available” suggested they’re simply referring to what limited fishing there happened to be at the time...and that’s consistent also with the fact that fishing wasn’t such a big issue” and at Day 7, 841: 1-3 “we consider that the underlying intention and what the 1965 understanding covers is preference for Mauritius if fishing were ever granted, to include future fishing rights if such were granted by the United Kingdom”, in response to Judge Greenwood’s question “whether what was meant by fishing rights was a perpetuation of what was already in existence, or protection for Mauritius to get something that had not yet been granted” (Day 7, 833: 20-22).

<sup>111</sup> Debate in Mauritius’ Legislative Assembly of 21 December 1965, UKCM Annex 15, p. 15.

1 further evidence of the very limited fishing practised at the time, under the rubric of my first  
2 point which was about appreciating the context of discussions in 1965 and understanding why  
3 the issue of fishing rights received only *very* limited attention.

4 **(5) Goodness of heart**

5 48. My fifth point responds to Mauritius’s challenge to the idea that the United Kingdom  
6 would extend Mauritius’s fishing rights to 200 miles out of “the goodness of its heart” or  
7 goodness of faith.<sup>112</sup>

8 49. Sir Michael has already addressed the Tribunal on this matter very generally<sup>113</sup>.

9 50. But I want to draw the Tribunal’s attention to a series of documents to which I referred to  
10 in the first round, and the Tribunal will find the series of document references at footnote 269 of  
11 the transcript for day 5.

12 51. Those documents relate to the taking of the decision in the early 1990s to extend the offer  
13 of free licences to all commercial licences issued to Mauritian flagged vessels (and not just to the  
14 inshore licences).

15 52. The evidence that yes, that decision was reached with reference to the 1965  
16 understanding, but the 1965 understanding was described by the British High Commissioner as a  
17 “moral obligation”<sup>114</sup> and there was a concern not to behave in a “shabby”<sup>115</sup> way but with regard  
18 to the “spirit” of the understanding.<sup>116</sup>

19 **(6) 2009 bilateral talks**

20 ***Reference to the 1965 understanding in January 2009***

21 53. My sixth point concerns the 2009 bilateral talks. On Monday Mauritius summarised the  
22 United Kingdom’s submission as follows: “throughout the bilateral talks in 2009, Mauritius took

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<sup>112</sup> Reichler, Day 8: 1055, para 50.

<sup>113</sup> See his reference to Prime Minister Harold Macmillan’s ‘Wind of Change’ Speech.

<sup>114</sup> Rejoinder, Annex 36.

<sup>115</sup> MR, Annex 100.

<sup>116</sup> MR, Annex 100; Rejoinder, Annex 40; Rejoinder, Annex 41.



1 its stance on fishing rights based solely on its sovereignty claims, and never invoked the 1965  
2 undertaking on fishing rights<sup>117</sup>.

3 54. The United Kingdom's case is that Mauritius's stance during the 2009 talks and in its  
4 response to the establishment of the MPA, rested on its claim to sovereignty, and was not made  
5 with reference to *free-standing legally binding fishing rights* pursuant to the 1965 understanding.

6 55. I expressly drew the Tribunal's attention to the reference to the 1965 understanding in the  
7 January 2009 talks, the reference to which you were taken by Mr. Reichler<sup>118</sup>.

8 56. The United Kingdom's position, as set out in round one<sup>119</sup>, is that this passage has to be  
9 reviewed:

10 a. With regard to the background of the BMFC exchanges;

11 b. With reference to the statements of Mr. Roberts and Ms. Yeadon who are very clear as to  
12 how references to the 1965 understanding were understood during the January 2009 talks; and

13 c. In light of the fact that, as is common ground, when the MPA was actually on the table in  
14 the July 2009 bilateral talks, Mauritius did not object with reference to free-standing legally  
15 binding fishing rights pursuant to the 1965 understanding, and the sovereignty umbrella would  
16 have permitted it to do so without in any way undermining its position on sovereignty.

17 57. It may be helpful for the Tribunal if I pause here to clarify how the sovereignty umbrella  
18 could have operated in this context. Mauritius chose very much to focus on its sovereignty claim  
19 in the bilateral talks; Mr. Neewoor is described as describing it as the "mother of all issues"<sup>120</sup>.

20 But what the sovereignty umbrella allowed Mauritius to do was to say later in the day, "well, and  
21 this is without prejudice to our claim to sovereignty of the Chagos Archipelago, let's assume for  
22 a minute that you, the United Kingdom, are sovereign. We, Mauritius, still have free-standing

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<sup>117</sup> Day 8: 1060: 18 – 20, para 57.

<sup>118</sup> Sander, Day 5: 620: 14-16; Reichler, Day 8, 1060: 21 to 2061:5, para 57.

<sup>119</sup> Sander, Day 5: 620: 17-19.

<sup>120</sup> Reply, Annex 129, at page 13 of that document.

1 legally binding fishing rights pursuant to the 1965 understanding and the MPA would be  
2 inconsistent with those legally binding rights”. But it did not do so.

3 ***Judge Greenwood’s question***

4 58. If I could take this opportunity to provide a fuller answer to Judge Greenwood’s question  
5 last week about the level of representation at the BMFC<sup>121</sup>. I provided a partial answer and I said  
6 that further detail would be provided. In summary, I can confirm that a political official  
7 represented the British and the Mauritian Government respectively.

8 59. In more detail, we saw last week that the Mauritius representative in 1994 was an  
9 Ambassador<sup>122</sup>. That was also the case in 1995<sup>123</sup> and 1997<sup>124</sup>. In 1996<sup>125</sup> it was a Permanent  
10 Secretary.

11 60. Regarding the British representative, in 1994 the UK representative, Mr. Don Cairns, was  
12 the BIOT Administrator. In 1995<sup>126</sup> and 1997<sup>127</sup> it was the BIOT Commissioner and in 1996<sup>128</sup> it  
13 was the British High Commissioner<sup>129</sup>. And all the relevant references will appear in the  
14 transcript.

15 **(7) Internal documents and legal advice**

16 61. I now move to my seventh point regarding the deployment of internal documents by  
17 Mauritius.

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<sup>121</sup> Day 5, 617: 1-3 “What level of representation was there at the BMFC? Are these political officials from the High Commission representing the British and their counterparts in the Mauritian Government, or are they just technical fishing people”.

<sup>122</sup> Judges Folder, tab 38. Sander Day 5, 618: 26-27 “the document at Tab 38, there is a signature of the Head of the Mauritius delegation, Ambassador”

<sup>123</sup> UKCM, Annex 64, para 1.

<sup>124</sup> Rejoinder, Annex 51.

<sup>125</sup> Rejoinder, Annex 49, para 1

<sup>126</sup> UKCM, Annex 64, para 1

<sup>127</sup> Rejoinder, Annex 51.

<sup>128</sup> Rejoinder, Annex 49, para 1

<sup>129</sup> As to 1998, Rejoinder Annex 52 does not provide names or titles.

1 62. Mr. Reichler said in the second round the United Kingdom chose not to engage with the  
2 “vast majority” of documents that he had referred to<sup>130</sup>.

3 63. But of course a vast majority of the documents he had referred to were internal documents,  
4 which for the reasons set out in the Rejoinder, and in the oral submissions last week, the United  
5 Kingdom consider:

6 a. should be read carefully to determine precisely what papers the author had seen and what  
7 issue he was in fact addressing;

8 b. that they in fact show more of a mixed bag of views than presented by Mauritius, and

9 c. are in any event not relevant.

10 64. Now, Mauritius has come back to those documents, citing again the Aust opinion of 1971  
11 and Watts opinion of 1981, regarding which the Tribunal heard the United Kingdom’s  
12 submissions last week. In particular as regards Mr. Reichler’s submission that “every UK legal  
13 adviser who opined on this question agreed that these undertakings were legally binding  
14 obligations”<sup>131</sup>, the Tribunal have the point that the use of the terms such as “obligation” or  
15 “agreement” tell us little or nothing about whether that was a political or legal obligation or  
16 agreement, and that the context in which such terms are used should be considered carefully.  
17 Similarly, as to the term "assurance", as to which the Tribunal will find Mr. Wordsworth's direct  
18 response to Judge Wolfrum's question at Day 7, Page 848, at Paragraph 93, and he continues at  
19 Pages 850 to 852.

20 65. Mr. Reichler then asked “Where are the opinions of the United Kingdom’s legal advisers  
21 concluding that the commitments undertaken in 1965 were not, or are not, legally binding?  
22 Where are they?”<sup>132</sup>:

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<sup>130</sup> Reichler, Day 8, 1032:3-4, para 3 “Because the United Kingdom chose not to engage with the vast majority of 23 them, my reading and explanation of them has been left unchallenged”.

<sup>131</sup> Reichler, Day 8, 1040: 23 to 1041: 2, para 21.

<sup>132</sup> Reichler, Day 8, 1039: 18-20, para 19.

1 a. But where is Mauritius' citation of authority to say that such internal documents are  
2 relevant? And in this respect I note that Mauritius has seemingly abandoned its case on unilateral  
3 declarations under Nuclear Tests in favour of an "affirmed package"<sup>133</sup> that crystallised on the  
4 moment of independence, so the relevance of such internal documentation appears all the more  
5 obscure.

6 b. Where is the case that says that legal advice given prior to a decision that is at issue should  
7 be disclosed?

8 c. And what would be the repercussions for how legal advice is provided to Government  
9 departments if that were the case?

10 d. And if internal legal advice and documents were relevant, where is Mauritius's legal  
11 advice? And where more generally is its internal documentation?

12 66. We were provided with five internal documents<sup>134</sup>. In response to a specific request from  
13 the United Kingdom<sup>135</sup>, and then from the Tribunal, Mauritius said first on 14 March that it had  
14 fully pleaded its case including by way of disclosure of "appropriate documentation"<sup>136</sup>. And  
15 then, on 7 April 2014, Mauritius said that it had reviewed to the fullest extent possible its internal  
16 documentation going to the nature and extent of fishing rights and had disclosed all such  
17 documentation<sup>137</sup>. We naturally took that at face value and Mr. Wordsworth said last week we  
18 simply wondered what had happened to Mauritian internal documentation.

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<sup>133</sup> Reichler, Day 8, 1055: 10-14, para. 49 "And we say, two, that the clarity requirement (although it is met in this case) does not affect the binding character of this undertaking. In the UK's view -- at least at all times prior to the commencement of these proceedings -- that undertaking was not a unilateral declaration, but was a condition of an agreement reached in 1965, an agreement that was repeated, renewed, and reaffirmed after Mauritius became an independent State"; see also Day 8, 1043:5-7 (para. 18) "As our friends on the other side have themselves argued, the binding character of these commitments is determined in part by whether the UK intended itself to be bound by them" (emphasis added).

<sup>134</sup> See letter dated 13 December 2013 from Mauritius confirming that five internal documents were disclosed by Mauritius.

<sup>135</sup> See letter dated 3 March 2014 from the United Kingdom to Mauritius.

<sup>136</sup> See letter dated 14 March 2014 from Mauritius to the United Kingdom.

<sup>137</sup> See letter dated 7 April 2014 from Mauritius to the United Kingdom.

1 67. An explanation was provided on Tuesday by Mr. Dabee, agent for Mauritius, but that  
2 explanation was only as regards documentation up to 1968.<sup>138</sup> But what about the decades after?  
3 No explanation was given.

4 68. Mr. Dabee did say that the United Kingdom had not made any request for the disclosure of  
5 any internal documentation, but of course not; we had been told on 7 April 2014 that Mauritius  
6 had disclosed its internal documentation going to the nature and extent of fishing rights. So why  
7 is it now suggested that a specific disclosure request could have been fruitful?<sup>139</sup> We are left  
8 genuinely perplexed.

### 9 **Conclusions**

10 69. Mr. President, Members of the Tribunal, that concludes the seven parts of my submission.  
11 The key point is that the words set out in paragraph 22(vi)(b) need to be considered carefully and  
12 in light of the Mauritian Premier's letter of 1 October 1965, and that the subsequent practice is  
13 entirely consistent with the concept of preferential rights.

14 MS. SANDER: Unless I can be of further assistance to the Tribunal, perhaps now  
15 might be a convenient time to take an early lunch break. I am told we are well on track to finish  
16 ahead of time.

17 PRESIDENT SHEARER: Thank you very much, Ms. Sander.

18 Yes, I think it would be convenient to break now and to have an early lunch break,  
19 but we will be back at the usual time, 2:30 in the afternoon.

20 Thank you very much.

21 (Whereupon, at 12:40 p.m., the hearing was adjourned until 2:30 p.m., the same day.)  
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<sup>138</sup> Dabee, Day 9: 1135:16-21 (para 18) "up to 1968 Mauritius was a colony of the United Kingdom and the Council of Ministers was presided over by a British Governor. There can be no doubt that the United Kingdom is in possession of all the relevant records and documents relating to issues concerning the detachment of the Chagos Archipelago, and the activities subsequent. Given the extensive records maintained by the United Kingdom, it should be in possession of internal documentation that we ourselves do not have".

<sup>139</sup> Wordsworth, Day 7, 860: 3-7 noting that in light of these one-sided circumstances, the Tribunal should be very wary of placing weight on the partial picture it had through sight of just the UK internal documentation.

1 AFTERNOON SESSION

2 PRESIDENT SHEARER: Just before you begin, Ms. Nevill, I have to announce that  
3 the Tribunal met during the adjournment and considered the question of the remaining issues of  
4 redactions to the documents in Annex 185, and they have noted that, as to those, nine documents  
5 remained controversial between the Parties, and they have made a decision as to those  
6 documents. The result of that decision will be made available by letter to the Parties today.  
7 They may have already received that letter, but, if not, you will receive it shortly.

8 All right, Ms. Nevill, you may address us now.

9 MS. NEVILL: Thank you, Mr. President.

10 **MPA: Scientific justification and consultation**

11 **Speech 19**

12 **Penelope Nevill**

13 1. Mr. President, Members of the Tribunal, my speech this afternoon will be in three parts.  
14 I will first address Mauritius's submissions in Reply concerning the scientific justification  
15 for the MPA, and the second part will address their submissions on consultation. I will  
16 conclude in the third part of my speech by addressing the argument by Mauritius on the  
17 alleged undertaking given by Prime Minister Brown at the Commonwealth Heads of  
18 Government Meeting in November 2009. I hope that this will take us up to the break and  
19 will not be any longer than an hour, and I promise I will not be referring you to further  
20 documents, though I will make reference to documents, and the references will be in  
21 footnotes.

22 **MPA: Scientific justification for a no-take MPA**

23 2. First, the scientific justification for a no-take MPA. In Reply Mauritius made two main  
24 submissions in respect of the scientific justification: first, it claimed the UK did not really  
25 try to defend the approach it had taken to the MPA because it provided no documents<sup>140</sup>

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<sup>140</sup> Day 8, Sands, p. 923:10-11.

