

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

REPUBLIC OF MAURITIUS

v.

**UNITED KINGDOM OF GREAT BRITAIN
AND NORTHERN IRELAND**



REPLY OF THE REPUBLIC OF MAURITIUS

VOLUME I

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CHAPTER 1: INTRODUCTION

1.1 These proceedings were initiated by the Republic of Mauritius on 20 December 2010 by its Notification and Statement of Claim under Article 287 and Annex VII, Article 1 of the 1982 United Nations Convention on the Law of the Sea (“UNCLOS”, or “the Convention”).

1.2 In accordance with the timetable set out in the Rules of Procedure adopted by the Tribunal on 29 March 2012, Mauritius submitted its Memorial on 1 August 2012. This set out the facts and legal arguments by which Mauritius challenges the right of the UK to establish a “Marine Protected Area” (“MPA”) and other maritime zones around the Chagos Archipelago, and the compatibility of the “MPA” and such zones with the Convention. In its Memorial, Mauritius set out the reasons why it considers the “MPA” to be unlawful under the Convention. It explained that the “MPA” constitutes a regime imposed unilaterally by a State with no authority to do so, in a manner that was plainly inconsistent with the requirements of the Convention.

1.3 On 31 October 2012, the United Kingdom (“UK”) filed Preliminary Objections to Jurisdiction, and requested that those objections be dealt with as a preliminary matter, separate from the Tribunal’s consideration of the merits. Mauritius did not accept that proposal because it considered that none of the UK’s jurisdictional objections were suitable for resolution as preliminary matters.

1.4 Mauritius filed its Written Observations on the Question of Bifurcation on 21 November 2012. The UK submitted its Written Reply to Mauritius’ Observations on 21 December 2012. The Tribunal held a one-day hearing on the question of bifurcation in Dubai, United Arab Emirates, on 11 January 2013. On 15 January 2013, the Tribunal issued Procedural Order No. 2, by which it rejected the UK’s request that its Preliminary Objections be dealt with as a separate jurisdictional phase and decided that those objections would be considered alongside the proceedings on the merits.

1.5 On 15 July 2013 the UK submitted its Counter-Memorial, requesting the Tribunal to find that it is without jurisdiction and also addressing the merits of Mauritius’ claim. The UK Counter-Memorial offers a first effort by the UK to set out legal arguments and supporting evidence to justify its purported right to create the “MPA” around the Chagos Archipelago, declared unilaterally on 1 April 2010. In many respects, the arguments are presented for the first time to Mauritius. Given the novelty of the material, this Reply is of a greater length than might normally be expected.

1.6 It will be recalled that in its Memorial, Mauritius made two principal arguments:

- (i) The UK does not have sovereignty over the Chagos Archipelago, is not “the coastal State” for the purposes of the Convention, and cannot declare an “MPA” or other maritime zones in this area. Further, the UK has acknowledged the rights and legitimate interests of Mauritius in relation to the Chagos Archipelago, such that the UK is not entitled in law under the Convention to impose the purported “MPA”, or establish the maritime zones, over the objections of Mauritius; and
- (ii) independently of the question of sovereignty, the “MPA” is fundamentally incompatible with the rights and obligations provided for by the Convention.

This means that, even if the UK were entitled in principle to exercise the rights of a coastal State, *quod non*, the purported establishment of the “MPA” is unlawful under the Convention.

1.7 The UK has sought to respond to both arguments, and additionally to raise a number of jurisdictional objections. There is nothing in the UK Counter-Memorial that causes Mauritius to change its approach, although the detail now offered by the UK does mean that Mauritius is now in a position to refine its own argument. Mauritius submits that the Counter-Memorial confirms that the UK has acted unlawfully in seeking to establish a nature reserve that unjustifiably interferes with the rights of Mauritius.

1.8 This Reply, submitted in accordance with the requirements of the Rules of Procedure of 29 March 2012 and Procedural Order No. 1, responds to the arguments set forth by the UK in its Counter-Memorial. Mauritius has addressed the UK’s factual account of the creation of the “British Indian Ocean Territory” (“BIOT”) and the establishment of the “MPA” to the extent necessary to present its case. Mauritius reserves its position on any issues that are not addressed in this Reply, and should not be considered to have made any concessions. Before turning to the arguments set out in this Reply, it is appropriate to make six general observations on the UK’s Counter-Memorial.

(a) *The UK’s argument on self-determination*

1.9 It is important to note that the Counter-Memorial is the very first occasion on which the UK has sought to justify in legal terms the detachment of the Chagos Archipelago from Mauritius in 1965, and the establishment of the “BIOT”. Of particular surprise (and concern) to Mauritius is the UK’s argument on the issue of self-determination, which rests on two remarkable propositions: firstly that, as at November 1965, there was no binding rule of international law concerning self-determination; secondly that, even if there was such a rule, the UK did not contravene it because the Chagos Archipelago was not an integral part of Mauritius and the representatives of Mauritius “agreed” to the detachment.

1.10 Both propositions are untenable, and the arguments of Mauritius are addressed in detail in chapters 2 and 5 below. While the Counter-Memorial represents the first occasion on which the UK has sought to justify in legal terms the creation of the “BIOT”, elements of its arguments on self-determination were aired by the UK after the creation of the “BIOT”, both in the UN General Assembly and at the Fourth Committee. Neither argument was well received by the international community in the late 1960s. The fact that they are still seen to offer refuge today offers an unhappy indication of the weakness of the UK’s position.

(b) *Documents disclosed by the UK in the English judicial review proceedings*

1.11 The Tribunal will be aware from the UK Counter-Memorial that this case has proceeded in parallel to a domestic judicial review before the English courts.¹ The claimant in that case, a former resident of the Chagos Archipelago, sought to challenge the decision taken by the UK Foreign Secretary on 1 April 2010 to create the “MPA” around the Chagos

¹ *Bancoult v Secretary of State for Foreign and Commonwealth Affairs* [2013] EWHC 1502 (Admin).

Archipelago. The Tribunal would have been unaware from the UK Counter-Memorial that a great number of UK government documents were disclosed in those proceedings – in relation to the internal decision-making process – and that the UK consciously chose not to make this relevant material available to the Tribunal in these proceedings. Mauritius became aware of these documents during the public hearings in the English courts, which took place in mid-April 2013.²

1.12 At the close of the hearings, Mauritius requested, and received, copies of the judicial review trial bundle from Clifford Chance LLP, the solicitors representing the claimant. Mauritius subsequently returned the trial bundle to Clifford Chance on 2 October 2013, but retained copies of documents that had been referred to in open court, in accordance with the requirements of English law.³

1.13 In the Counter-Memorial, the UK has relied on a very small selection of documents from the judicial review, but the majority of the relevant material was not referred to or disclosed. While it is for the UK to decide how it wishes to litigate its case, it is a matter of some concern that the limited evidence it has presented is partial and incomplete.

1.14 By way of example, the UK has presented the process leading up to the decision to create the “MPA” as rational and orderly.⁴ In light of the materials now available to Mauritius and the Tribunal, it is plain that this was not the case. The documents show that the “MPA” was set up at the whim of the then Foreign Secretary, David Miliband. The evidence before the Tribunal shows that Mr Miliband acted against the express advice of his own advisers, who saw this as decision-making “on the hoof”. The judicial review documents reveal that on 30 March 2010, just two days before the announcement of the “MPA”, the “BIOT” Administrator, Joanne Yeadon, made a submission to the UK Foreign Minister advising that “he should stop short of announcing that he is going to ask the BIOT Commissioner to declare an MPA in the Territory at this stage.”⁵

1.15 Ms Yeadon was informed the next day, on 31 March 2010, that the Foreign Secretary was “minded to ask [Colin Roberts, the Director of Overseas Territories at the Foreign Office] to declare an MPA”.⁶ The Foreign Secretary’s stance was met with considerable resistance. Mr Roberts suggested that the Foreign Secretary needed “a clearer steer” and that a staged approach should be adopted “leading to a full no-take MPA in three years time.”⁷ Andrew Allen, the head of the Southern Ocean Team at the Foreign and Commonwealth Office (“FCO”) warned that “this approach risks deciding (and being seen to decide) policy on the hoof of political timetabling reasons rather than on the basis of expert advice and

² 15-18 and 22-24 April 2013.

³ Letter dated 3 October 2013 from Clifford Chance LLP to Treasury Solicitor’s Department (Annex 181); Letter dated 10 October 2013 from Solicitor-General of Mauritius to Mr. L. Tolaini, Clifford Chance LLP (Annex 182)

⁴ UKCM, paras. 3.30-3.69.

⁵ Submission dated 30 March 2010 from Joanne Yeadon, Head of “BIOT” & Pitcairn Section, to Colin Roberts, Director, Overseas Territories Directorate, the Private Secretary to Parliamentary Under Secretary Chris Bryant and the Private Secretary to the Foreign Secretary, “British Indian Ocean Territory (BIOT): Proposed Marine Protected Area (MPA): Next Steps”: (Annex 152)

⁶ Para. 3.65 below.

⁷ Para. 3.66 below.

public consultation.”⁸ Ignoring all the concerns expressed by officials and advisers at the FCO, the Foreign Secretary nevertheless announced the “MPA” the following day.

1.16 Another example illustrates the gulf between the position put by the UK to this Tribunal, and the reality. In the Counter-Memorial, the UK has pleaded that Mauritius has no traditional fishing rights in the Chagos Archipelago.⁹ Yet this new material makes clear that Mauritian fishing rights were recognised by the FCO before, during and after the process of declaring the “MPA”. When Ms Yeadon was asked by Mr Roberts in July 2009 for an “authoritative statement of what we think are Mauritius’ rights today to fish in the BIOT waters”, she advised that “Mauritian fishing rights were never defined in the Lancaster House side meetings but what it boils down to is free access to BIOT waters”.¹⁰

1.17 The UK has also claimed that it was taken by surprise by Mauritius’ decision to bring these proceedings, and that Mauritius has failed to meet the requirements of Article 283 of the Convention. Yet it is now clear from this material that FCO officials warned the Foreign Secretary that announcing the “MPA” may lead to an “international legal challenge” by Mauritius.¹¹ Mr Allen warned that hastily announcing the “MPA” would “give greater scope for the expected legal challenge as we wouldn’t have sound arguments on which we could say we based these recommendations – one day after we had recommended something else.”¹²

1.18 The new documents also confirm that the UK was well aware that the Prime Minister of Mauritius had received a clear commitment from UK Prime Minister Gordon Brown, at a meeting in Port of Spain on 27 November 2009, that he would put the “MPA” on hold.¹³ Mauritius now tenders a witness statement from Prime Minister Ramgoolam which sets out the circumstances in which Mr Brown told him that the proposed “MPA” would be put on hold, and that it would only be discussed within the framework of bilateral talks between Mauritius and the UK.¹⁴

1.19 Relatedly, Mauritius notes that eleven documents annexed to the UK’s Counter-Memorial have been redacted.¹⁵ In addition, 35 of the documents obtained by Mauritius following the judicial review proceedings have also been redacted by the UK.¹⁶ While Mauritius recognises that certain redactions may be justified for reasons of national security (while expressing no view as to whether such a justification may be put forward in relation to

⁸ Para. 3.67 below.

⁹ UKCM, paras. 8.11-8.17.

¹⁰ Paras. 3.41-3.42 below.

¹¹ Para. 3.62 below.

¹² Para. 3.67 below.

¹³ See Redacted documents from the Judicial Review Proceedings (*Bancoult v. Secretary of State for Foreign and Commonwealth Affairs*): Annex 185.

¹⁴ Statement of Dr the Honourable Navinchandra Ramgoolam, Prime Minister of the Republic of Mauritius, 6 November 2013: Annex 183.

¹⁵ UKCM, annexes 94, 99, 101, 110, 114, 115, 116, 117, 118, 119 and 120.

¹⁶ Redacted documents from the Judicial Review Proceedings (*Bancoult v. Secretary of State for Foreign and Commonwealth Affairs*) (Annex 185). These documents are to be found in the following bundles of the judicial review proceedings: ZPR5 (tabs 57, 61, 67, 68, 77, 83, 93, 117, 119, 122, 126, 133, 168, 170, 179, 200, 202, 203, 204, 205, 206); Exhibit Bundle 2 (tabs 7, 8, 12); Exhibit Bundle 3 (tab 35); Exhibit Bundle 11 (tabs 8, 9, 10, 12, 13, 15, 20, 21, 22, 23).

the above documents), it is plain that other redactions are not connected to such concerns. By way of example, among the documents from the judicial review proceedings, Mauritius has identified a document which has been made available twice by the UK, but with different redactions. The document is a paper circulated by Colin Roberts on 5 May 2009 on the establishment of the “MPA”. The two duplicates of the document are annexed to this Reply, and merit a close comparison. The version of the document at Annex 133 shows that one sentence has been redacted at the bottom of the fourth page; the second version of this document, which is at Annex 132, shows that sentence without redaction. It reads: “The position is complicated by a side deal done at the time of excision which gave Mauritius the right to apply for fishing licences free of charge.”¹⁷

1.20 This example makes clear that the UK has made redactions unrelated to any national security concerns, for the purpose of suppressing evidence that is unhelpful to it.¹⁸ It also appears that a number of redactions relate to statements made by the Prime Minister of Mauritius, or other Mauritian representatives, to the UK.¹⁹ Mauritius understands that the UK would not wish to disclose statements made by the Head of Government or representatives of a third State, but wishes to make clear that it has no objection to statements of its Prime Minister or representatives being disclosed to the Tribunal.

1.21 Mauritius therefore invites the UK to confirm by 30 November 2013 that it will submit, along with its Rejoinder, unredacted copies of the documents at Annex 185. In the event that the UK does not offer such confirmation, Mauritius reserves the right to make a formal application to the Tribunal to obtain copies of these documents without unjustified redaction.

(c) UK silences

1.22 Mauritius notes that the UK has remained silent on a number of issues in its Counter-Memorial. In particular, the UK has failed to address three key pieces of evidence advanced by Mauritius in the Memorial. Such evidence is unchallenged by the UK, and directly contradicts the account set out in the Counter-Memorial.