1 and that the UK was less than clear about the scientific case for the MPA.<sup>141</sup> Second, it  
2 suggested that there was and is no scientific basis to support a no-take MPA to protect  
3 migratory and other ocean species or – and this is a claim we have heard for the first time –  
4 to protect coral reefs and inshore fisheries<sup>142</sup>.

5 3. The UK emphatically rejects the claim that it has not defended the approach that it took  
6 to the MPA. A large part of the Attorney-General’s speech in the first week was directed  
7 to just that<sup>143</sup>. His speech and the written pleadings referred to the international consensus  
8 that the oceans are in peril; and that, as the UN Secretary-General Ban Ki-Moon has said,  
9 we humans have put the oceans at risk of irreversible damage<sup>144</sup>; and that it is agreed  
10 internationally that marine protected areas are a crucial step in the attempts to address this  
11 extremely serious risk. For this reason, the international community has set a target of  
12 protecting 10% of the world’s oceans by 2020. And Mauritius has not challenged this, nor  
13 has it challenged that the BIOT MPA was a significant step towards meeting this target, at  
14 the time almost doubling global coverage of MPAs.

15 4. It is worth recalling the approach that Mauritius took to scientific evidence in its written  
16 pleadings. The point that a no-take MPA might not be justified was first raised by  
17 Mauritius in its Reply in the context of its claim that the MPA was in breach of Article  
18 300<sup>145</sup>. The threshold for abuse of rights is very high, a point that Professor Boyle will  
19 develop shortly. Yet what scientific evidence did Mauritius rely on? Mauritius produced  
20 none of its own scientific evidence to support its claim, and this was pointed out in the  
21 Rejoinder<sup>146</sup>. It relied instead on MRAG’s comments on the MPA proposal provided

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<sup>141</sup> Day 8, Macdonald, p. 929: 3-6.

<sup>142</sup> Day 9, Reichler, p. 1075: 6-9.

<sup>143</sup> Day 1, Grieve, pp. 45-51.

<sup>144</sup> “The Oceans Compact: Healthy Oceans for Prosperity – An Initiative of the United Nations Secretary-General”, July 2012, p. 2, [http://www.un.org/depts/los/ocean\\_compact/SGs%20OCEAN%20COMPACT%202012-EN-low%20res.pdf](http://www.un.org/depts/los/ocean_compact/SGs%20OCEAN%20COMPACT%202012-EN-low%20res.pdf).

<sup>145</sup> MR, paras. 6.118-6.120.

<sup>146</sup> UKR, para. 3.45.

1 internally to officials in July 2009. As I demonstrated last week<sup>147</sup>, MRAG’s arguments  
2 were considered and dismissed by the workshop held at the National Oceanography  
3 Center,<sup>148</sup> and this was attended by 15 scientists. It was also addressed and dismissed  
4 again in an extended and more detailed treatment in the article by Dr. Koldewey and her  
5 colleagues<sup>149</sup>. These two documents were produced with the UK’s written pleadings. The  
6 scientific justification is further explained in the answers to Judge Wolfrum’s questions  
7 provided to the Tribunal last week, now at Tab 74 of the UK Arbitrators Folder. Each is  
8 authored by, contributed to, or refers to studies and research by scientists working in the  
9 field, and each provides references to relevant scientific publications in support of their  
10 analysis and conclusions<sup>150</sup>. On a rough count, the Koldewey article cites at least 100  
11 scientific publications. What we say is that any expert evidence produced by the parties in  
12 this case would have looked very much the same.

13 5. Furthermore, in addition to these documents, there is another, the Report of the Facilitator  
14 on the outcome of the public consultation<sup>151</sup>. Counsel for Mauritius asked “how  
15 many...Americans”, “how many were aware that there was no scientific evidence to justify  
16 a ban on fishing”?<sup>152</sup> Well, the answer is that we haven’t worked out how many  
17 respondents were American, and we don’t know whether they would have been able to  
18 give the name of Noah’s wife in a pop quiz, but we do know from the Facilitator’s Report,  
19 at paragraphs 22 and 23, that a large number were scientists, and I invite you to refer to  
20 those passages at a later stage. The independent facilitator’s collation of the responses at

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<sup>147</sup> Day 5, Nevill, p. 566:13 to p. 567: 8, referring to UKCM, Annex 102/Tab 17 UKAF, Folder 1.

<sup>148</sup> National Oceanography Centre final report of workshop held on 5-6 August 2009, UKCM, Annex 102, UKAF, Folder 1, Tab 17.

<sup>149</sup> H. Koldewey, D. Curnick, S. Harding, L. Harrison, M. Gollock, ‘Potential benefits to fisheries and biodiversity of the Chagos Archipelago/British Indian Ocean Territory as a no-take marine reserve’, 60 Marine Pollution Bulletin 1906 (2010), UKR, Annex 63, UKAF, Folder 1, Tab 18; see also UKR, para. 3.46..

<sup>150</sup> NOC Report - around 30 footnote references to scientific publications; Koldewey et al - in 141 footnotes, over 100 references to scientific articles; the BIOT answer to Judge Wolfrum’s questions - 40 scientific references.

<sup>151</sup> UKCM, Annex 121.

<sup>152</sup> Day 9, Reichler, pp. 1079: 21-23 - 1080:1.



1 Annex 122 of the Counter-Memorial lists 94 responses from academic and scientific  
2 institutions and environmental organisations and networks<sup>153</sup>. They clearly disagreed with  
3 Mr. Reichler’s view of the science. The majority supported option 1, a no-take marine  
4 reserve<sup>154</sup>. As for what the respondents knew when they were responding to the public  
5 consultation, the Consultation Document posted online on 10 November 2009 summarised  
6 the arguments for a marine reserve and its costs and benefits on pages 9 to 11, and it also  
7 provided a link to the NOC workshop report.<sup>155</sup> The respondents did in fact have access to  
8 the scientific arguments against a no-take MPA, albeit that MRAG’s arguments were not  
9 summarised directly in the Consultation Document.

10 6. The UK is clear about the argument for a no-take MPA. The NOC Report conclusions  
11 were set out at paragraph 3.54 of the Memorial, and the arguments were further  
12 summarised and developed at paragraphs 3.48 to 3.52 of the Rejoinder.

13 7. There is a divergence of agreement amongst scientists on the scientific justification for  
14 large no-take MPAs for pelagic fisheries, and this was reflected in MRAG’s arguments on  
15 the MPA proposal.

16 8. This argument, along with MRAG’s argument that a no-take MPA would “most likely  
17 displace most fishing fleets to the edge of the BIOT area,”<sup>156</sup> was addressed by Dr.  
18 Koldewey and her colleagues in their article. The authors accept that there is a lack of  
19 existing scientific data as to the effects of the BIOT MPA for pelagic species, and that the  
20 full effects of pelagic MPAs are not yet fully understood. Nevertheless, they conclude that

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<sup>153</sup> UKCM, Annex 121.

<sup>154</sup> UKCM, Annex 122. Of the 34 academic and scientific institutions individual responses that were summarised, 25 supported option 1, 4 option 4, 3 supported an MPA without specifying an option and 1 a reef system; 1 supported none of the options; of the 60 environmental organisations and NGOs, 4 supported a the 4<sup>th</sup> option; 5 supported the MPA without specifying an option and 51 supported option 1.

<sup>155</sup> Consultation on whether to establish a Marine Protected Area in the British Indian Ocean Territory, MM, Annex 152.

<sup>156</sup> MRAG’s argument that effort displacement can counteract the benefits of a no-take MPA is based on modelling studies, rather than studies of actual fishers behaviour. Koldewey and her colleagues conclude that “While some displacement is possible... following implementation of the marine reserve, the reduced area of ocean fishing may result in a decreased fishing effort through vessel de-commissioning or a large-scale change in fishing patterns” and refer to the work being done on the displacement effect elsewhere in the Indian Ocean caused by Somali piracy.

1 partial protection for migratory species cannot be considered futile, and this is for a number  
2 of reasons which I will attempt to summarize:

3 First, the prevailing belief that the application of area closures is an inappropriate  
4 management approach rests on two aspects of the pelagic system; that is, the highly migratory  
5 nature of many species that inhabit that system and the ephemeral nature of the physical  
6 processes that drive pelagic biological processes. But they also note that this assumption has  
7 been challenged<sup>157</sup>, and this is because it fails to adequately consider aspects of the wide variety  
8 of habitats in the sea system and the effects of the behaviour of fishermen<sup>158</sup>. There are various  
9 theories that the wide variety of habitats of the type in BIOT are hotspots of pelagic diversity,  
10 and there is evidence of shoaling behaviour of pelagic species around seamounts of the type  
11 found in BIOT. The second point they make is that studies have already demonstrated that  
12 marine reserves can benefit pelagic species, with studies of tuna mobility demonstrating that they  
13 would benefit from national level closures; that is, there are positive, measurable effects of  
14 closures on pelagic species. Finally, they say it is now believed that pelagic MPAs are an  
15 important tool in conservation management, and you will find this analysis at p. 6 of the article,  
16 at the bottom of the 1<sup>st</sup> column and top of the 2<sup>nd</sup>.

17 • Aside from the issue of the benefit to pelagic species, by-catch is a serious conservation  
18 issue that is complex and eco-system wide in its effects, and I referred to this argument in  
19 support of a no-take MPA last week.

20 9. As explained in the answers to Judge Wolfrum's questions, the MPA provides a chance  
21 to assess what proportions of pelagic fish, mainly tuna, remain in the BIOT marine reserve  
22 or join the circular Indian Ocean migration. Many tuna do breed in BIOT waters, and  
23 analogies from the Pacific suggest that 50% might never leave BIOT waters and therefore

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<sup>157</sup> H. Koldewey, D. Curnick, S. Harding, L. Harrison, M. Gollock, 'Potential benefits to fisheries and biodiversity of the Chagos Archipelago/British Indian Ocean Territory as a no-take marine reserve', 60 Marine Pollution Bulletin 1906 (2010), UKR, Annex 63, UKAF, Folder 1, Tab 18, p. 6, 1st column.

<sup>158</sup> Ibid.

1 would be protected by an MPA<sup>159</sup>. Scientific studies on these aspects of the BIOT MPA  
2 are now under way, and you may have seen Gary Fletcher of the Zoological Society in  
3 London on the second Chagos and science DVD, where he explains the work that is being  
4 done to monitor shark and tuna traffic in the MPA<sup>160</sup>.

5 10. The science of the MPA is not just based on conservation of fisheries, although that  
6 aspect of the scientific case for the MPA has received particular attention in submissions  
7 because of the way the jurisdictional provisions of the Convention are structured.

8 11. The scientific arguments are based on an ecosystem, biodiversity and precautionary  
9 approach, not whether a particular fish stock has been overfished as suggested by Mr.  
10 Reichler's submissions this week<sup>161</sup>. However, the contribution the MPA could make to  
11 meet the problem of overexploited Indian Ocean fisheries is one of the scientific  
12 justifications given for it<sup>162</sup>. Coral reef fishing is low or was low, but, as the BIOT answer  
13 to Judge Wolfrum's questions explained, there is no such thing as sustainable reef  
14 fishing<sup>163</sup>.

15 12. The argument for the inclusion of the reef system rests on the ecosystem and  
16 precautionary approach, that is, the crucial role the Chagos Archipelago reef system plays  
17 for scientific research, both as a baseline of what a healthy reef should be and because of  
18 its recovery to the 1998 coral bleaching event, which was due to a spike in water  
19 temperatures caused by the El Niño weather pattern. This science is considered to be  
20 crucial to addressing the loss of the world's reefs due to pollution and overfishing, and the  
21 effects of climate change on water temperatures – in short, reefs don't like increases in

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<sup>159</sup> "Biological effects of the marine reserve in BIOT (Chagos)", Answers to Judge Wolfrum, UKAF, Folder 2, Tab 74, p 6.

<sup>160</sup> DVD, Chagos: Science in Action I, around 6 minutes.

<sup>161</sup> Day 9, Reichler, p. 1075: 6-15.

<sup>162</sup> NOC Report, UKCM, Annex 102, p. 5 and p. 7, table 2.

<sup>163</sup> "Biological effects of the marine reserve in BIOT (Chagos)", Answers to Judge Wolfrum, UKAF, Folder 2, Tab 74, p 5.

1 water temperatures because it increases the presence of compounds which inhibit the  
2 calcification which builds reefs<sup>164</sup>.

3 13. Thus, there is a significant amount of scientific analysis and opinion which supports a no-  
4 take BIOT MPA. The WTO Appellate Body, in the context of the SBT and GATT  
5 agreements, has accepted that “responsible governments may act in good faith on the basis  
6 of what, at any given time, may be a divergent opinion, coming from qualified and  
7 respected sources.”<sup>165</sup> And we say that that reasoning applies equally to UNCLOS. The  
8 UK is entitled to act on the opinions of those who say there is scientific justification for an  
9 MPA which includes closure of BIOT’s pelagic fisheries and around the coral reef  
10 systems.

11 14. Mauritius did not respond to any of these scientific publications or reports on the science.  
12 It has not questioned the credentials or scientific expertise of the workshop participants,  
13 which included Dr. Koldewey, nor Dr. Koldewey’s colleagues who did not attend the  
14 workshop but co-authored the article in the *Marine Pollution Bulletin*. It did attack  
15 Professor Sheppard for citing his own research<sup>166</sup>, but given that a principal part of  
16 Professor Sheppard’s research since the 1970s has been carried out in BIOT or on samples  
17 from BIOT, this would have been very difficult for him to have avoided.

18 15. In oral submissions in the second round Mauritius returned once more to its case against  
19 the no-take MPA by questioning its funding and the related question of enforcement. This  
20 was, as we know, raised by MRAG as part of its arguments against a no-take MPA, and  
21 these points can be dealt with shortly.

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<sup>164</sup> E.J. Goodwin, *International Environmental Law and the Conservation of Coral Reefs* (Routledge, 2013), ch. 1.

<sup>165</sup> *EC – Measures Affecting Asbestos and Asbestos Containing Products*, AB-2000-11, WT/DS135/AB/R, 12 March 2001, para. 178.

<sup>166</sup> Day 8, Macdonald, pp. 928:22-24 - 929:1-3.

1 16. First, funding. In a passage memorable for its rhetorical flourish, counsel for Mauritius  
2 claimed that UK had ceded sovereignty to the Bertarelli Foundation<sup>167</sup>. There is absolutely  
3 no evidence that UK officials' decision-making was captured by NGO interests seeking a  
4 no-take MPA, and the submission, in fact, defies logic, and this is why. If options 2 or 3  
5 had been chosen instead of a no-take MPA, the BIOT administration would still have had  
6 funding through continued licence fees: therefore, it wasn't an option between funding or  
7 no funding. In any event, funds from licence fees did not cover the full running costs and  
8 the shortfall was - and still is - covered by a subsidy from the Overseas Territories  
9 Development Fund<sup>168</sup>. And what is the logic of Mauritius' submissions? If all measures  
10 paid for by private funding were held to be in breach of international environmental law on  
11 that basis, it would seriously impede advances in environmental protection. But this is not  
12 the direction that the law is taking<sup>169</sup>, as explained by recent books on international  
13 environmental law. Furthermore, the Global Environment Facility, an offshoot of the  
14 International Bank for Reconstruction and Development, actively promotes public-private  
15 partnerships as an integral part of achieving its overall global environmental objectives<sup>170</sup>.