1.23 First, the UK has maintained a studious silence about the memorandum sent to the UK Prime Minister on 22 September 1965, on the eve of his meeting with the Mauritian Premier.²⁰ This meeting was a turning point in the discussions on the detachment of the Chagos Archipelago. The UK Prime Minister’s Principal Private Secretary advised him that the object of his meeting with the Premier of Mauritius was:

¹⁷ See Paper submitted on 5 May 2009 by Colin Roberts, Director, Overseas Territories Directorate, to the Private Secretary to the Foreign Secretary, “Making British Indian Ocean Territory the World’s Largest Marine Reserve” (Annex 133); Paper submitted on 5 May 2009 by Colin Roberts, Director, Overseas Territories Directorate, to the Private Secretary to the Foreign Secretary, “Making British Indian Ocean Territory the World’s Largest Marine Reserve” (version with fewer redactions) (Annex 132).

¹⁸ Although those redactions were made by the UK in the course of the domestic judicial review proceedings, those proceedings also raised the issue of Mauritian fishing rights in the Chagos Archipelago (although the English Administrative Court declined to rule on the issue, holding that it was a matter for this Tribunal).

¹⁹ Redacted documents from the Judicial Review Proceedings (*Bancoult v. Secretary of State for Foreign and Commonwealth Affairs*) (Annex 185).

²⁰ MM, Annex 17.

“to frighten him with hope: hope that he might get independence; Fright lest he might not unless he is sensible about the detachment of the Chagos Archipelago”²¹

The UK appears to have ignored this document because it shows that the “agreement” of Mauritian Ministers to the detachment of the Chagos Archipelago was obtained under conditions of duress. This document, more than any other so far uncovered by Mauritius, makes clear that it was only by agreeing to detachment that Mauritius could achieve independence in 1968. While the UK denies this in its Counter-Memorial, it does not provide any alternative interpretation of the document. Mauritius submits that this is because its clear and unambiguous language affords no alternative interpretation.

1.24 Second, the Counter-Memorial does not address the documents, unearthed by Mauritius and addressed in the Memorial, which reveal that the UK sought to deceive the UN General Assembly and its committees by presenting the creation of the “BIOT” as a *fait accompli*.²² It is evident from this material that the UK made a number of false statements to the UN, alleging that there was virtually no permanent population in the Chagos Archipelago.²³ This was done to avoid the widespread criticism and condemnation which would inevitably follow the forcible removal of the inhabitants of the Chagos Archipelago. In its Counter-Memorial, the UK argues that the creation of the “BIOT” was not illegal, yet it does not explain why it went to such lengths to conceal its existence from the international community.

1.25 Third, the UK has remained silent on the meeting of 12 May 2009 between Colin Roberts and a Political Counsellor at the US Embassy in London. The notes of that meeting, set out in a Wikileaks document attached to Mauritius’ Notification and Statement of Claim, reveal that the FCO established the “MPA” for reasons other than environmental conservation. In that meeting, Mr Roberts explained that the “MPA” would “put paid to resettlement claims of the archipelago’s former residents”.²⁴

(d) The nature and purpose of the “MPA”

1.26 The UK offers an inaccurate account of the object and purpose of the “MPA”, apparently in order to support its challenge to the Tribunal’s jurisdiction. On the one hand, it concedes that the “MPA” is a nature reserve that has the overall aim of protecting and preserving the environment.²⁵ On the other hand, it argues that it is a measure only intended

²¹ Para. 2.50 *et seq.*, below.

²² Paras. 2.75-2.78 below.

²³ MM, paras. 3.38-3.44.

²⁴ MM, paras. 4.45-4.49.

²⁵ See for example UKCM, para. 1.15: “It should not be overlooked that, by bringing these proceedings under UNCLOS, Mauritius is ultimately seeking to block a conservation measure – a marine protected area. This is, or should be, entirely distinct from the question of Mauritius’ claim to sovereignty. What Mauritius fails to acknowledge, indeed appears to contest, is that the BIOT MPA is an important conservation and biodiversity measure, implemented after two years of work by officials and a wide ranging consultation process, which included Mauritius.”

to conserve fisheries stocks in order that they can be harvested in the future.²⁶ It is plain that the “MPA” is a nature reserve, intended to protect biodiversity, and that it applies on land and at sea. It not a fisheries measure. Accordingly, as set out in Chapter 7 of this Reply, the UK cannot avail itself of the limited jurisdictional exceptions that relate to fisheries conservation measures.

1.27 The UK’s pleading – both in what it says and what it does not say – has served to illuminate the nature of the dispute between the parties. It has served to confirm that this is an environmental dispute, and allows Mauritius to refine its arguments on jurisdiction and on the merits.

(e) Recognition of Mauritius’ Rights

1.28 The UK’s approach in the Counter-Memorial is in direct conflict with the general recognition that Mauritius has sovereign rights in relation to the Chagos Archipelago. As set out in the Memorial and in this Reply, the great majority of States recognise the existence of those rights.²⁷

1.29 As explained above, it is also clear that, prior to the announcement of the “MPA” by the UK Foreign Secretary, FCO officials recognised that Mauritius had fishing rights over the Chagos Archipelago. It is striking that while the UK now argues that Mauritius has no rights (fishing or otherwise) over the Chagos Archipelago, it has conveyed the opposite to other States. For instance, when Japan sought permission to fish in “BIOT” waters in 1972, it was told by the UK that “no fishing can be allowed within the fishing limits of the Territory except for fishing by Mauritian fishermen who have traditionally fished in the area.”²⁸

1.30 It is a further curiosity of the Counter-Memorial that, while the UK there argues that Mauritius has no sovereign rights over the Chagos Archipelago, it nevertheless recognises that Mauritius has certain attributes of a coastal State. The UK has made no objection to the submission by Mauritius as a “coastal State” of Preliminary Information to the UN Commission on the Limits of the Continental Shelf (“CLCS”) in May 2009, concerning the Extended Continental Shelf in the Chagos Archipelago region.²⁹ As noted in the Memorial, the UK has not submitted any information of its own, and the time limit for submitting such information has expired (a point which the UK appears to recognise). The UK is thus bound to accept that Mauritius is the only “coastal State” entitled to make a full submission to the CLCS with regard to the Chagos Archipelago. The UK has also repeatedly recognised the prior right of sovereignty of Mauritius by undertaking that the Chagos Archipelago will “revert” to Mauritius when no longer required for defence purposes.³⁰ On its own account,

²⁶ UKCM, Chapter 6.

²⁷ See resolutions adopted by the African Union, the Non-Aligned Movement, the Africa-South America Summit and the Group of 77 and China (MM, paras 3.110-3.112 and paras. 2.83-2.84 below.

²⁸ See Para. 3.8 below and Annex 101: UK Foreign and Commonwealth Office, African Research Group Research Analysts Paper, “BIOT/Mauritius: Fishing Rights”, 11 October 1996, para. 4.

²⁹ MM, paras. 4.31-4.35.

³⁰ MM, paras. 3.31, 3.103-4, 3.107-8, 6.40, 6.47, 6.50.

from the undisclosed documents described above, the UK is no more than a “temporary freeholder”.³¹

I. The Structure of the Reply

1.31 This Reply is structured to provide a logical and coherent response to the UK’s factual and legal arguments in its Counter-Memorial. Chapters 2 and 3 comprise the factual chapters. Chapter 4 responds to the UK’s first jurisdictional argument on Article 283 of the Convention. Chapters 5 and 6 sets out the arguments with regard to the two principal arguments in Mauritius’ Memorial. Chapter 7 responds to the UK’s second and third objections to jurisdiction (following the presentation of the facts and the legal arguments, the substance of which makes clear that this is a dispute over which the Tribunal plainly has jurisdiction).

(a) The Factual Chapters of the Reply

1.32 Following this Introduction, **Chapter 2** sets out the historical and factual background and responds to the UK’s selectively partial account of the facts. Chapter 2 addresses in detail the four primary factual assertions made by the UK in Chapter 2 of its Counter-Memorial.

1.33 First, Chapter 2 shows that, contrary to what is asserted by the UK, the Chagos Archipelago has always been an integral part of the territory of Mauritius. The chapter sets out the constitutional, legislative and administrative arrangements recognising the Chagos Archipelago as part of Mauritius. The economic, cultural and social links between the Chagos Archipelago and the main island of Mauritius are described in detail. The chapter also demonstrates that the international community recognised the Chagos Archipelago as part of the territory of Mauritius, and that the UK acted in a manner that implied such recognition.

1.34 Second, Chapter 2 shows that the question whether or not Mauritius would obtain independence from the UK was conditioned on Ministers’ agreement to the detachment of the Chagos Archipelago. UK officials and representatives at the highest levels had expressed doubts as to whether Mauritius would obtain independence from the UK. In September 1965 it was made clear to Mauritian Ministers that the excision of the Chagos Archipelago was the only way by which Mauritius would be granted independence.

1.35 Third, Chapter 2 explains that there was serious concern at the UN in 1965 that the establishment of the “BIOT” was in breach of the right to self-determination. Mauritius has consistently protested against the detachment and asserted its own sovereignty over the Chagos Archipelago.

1.36 Fourth, the Chapter shows that the UK made binding undertakings with regard to the fishing, mineral and oil rights of Mauritius in the Chagos Archipelago. These undertakings are reflected at paragraph 22 of the record of the meeting held on 23 September 1965 at Lancaster House. Data collected by the Mauritian Ministry of Fisheries shows that there have been catches by Mauritian fishing vessels in the waters of the Chagos Archipelago from at least 1977 until 2009.

³¹ Para. 3.12 below.

1.37 **Chapter 3** of the Reply addresses the creation of the “MPA” and responds to Chapter III of the UK Counter-Memorial. Relying on the material disclosed by the UK in the judicial review proceedings, the chapter demonstrates that UK’s account of the events leading up to the declaration of the “MPA” is flawed to the point of being misleading.

1.38 The events leading to the creation of the “MPA” are set out chronologically, beginning with the UK’s internal analyses of Mauritius’ rights, undertaken in 1996 and 2004. The chapter sheds light on the internal FCO deliberations, culminating in the announcement by the Foreign Secretary on 1 April 2010, against the backdrop of the approach by Pew in 2007 and 2008 and bilateral talks between Mauritius and the UK. The documents from the English judicial review proceedings make clear that the “MPA” was announced despite widespread recognition of Mauritius’ rights both in internal correspondence and bilateral relations.

(b) The Legal Chapters of the Reply

1.39 The two factual chapters lay the foundation for the legal chapters, which address the merits of the dispute and the Tribunal’s jurisdiction.

1.40 **Chapter 4** addresses the exchanges between the Parties, and the UK’s arguments on Article 283 of the Convention. It outlines the requirements of Article 283(1) and confirms that Mauritius has complied with them in respect of each of the matters raised in the present dispute. In relation to Article 283, the chapter specifically considers the dispute over the entitlement of a coastal State to declare maritime zones.

1.41 In its Preliminary Objections to Jurisdiction, the UK does not argue that the Article 283 objection applies to the claim that the UK is not entitled to establish the “MPA” because it is not “the coastal State”.³² Mauritius notes that the UK now contradicts itself and adopts the opposite approach in its Counter-Memorial.

1.42 The chapter considers in detail the exchange of views between Mauritius and UK over the incompatibility of the “MPA” with the requirements of the Convention. The documents made available by the UK in the domestic judicial review proceedings confirm that the UK (a) recognised that Mauritius raised serious concerns with regard to the legality of the proposed “MPA” by reference to the rules set out in the Convention; and (b) explicitly foresaw the risk of an international legal challenge by Mauritius. They also confirm that, following the commitment given by UK Prime Minister Gordon Brown to the Prime Minister of Mauritius in November 2009, and subsequent developments, any further exchanges would have been futile.

1.43 **Chapter 5** sets out the arguments with regard to Mauritius’ first principal argument in the Memorial: that the UK does not have sovereignty over the Chagos Archipelago and is not the “coastal State” for the purposes of the Convention. Chapter 5 builds on the claim, set out in Chapter 6 of the Memorial, that the UK does not have the right unilaterally to establish maritime zones, including the “MPA”, around the Chagos Archipelago.

³² Written Observations Submitted by the Republic of Mauritius on the Question of Bifurcation, 21 November 2012, para. 61.

1.44 In this chapter, Mauritius responds to the UK's assertions in its Counter-Memorial on the inapplicability of the right to self-determination to these proceedings. The chapter demonstrates (a) that the right to self-determination was clearly established; (b) that the UK was not able to be a "persistent objector" in relation to the establishment of the right; (c) that in any event, the UK did not consistently object to the development of the right; and (d) that the territorial integrity of non-self-governing territories is an essential aspect of the right to self-determination, to be waived only by the freely expressed wish of the people.

1.45 Having established that the right to self-determination was clearly established in November 1965, Chapter 5 proceeds to explain that the detachment of the Chagos Archipelago contravened the right of the people of Mauritius to self-determination. Relying on the conclusion drawn in Chapter 2 that the Chagos Archipelago has always formed part of the territory of Mauritius, it is shown that the people of Mauritius did not waive their right to territorial integrity by a free expression of their wishes, and that the international community condemned the UK's conduct. Chapter 5 also sets out the continued protestations by Mauritius, and demonstrates that the principle of *uti possidetis* does not give a colonial power the right to dismember a dependent territory before independence.

1.46 On the basis of these findings, Mauritius demonstrates that the UK does not have sovereignty over the Chagos Archipelago and it is not the "coastal State" for the purposes of the Convention. Further, as a result of the UK's acknowledgment of the rights and legitimate interests of Mauritius in the Chagos Archipelago, the UK is not entitled in law unilaterally to establish an "MPA" around the Chagos Archipelago over the objections of Mauritius.

1.47 **Chapter 6** builds on the arguments in Chapter 7 of Mauritius' Memorial and responds to the arguments advanced by the UK in Chapter VIII of the Counter-Memorial. It addresses the breaches by the UK of its obligations under the Convention that are not dependent upon a determination that the UK is not a "coastal State", including obligations in Parts II, V, VI, XII and XVI of the Convention and Article 7 of the 1995 Agreement.