16 17. Ms. Macdonald raised the question of funding again yesterday, drawing your attention to  
17 Colin Roberts' first witness statement in the judicial review proceeding. She asserted that,  
18 read together with the UK's answer to the question of whether there was any condition on  
19 the Bertarelli funding, it showed that, "the creation of the MPA was premised on a policy  
20 of no resettlement."<sup>171</sup> The evidence simply does not support that submission: as I  
21 explained last week<sup>172</sup>, the MPA proposal and MPA itself were expressly stated to be based

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<sup>167</sup> Day 9, Reichler, p. 1079: 1-8.

<sup>168</sup> As explained in the Consultation Document, MM, Annex 152, p. 11.

<sup>169</sup> Sands and Peel, with Fabra and MacKenzie, *Principles of International Environmental Law* (3<sup>rd</sup> ed., 2012), pp. 891-2.

<sup>170</sup> See 'The GEF and the Private Sector', on the Global Environment Facility website: <http://www.thegef.org/gef/PPP>

<sup>171</sup> Day 10, Macdonald, p. 1152: 15-17.

<sup>172</sup> Day 5, Nevill, p. 571: 12-24, referring to the Consultation Document, MM, Annex 152. See also the Foreign Secretary's press release of 1 April 2010, MM, Annex 165, referred to at p. 588:3-7.

1 on existing UK policy on right of abode in BIOT, but without prejudice to the outcome of  
2 the proceedings before the European Court of Human Rights in the *Chagos Islanders* case.  
3 We don't know the precise thinking behind Mr. Roberts's statement, but infer that he was  
4 concerned that if the contract could be terminated depending on the outcome of that case,  
5 the same result in domestic judicial review proceedings could have had a similar effect on  
6 it.

7 18. Second, enforcement. Ms. Macdonald's response in Reply was that Mauritius did not  
8 need evidence that enforcement was deficient because it could simply "note" the fact that  
9 the MPA covers an area of 640,000 square kilometres<sup>173</sup>. Yet Mr. Reichler implicitly  
10 accepted the next day that MRAG had enforced the fishing licensing regime in the FCMZ  
11 between 1991 and 2010<sup>174</sup>. He talked about how good a job it had done. The BIOT only  
12 had one enforcement vessel then too. There is no evidence – and Mauritius has not  
13 provided any – that MRAG's fear has been realised that a no-take MPA "might" increase  
14 illegal fishing, because licensed fishing vessels assisted in the policing of unlicensed ones.  
15 We accept that surveillance and enforcement is a challenge and work is being done in this  
16 area, as explained in the Rejoinder in paragraph 3.56, which I referred to briefly last week.  
17 I will not repeat what is said here, but simply draw the Tribunal's attention to it and ask  
18 that you read in full in due course.

19 19. In conclusion, Mauritius, through Professor Crawford, suggested once more that the  
20 MPA has not been implemented, and that the funds are insufficient to do so because they  
21 compare unfavourably with the United States provision for the large-scale MPA in the  
22 Northwestern Hawaiian Islands. But the level of US funding for its large-scale MPA –  
23 which is indeed enviable – does not prove that BIOT MPA funds are insufficient. If it  
24 truly were the case that the BIOT MPA is not being implemented and enforced under

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<sup>173</sup> Day 8, Macdonald, p. 929: 9-12.

<sup>174</sup> Day 9, Reichler, p. 1075: 9-13.

1 existing legislation, then, given the huge level of interest that the MPA has generated, you  
2 would have expected Mauritius to be able to find a plethora of information on the internet  
3 which complains of just that, for example, in the *MPA Newsletters* published quarterly by  
4 the US National Oceanographic and Atmospheric Administration<sup>175</sup>, or the Chagos  
5 Conservation Trust website<sup>176</sup>, and so forth. You would think the scientists and the  
6 environmentalists would be the first to complain. But Mauritius has been unable to  
7 provide anything but inference and conjecture.

8 20. Furthermore, this line of argument provides no answer to the question of why, if the  
9 Government of Mauritius had truly wanted to engage on the science of a no-take MPA  
10 versus a zoned approach, or related questions of funding and enforcement, it did not do so -  
11 and Ms. Sander has just made the same point in regard to the Mauritian position on fishing,  
12 Mauritian fishing in the BIOT MPA. Mauritius knew that these were the options that were  
13 being canvassed by UK officials because they told them so in the 21 July talks<sup>177</sup>. At that  
14 point it was told that one of the options was no-take, but they were also looking at an MPA  
15 that would protect just the coral reef system. It could have raised and addressed these  
16 concerns at the time under a sovereignty umbrella. And it had ample opportunity to  
17 respond after the 21<sup>st</sup> of July, as I explained in my submissions last week<sup>178</sup>. It did not.  
18 Why not? Mauritius never answers this question.

19 21. You might ask well, what about the claim made by Mauritius in its letter of 23 November  
20 that a total ban on fisheries exploitation would not be compatible with the long-term  
21 resolution of the sovereignty issue? We say that that too could have been discussed if it

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<sup>175</sup> See: <http://marineprotectedareas.noaa.gov/resources/publications/newsletters/>.

<sup>176</sup> See: <http://chagos-trust.org/>.

<sup>177</sup> OTD Directorate record of discussion in Port Louis, UKCM, Annex 101, para. 8.

<sup>178</sup> Day 5, Nevill, p. 559: 8 to p. 565:4, p. 572: 2 to p. 574: 16, p. 575:1 to - p. 578: 7, p. 579:12 to - p. 580:3. Offers of talks were either made or reiterated at least 15 times between 15 September 2009 and 26 March 2010: on 15 September, 1, 12, 13, 22 and 23 October, 10 and 11 November, 15 December, 14, 20 and 21 January, 8 and 15 February 2010, 19 March and, finally, on 26 March 2010.

1 had met with UK officials. Discussion of the relative merits of the scientific argument for  
2 a no-take MPA over a zoned approach would, it appears to us, have dovetailed with the  
3 sovereignty concern expressed in the letter of 23 November. So, what discussion might  
4 have followed from that? We can only speculate, but the parties could have discussed the  
5 benefits of a no-take MPA pending any change or implementation of UK policy on  
6 resettlement or cession of the territory to Mauritius. And this is because it has been  
7 established that a no-take MPA for even a limited period has beneficial effects. In fact,  
8 one of the first unintended experiments on MPAs was the effective closure of the North  
9 Sea during WWII<sup>179</sup>. A study posted by the European Commission's in-house science  
10 service explains that "In six years war-mediated closure resulted in an instant increase in  
11 catch per unit effort in cod, haddock and whiting." So, the parties could have discussed  
12 such issues. UK and Mauritian officials might also have explored what would happen to  
13 an MPA if there was resettlement: the views of those settling would be important, an MPA  
14 might be modified, alternative sources of economic support could be explored instead of  
15 fisheries, given the environmental importance of the Chagos Archipelago marine area.

16 22. But Mauritius refused to even meet to talk over these points and these possibilities. And  
17 it did so because of the continuation of a public consultation, which did not determine the  
18 outcome of the MPA proposal and did no conceivable harm to any Mauritian interests in  
19 BIOT or its waters. On a question as serious as saving the world's oceans and the Indian  
20 Ocean from imminent irreversible decline, we say that this lack of cooperation by  
21 Mauritius is simply not good enough.

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<sup>179</sup> "Fish population in the North Sea: fishing pause during WWII provides unique insight", 20 September 2010, [https://ec.europa.eu/jrc/en/news/fish-population-north-sea-fishing-pause-during-wwii-provides-unique-insight-8338?search#\\_ftnref1](https://ec.europa.eu/jrc/en/news/fish-population-north-sea-fishing-pause-during-wwii-provides-unique-insight-8338?search#_ftnref1), referring to "An unintended experiment in fisheries science: a marine area protected by war results in Mexican waves in fish numbers-at-age", Doug Beare, Franz Hölker, Georg H. Engelhard, Eddie McKenzie and David G. Reid *Naturwissenschaften* - 2010, Volume 97, Number 9, pp. 797-808.



1 23. Mr. Reichler attempted to undermine the public consultation earlier this week by  
2 suggesting the respondents did not know what they were talking about. As we have  
3 already shown, this is not the case<sup>180</sup>. Mr. Reichler also referred to it as a, “noble  
4 democratic exercise,” but in a tone that suggested it was not meant as a compliment. But  
5 we will take it as one: public consultations carried out by the UK Government on policy  
6 questions fulfil a democratic function in the UK constitutional system. And in this instance  
7 you could say that they performed a similar function in the international system. The public  
8 consultation exercise was a good example, we say, of what can be done to meet one of the  
9 “governance challenges” identified by academics working in the field of international  
10 environmental law: that is, the challenge of enabling meaningful participation by non-State  
11 actors and individuals in environmental governance<sup>181</sup>. I’m now going to move to the  
12 second part of my speech addressing specific points that were raised in reply on  
13 consultation.

#### 14 **Consultation**

15 24. Mauritius raised two broad points, and I hope to move through these relatively briefly.

16 25. The first is the contention that there was a tension between offering Mauritian  
17 involvement in the public consultation and making it clear that the public consultation  
18 would go ahead before the talks and could not be delayed. It was also suggested that the  
19 first dates offered by the UK for the next round of talks was 4-5 November, and that talks  
20 on that date would not have fed into the consultation document<sup>182</sup>. As I explained last  
21 week, the UK was seeking dates for the next round of talks from the 15<sup>th</sup> of September, but  
22 Mauritius did not respond. The form that any Mauritian involvement in the public  
23 consultation would take was to be resolved through those further discussions, but the

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<sup>180</sup> Day 11, Nevill, p. 1305: 13 to 1306: 9.

<sup>181</sup> Sands and Peel, with Fabra and MacKenzie, *Principles of International Environmental Law* (3<sup>rd</sup> ed., 2012), p. 893.

<sup>182</sup> Day 8, Macdonald, p. 937: 13-21.

1 suggestions given were launching the public consultation by a joint press statement or  
2 referencing Mauritius in the consultation document<sup>183</sup>. Furthermore, there is nothing to  
3 suggest that either of these things could not have been achieved if the talks were held on  
4 the 4<sup>th</sup> and 5<sup>th</sup> of November. As we have seen, the UK was able to amend the Consultation  
5 Document and repost it online by the 12<sup>th</sup> of November in response to the Mauritian protest  
6 on 10 November on the wording of the document<sup>184</sup>. But having said that, the UK never  
7 suggested to Mauritius that carrying out a public consultation was conditional on Mauritian  
8 involvement.

9 26. The second main point raised in reply on the consultation concerns the timeframe  
10 between the receipt of the Facilitator’s Report, the MPA decision, and the exchange in  
11 Parliament on 6 April 2010 led by Jeremy Corbyn of the All Parliamentary Group on  
12 Chagos<sup>185</sup>. Professor Boyle already explained last week the three reasons for the  
13 timeline<sup>186</sup>. Ms. Macdonald raised the same point again this week, and referred the  
14 Tribunal to 11 pages of debate in the House of Commons on the 6<sup>th</sup> of April 2010, and  
15 another 18 pages from an earlier debate of the 10<sup>th</sup> of March. She spent some time on  
16 these. The point of her exercise appeared to be little more than an attempt to muddy the  
17 waters to obscure Mauritius’s inability to demonstrate that the responsibility for any lack of  
18 consultation lay at its door, not that of the UK. Ms. Macdonald also focussed on the  
19 statement by the Minister on 6 April 2010 that “no further information could have come  
20 in—and that was referring to a further debate that had been promised on the 10<sup>th</sup> of March  
21 – but “no further information could have come in that would have made any difference to  
22 the decision on the protection of the marine environment” in the BIOT. The debate of 10

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<sup>183</sup> UKR, Annex 74, Colin Roberts 3<sup>rd</sup> witness statement, para. 20.

<sup>184</sup> Note Verbale dated 11 November 2009 from the British High Commission, Port Louis, to the Ministry of Foreign Affairs, Regional Integration and International Trade, Mauritius, No. 54/09, MM, Annex 154; UKCM, para. 3.62.

<sup>185</sup> Day 8, Macdonald, p. 942:6 to p. 948: 12.

<sup>186</sup> Day 7, Boyle, p. 888: 9 to p. 889:5.

1 March 2010, which is at Tab 2, p. 12 of Ms. Macdonald's speech – and I do not propose  
2 that we would turn to it now – but that debate concerned the Chagossian community, and,  
3 although this was not the main content of the debate, it was suggested, quite wrongly we  
4 say, that there was no consultation with Chagossian communities over the MPA proposal.  
5 As Mr. Lewis pointed out in his response in that debate—that's the Minister<sup>187</sup> – there was  
6 consultation with Chagossian communities in the Seychelles, the town of Crawley in the  
7 UK and Mauritius. And these are summarised in paragraphs 59 to 62 of the Facilitator's  
8 Report<sup>188</sup>. In these circumstances, further debate on the issue of consultation with  
9 Chagossians over the MPA proposal would not have made any difference. I turn now to the  
10 third part of my speech, the alleged undertaking given by Prime Minister Gordon Brown at  
11 CHOGM, and this is an issue we have heard—

12 JUDGE WOLFRUM: Ms. Nevill, before you reach that point, may I ask you a  
13 question on the consultation process? These two subjects are not that much related.

14 Perhaps it's a little bit late for asking this question; therefore, I don't expect an answer  
15 right away. In the consultation process, were these questions to which you referred more than  
16 once particularly addressed to the major marine scientific research institutes of the world, then  
17 you would have an Expert advice so to speak. You refer to the consultation process as a means  
18 of establishing, I use my own words, of democracy in the world, and that is well-understood, but  
19 also as a means to collect scientific advice. My question is focusing on that second point.

20 And since I'm on it, I have another question which I forgot to ask the other day. You  
21 have seen this report of 1st May 2014 of Mr. Sheppard. Was that a publication written  
22 independently or for the purposes of these proceedings, or was it, in the alternative, an internal  
23 report? I realize that Mr. Sheppard was in the MPA business, so to speak, right from the

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<sup>187</sup> Hansard, 10 March Col 90WH, Mauritius Arbitrators Folder, Round 2, Tab 2.1, p. 29 (of the tab numbering).

<sup>188</sup> 'Whether to establish a marine protected area in the British Indian Ocean Territory: Consultation Report', Rosemary Stevenson, Consultation Facilitator, UKCM, Annex 121, paras. 17, 21, 59-62.

1 beginning, at least his name pops up all over the documentation. Therefore, I believe he was  
2 heavily involved.