1.48 Chapter 6 provides detailed argument with regard to the particular respects in which the UK has breached its international legal obligations by adopting an "MPA" in the Chagos Archipelago, including:

- (i) The breach of undertakings made by the UK at the Lancaster House meeting of 23 September 1965 and on numerous subsequent occasions, in which the UK acknowledged Mauritian fishing rights in the waters of the Chagos Archipelago, and committed itself to respect those rights.
- (ii) The breach of the obligation under general international law to give effect to pre-existing rights to exploit natural resources, including in particular fisheries. These rights have been consistently recognised by the UK over the course of almost fifty years. The UK's assertion that there are "no traditional fishing rights at issue"³³ in this case cannot be squared with Mauritius' longstanding fishing practices in the waters of the Chagos Archipelago.
- (iii) The breach of the obligation under Article 2(3) of the Convention that a coastal State exercising sovereignty over the territorial sea must do so subject

³³ UKCM, para. 8.31.

to the Convention and other rules of international law, including those concerning access to natural resources and the obligation to comply with legally binding undertakings. The other rules of international law applicable to the UK that are relevant to these proceedings include: (a) the obligation to respect Mauritius' historic rights to access natural resources; (b) the obligation to comply with undertakings, including undertakings that protect fishing, mineral and oil rights; (c) the obligation to consult in regard to matters that may affect the rights of other States; and (d) the obligations flowing from the commitment given by UK Prime Minister Gordon Brown in November 2009.

- (iv) The breach of the requirements under Articles 55 and 56(2) of the Convention that a coastal State exercising rights pursuant to Part V must have “due regard” for the rights of other States, including rights relating to fisheries, and must exercise its rights and jurisdiction in the exclusive economic zone “subject to the specific legal regime established” under Part V of the Convention.
- (v) The breach of the requirements of Articles 63 and 64 of the Convention,³⁴ and Article 7 of the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (hereinafter “the 1995 Agreement”), that the UK must seek agreement and/or co-operate directly with Mauritius and relevant organisations on the measures necessary for the conservation of stocks of tuna and other highly migratory species.
- (vi) The breach of the requirement under Article 194(1) of the Convention, that the UK must endeavour to harmonise with Mauritius and other States its policies to prevent, control and reduce pollution of the marine environment.
- (vii) The breach of the obligation that the UK must act in a manner that does not constitute an abuse of rights under Article 300 of the Convention, in particular by disregarding the rights and interests of Mauritius as acknowledged by the UK itself.
- (viii) The breach of the requirement of Article 194(4) of the Convention that the UK, in taking measures to prevent, reduce or control pollution of the marine environment, must refrain from unjustifiably interfering with activities carried out by Mauritius in the exercise of its rights in conformity with the Convention.
- (ix) The breach of the requirement of Article 78(2) under Part VI of the Convention, by which the UK must refrain from infringing or interfering unjustifiably with navigational and other rights and freedoms of Mauritius.

³⁴ Mauritius does not pursue the claim advanced under Article 62(5) of the Convention (see MM, para. 5.23(vi)), since the UK has confirmed that no regulations have in fact been made in respect of the “MPA”, despite the fact that it was declared two and a half years ago. However, Mauritius reserves its rights in respect of any regulations which the UK may make in the future.

1.49 **Chapter 7** sets out Mauritius' arguments with respect to the UK's second and third objections to jurisdiction. The first part addresses the Tribunal's jurisdiction over what the UK terms "Mauritius' sovereignty claim", and explains why this Tribunal has jurisdiction to consider sovereignty issues under Part XV of the Convention. It outlines the key questions arising under Article 288(1) of the Convention, and demonstrates that the mere fact that this dispute raises questions of sovereignty does not exclude the Tribunal's jurisdiction, as it remains a "dispute concerning the interpretation or application of th[e] Convention".³⁵

1.50 With regard to Article 288(2), the chapter demonstrates that the UK's interpretation ignores the plain words of Article 293(1), and would mean that no principles of international law beyond the Convention could ever be argued before a Tribunal or Court having jurisdiction under Part XV. The first part of Chapter 7 also confirms that there is nothing in the text of the Convention, or its *travaux préparatoires*, to support the argument by the UK that this dispute as to sovereignty is excluded from the jurisdiction of the Tribunal under Part XV of the Convention.

1.51 The second part of Chapter 7 addresses the jurisdiction of the Tribunal to determine that the "MPA" is incompatible with the Convention. The chapter demonstrates that the Tribunal has jurisdiction in respect of the claims under Articles 2(3), 194 and 300 of the Convention and that neither Article 297(1)(c) nor Article 297(3)(a) excludes any of the claims made by Mauritius.

1.52 Chapter 7 also addresses the UK's attempt to categorise the "MPAs" as a dispute about fishing, despite the fact that this is contrary to the internationally accepted definition of a Marine Protected Area and UK practice in respect of the "MPA". With respect to Mauritius' second principal argument in the Memorial, it is shown that the Tribunal has jurisdiction over all of Mauritius' claims.

1.53 There follows the relief sought by Mauritius.

1.54 The Reply comprises 4 additional volumes that are integral to the pleading. Volumes II, III, IV and V of this Reply comprise the annexes. The legal authorities relied on by Mauritius in this Reply are provided in electronic form.

³⁵ As observed in UKCM, para. 4.2.

CHAPTER 2: HISTORICAL AND FACTUAL BACKGROUND

I. Introduction

2.1 This Chapter addresses the historical and factual background and responds to the arguments in Chapter 2 of the United Kingdom's Counter-Memorial. Chapter II of Mauritius' Memorial described the geography and early history of Mauritius, and Chapter 3 provided a detailed account of the unlawful detachment of the Chagos Archipelago. Mauritius notes that much of the factual account set out in Chapters 2 and 3 has not been challenged by the UK in its Counter-Memorial. With regard to the historical and factual background, the Parties agree on four key points:

- (i) From 1810 until 12 March 1968, the UK was the administering colonial Power in Mauritius;
- (ii) Throughout this period the Chagos Archipelago was administered by the British colonial Government in and from Mauritius;³⁶
- (iii) On 8 November 1965, while it was the administering colonial Power, the UK detached the Chagos Archipelago from Mauritius and established the "BIOT";
- (iv) Mauritius has retained *inter alia* fishing, mineral and oil rights in and around the Chagos Archipelago (from the materials now available it is apparent that the United Kingdom considers itself to be, at best, no more than a "temporary freeholder").³⁷

2.2 Parts A and B of the United Kingdom's Chapter II describe the geography of the Chagos Archipelago and Mauritius, and what is referred to by the UK as the constitutional history of the Chagos Archipelago/"BIOT". Mauritius sees no need to address the UK's geographic description of the Chagos Archipelago, which is not in dispute, or the UK's account of the purported constitutional arrangements of the "BIOT".³⁸ Mauritius reiterates that it does not recognise the "BIOT".

2.3 The UK makes four principal factual assertions in Chapter 2 of the Counter-Memorial:

³⁶ The UK was the *de facto* administering Power from 1810 until the 1814 Treaty of Paris, by which Mauritius (including the Chagos Archipelago) was formally ceded to the UK (See UKCM, Annex 1, Article 8).

³⁷ See paras. 3.12-3.15 below.

³⁸ Whereas paragraph 2.9 of the UKCM refers to "Three Brothers (South, Middle and North)", Mauritius notes that there are in fact four islands. The fourth was named Resurgent Island in 1975. Mauritius also notes that Figure 2.2 of the UKCM does not accurately reflect the EEZ of Mauritius. This is correctly shown in MM, Figure 7 (Vol. IV).

- (i) The Chagos Archipelago was not a part of the colony of Mauritius, because it was administered as a dependency of Mauritius;³⁹
- (ii) The purported agreement of Mauritian Ministers to the detachment of the Chagos Archipelago in 1965 was unrelated to the question of whether or not Mauritius would be granted independence by the UK;⁴⁰
- (iii) The “real concern” behind the protests at the UN in 1965 was the establishment of a military base rather than the breach of the principle of self-determination, and subsequent Mauritian protests between 1980 and 1998 were unspecific and “consistent with present United Kingdom sovereignty over the Chagos Archipelago”,⁴¹ and
- (iv) Fishing in the Chagos Archipelago is of little interest to Mauritius, such that it has exercised these rights on a *de minimis* scale, and Mauritius has no ownership of oil and minerals in the Chagos Archipelago.⁴²

2.4 All four of these assertions are wrong, and materially so. The present Chapter addresses each of them in turn. **Part II** shows that the Chagos Archipelago has always been an integral part of the territory of Mauritius. It addresses (a) constitutional, legislative and administrative arrangements; (b) the economic, cultural and social links between the Chagos Archipelago and Mauritius; (c) the conduct of the UK impliedly recognising the Chagos Archipelago as forming part of Mauritius; and (d) the recognition of the Chagos Archipelago as part of Mauritius by the international community. **Part III** addresses the purported agreement of Mauritian Ministers to the detachment, setting out (a) Mauritius’ road to independence, showing (b) that independence was granted to Mauritius on condition that Ministers agreed to the detachment (*i.e.* under obvious duress); and examines (c) the evidence relied on by the UK. **Part IV** describes the reaction at the UN from 1965 to 1968 and the subsequent Mauritian protest. **Part V** describes the UK’s undertakings with regard to (a) fishing rights; and (b) mineral and oil rights.

II. The Chagos Archipelago has always been an integral part of the territory of Mauritius

2.5 The UK argues that the Chagos Archipelago was administered as a Dependency of the colony of Mauritius and, as such, was not an integral part of Mauritius.⁴³ The UK contends that the islands were only “very loosely” administered from Mauritius, “purely as a matter of convenience”, and that contact between the two was “minimal”.⁴⁴

³⁹ UKCM, Chapter 2, Section B.

⁴⁰ UKCM, Chapter 2, Section D.

⁴¹ UKCM, Chapter 2, Section E.

⁴² UKCM, Chapter 2, Section F.

⁴³ UKCM, paras. 2.16, 2.19-2.32 and 7.34.

⁴⁴ UKCM, para. 2.19.

The conclusion drawn by the UK is that the islands of the Chagos Archipelago “were in law and in fact quite distinct from the Island of Mauritius.”⁴⁵

2.6 This argument is a surprising one, and reflects the weakness of the UK position. Mauritius does not accept the UK’s argument that the Chagos Archipelago was not an integral part of its territory at the time it was unlawfully detached on 8 November 1965. Chapter 2 of the Memorial on the early history of Mauritius set out the close economic, cultural and social relationship between the Chagos Archipelago and the main island of Mauritius. In its Counter-Memorial, the UK has not directly contested Mauritius’ account of the early history, which stands unchallenged. Instead it argues that because the UK administered the Chagos Archipelago as a “Dependency” it was not – and is not – a part of Mauritius.⁴⁶

2.7 In the Appendix to Chapter 2 of the Counter-Memorial, the UK provides a descriptive account of British and French practice with regard to the administrative arrangements of certain colonial territories, and gives examples of territories that were made “Dependencies” of colonies by colonial powers. Mauritius makes no comment on the examples given in the Appendix. It may well be that there were occasions on which the UK (or other colonial powers such as France) made such arrangements, labelling certain territories “Dependencies” of others. Regardless of that categorisation, the Chagos Archipelago has always been an integral part of Mauritius.

2.8 The UK argument is unhappily formalistic, based entirely on its own classification of the islands as a “Dependency”, without addressing the overwhelming evidence as to the substance, which proves beyond doubt that the Chagos Archipelago has always been (and was treated by the UK as) part of the territory of Mauritius. At footnote 11 of the Counter-Memorial the UK quotes the following sentence from the Mauritius Memorial: “Before 1965, the Chagos Archipelago had been a dependency of, and thus part of, the non-self-governing territory of Mauritius.”⁴⁷ The UK contends that this is a *non-sequitur*: because the UK administered the Chagos Archipelago as a dependency of Mauritius, it could not be a part of that colony. This is plainly wrong. In a 2009 judgment rendered by the UK’s highest court (the House of Lords, as it then was), Lord Hoffmann offered the following description of the Chagos Archipelago:

“The islands were a dependency of Mauritius when it was ceded to the United Kingdom by France in 1814 and until 1965 were administered as part of that colony.”⁴⁸

2.9 The UK now disagrees with the views expressed by its own highest court. Mauritius agrees with Lord Hoffmann’s view that the Chagos Archipelago was administered as part of Mauritius until its unlawful detachment. The fact that the Chagos Archipelago has always been an integral part of Mauritius is also evident from

⁴⁵ UKCM, para. 2.32.

⁴⁶ UKCM, paras. 2.16-2.32.

⁴⁷ See UKCM, fn 11 at p. 12 (quoting MM, para. 6.8).

⁴⁸ Lord Hoffmann in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.2)* [2008] UKHL 61, [2009] 1 AC 453 (“*Bancoult (No.2)*”), at 475-476, para. 4 (emphasis added).

(a) the constitutional, legislative and administrative arrangements; (b) the economic, cultural and social links between the Chagos Archipelago and Mauritius; (c) the practice of the UK; and (d) the fact that it is recognised as such by the international community.

(a) Constitutional, legislative and administrative arrangements

2.10 Constitutional, legislative and administrative arrangements confirm that the Chagos Archipelago has always been an integral part of the territory of Mauritius. Throughout the period of French rule, from 1715 to 1810, the Chagos Archipelago was administered as part of Mauritius. This continued without interruption throughout the period of British rule, from 1810 until 8 November 1965. As noted in the Memorial, the 1814 Treaty of Paris, which formally ceded Mauritius to the UK, recognised the Chagos Archipelago as part of the territory of Mauritius.⁴⁹

2.11 In its Counter-Memorial, the UK concedes that the Chagos Archipelago was “included for some purposes within the definition of the ‘Colony of Mauritius’”.⁵⁰ Successive constitutions of the dependent territory of Mauritius defined Mauritius as including its dependencies.⁵¹ Under British colonial rule the Governor of Mauritius was granted legislative authority over the Chagos Archipelago. In 1815 the first British Governor of Mauritius, Sir Robert Farquhar, issued a proclamation by which UK Acts of Parliament abolishing the slave trade “extend to every, even the most remote and minute portion, of the Possession, Dominions and Dependencies of Her Majesty’s Government”.⁵² Two Ordinances of 1852 and 1853, referred to by the UK in its Counter-Memorial, granted the Governor of Mauritius the power to extend the laws and

⁴⁹ MM, paras. 2.15-2.16: see Article VIII of the 1814 Treaty of Paris (UKCM, Annex 1): “His Britannic Majesty, stipulating for Himself and His Allies, engages to restore to His Most Christian Majesty, within the terms which shall be hereafter fixed, the colonies, fisheries, factories, and establishments of every kind which were possessed by France on the 1st of January, 1792, in the Seas and on the Continents of America, Africa, and Asia, with the exception however of the Islands of Tobago and St. Lucie, and of the Isle of France and its Dependencies, especially Rodrigues and Les Séchelles, which several Colonies and Possessions His Most Christian Majesty cedes in full right and Sovereignty to His Britannic Majesty, and also the portion of St. Domingo ceded to France by the Treaty of Basle, and which His Most Christian Majesty restores in full right and Sovereignty to His Catholic Majesty” (emphasis added). During the period of French rule, Mauritius was known as *Ile de France* and is referred to as such in the Treaty. For convenience, the name Mauritius is used throughout this chapter.