3 Thank you.

4 MS. NEVILL: Thank you, Judge Wolfrum. I will take your last question first. The  
5 document at Tab 74 produced by the BIOT Administration was prepared for the purposes of  
6 these proceedings in response to your question.

7 As to your first question regarding the role of the responses from the scientific  
8 community and NGOs working in the field in the public consultation, the Government wasn't  
9 using that necessarily as scientific advice as such; however, that reinforced the scientific advice  
10 that it had received, and you will also see when you look through or if you look through the  
11 collation of responses, that many of the scientists that were involved in the workshop and more  
12 generally were also responding through the public consultation. The public consultation is  
13 intended to be a qualitative exercise rather than a quantitative one, so really in this sense, as I  
14 understand it, it was just feeding into the overall decision-making process and affirming the  
15 scientific advice that had already been received. But as I've said, many of the same scientists  
16 also made submissions through that process.

17 PRESIDENT SHEARER: Ms. Nevill, just a quick follow-up to the second of the  
18 questions posed by Judge Wolfrum, Professor Sheppard's name did not appear in the dramatis  
19 personae list that was handed up. I gather that he belongs to an organization called the Chagos  
20 Conservation Trust; is that correct?

21 MS. NEVILL: Yes.

22 PRESIDENT SHEARER: Is that a free-standing NGO or was that somehow related  
23 to the British Government?

24 MS. NEVILL: Thank you, Mr. President.

25 It's a free-standing NGO, but it has been quite involved with the BIOT administration

1 insofar as it was established originally by the first BIOT Environmental Adviser – well, actually,  
2 he was a Brit Rep, if I get this right, so he had been part of the UK military establishment based  
3 on Diego Garcia and had developed an interest in this area and obviously a role in implementing  
4 the regulations in place at the time, and subsequently because of his interest, he became BIOT  
5 Environmental Adviser and established this independent NGO.

6 ARBITRATOR WOLFRUM: Another follow-up on the last question. What is the  
7 academic background of Professor Sheppard?

8 MS. NEVILL: The academic background, he has a chair at the University of  
9 Warwick, and I think it's the Faculty of Earth Sciences. He has been involved in scientific  
10 research expeditions to the BIOT since the 1970s. He went out with the first expeditions led by  
11 David Bellamy, who's quite a well-known character, at least on the television screens in New  
12 Zealand and the United Kingdom. He was probably one of the first celebrity scientists. So, he  
13 was involved in the first scientific expeditions to the BIOT, and he's worked and published in  
14 that area ever since. He now splits his time between his chair in Warwick and advising the UN  
15 and other international agencies on issues of tropical and coastal waters and small states.

16 ARBITRATOR HOFFMANN: Ms. Nevill, it seems like we are in questions and  
17 answer session now, but I – and I should have asked you this when you were discussing your  
18 first point on the scientific justification for the MPA. I just wanted you to, perhaps, if you would  
19 kindly explain perhaps in clear terms why it was deemed necessary to put a stop to the Mauritian  
20 vessels' right to fish in the waters of the Chagos Archipelago? I note from statistics, UK  
21 statistics, that showed that the amount of fish that was caught in these waters were small. It was  
22 minimal. Mr. Loewenstein also referred to that in his presentation. Well, purportedly this was  
23 done in the interest of environmental objectives, as you have explained to us, of a no-take MPA.  
24 However, this was not considered, seems not to be considered necessary with the recreational  
25 fishing in the Diego Garcia waters, where catches of tuna and tuna-related species are reported to

1 reach up to 28 tons per annum. And this, I would note, is notwithstanding a remark from this  
2 National Oceanic Center report that you also referred to the workshop held on the 5th and 6th of  
3 August of 2009, which stated that final protection of the BIOT area as a no-take MPA would also  
4 need to apply to recreational fishing on Diego Garcia.

5 Now, I know I asked this question earlier and Mr. Whomersley already responded to  
6 that, and we heard it said on Tuesday referring to Joanne Yeadon's submission of the 1st of  
7 September 2010, where she records that the environmental adviser of BIOT assesses the  
8 exclusion of Diego Garcia and its three-mile territorial waters to be of no environmental  
9 significance.

10 I just wanted you to explain to me, and I failed to grasp this very clearly, why there  
11 was this distinction between the exclusion again of Diego Garcia recreational fishing with the  
12 amounts of fish caught there as opposed to rather minimal catches of Mauritian vessels in the  
13 BIOT area, if you can, please.

14 MS. NEVILL: I will attempt to give a reasonably – I will start again. The answer to  
15 that question, I would say, lies in a variety of factors, so I'm just going to try to convey that. The  
16 proposal for a large –

17 ARBITRATOR WOLFRUM: Ms. Nevill, turn around, please.

18 (Pause.)

19 MS. NEVILL: I have just been told that Professor Boyle can answer the question,  
20 but I would also just perhaps say what my thinking on this as well, or what my response would  
21 be as well.

22 The initial proposal for the BIOT MPA for a large-scale marine park in the Chagos  
23 always anticipated the closure of the reef system. Inshore fishing was predominantly carried out  
24 in that area as connoted by its title. Protecting the coral reefs was always on the table from the  
25 very beginning.

1           As we've also heard, they received legal advice to the effect that there was no binding  
2 legal obligation, and, of course, that was sitting in the background, but what was primarily or one  
3 of the key issues that also fits into this, all the decision-making in this area, was the fact that  
4 when they attended meetings with Mauritian officials or received any subsequent  
5 correspondence from Mauritian officials, they never once raised the issue of fishing by  
6 Mauritian-flagged vessels in the waters.

7           They also carried out consultations when they were in Mauritius. Ms. Yeadon met  
8 with Mr. Talbot, the family that had been for a long time engaged in inshore fishing in the BIOT,  
9 and although his response was initially one of concern, he then went on to kind of say, "well, we  
10 could deal with all this, maybe I could run my boats up for tourism" and so forth. And so, in this  
11 sense, when they consulted with everyone involved, given the scientific benefit of protecting the  
12 entire reef system and then what came through in the consultation process, if you like, all of  
13 those factors fed into the decision and the recommendation of the approach that they ultimately  
14 took, which was a complete no-take MPA. And as Ms. Sander has already taken you to the  
15 documents I believe they established that this was not an issue that was raised by Mauritius in its  
16 consultations with the UK insofar as it had consultations.

17           As to the second question, the answer is not dissimilar. The guidelines on  
18 developing MPAs require that, or suggest that, such the ones that are developed under the  
19 Convention on Biological Biodiversity and other guidelines by the FAO, the consultation with  
20 affected stakeholders is one of the key things that you must carry out, and one of the reasons is,  
21 if you don't get them engaged, they just ignore the law or ignore the rule. And obviously for a  
22 State carrying out in the exercise that the UK was engaged in, in 2009, also there were also other  
23 stakeholders involved, as we've said, which were third States.

24           And it was as a result of those consultations with stakeholders such as the United  
25 States, that although initially the recommendation was, as you've said, that Diego Garcia should

1 be included in the area, that it was considered that the response to those consultations was such  
2 that it could not be.

3 So, in a sense you end up with an MPA that's the product of your consultations as  
4 well as the scientific arguments.

5 Any more questions? I turn to something that I have to say I find probably not quite  
6 as exciting as the science as to how you develop an MPA.

7 But anyway, the third part of my speech is the alleged Prime Minister Gordon Brown  
8 undertaking about which we've heard much over the last three weeks.

9 **The alleged Prime Minister Brown “undertaking”**

10 27. The Agent for the United Kingdom took you earlier this week to the five additional UK  
11 documents admitted into evidence earlier this week. Ms. Macdonald addressed you  
12 yesterday on those documents, as well as the second witness statement of Prime Minister  
13 Ramgoolam of 6 May 2014, in which he responds to the accounts of the meetings that he  
14 attended that are given in two of the additional documents, the emails of 8 November 2009  
15 and 20 January 2010.

16 28. As these documents show, Mauritius knew from at least 14 January 2010 that the United  
17 Kingdom did not accept any commitment had been given by Prime Minister Brown. Prime  
18 Minister Ramgoolam does not deny this in his latest witness statement. His latest witness  
19 statement appears to be directed instead to the argument that what was allegedly being put  
20 “on hold” was the MPA project as a whole, not the public consultation.

21 29. In order to establish its case on this point, Mauritius must establish both that there was a  
22 commitment given by Prime Minister Brown and that it meets the requirements of a  
23 binding legal obligation under the *Eastern Greenland* and *Nuclear Tests* line of cases. We  
24 say the Mauritius case fails on both counts.



1 30. Prime Minister Brown was asked if he had given any commitment in early December  
2 2009, and, as reported in the email of 8 December 2009, the response was that, “the PM  
3 did not say that the consultation/MPA proposal was over or that the issue had finished.”<sup>189</sup>

4 The further email of 4 January 2010 from the Prime Minister’s Private Secretary reports  
5 that, and here I quote again, “the PM said that we would look at ways to ensure that  
6 Mauritians were more fully consulted.”<sup>190</sup> That is consistent with the denial recorded in  
7 the email of 8 December. I can also confirm, in response to Judge Greenwood’s question  
8 yesterday, that this 4 January email is the “read-out” the British High Commissioner  
9 showed Foreign Minister Boolell in their meeting on the 13<sup>th</sup> of January 2010<sup>191</sup>.

10 31. Mauritius claims that Prime Minister Ramgoolam’s account in his first witness statement  
11 is to be preferred. Now, in *Nicaragua v United States* the International Court of Justice  
12 said in strong terms that evidence given by Ministers in writing, or orally before the Court,  
13 on matters which are controverted, and in favour of the interests or contentions of the State  
14 to whom the witness owes allegiance, must be treated with great reserve, but that it could  
15 retain such parts of the evidence given by Ministers, orally or in writing, as may be  
16 regarded as contrary to the interests or contentions of the State to which the witness owes  
17 allegiance<sup>192</sup>.

18 32. Turning to the case here, Prime Minister Ramgoolam’s first statement, dated November  
19 2013 was prepared in response to the UK’s Counter-Memorial in which the UK rejected  
20 the claim, made for the first time in the bifurcation hearing, that Prime Minister Brown had

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<sup>189</sup> Email dated 4 January 2010, Stephen Hickey, Private Secretary to the Foreign Secretary to Joanne Yeadon, forwarding an email of the same date sent to him by Tom Fletcher, Private Secretary to the Prime Minister, UK AF, Tab 75.

<sup>190</sup> Email dated 4 January 2010, Stephen Hickey, Private Secretary to the Foreign Secretary to Joanne Yeadon, forwarding an email of the same date sent to him by Tom Fletcher, Private Secretary to the Prime Minister, UKAF, Tab 76.

<sup>191</sup> Email dated 14 January 2010 from John Murton, High Commissioner Mauritius, to Joanne Yeadon, BIOT Administrator, UKAF, Tab 77.

<sup>192</sup> *ICJ Reports, 1986, p. 14, para. 70.*

1 said, and I quote, “the MPA would not be implemented.” We responded on the basis that  
2 the misunderstanding, as we then understood it to be based on the letter of 30 December  
3 2009 read together with the other Mauritius communications of 23 November, 30  
4 December and 19 February 2010, we understood that the misunderstanding was over  
5 whether there was an agreement that the public consultation would be halted. Mauritius  
6 then produced a carefully worded statement from the Prime Minister in Reply, which it  
7 relied on to support the argument that there was a promise both that the public consultation  
8 would be halted and that consultations would only take place through the bilateral forum  
9 and a promise that the MPA project would be halted. Given the circumstances of the  
10 preparation of this statement, we say the ICJ’s approach in *Nicaragua v United States* is  
11 directly applicable and we invite the Tribunal to apply it here. And it applies with equal  
12 force to the Prime Minister’s second statement introduced this week.

13 33. Our second submission is that, even on its own case, Mauritius cannot establish that it has  
14 met the requirement for the creation of a binding unilateral legal obligation of a statement  
15 made in “clear and specific terms.”<sup>193</sup> Between all of the documents which touch on this  
16 issue, whether interstate communications, internal documents, or submissions, there are  
17 clear discrepancies in the Mauritian accounts of what allegedly passed between the two  
18 Prime Ministers. These appear to turn on whether the alleged commitment was to withdraw  
19 the MPA or the public consultation. And the Tribunal has already been referred to the  
20 relevant documents<sup>194</sup>, so I will not go through them again, but will make some brief points

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<sup>193</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda)*, ICJ Reports 2006, p. 6, para. 50 and Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto, International Law Commission, 2006, principle 7.

<sup>194</sup> They are: Email exchange dated 8 December 2009 between Ewan Ormiston, Deputy High Commissioner Mauritius, and Andrew Allen, Head of Southern Oceans Team, Overseas Territories Directorate (UKAF, Folder 3, Tab 75), Extract of Information Paper CAB (2009) 953, 9 December 2009 (MR, Annex 148), Letter of 30 December 2009 from Foreign Minister Boolell to the Foreign Secretary (MM, Annex 157), Email dated 4 January 2010, Stephen Hickey, Private Secretary to the Foreign Secretary to Joanne Yeadon, forwarding an email of the same date sent to him by Tom Fletcher, Private Secretary to the Prime Minister (UKAF, Folder 3, Tab 76), Email dated 14 January 2010 from John Murton, High Commissioner Mauritius, to Joanne Yeadon, BIOT Administrator including two attachments (1) Engagement with Mauritius on the issue of Marine Protection in BIOT; (2) Draft letter to Foreign Minister Boolell

1 in response to Ms. Macdonald’s submission yesterday. The tab numbers that you have will  
2 be in the footnotes in this section.

3 34. In the Parliamentary Debates of 18 January 2010, referred to by Ms. Macdonald, the  
4 relevant extracts are at pages 9 and 10<sup>195</sup>. Prime Minister Ramgoolam does not purport to  
5 report on the exact words said by Prime Minister Brown as suggested by her submission.  
6 What he said to Parliament was this:<sup>196</sup>

7 “I said over and again it was imperative that the issue of sovereignty continue to be addressed  
8 especially in the context of any proposed Marine Protected Area...” And then I’ll leap over a  
9 bit:

10 “It was my clear understanding, Mr. Speaker, that at the end of the meeting with the British  
11 Prime Minister the British Government would do nothing to undermine resettlement and  
12 sovereignty of Mauritius over the Chagos Archipelago and that the MPA would be put on hold  
13 and would only be discussed during the bilateral talks...”

14 What we see here is that he said that that was his understanding – he does not say that this is  
15 what Prime Minister Brown actually said. So, we say that this document does not provide any  
16 support for the Mauritian case.