⁵⁰ UKCM, para. 2.32.

⁵¹ Section 52 of the Letters Patent (16 September 1885) altered the constitution of the Council of Government and defined the Colony of Mauritius as “the Island of Mauritius and its Dependencies” (Annex 4). Section 2(1) of the Mauritius (Constitution) Order in Council, 1958 defined the colony of Mauritius as “the Island of Mauritius (including the small islands adjacent thereto) and the Dependencies of Mauritius” (Annex 16). There is a similar definition provided for in section 1(1) of Mauritius (Legislative Council) Order in Council, 1947 (Annex 8). Section 90(1) of the Mauritius (Constitution) Order, 1964 defines Mauritius as “the island of Mauritius and the Dependencies of Mauritius” (Annex 28).

⁵² Edis, R, “Peak of Limuria – The Story of Diego Garcia” (Reprinted Edition, 1998) (Extract), (hereinafter “Edis”), p. 35: Annex 104. Slavery was abolished in Mauritius and its dependencies in 1835.

regulations of Mauritius to the Seychelles and other Dependencies (including the Chagos Archipelago).⁵³

2.12 The limited evidence relied on by the UK to argue that the Chagos Archipelago was not part of Mauritius does not support its position. The UK refers to two Ordinances (from 1875 and 1904) that provided for the appointment of Stipendiary Magistrates from Mauritius to the Dependencies of Mauritius, including the Chagos Archipelago.⁵⁴ In relation to the first (Ordinance No. 41 of 1875), the UK asserts that “the Stipendiary Magistrate for the listed Islands was separate from the Stipendiary Magistrate of Port Louis, with his own jurisdiction and applicable law” and that “the Ordinance clearly distinguished throughout between Mauritius and the Dependencies”.⁵⁵ In relation to the second (Ordinance No. 4 of 1904), the UK claims that it too “distinguished between Mauritius and the Islands”.⁵⁶ Mauritius fails to see how these statements assist the UK. The two Ordinances distinguished between the Chagos Archipelago and Mauritius because they established a regime by which a Magistrate from Mauritius conducted periodical visits to islands of the Chagos Archipelago. Contrary to what the UK asserts, the Magistrate appointed to the Chagos Archipelago was not in fact necessarily distinct from those serving on the main island of Mauritius. An earlier Ordinance of 1872 appointed “for the time being” the Junior District Magistrate of the District of Port Louis as the District Magistrate responsible for the Chagos Archipelago.⁵⁷

2.13 The 1875 Ordinance cited by the UK provided for the appointment of a Police and a Stipendiary Magistrate, and permanent Officers of the Civil Status for the Chagos Archipelago. The Stipendiary Magistrate was granted free passage to and from the islands and reported the results of all visits to the Governor of Mauritius.⁵⁸ While the UK asserts that the Magistrate for the Chagos Archipelago had his “own jurisdiction and applicable law”, Article 6 of the 1875 Ordinance provides that the Magistrate had by and large the same powers and authority vested in Stipendiary Magistrates in

⁵³ Mauritius and Dependencies, Ordinance No. 14, 23 March 1853, (UKCM, Annex 3) and Mauritius and Dependencies, Ordinance No. 20, 2 June 1852 (UKCM, Annex 2). The 1853 Ordinance is virtually identical in its terms to the 1852 Ordinance, except that the earlier ordinance empowered “the Governor” rather than “the Governor in his Executive Council”.

⁵⁴ See Ordinance No. 41 of 31 December 1875 (UKCM, Annex 4) and Ordinance No. 4 of 18 April 1904 (UKCM, Annex 5).

⁵⁵ UKCM, para. 2.27.

⁵⁶ UKCM, para. 2.30.

⁵⁷ See Article 3 of Ordinance No. 5 of 1872: “The Junior District Magistrate of the District of Port Louis, in the Island of Mauritius, for the time being, is hereby constituted to be the District Magistrate of the said Islands, and he, the said Junior District Magistrate of Port Louis, and all the Officers of his Court, shall have the same powers, authority and jurisdiction respectively, to all intents and purposes, as if the said Islands formed part of the said District of Port Louis.”(Annex 2).

⁵⁸ Ordinance No. 41 of 31 December 1875 (UKCM, Annex 4) Articles 2 and 3. The reports of visiting Magistrates provided a detailed account of all the main settlements; see Report of Ivanoff Dupont, Acting Magistrate for the Lesser Dependencies of Mauritius, on the Islands of the Chagos Group, 11 June 1883: Annex 3 and Report of Maurice Rousset, Acting Magistrate for Mauritius and the Lesser Dependencies, on the Chagos Group, 19 June 1939: Annex 6.

Mauritius.⁵⁹ By virtue of the 1875 Ordinance, the Magistrate was vested with the duty and power to examine the conduct and state of labourers employed in the Islands, including whether wages had been duly paid, the provision of medicine and proper accommodation, and to investigate allegations of maltreatment. The Magistrate was also empowered to “perform within the said Islands the duties of Clerk of a District Court”.⁶⁰ Article 10 provided for a procedure by which the inhabitants of the Chagos Archipelago could bring complaints for any offence or breach of the law committed on the islands before a Stipendiary Magistrate in Port Louis, who

“shall deal with the said offence according to the provision of the laws of Mauritius applicable to such offence, and in the same way as if the said offence had been committed in Port Louis, provided no judgment or order has been given in the matter by the Stipendiary of the said Islands.”⁶¹

2.14 The 1875 Ordinance, rather than demonstrating that the Chagos Archipelago is not part of Mauritius (as the UK argues), clearly shows the opposite. The same can be said of the 1904 Ordinance invoked by the UK. This provided for two Magistrates to be appointed for the Lesser Dependencies (which included the islands of the Chagos Archipelago). The 1904 Ordinance required the Magistrate to “report to the Governor the result of each visit and of the inspections made, and generally on all matters connected with the well-being of the Islands and the welfare of the inhabitants.”⁶² As well as exercising jurisdiction over the islands of the Chagos Archipelago, the Magistrates could in some circumstances exercise jurisdiction in the main island of Mauritius.⁶³ The 1904 Ordinance also provided that the powers given to the Governor of Mauritius under Article 284 of the Labour Law of 1878 “shall apply *mutatis mutandis* to the Islands”.⁶⁴

2.15 Two further Ordinances (not cited by the UK) further demonstrate the close links between the Chagos Archipelago and the main island of Mauritius. Section 83 of the Courts Ordinance, 1945 established a regime by which all Mauritian Magistrates could exercise jurisdiction throughout Mauritius, including the Chagos Archipelago:

“It shall be lawful for the Governor to appoint as many fit and proper persons as may be needed to be Magistrates for Mauritius and the Dependencies, and every person so appointed shall by virtue of such appointment have and may exercise jurisdiction as a District Magistrate

⁵⁹ See Mauritius and Dependencies, Ordinance No. 41, 23 March 1853, (UKCM Annex 3), Article 6: “The said Magistrate shall have the powers and authority vested in Stipendiary Magistrates in Mauritius by Order in Council of 7th September 1838 and Ordinance No. 15 of 1852, but under the modifications hereinafter enacted.”