17 35. At the meeting on 20 January with British High Commissioner, Prime Minister  
18 Ramgoolam is recorded as saying “he had asked for the MPA consultation to be stopped,  
19 and Brown had agreed [and in a quote within a quote]: 'It’s done’.”<sup>197</sup> Prime Minister  
20 Ramgoolam says in his most recent witness statement that this is not an accurate reflection  
21 of what he said. However, the record of 20 January is consistent with Foreign Minister

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(UKAF, Folder 3, Tab 77), (MR, Annex 151), National Assembly of Mauritius, 18 January 2010, Reply to Private Notice Question (MR, Annex 151), Emails dated 20 and 21 January 2010 from John Murton, High Commissioner Mauritius to Joanne Yeadon, BIOT Administrator (UKAF, Folder 3, Tab 78), Bifurcation Transcript, 11 January 2013, p. 74/18-20, Statement of Prime Minister Ramgoolam, 6 November 2013 (MR Annex 183, M AF, Round 2, Tab 9.2), Mauritius Reply, para. 1.18, Statement of Prime Minister Ramgoolam, 6 May 2014 (M AF, Round 2, Tab 9.1).

<sup>195</sup> MR, Annex 151.

<sup>196</sup> MR, Annex 151, pp. 9-10.

<sup>197</sup> UK Arbitrators Folder, Tab 78.

1 Boolell’s report to the British High Commissioner on 13 January 2010, and recorded in the  
2 email of 14 January. There the Prime Minister is reported as saying that the Prime  
3 Minister had told the cabinet meeting following CHOGM that Brown had “agreed to ‘drop’  
4 the public consultation. He was—and this is referring to Prime Minister Ramgoolam—very  
5 and usually clear and definitive about this.”<sup>198</sup> We say this is a clear contemporaneous  
6 statement, referring to dropping the public consultation.

7 36. In the bifurcation hearing on 11 January 2013<sup>199</sup> which I’ve already referred to, Mauritius  
8 said the assurance was that “the MPA would not be implemented.” So, this refers neither  
9 to the MPA nor to the public consultation. Sorry, it obviously refers to the MPA, but it  
10 doesn’t refer to the word “put it on hold” and only carry out in bilateral discussions and so  
11 forth, nor does it refer to the words “on hold”.

12 37. Finally, in his statement of 6 November 2013, Prime Minister Ramgoolam<sup>200</sup> does not  
13 even say that Prime Minister Brown actually said he would put the MPA “on hold.” The  
14 relevant passage is at paragraphs 14 and 15, and I will just quote from it:

15 “I replied: “You must put a stop to it.” There could have been no doubt that I was  
16 referring to the proposed ‘marine protected area.’

17 Mr. Brown then said: “I will put it on hold.”

18 Now, Prime Minister Ramgoolam’s own account rests on his supposition that there  
19 could have been no doubt that he was referring to the proposed MPA, but if one reads the  
20 account given in paragraphs 10 to 13 of his witness statement of what preceded that exchange,  
21 there is plenty of room for doubt. And you will find that statement at Tab 9.2 of the Round 2  
22 Mauritius Folder. I do not suggest that you turn to it now, but invite you to read the relevant  
23 paragraphs in due course. And I will just quickly briefly go through them: “At the outset of our

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<sup>198</sup> UK Arbitrators Folder, Tab 77.

<sup>199</sup> Bifurcation Transcript, p. 74:18-20.

<sup>200</sup> MR, Annex 183, paras. 11-15.

1 conversation, Mr. Brown praised the leading role which I'd played in forging a consensus on a  
2 crucial and delicate issue and so forth in the meeting'.

3           And then it goes on to talk about Mr. Brown recognizing the positive leadership  
4 role I had played on this issue and asked me what he could do for Mauritius: "I, therefore, took  
5 the opportunity to convey to Mr. Brown the deep concern of Mauritius over the proposal of the  
6 United Kingdom to establish an MPA around the Chagos Archipelago and for launching of a  
7 public consultation by the UK Foreign and Commonwealth Office on 10 November, just two  
8 weeks earlier".

9           He then goes on in the next paragraph: "I also conveyed to Mr. Brown that since  
10 the bilateral talks between Mauritius and the United Kingdom were intended to deal with all the  
11 issues relating to the Chagos Archipelago, they were the only proper forum in which there should  
12 be further discussions on the proposed MPA. I further pointed out that the issues of sovereignty  
13 and resettlement remain pending, and that the rights of Mauritius and the Chagos Archipelago  
14 waters had to be taken into consideration. In response, Mr. Brown asked me once again what  
15 would you like me to do? I remember these words clearly. You must put a stop to it. There  
16 must have been no doubt that I was referring to the proposed Marine Protected Area".

17           Well, we say, really? Because what he had just been talking about was the assertion  
18 that the only consultations that could take place were through the bilateral forum and not through  
19 a public consultation process. It's our submission that what preceded this exchange shows that  
20 there is plenty of room for doubt.

21 38.    The record here, such as it is, provides no evidence of facts resembling those in *Eastern*  
22       *Greenland*: there is no contemporaneous written record written by Prime Minister Brown  
23       of what he had said that is not contested by Mauritius or which follows a back-and-forth  
24       negotiation over a long running dispute<sup>201</sup>. Nor is there any clear statement of the kind that

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<sup>201</sup> *Eastern Greenland*, 1933 P.C.I.J. Ser. A/B, No. 53.

1 was before the Court in the *Nuclear Tests*<sup>202</sup> case, namely press releases and televised  
2 statements, where there could not have been any dispute over what was said or the  
3 circumstances of the statement.

4 39. The manifestation of an intent to be bound, a crucial element of the unilateral creation of  
5 a legal obligation, rests in large part on the clarity and specificity of the statement,  
6 corroborated by an examination of the circumstances in which the statement is made<sup>203</sup>.  
7 And we find that in the ICJ's decision in *Congo v Rwanda (2002 application)*. That cannot  
8 be established here: at best, all Mauritius has is a friendly conversation in the margins of  
9 CHOGM between two Prime Ministers, and an account of the alleged commitment given  
10 in that conversation which rests, even on Prime Minister Ramgoolam's own statement, on  
11 his supposition that Prime Minister Brown 'must have known' what he was referring to.  
12 There is no clear and specific statement.

13 40. Finally, even if it could be said that a commitment was given in November 2009, by 20  
14 January 2010<sup>204</sup> at the latest it had been made clear to Mauritius and also to Prime Minister  
15 Ramgoolam by the British High Commissioner that any commitment had been  
16 withdrawn<sup>205</sup>. Prime Minister Ramgoolam's second statement, as I have already said, does  
17 not deny this aspect of the account given by the British High Commissioner of their  
18 meeting on the 20<sup>th</sup> of January. Furthermore and if we apply the principles developed by  
19 the International Law Commission on promises of states, any withdrawal was not arbitrary:  
20 Mauritius had not changed its position. There had been no fundamental change in its

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<sup>202</sup> ICJ Reports, 1974, p. 253, para. 51 (UKCM Authority 8); Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto, International Law Commission, 2006, principle 7 and commentary (UKCM, Authority 72).

<sup>203</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda)*, ICJ Reports 2006, p. 6, para. 53.

<sup>204</sup> UK Arbitrators Folder, Tab 78.

<sup>205</sup> Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto, International Law Commission, 2006, principle 10 and commentary (UKCM, Authority 72).

1 circumstances. Therefore, we say even if there had been any binding obligation, and we  
2 say there clearly was not, or any binding obligation and clear statement, it was terminated.

3 41. The Note Verbale of 15 February 2010, followed, and this, of course, requested dates for  
4 the third round of bilateral talks. Judge Greenwood asked whether this was the formal  
5 response to the letter of 30 December 2009. The Agent for the United Kingdom has already  
6 explained that we say that it is. In the meeting between Foreign Minister Boolell and the  
7 British High Commissioner on 8 February, the Foreign Minister had said not to send the draft  
8 letter which replied expressly and in longer terms to the 30 December letter sent by the  
9 Foreign Minister, because he thought it would only cause further misunderstandings.  
10 Notwithstanding the Foreign Minister's indication to the British High Commissioner, the  
11 invitation extended in the Note Verbale of 15 February was rejected in round two by the  
12 letter from Mr. Seeballuck of 19 February 2010, and we invite the Tribunal to read this in full  
13 in due course. It shows, we say, the complete lack of cooperation by Mauritius.

14 MS. NEVILL: I have probably about ten minutes left, so we could take a break now  
15 or I could finish.

16 PRESIDENT SHEARER: Yes, I think, if it's only ten minutes, you should continue,  
17 Ms. Nevill, and we will take the break after you. I thank you.

18 *Relevance of any distinction between a commitment to put the consultation on hold or put the*  
19 *MPA on hold*

20 42. Because Mauritius has focused on the evidence and the further evidence from Prime  
21 Minister Ramgoolam on the statement that it was clearly an undertaking to put the MPA on  
22 hold and not just the public consultation, we have looked at why the distinction between an  
23 agreement to put the public consultation on hold and carry out consultations in bilateral  
24 talks or put the MPA on hold would be relevant. We say that it could only possibly go to  
25 breach. If the Tribunal has jurisdiction over a binding unilateral undertaking under

1 Articles 2(3), 56(2) and 300 as Mauritius claims<sup>206</sup>, a proposition which we roundly reject  
2 for the reasons given by Professor Boyle last week<sup>207</sup>, it cannot seriously be argued that  
3 proclaiming an MPA in breach of a legal binding commitment to halt a public consultation  
4 exercise and consult only with Mauritius could breach those provisions. The point is that  
5 the UK could have exercised its sovereign rights under UNCLOS to implement an MPA in  
6 the FCMZ/EPPZ whether or not it had carried out a UK government public consultation  
7 exercise beforehand; BIOT law did not even require a public consultation. It follows that  
8 even if the UK had failed to comply with a promise to withdraw a public consultation,  
9 there could be no breach of those Articles: 2(3), 56(2) or 300.

10 43. Secondly, any obligation the UK might have to consult with Mauritius under Article  
11 56(2) or indeed under Article 2(3), could not be breached by the lack of consultations with  
12 Mauritius in circumstances where Mauritius refused to take up the offers of further talks in  
13 the correspondence of 15 December 2009, and 15 February, 19 March and 26 March 2010.  
14 There could be no breach, even if there was a breach of the undertaking to withdraw the  
15 public consultation. If there was an obligation to consult under those Articles, then it  
16 would follow that the obligation must be to invite consultations on matters falling within  
17 their subject matter, namely the powers of the coastal State in the EEZ to exercise the right  
18 and jurisdiction provided for in paragraph 56(1)(a) and (b) to *inter alia*, conserve and  
19 manage natural resources, exercise jurisdiction over marine research and the protection and  
20 preservation of the marine environment. The object and purpose of those Articles cannot  
21 logically require either consultations over an alleged breach of an undertaking to withdraw  
22 a public consultation, or that consultation on matters falling under that article take place  
23 only with one State party and with no other person.

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<sup>206</sup> Articles 78 and 194 could have no relevance here.

<sup>207</sup> Day 7, Boyle, p. 820: 9 to p. 823: 19, p. 825:12-16.



1 44. And, thirdly, there is nothing in those articles which would suggest that a State with the  
2 right to be consulted by another on the exercise of that latter State's rights in respect of the  
3 EEZ as set out in Article Art 56(1) has the right to make its acceptance of the invitation to  
4 consult conditional, much less conditional on the withdrawal of a consultation with the  
5 public. This would be anathema to the spirit of any treaty article requiring consultation,  
6 even if it did not in law require public consultation as distinct from inter-State consultation.  
7 There was, we say, no legal connection between the public consultation and the due regard  
8 of Mauritius's interests as a non-coastal State under Article 56(2). The only connection  
9 was the perceived effect of the continuation of the public consultation on Prime Minister  
10 Ramgoolam's public positioning in Mauritius in the lead-up to the Mauritian general  
11 elections, given that it contradicted statements he had made publicly and thus caused him  
12 difficulties. This had absolutely nothing to do with the substance of the MPA proposal, or  
13 how that might affect Mauritian interests in the matters covered by Article 56 or the  
14 territorial sea covered by Article 2(3). And we note in this regard that if you look back  
15 over the document – and I think it's the 14<sup>th</sup> of January – and look at those that follow  
16 closely, you will see that in those documents Foreign Minister Boolell actually expresses  
17 support or talks in terms of expressions of support for the MPA<sup>208</sup>.

## 18 **Conclusion**

19 45. And, now, finally my conclusion, which can be short and blunt:

- 20 • The science supports the BIOT MPA
- 21 • It is implemented, funded and enforced
- 22 • There was wide-ranging consultation, through the public consultation exercise and bilateral
- 23 meetings with third States and other stakeholders

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<sup>208</sup> UKAF, Folder 3, Tabs 77 (email of 14 January 2010) and 79 (email of 8 February 2010).

1 • And finally, it is too late now for Mauritius to complain that it was not consulted: it plainly  
2 was and the responsibility for the failure of further engagement over the scientific and other  
3 issues now raised by Mauritius lie firmly at its door.

4 MS. NEVILL: Mr. President, unless the Tribunal has any further questions, that  
5 closes my submissions.

6 PRESIDENT SHEARER: I don't see, Ms. Nevill, and thank you very much.

7 And the Tribunal will rise now and resume after 20 minutes. That's at five to 4:00.

8 (Brief recess.)

9 PRESIDENT SHEARER: Yes, Professor Boyle, please, go ahead.

10 PROFESSOR BOYLE: Mr. President, it falls to me once again to bring up the  
11 graveyard slot, but I do hope to finish well before 5:00. It depends on whether you have any  
12 questions or not.

### 13 **Speech 20**

#### 14 **The MPA: consultation and abuse of rights**

#### 15 **Professor Alan Boyle**

16 1. In this speech I will make six points:

17 a. First, that prior to terminating Mauritian fishing rights, the United Kingdom consulted in a  
18 timely fashion and gave Mauritius every opportunity for the matter to be discussed fully. And it  
19 was Mauritius that did not use that opportunity and it cannot now complain of non-consultation.

20 b. Secondly, we would say that the United Kingdom has the right under UNCLOS to regulate  
21 and where necessary terminate Mauritian fishing in the BIOT MPA. This follows from our  
22 previous submissions on articles 2(3), 56, 58, and 62.

23 c. Thirdly, I will argue that the United Kingdom was fully justified on conservation grounds  
24 in terminating all commercial fishing in the BIOT MPA, including Mauritian fishing. Mauritius  
25 has offered no expert testimony to the contrary.

1 d. Fourthly, there is nothing in the design or implementation of the MPA which demonstrates  
2 that it cannot or will not fulfil its purpose. Mauritius' arguments in this respect misrepresent the  
3 MPA.

4 e. Fifthly, that there is no basis for an abuse of rights claim. The high evidential threshold for  
5 such a claim has not been met and it comes nowhere near being met. Mauritius has made no  
6 attempt to answer the United Kingdom's argument that, when such claims are made in respect of  
7 EEZ fisheries, article 297(3)(b) is the applicable law and not article 300.

8 f. Finally, I will deal with Mauritius' second round arguments in relation to other alleged  
9 breaches of UNCLOS.

10 ***a. Prior to terminating Mauritian fishing the United Kingdom consulted in a timely fashion***

11 2. Turning then to consultation. I will be quite brief on this, as Ms. Nevill has dealt with the  
12 main part of the story. In response to our first round argument, Ms. Macdonald put her case this  
13 way, she said: "The question is when Mauritius was brought in, and was it brought in early  
14 enough to shape the thinking."<sup>209</sup> We agree with the principle; how we apply it is the issue. Ms.  
15 McDonald did not seriously contest the point that January 2009 was too early, nor did she try to  
16 argue that we should have consulted in advance of the Foreign Secretary deciding that an MPA  
17 was worth considering. But once he did decide, then Mauritius had the opportunity – an ample  
18 opportunity as we think Ms. Nevill has shown – to shape his thinking.

19 3. Mauritius then denied that the July 2009 bilateral talks satisfied the obligation of  
20 consultation, saying they should have carried on longer. But even if that is true, Ms. Nevill has  
21 shown that there were further meetings, up to November in fact, and that by November all of the  
22 necessary information about the MPA had been supplied to Mauritius. That information also  
23 indicated that a no-take MPA formed one option under consideration, that was made clear in July

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<sup>209</sup> MacDonald, Monday 5<sup>th</sup> May, p. 936, response to Judge Greenwood.

1 and at subsequent meetings, as we pointed out in the first round. Mauritius has not contradicted  
2 that evidence.

3 4. Further meetings thereafter, we would suggest, were concerned not with the MPA or with  
4 the fishing ban, but rather with the Brown/Ramgoolam meeting and the Public Consultation. Ms.  
5 McDonald says this about the public consultation:

6 "So the dispute between the Parties on this point is not primarily, it seems to us, about the factual  
7 position. The United Kingdom thought that it was acceptable to be talking to Mauritius about the  
8 [MPA] proposal while consulting with the rest of the world at the same time." She went on:  
9 "And Mauritius, for the reasons expressed in the many communications which you have seen,  
10 did not."

11 5. She puts the point well, but we disagree. By that point the parties were no longer  
12 consulting over the MPA, they were arguing about the Public Consultation and what had or had  
13 not occurred in the Brown/Ramgoolam exchange. We say that is irrelevant to consultation over  
14 the MPA, it's a red herring. It may be diverting, but it misses the point.

15 6. The point is that Mauritius had every opportunity between July 2009 and November 2009  
16 to enter into a dialogue with the United Kingdom about the options being canvassed for the MPA  
17 at that time. It could, for example, have sent scientists to participate in the NOC Workshop in  
18 Southampton.<sup>210</sup> It did not do so. It could have made representations on behalf of its fishermen  
19 about the potential loss of fishing licences. There is no evidence that it ever did so. Perhaps this  
20 can be explained by the lack of interest that was shown by Mauritian fishing boat owners when  
21 they were consulted by Joanne Yeadon in Port Louis.<sup>211</sup> Mauritius could have suggested  
22 referring the matter to the British Mauritian Fisheries Commission, but it resisted proposals to  
23 reactivate that body.<sup>212</sup> It could have followed through on its initial agreement to set up a joint

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<sup>210</sup> Murton-Yeadon 14.1.2010. [Tab 77]

<sup>211</sup> *Bancoult* case, Yeadon's third witness statement, UKR Annex 73.

<sup>212</sup> UKCM, Annexes 93 and 94, at p. 2.

1 working group of United Kingdom and Mauritian scientists to study the various options,  
2 including the full no-take protected area.<sup>213</sup> But it never did. Perhaps the best analogy here, it  
3 occurred to me, is a dance, with the belle of the ball declining every invitation to a waltz.

4 7. As our first round evidence showed, Mauritian ministers and officials displayed no interest  
5 in any adverse impact on their own fishermen. They were interested in joint licensing of foreign  
6 fishing in BIOT waters, perhaps in furtherance of their economic policy of making Mauritius a  
7 fisheries hub in the Indian Ocean. But they were also interested in discussing joint licensing as a  
8 means of demonstrating their sovereignty or shared sovereign rights. Even in February 2010,  
9 when the British High Commissioner was still discussing the MPA with Foreign Minister  
10 Boolell, the record shows no mention by Mauritius of the possible loss of fishing rights.<sup>214</sup> You  
11 will recall, I'm sure, the letter from Prime Minister Ramgoolam on 30<sup>th</sup> December 2009 and the  
12 terms in which he rejected a no-take MPA.<sup>215</sup> They focused on sovereignty. They were not part  
13 of any dialogue about unjustified interference with Mauritian fishing rights. But the Prime  
14 Minister's letter does show that he was very well aware of the implications of a no-take MPA.

15 8. Now, it does seem to us that on that evidence, largely uncontradicted by Mauritius, that the  
16 consultation was timely, it facilitated informed dialogue about a no-take MPA had Mauritius  
17 wished to enter into such a dialogue, and it allowed Mauritius ample opportunity to make  
18 representations and to try to influence the policy of the British Government, which was by no  
19 means fixed at this point. The options remained open right to the end. Judge Greenwood, at some  
20 point last week, rightly drew attention to internal United Kingdom documents which showed that  
21 even by late March 2010 no decision had been taken by the British Government. And no  
22 decision to declare an MPA was in fact taken by the Foreign Secretary until 1<sup>st</sup> April 2010. So, it  
23 was open to Mauritius at any point up until March 2010 had it wished to enter into a

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<sup>213</sup> Joint Communique, 21 July 2009, MM, Annex 148.

<sup>214</sup> Murton-Yeadon, 8.2.2010 [Tab 79]

<sup>215</sup> UK Arbitrators Folder, Tab 72.

1 conversation of any substance about the impact on Mauritian fishing rights and about the need  
2 for a no-take MPA, it was open to Mauritius to pursue that opportunity. But as I've I think shown  
3 after November they showed no interest in it at all.

4 ARBITRATOR GREENWOOD: Professor Boyle.

5 PROFESSOR BOYLE: Yes.

6 ARBITRATOR GREENWOOD: Earlier in these hearings, you or one of your  
7 colleagues explained that one of the reasons why the relatively short time elapses between the  
8 close of the consultation and the Foreign Secretary taking the decision, was the electoral  
9 timetable in the United Kingdom.

10 PROFESSOR BOYLE: Yes.

11 ARBITRATOR GREENWOOD: Now, I know that the date of elections in the  
12 United Kingdom isn't fixed and that this election was only called on something like the 6th of  
13 April, but because of the length of time that Parliament had already run, by the beginning of  
14 2010, it would have been apparent to anyone that a British General Election had to be called  
15 before the end of July of that year.

16 PROFESSOR BOYLE: Yes.

17 ARBITRATOR GREENWOOD: Now, that being the case, by the time the  
18 consultation closes on the 5th of March, the impending election, even though the date itself  
19 hadn't been fixed, must have been in people's minds.

20 PROFESSOR BOYLE: I'm sure that was right, yes.

21 ARBITRATOR GREENWOOD: So, what I want to ask you is this: If the  
22 Mauritians had come back in response to the e-mail of I think it's the 26th of March and said,  
23 well, as you have taken no decision yet, we would like to discuss the following matters, how  
24 could the Foreign Secretary have gone along with that and still accommodated the British  
25 electoral timetable?

1 PROFESSOR BOYLE: That would have been a tricky choice, I agree with that. The  
2 obvious answer to that is that Mauritius, of course, had had ten months in which to raise these  
3 questions, and I would suggest that that was a question that should certainly have been raised  
4 earlier.

5 Now, I don't know how the Foreign Secretary would have responded if Mauritius had  
6 come in March and raised more serious representations on the point. We can only speculate. I  
7 have absolutely no idea. It would have been difficult, that's obvious, but I don't think any of us  
8 can say that he would necessarily have gone ahead or that he would necessarily have paused. I  
9 just don't know, you don't know, none of us can say, that's simply guesswork. But clearly at this  
10 point, if Mauritius had made a serious request to consider the fishing issue and the need for a no-  
11 take MPA, it seems to me that is something that politicians would have had to take seriously, and  
12 at least consider it carefully, even if at the end of the day they rejected it.

13 And after all, we are talking ultimately about consultation here. We're not  
14 necessarily talking about reaching agreement. But as I say, we're speculating. And that's all I  
15 can say. And I think that's all anyone can say in answer to that question.

16 9. So, we would suggest that Mauritius really has no basis for complaint here, and if there  
17 was a legal obligation to consult before adopting the MPA on a no-take basis, which we doubt,  
18 then it has been satisfied by the United Kingdom on the evidence before you.

19 ***b. The United Kingdom had the right under UNCLOS to regulate and where necessary***  
20 ***terminate Mauritian fishing in the EEZ***

21 10. That brings me to my second point, that the United Kingdom had the right to regulate and  
22 where necessary terminate Mauritian fishing rights in the BIOT MPA. Now, Mauritius' response  
23 on this point is to reiterate that it has fishing rights in the MPA, and that these must be respected  
24 in accordance with its interpretation of articles 2(3) and 56(2). It did not say anything about

1 articles 61 or 62. But these are the key provisions of UNCLOS on access to EEZ fisheries.  
2 Mauritius' failure to deal with them is quite remarkable.

3 11. As I observed this morning, article 61 requires coastal states to “ensure through proper  
4 conservation and management measures that the maintenance of the living resources in the  
5 exclusive economic zone is not endangered by over-exploitation.” This obligation extends to  
6 protection of associated or dependent species – or in more straightforward terms it covers the  
7 effects of fishing on by-catch and biodiversity.

8 12. Article 62 then sets out the responsibility of coastal states to determine harvesting capacity  
9 and allowable catch. And it goes on in Article 62(2) to provide for other states to be given access  
10 to surplus fish stocks through “agreements or other arrangements, pursuant to the terms,  
11 conditions, laws and regulations referred to in paragraph 4.” So, there might be a binding  
12 agreement on access, as there is for example between the EU and Mauritius. Or there might be  
13 an ‘arrangement’ which could be a binding undertaking, or a non-binding MOU, or perhaps  
14 simply an informal promise to licence fishermen.<sup>216</sup> The important point that I’m trying to make  
15 here is that the wording of Article 62 is broad enough to cover whatever form of access  
16 agreement or arrangement was negotiated between the United Kingdom and Mauritius in 1965 or  
17 subsequently.

18 13. Access agreements for surplus fish stocks are common. The EU has agreements with many  
19 African states. The United States has agreements in the South Pacific. Japanese and Taiwanese  
20 vessels fish under licence in the Indian Ocean and as far away as the Falkland Islands. Taiwanese  
21 and Spanish vessels also fished for tuna in BIOT waters until the MPA was introduced in 2010.  
22 In some of these cases there may be a right to fish under a treaty, as in the EU-Mauritius  
23 agreement, but none of these states, so far as I can determine, has ever claimed that access  
24 agreements or arrangements give them sovereign rights over the fish. None of them has ever

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<sup>216</sup> The Virginia Commentary offers no guidance.



1 sought to bring an access dispute to an UNCLOS tribunal under part XV. No-one else  
2 complained that their rights had been violated when the BIOT fishery was closed.

3 14. What I have outlined is the UNCLOS framework for access to fish stocks in the EEZ. It is  
4 a framework which, by implication, the parties to this dispute accepted when licences were  
5 issued to allow Mauritian vessels to fish in waters beyond the territorial sea of BIOT. Once the  
6 new 200 nautical mile fisheries and conservation and management zone was introduced in 1991,  
7 Mauritian vessels applied for and were granted a limited number of offshore licences, up to at  
8 least 1999.<sup>217</sup> In conformity with article 62(4) they were not exempt from BIOT law or from  
9 prosecution for illegal fishing. The United Kingdom's position, as set out in an FCO memo of  
10 1994, was that "BIOT licences are issued free to Mauritius fishing companies but we will not  
11 hesitate to prosecute any vessel fishing illegally."<sup>218</sup> So, the United Kingdom could and did retain  
12 all of the normal powers of a coastal state in relation to BIOT, including the power to designate  
13 closed areas or protected species, and to reduce, on conservation grounds, the number of licences  
14 issued to Mauritian vessels. All of this was explained earlier today by Ms. Sander.

15 15. What this tells us is that the United Kingdom acted as the coastal state in relation to  
16 Mauritian fishing throughout this period. Not only did it exercise the full range of regulatory  
17 powers envisaged by article 62(4) of UNCLOS, but it did so in this respect without any protest  
18 from Mauritius. And Mauritian fishing vessels complied with BIOT laws, as they were required  
19 to. On this evidence, there is nothing to suggest that Mauritius has ever been a coastal state for  
20 fisheries purposes in relation to BIOT, still less the coastal state.

21 16. The point that's emphasised by commentators on article 62 is the very broad discretion  
22 which it gives to coastal states. I have referred to article 62(4) previously, and won't take you to  
23 it again. But Dr. Klein in her book on *Dispute Settlement in the Law of the Sea* makes the point:  
24 "Beyond being consistent with the Convention, the nature of the terms and conditions [in Article

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<sup>217</sup> UKCM, paras. 2.104-110.

<sup>218</sup> UKR, Annex 45, Internal note from FCO to the British High Commission, 2 November 1994.

1 62(4)] is solely the discretion of the coastal state.”<sup>219</sup> And Professor Burke in his writing on the  
2 subject concludes that: “the coastal state’s authority to vary these conditions underscores the  
3 State’s total control over access.”<sup>220</sup>

4 17. And in deciding whether to allow other states access to EEZ fisheries, Article 62(3)  
5 requires the coastal state to “take into account all relevant factors, including, inter alia, the  
6 significance of the living resources of the area to the economy of the coastal State concerned and  
7 its other national interests.” Now, referring to this provision, Professor O’Connell said it  
8 “portends a policy of denying allocations to countries which do not reciprocate in other  
9 matters.”<sup>221</sup> Dr. Klein writes that: “It is quite foreseeable that a coastal state would rely on  
10 political interests in determining access to fish in its zone. The political nature of these decisions  
11 [she says] renders them largely unsuitable for third-party review through international courts and  
12 tribunals.”<sup>222</sup> Plainly Professor O’Connell and Dr. Klein, unlike Professor Crawford, believed  
13 that political motives were acceptable, if not inevitable, in this context. And Professor O’Connell  
14 and Dr. Klein, it seems to me, would not regard the BIOT MPA as an abuse of rights simply  
15 because the Foreign Secretary sought political advantage from it.

16 18. Article 62(3) does require the coastal state to take into account “the need to minimize  
17 economic dislocation in States whose nationals have habitually fished in the zone...” This is an  
18 attempt to balance the discretion of the coastal state with the impact on other users of EEZ. But  
19 as Dr. Klein rightly comments, “the difficulty in this provision lies in assessing which of the  
20 factors is to take priority.”<sup>223</sup> She goes on to say that “Once again, the discretion of the coastal  
21 state has priority.”<sup>224</sup>

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<sup>219</sup> Klein, *Dispute Settlement in the UNCLOS*, p. 184.

<sup>220</sup> Burke, *The Law of the Sea Convention Provisions on Conditions of Access to Fisheries Subject to national Jurisdiction*, 63 *Oregon LR* 73 (1984), p. 93.

<sup>221</sup> O’Connell, *International Law of the Sea*, pp. 566-67.

<sup>222</sup> Klein, *Dispute Settlement in the UNCLOS*, p. 182.

<sup>223</sup> Klein, p. 183.

<sup>224</sup> Klein, p. 183.

1 19. Now, Mauritius has never suggested a loss of fishing licenses has caused it any economic  
2 dislocation. Mauritius responds to all of this, however, by citing once again article 56(2) and the  
3 obligation of the coastal state to have “due regard” to the rights and duties of other States”. Mr.  
4 Loewenstein reiterated that the phrase means respect for or non-interference with Mauritius’  
5 fishing rights. But he made no attempt to relate article 56(2) with article 62.

6 20. We have already set out our view of the meaning of “due regard” in article 56(2). The  
7 interpretation asserted by Mr. Loewenstein is not supported by the Virginia Commentary or the  
8 UNCLOS travaux. Nor is it consistent with the ordinary meaning of the words. Mr. Chairman,  
9 you have no doubt had due regard to the need for counsel to finish on time during these  
10 proceedings, but that has not prevented you from exercising a discretion to extend the hearing if  
11 it seems appropriate and fair to do so. Plainly in this context having due regard for the time does  
12 not necessarily mean finishing on time, except possibly today. So it is possible to have due  
13 regard for something while in the end overriding it.

14 21. Dr. Klein deals directly with article 56(2). She deals directly with the point argued by  
15 Mauritius. She says this: “It has been suggested that the coastal state’s power of regulation  
16 should be exercised in a reasonable manner in accordance with the duty to act with due regard  
17 for the rights and duties of other states. [She goes on to say] Such an obligation would be a small  
18 concession in the light of coastal states’ resistance to any check on their powers through third-  
19 party allocation of fishing resources within the zone.”<sup>225</sup> For her, article 56(2) must be read  
20 together with Part XV, especially article 297(3)(a).

21 22. Like other commentators, Dr. Klein does not give the fishing rights of other states in the  
22 EEZ anything like the prominence accorded to them by Mauritius. Her treatment of those rights  
23 is far more consistent with the interpretation of article 56(2) articulated by the United Kingdom,  
24 and with the purpose for which the EEZ was created. On that view, the fishing rights of other

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<sup>225</sup> Klein, p. 184.

1 states are but one factor to be weighed in the balance, and it is for the coastal state to decide  
2 which factors have the greatest weight. As I argued last week, her conclusion is reinforced by  
3 article 58(3), and indeed from what I've said today is also reinforced by Article 62. Again these  
4 are articles on which Mauritius has said nothing.

5 23. Mauritius tried again in the 2<sup>nd</sup> round to draw support from the *Fisheries Jurisdiction*  
6 *cases*.<sup>226</sup> In its judgments in those cases the International Court found that Iceland had not given  
7 “due regard” to the rights of the United Kingdom and Germany to fish in waters adjacent to  
8 Iceland’s 12 mile fishery zone. But this finding does not undermine the conclusions drawn by  
9 Dr. Klein with respect to EEZ fish stocks. The *Fisheries Cases* were dealing with equitable  
10 allocation of high seas fish stocks under pre-UNCLOS law. Article 62 of UNCLOS creates no  
11 comparable rights for other states fishing in the EEZ – indeed it takes them away. It is no  
12 exaggeration to say that the UNCLOS fisheries articles were consciously designed to avoid the  
13 outcome of the *Fisheries Cases*. So, once again Mauritius asks you to apply out of date legal  
14 analysis last heard in the 1970s. That cannot be right.

15 24. The United Kingdom therefore concludes that consistently with the relevant articles of  
16 UNCLOS it is for the United Kingdom, as the relevant coastal state, to determine the weight and  
17 priority to be given to Mauritian fishing in the BIOT MPA beyond the territorial sea.

18 25. Now, Articles 56, 61 and 62 of UNCLOS do not apply to the territorial sea of BIOT and  
19 Mauritian vessels had been licensed to fish in the territorial sea. Mauritius continues to argue that  
20 its fishing rights are incorporated in article 2(3) and must be respected on that basis, but it said  
21 nothing new in the second round on that point, and we reiterate our first round arguments and  
22 indeed I reiterated them this morning. But it is our view that if fishing in the EEZ can be  
23 terminated by the coastal state, a fortiori the same must true of the territorial sea. But whatever  
24 the position in general international law, the nature of the rights exercised by Mauritius in the

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<sup>226</sup> (UK/Iceland) 1974 ICJ Reports 3, para 72.

1 territorial sea and beyond was itself expressed in highly contingent terms. Fishing rights were to  
2 remain available “as far as practicable.” As Ms. Sander emphasised this morning, the wording  
3 used in 1965 envisages termination when necessary. We say that in 2010 it became necessary  
4 and that doing so is consistent with articles 2(3), 56 and 62 of UNCLOS.

5 *c. The United Kingdom was fully justified on conservation grounds in terminating all*  
6 *commercial fishing in the BIOT MPA, including Mauritian fishing.*

7 26. And that brings me to my third point. Mauritius argued that in any balancing exercise its  
8 fishing rights must be treated with great respect. Mr. Loewenstein’s position was that even  
9 assuming the United Kingdom had the right to restrict fishing, nothing in the evidence showed  
10 any abuse by Mauritius. He asked whether the United Kingdom’s environmental objectives  
11 could justify a no-take zone? He said the fish stocks were amongst the least damaged in the  
12 world on the United Kingdom’s own evidence. If they weren’t threatened by recreational fishing,  
13 he asked, how could there be good reasons for overriding the fishing rights of Mauritius? And  
14 Judge Hoffman also raised that question with Ms. Nevill before the break. What follows adds to  
15 her answer, at least I hope it does.

16 27. Let me begin by saying that Mauritius is a party to the UN Fish Stocks Agreement, as is  
17 the UK. The Preamble to that agreement recites that the parties were “Conscious of the need to  
18 avoid adverse impacts on the marine environment, preserve biodiversity, maintain the integrity  
19 of marine ecosystems and minimize the risk of long-term or irreversible effects of fishing  
20 operations.” That sums up the principal objective of the agreement. Articles 5 and 6 then go on  
21 to require the parties, among other things, to protect biodiversity and to take an ecosystem and  
22 precautionary approach to fisheries management, elaborating thereby articles 61 and 62 of  
23 UNCLOS. Article 56 of UNCLOS therefore also has to be interpreted and applied by coastal  
24 states with the Fish Stocks Agreement provisions in mind. And, we would say, so does article

1 2(3): indeed articles 5, 6 and 7 of the Fish Stocks Agreement apply to all maritime areas within  
2 national jurisdiction, including the territorial sea.<sup>227</sup>

3 28. The Marine Protected Area in BIOT does what the Fish Stocks Agreement requires. It was  
4 not adopted in order to conserve specific fish stocks. It was adopted in order to conserve the  
5 world's second largest coral reef ecosystem as a whole, based on the understanding that fish  
6 stocks, sharks, other predators, biodiversity, and coral reefs form an interrelated whole. As such  
7 it reflects the experience of the failed fisheries management regimes of the last century and a  
8 realisation that the abundance of fish stocks and the health of the oceans stand or fall together.

9 ARBITRATOR WOLFRUM: Professor Boyle, sorry for interrupting you.

10 You're referring to highly migratory species, I've seen, and in some of the documents  
11 presented by the United Kingdom, some of these were internal documents, said that MPAs are  
12 not the most effective mechanism to protect highly migratory species. The reason is very simple,  
13 and the Law of the Sea Tribunal had some experience with that in the *Swordfish* case. Fish don't  
14 believe in borders, and certainly not highly migratory species. They're not stationary, and  
15 therefore to get out of the MPA it may be fished outside, which was the problem in the *Swordfish*  
16 case.

17 Could you explain to me why nevertheless you found it necessary to limit the  
18 catching of tuna from Mauritius. That's my first question.

19 The second question comes to what you were just touching upon, coral reefs. It is  
20 very clear from the documents we have seen that this is the second largest coral reef area and is  
21 probably the one which is rather safe and sound. Still, there was huge construction activities to  
22 facilitate the entry and the exit for the harbor facilities on Diego Garcia. Some parts of the coral  
23 reefs have been moved away, and some coral rocks have been used as construction material.  
24 How is that to be harmonized with the very noble objective of the MPA?

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<sup>227</sup> UNFSA, article 3.

1 PROFESSOR BOYLE: Answering your questions backwards, Judge Wolfrum, the  
2 answer to the last question is in the written answers we gave you in the first round. I would  
3 simply refer you to those items. I have nothing further I can add to that, except perhaps that if I  
4 recall correctly, those construction works were undertaken quite a long time ago. They have  
5 been there since the 1970s. I don't think there are ongoing construction works. It can hardly be  
6 an argument against protecting the entirety of the coral reef system. The construction work was  
7 undertaken sometime in the past. That would be an argument for – I can't think of an analogy, I  
8 could leave that one at that. I don't think there is any evidence that this is currently a problem,  
9 and if it happened in the past, it happened in the past. It's not an argument for not trying to  
10 protect what we have now.

11 I have an analogy: you wouldn't argue that we shouldn't try to protect Rome  
12 because we can't protect all of it. Some of it was knocked down in the past, but that's still no  
13 reason for not protecting what was left.

14 So, I think I may have answered that one.

15 In regard to the fishing, I will come to this, but as I understand it, the Mauritian  
16 fishing was not for tuna, at least not very much - there was some limited offshore fishing in the  
17 1990s - but since then the Mauritian fishing has been exclusively inshore fishing for reef fish.  
18 I'm not an expert in the precise fish that we're talking about here, but if I understand it correctly,  
19 that may not be tuna.

20 The other thing which I think it is important to realize to come back to your first  
21 question, the arguments here are like any scientific argument, complex and disputed. It is stated  
22 in at least one of the reports – I can't remember which one precisely - that the scientists think that  
23 about 50 percent of the tuna stocks in BIOT remain within BIOT. They may be migratory within  
24 the MPA, but they're not migratory in the sense that you would bump into them if you were off  
25 Mauritius or anywhere else.

1           So, there is a question of how migratory these particular stocks are. That is  
2 obviously a matter for research. That's the first point.

3           The second point is that it stands to reason prohibiting fishing within the MPA may  
4 conceivably displace fishing activity elsewhere; presumably the boats that didn't fish in the MPA  
5 will now fish outside. But again, the scientists are debating the question of what impact the ban  
6 does have, and there are quite a lot of studies which suggest that it does have an impact,  
7 notwithstanding the point that you made.

8           So, I think these are questions for legitimate scientific research. I don't think  
9 they're ones that lawyers can resolve in Istanbul on a Friday afternoon. It may be that there are  
10 matters that the Parties should have been invited to address or should have offered to address  
11 through expert evidence, but that's not the way that we've conducted these proceedings, and that  
12 may be unfortunate, but as I said, I don't think I can answer that question definitively now. I can  
13 simply say – and I think this is the important point – these are matters of legitimate scientific  
14 research and debate, it seems to me – I will be coming on to this point – they should be left to  
15 scientists.

16           ARBITRATOR WOLFRUM: I disagree with you on one point. Lawyers can do  
17 nearly everything, and you know I'm not trying to make a joke, but remember what the Law of  
18 the Sea Tribunal said about the Bluefin Tuna, Southern Bluefin Tuna.

19           PROFESSOR BOYLE: Yes.

20           ARBITRATOR WOLFRUM: But be it as it may, perhaps I have not put my  
21 question clearly enough, Professor Boyle. What I'm not so much interested is looking at so far  
22 coral reefs are concerned, into the past but into the future. Under the present MPA, is it  
23 absolutely clear, also in respect of the United States, that this kind of construction work is  
24 affecting the coral reef could not undertaken?

25           PROFESSOR BOYLE: I think we did address that in our answers to you in the



1 first round. If the United States wishes to undertake construction, it needs to do so with the  
2 consent and agreement of the British authorities, and you will recall what we said in regard to the  
3 project to chop down large numbers of trees – once discussions took place on that the project  
4 was stopped.

5 I'm not aware of any evidence of the issue that you raise being a problem, which is  
6 why I don't have an answer to it, but this is British territory, and the United Kingdom law applies  
7 there, and Americans have to do things with the agreement of the United Kingdom, and I was  
8 actually going to go on and this may possibly answer your question, but I was going to go on and  
9 tell you something about the non-existence of a legal black hole, but would that perhaps deal  
10 with your question in part?

11 ARBITRATOR WOLFRUM: Hopefully. Okay.

12 PROFESSOR BOYLE: If you wish to come back to it after that, I would be happy  
13 to and try to answer, and it could be in the meantime those behind me may be able to nudge me.

14 So, if I may, I can proceed.

15 29. But it is precisely because the BIOT MPA remains largely unaffected by humans, by  
16 fishing, or by pollution, that it needs comprehensive protection. And the best scientific advice as  
17 indicated in the NOC report and in the research paper by Professor Koldewey and her colleagues  
18 and in the other scientific literature is that a no-take zone would be the best way of maintaining  
19 the ecosystem as a whole. Mauritian catches of fish were, it is true, not large. But they also  
20 weren't insignificant: up to 2010 they varied from a maximum of 321 tons in 1996 to 161 tons in  
21 2009. Well, that's significantly larger than the recreational fishing by US servicemen on Diego  
22 Garcia, which averages 20 tons annually. So, given the scientific advice and consistently with the  
23 object of the Fish Stocks Agreement, in our view there is no need under Part V of UNCLOS to  
24 show either abuse by Mauritius of its fishing rights or endangerment of fish stocks or harm to the  
25 environment in order to justify ending Mauritius' right to fish and indeed the fishing by all of

1 those other States that fished in the BIOT MPA. It would have been necessary to do so in the  
2 1960s under the old High Seas fishing regime, which would have applied. But it is not necessary  
3 today under the EEZ regime, or under the ecosystem precautionary approach mandated by the  
4 Fish Stocks Agreement.

5 30. So, does the scientific evidence justify a no-take marine protected area? Well, Ms. Nevill  
6 has tried to show why most of the scientists believe a no-take zone is the best option. And last  
7 week I drew your attention to article 6 of the Fish Stocks Agreement and the evidential threshold  
8 which a precautionary approach to the management of marine living resources has to satisfy. It  
9 seems clear to us that the scientific research reviewed by Ms. Nevill more than meets that  
10 threshold. The scientists have set out in our view a strong case for the approach taken by the  
11 United Kingdom. The research on which their conclusions are based is fully explained in the  
12 scientific literature to which we have directed the tribunal. That research, as I said last week, is  
13 not unique to BIOT, it draws on research into other coral reefs, other fisheries, and other MPAs  
14 worldwide. And several of those MPAs are also no-take MPAs.

15 31. So, as I said last week the BIOT MPA is based on the same scientific research used  
16 elsewhere. Mauritius has never questioned that science until these proceedings, and neither  
17 Professor Crawford nor Mr. Reichler offered you any basis for doing so this week. In our view  
18 the scientific studies fully support the decision to adopt a no-take MPA, and I'm about to come  
19 on to the non-legal-black hole.

20 *d. Nothing in the design or implementation of the MPA demonstrates that it cannot or will not*  
21 *fulfil its purpose.*

22 32. In his final speech, Professor Crawford said again that the design and implementation of  
23 the MPA cannot fulfil its purpose and that it should be "put out of its misery." We had failed, he  
24 said, to engage with its inadequacy. Now, as usual, his rhetoric was first class, but the analysis

1 does not quite withstand closer scrutiny. So, first let's have a look at the design. What is wrong  
2 with it?

3 33. He identified the absence of regulations again. But with all due respect, this is nonsense.  
4 The only legal black hole is the one that would appear if Mauritius succeeded in destroying the  
5 MPA. There are currently in force throughout BIOT four relevant ordinances regulating, inter  
6 alia, marine pollution, fishing and the harvesting of other living resources, and marine scientific  
7 research. They are summarised in the Rejoinder,<sup>228</sup> but for the record they include:

8 • 1988 Environment Protection (Overseas Territories) Order,<sup>229</sup> which prohibits dumping  
9 within the Fisheries Conservation and Management Zone.

10 • 1994 Prevention of Oil Pollution Ordinance,<sup>230</sup> which regulates the discharge of oil from  
11 vessels or pipelines in the internal waters and territorial sea of BIOT, including the Diego Garcia  
12 lagoon.

13 • 1997 Regulation of Activities by Vessels Ordinance,<sup>231</sup> which regulates research  
14 activities in the internal waters and territorial sea of BIOT; again it covers the lagoon.

15 • And finally, the 2007 Fisheries Conservation and Management Ordinance,<sup>232</sup> which  
16 prohibits fishing and the harvesting of any living resources in internal waters, the territorial sea  
17 and 200 mile fisheries conservation and management zone of BIOT unless carried out in  
18 accordance with a licence. The no-take MPA is at present implemented through that provision.

19 ARBITRATOR GREENWOOD: Professor Boyle, I'm sorry to interrupt you again.  
20 Is the essence of what you're telling us that the only difference between the MPA and what had  
21 existed for several years before that is that no more licenses are being granted under the fisheries  
22 legislation?

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<sup>228</sup> UKR, para 7.22.

<sup>229</sup> UKR, Annex 31.

<sup>230</sup> UKR, Annex 42.

<sup>231</sup> UKR, Annex 50.

<sup>232</sup> UKR, Annex 59.

1 PROFESSOR BOYLE: Yes.

2 ARBITRATOR GREENWOOD: Thank you.

3 PROFESSOR BOYLE: Although we did explain last week that the Fisheries  
4 Ordinance has recently been amended, making it easier to penalize illegal fishing and other laws  
5 will be amended or supplemented when necessary.

6 34. Now, these laws and regulations apply throughout the internal waters, territorial sea, and  
7 fisheries conservation zone: they are not limited to the MPA. And as Mr. Whomersley indicated  
8 on Monday, they apply to Diego Garcia and its lagoon in the same way that they apply  
9 everywhere else in BIOT. The exclusion of Diego Garcia from the MPA, and pardon the pun  
10 again, is a red herring because it denies the lagoon none of the already extensive protection  
11 applied everywhere else. There is no need to apply the MPA to the Diego Garcia lagoon because  
12 commercial fishing has never been allowed in the Diego Garcia lagoon. The recreational fishing  
13 by US service personnel has been judged by the scientists to be of no environmental or  
14 conservation significance, and even sailors and yachtsmen do have to eat. As for the marine  
15 pollution caused by waste discharges from naval vessels and the Pacific Marlin, this was  
16 addressed in our answers to Judge Wolfrum's questions last week. And I think that's a good  
17 illustration of the point: once it was discovered there was a problem it was clear that they were  
18 almost certainly breaking the applicable law and something was done about it. So, this is not a  
19 legal black hole.

20 35. Ms. Nevill has responded to Professor Crawford's points about the funding and  
21 enforcement, so I won't say anything more about those.

22 36. It really seems to me it cannot plausibly be said on this evidence that the design of the  
23 MPA is not reasonable in relation to its purpose as Professor Crawford would have you  
24 believe.<sup>233</sup> Apart from citing one American example, he made no attempt to compare the BIOT

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<sup>233</sup> Crawford, Tuesday, 6<sup>th</sup> May, pp. 1128-1130, paras. 23-30.

1 MPA to any of the other big seven MPAs. BIOT has the least damaged and most unpolluted  
2 coral reef system in the world. Compare that to the Great Barrier Reef where in a recent report  
3 UNESCO has warned that it is threatened with loss of its World Heritage Convention listing  
4 because it is so badly polluted and so poorly protected.<sup>234</sup> Now, restoring or saving an MPA in  
5 that condition will require far greater resources and expenditure than the BIOT MPA.

6 ARBITRATOR GREENWOOD: Professor Boyle, I'm sorry, you were just quoted  
7 here as saying BIOT has the least damaged and most polluted coral reefs in the world. You  
8 mean the most unpolluted I take it.

9 PROFESSOR BOYLE: I would not wish to go down in history for saying any such  
10 thing, let me go back because you also robbed me of my concluding line.

11 37. BIOT is the least damaged and most unpolluted coral reef system in the world. I then went  
12 on to make the point that the Great Barrier Reef is polluted, and I said restoring or saving an  
13 MPA in that condition will require far greater resources and expenditure. It seems to us that all  
14 that BIOT needs is to be left alone, free from lawyers.

15 *e. There is no basis for an abuse of rights claim.*

16 38. Mr. President, I'm almost there. Abuse of rights is a very serious allegation. It is not  
17 conducive to friendly relations, and courts have rightly set a high standard of proof. It is  
18 regrettable that the allegation has been made in this case because the evidence is very sparse  
19 indeed. We have answered Mauritius' claim that the design and implementation of the MPA is  
20 evidence of abuse of rights, and that it lacks a scientific basis. In our view, these claims are  
21 entirely misguided, and the evidence advanced to sustain them is insignificant.

22 39. Evidence of an improper political purpose is equally sparse – recycled allegations about  
23 what John Roberts did or did not say and a pervasive scepticism that any democratic government  
24 might seriously believe in global environmental protection and sustainable use of living

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<sup>234</sup> Guardian, 1<sup>st</sup> May 2014 [<http://www.theguardian.com/environment/2014/may/01/unesco-wants-great-barrier-reef-on-danger-list-over-dredging-fears>]

1 resources. There is simply no evidence that UNCLOS rights have been misused for an improper  
2 purpose: certainly none that has remained unanswered or that might withstand further scrutiny.  
3 The high evidential threshold for such a claim has not been met and it comes nowhere near being  
4 met. Professor Crawford's silence on article 297(3)(b) was telling. Mauritius, we would suggest,  
5 has no case on article 300.

6 ***f. Mauritius' second round arguments do not substantiate any of its other claims concerning***  
7 ***alleged breaches of UNCLOS***

8 40. That brings me to the remaining allegations, such as they are. Mauritius offered no  
9 evidence to support its claim that articles 63 and 64 of UNCLOS and article 7 of the Fish Stocks  
10 Agreement had been violated. It could not rebut the IOTC data showing that its vessels fished  
11 nowhere near BIOT. Mr. Loewenstein therefore dismissed the IOTC as irrelevant.<sup>235</sup> He said  
12 nothing about the British Mauritius Fisheries Commission. But Mauritius' own conduct in the  
13 British Mauritius Fisheries Commission and in the IOTC speaks volumes about its pervasive and  
14 long-standing record of non-cooperation with the United Kingdom on fisheries management.  
15 This is all the more regrettable when cooperation could readily have taken place under a  
16 sovereignty umbrella – as it did until 1999 when Mauritius withdrew from the Fisheries  
17 Commission – and as it still does between Mauritius and France over Tromelin. And no answer  
18 came from Mauritius on these points.

19 41. Mr. Loewenstein's response on article 78 was brief: he asserted again that the 1965  
20 understanding covered sedentary species. He offered no evidence that the parties ever  
21 contemplated this, or had ever discussed it. There is no basis, we would suggest, for concluding  
22 that such a right had ever existed or that it has ever been exercised. It has for many years been  
23 illegal to harvest sedentary species in BIOT waters. Mauritius has never once protested about  
24 that, has never once raised the matter of violation of its rights. On article 194, no attempt was

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<sup>235</sup> Loewenstein, Tuesday 6<sup>th</sup> May, p. 1110-1112, para 24.

1 made to identify applicable international rules and standards for pollution control, or to show  
2 how existing or future laws on pollution from ships might interfere with Mauritian fishing or the  
3 exercise of other rights. Mauritius complains about pollution of the lagoon from US navy vessels  
4 – yet the logic of its argument on article 194 is that the United Kingdom should not try to stop  
5 Mauritian fishing boats from polluting the MPA, or we will be back in court, again.

6 42. Mr. President, members of the tribunal, that happily concludes my remarks this afternoon.  
7 May I thank you and your colleagues for your attention, your courtesy and your patience over the  
8 past three weeks. And I would ask you, unless I can be of any further assistance, to call on Mr.  
9 Whomersley to conclude the United Kingdom’s case.

10 PRESIDENT SHEARER: Thank you very much, Professor Boyle.

11 And so I now call upon Mr. Whomersley to present the final formal submissions of  
12 the United Kingdom.

13 MR. WHOMERSLEY: Thank you.

14 1. Mr. President, Members of the Tribunal,

15 2. I think I have perhaps the dubious honour of making the final speech in these proceedings.  
16 It has been a long haul and I think we are all pleased that we are now very near the end – and, I  
17 think, relatively unscathed at that.

18 3. I spoke at length at the beginning of the UK’s oral presentation and I’m not going to repeat  
19 what I said then.

20 4. But, I think, nevertheless it is important that I make just a few concluding comments. Mr.  
21 President, it is axiomatic that in the modern world States must cooperate in pursuit of mutually  
22 beneficial goals, including, most importantly for current purposes, the conservation of the marine  
23 environment of the Indian Ocean.

24 5. Now, Mr. President, the United Kingdom has striven hard to cooperate with Mauritius over  
25 issues relating to BIOT. But we have been faced with Mauritius first supporting the MPA and

1 then changing its mind; and with Mauritius first wanting to make a joint submission to the  
2 Commission on Limits to the Continental Shelf and now threatening to act unilaterally. Then  
3 we've been faced with these proceedings, without Mauritius having first made any attempt to  
4 exchange views as required by the Convention.

5 6. Now, Mr. President, let me make it quite clear that, whenever we, the United Kingdom,  
6 have suggested cooperation with Mauritius, we have never asked them to resile from their view –  
7 albeit one with which we strongly disagree – but we've never asked them to resile from their  
8 view about sovereignty over BIOT. As I think has come through very clearly in the various  
9 presentations and statements that have been made over the last day and a half, we have always –  
10 we have always – been prepared to act and to conduct discussions under a sovereignty umbrella,  
11 so that neither side's position is prejudiced. This is an approach which the United Kingdom  
12 would be happy – and indeed keen - to adopt for the future.

13 7. Now, it may be, Mr. President, that these proceedings may have sharpened the divisions  
14 between the two States, when in fact the path that we should be following, they should be  
15 following is that of cooperation. And I wanted to make clear again, as I did in my opening, that  
16 the United Kingdom remains committed to the path of cooperation.

17 8. Mr. President, that's, in a sense, all I wanted so say on the substance. I want to just move  
18 on to express the thanks of myself, my Government, I think the whole of my team to you and to  
19 the other Members of the Tribunal for the great courtesy you've shown us, the care with which  
20 you have obviously approached this case. I would also like to thank Brooks Daly and the other  
21 members of staff of the Permanent Court of Arbitration for the efficiency with which they have  
22 organised these proceedings. I am very grateful to our two Court Reporters who have unfailing, I  
23 think, produced very accurate transcripts. I am also grateful to our colleague there in the corner  
24 for striving to help us with the technology, which has not always been an easy task. I would like  
25 also to reciprocate the thanks expressed by the Agent for Mauritius for Mauritius' cooperation on



1 procedural issues. Finally, Mr. Chairman, I'm afraid that I've been expressly forbidden by my  
2 team to say anything on this occasion to thank them for all their hard work, so I'm afraid that's  
3 the end of the thanks.

4 9. Mr. President, Members of the Tribunal, it only remains for me to read out the United  
5 Kingdom's formal submissions. These are unchanged from those set out in our Counter-  
6 Memorial and Rejoinder and I will now read them.

7 **1. SUBMISSIONS**

8 10. For the reasons set out in the Counter-Memorial, the Rejoinder and these oral pleadings,  
9 the United Kingdom respectfully requests the Tribunal:

10 a. First, to find that it is without jurisdiction over each of the claims of Mauritius;

11 b. And two, in the alternative, to dismiss the claims of Mauritius.

12 11. In addition, the United Kingdom requests the Tribunal to determine that the costs incurred  
13 by the United Kingdom in presenting its case shall be borne by Mauritius, and that Mauritius  
14 shall reimburse the United Kingdom for its share of the expenses of the Tribunal.

15 12. We will, as you've requested, send a letter to the Registrar providing written confirmation  
16 of these submissions.

17 Mr. President, Members of the Tribunal, unless I can help you further, that completes  
18 the second round of the United Kingdom's oral pleadings.

19 Thank you.

20 PRESIDENT SHEARER: Thank you very much, Mr. Whomersley.

21 Any other matters? No.

22 Thank you very much.

23 Well, I think it remains for me to thank everybody for the courtesy and the  
24 constructive spirit in which these proceedings have been conducted. It has been a lengthy  
25 process, and one which I think all members of the Tribunal have taken very seriously, indeed,

1 and we have worked hard to understand all your submissions. I must say that the oral  
2 proceedings have proved their worth, that they have sharpened the issues between the Parties,  
3 and they have certainly set before the Tribunal a clearer understanding from which the Tribunal  
4 can arrive ultimately at an award.

5 I want to remind you of the reception between 6:00 and 7:00 p.m. this evening in the  
6 Pasha Room, and that invitation extends to all the people in this room, including, of course, the  
7 PCA staff and our indefatigable reporters, and partners, and spouses, if any, as to with us in  
8 Istanbul. So, with that, I close the proceedings, and look forward to seeing you in a more relaxed  
9 way in approximately one hour's time.

10 Thank you.

11 These oral proceedings are now closed. Thank you.

12 (Whereupon, at 4:55 p.m., the hearing was concluded.)

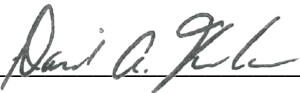
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CERTIFICATE OF REPORTER

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

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



DAVID A. KASDAN

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