⁶⁰ See Ordinance No. 41 of 31 December 1875 (UKCM, Annex 4), Article 17.

⁶¹ *Ibid.*, Article 10.

⁶² Ordinance No. 4 of 18 April 1904 (UKCM, Annex 5), Article 4(3).

⁶³ *Ibid.*, Article 21.

⁶⁴ *Ibid.*, Article 37.

in each and every district of the Colony and as Magistrate of the Dependencies, subject to the provisions of section 87”⁶⁵.

Section 86 further provides that:

“Any Magistrate assigned the Lesser Dependencies shall have and exercise the same rights, duties, powers and jurisdiction as any other District Magistrate and shall, in addition thereto, perform such administrative or other duties as may be allotted to him by the Governor.”⁶⁶

2.16 From 1945 onwards, Magistrates in Mauritius were given the title “Magistrates for Mauritius and the Dependencies”.⁶⁷ The Magistrates assigned to the Chagos Archipelago toured all of the main settlements and provided a detailed report on, *inter alia*, the conditions of the infrastructure and the wellbeing of the workforce, as well as giving an account of births, marriages and deaths.⁶⁸ The UK acknowledges that “The Government in Mauritius reviewed administrative arrangements in the Lesser Dependencies in the light of the visiting magistrates’ reports.”⁶⁹

2.17 While the day-to-day administration of the workforce was largely left to the plantation managers, the Magistrates reviewed all punishments and fines imposed on the workforce by the plantation managers. A former commissioner of the “BIOT” gave this account of visiting Special Commissioners and District Magistrates:

“They probed with surprising intrusiveness into the island’s affairs and their painstaking reports give fascinating glimpses of life on the island. They clearly saw it as their duty to guard against tyrannous behaviour on behalf of the management, which could all too easily have sprung up. They were not slow to upbraid and punish such manifestations.”⁷⁰

⁶⁵ Courts Ordinance, 1945: Annex 7. Section 87 provides “Whenever two or more Magistrates have been appointed to any District, it shall be lawful for the Governor by Proclamation to declare that the Court for the District shall sit in two or more Divisions, as the case may be, and the names by which such Divisional Courts shall be designated.”

⁶⁶ Courts Ordinance of 1945: Annex 7. Part IV of the Courts Ordinance 1945 on the law in force in the colony of Mauritius does not distinguish between Mauritius and its dependencies.

⁶⁷ See Extracts from the Mauritius Gazette, General Notices (General Notice No. 76 of 3 February 1951; General Notice No. 895 of 18 October 1952; General Notice No. 684 of 26 June 1953; General Notice No. 503 of 4 July 1953; General Notice No. 839 of 19 October 1957; General Notice No. 149 of 8 February 1963; General Notice No. 271 of 20 March 1964; General Notice No. 447 of 28 April 1964; General Notice No. 1011 of 29 October 1964; General Notice No. 406 of 23 April 1965): Annex 14.

⁶⁸ See Report of Ivanoff Dupont, Acting Magistrate for the Lesser Dependencies of Mauritius, on the Islands of the Chagos Group, 11 June 1883: Annex 3; Report of Maurice Rousset, Acting Magistrate for Mauritius and the Lesser Dependencies, on the Chagos Group, 19 June 1939: Annex 6.

⁶⁹ UKCM, para. 2.30.

⁷⁰ Edis, p. 43 (Annex 104). Edis also gives examples of the fines and instructions issued by the Magistrates (p. 43-44): “Pakenham Brooks, who paid a visit as Special Magistrate in 1875, handed out sizeable fines both to an under-manager at Point Marianne for striking a labourer and to James Spurs, the Manager at East Point, for unjustifiably imprisoning three labourers without sufficient cause. The

The practice adopted by British authorities in Mauritius of assigning Mauritian Magistrates to the Chagos Archipelago from 1872 until 1965 demonstrates the close legal nexus between the Chagos Archipelago and the main island of Mauritius.

(b) *Economic, cultural and social links*

2.18 The UK's claim that the Chagos Archipelago was not part of the territory of Mauritius is also contradicted by the close economic, cultural and social links between Mauritius and the Chagos Archipelago. This relationship was described in Chapter 2 of the Memorial, and has been ignored by the UK in its Counter-Memorial.⁷¹ The French first claimed Diego Garcia in 1769, and permanent settlement on that island was probably established through a concession granted on 17 February 1783 by the French colonial government in Mauritius.⁷² Concessions were subsequently granted to more businessmen from Mauritius to set up establishments on Diego Garcia and other islands of the Chagos Archipelago.⁷³

2.19 When Mauritius became a British colony, the leasehold system continued, and the Chagos Archipelago was administered as part of Mauritius without interruption until its unlawful detachment on 8 November 1965. Plantation proprietors resided in Mauritius, and the on-site managers and administrators were also from Mauritius.⁷⁴ Contrary to the UK's claim that concession-holders were "little troubled by the Government in Mauritius until 1859-1860", an Assistant Protector of Slaves visited the Chagos Archipelago in 1835, followed by a visit by Special Justice Charles Anderson in 1838.⁷⁵ An account of this second visit reveals that Special Justice Anderson "exceeded his instructions by intervening actively and ordering the reduction of the daily tasks of the labourers which he regarded as too severe."⁷⁶ Special Justice Anderson is recorded as recommending "that the proprietors of the plantations resident in Mauritius ... 'ought to be compelled to make good the past deficiencies to their fullest extent and that other means should be adopted to prevent repetition of such wilful neglect.'"⁷⁷ While the

management at Point Marianne and Minni Minni were also instructed to provide sick-bays for their workforce. Prices and weights and measures in the Company's shops were carefully checked and the labourers' accommodation, the hospital and the jail measured to ensure that they fulfilled minimum specifications."

⁷¹ See MM, paras. 2.12, 2.18-2.27.

⁷² MM para. 2.11; Vine, D., *Island of Shame* (Princeton University Press, 2009): Annex 126, (hereinafter "Vine"), p. 23. There is also an account of a grant of Diego Garcia by the French Governor in Mauritius in 1778 (See Edis, p. 28): Annex 104.

⁷³ See Edis, p. 32: Annex 104. When four British ships dispatched from Bombay arrived at Diego Garcia on 27 April 1786, concessionaires returned to Mauritius to warn French Authorities. In response, the French frigate *Minerva* (or *Minerve*) was then sent to the Chagos Archipelago. Finding that the British had already left Diego Garcia, the French put up a stone marker proclaiming their sovereignty (see MM, para. 2.14; Edis, p. 31: Annex 104; Vine, p. 23: Annex 126.

⁷⁴ Edis, p. 37, 39: Annex 104.

⁷⁵ UKCM, para. 2.24; Edis, p. 36: Annex 104.

⁷⁶ Edis, p. 36-37: Annex 104.

⁷⁷ *Ibid.*

Governor of Mauritius did not act on Anderson's recommendations, some of the plantation managers did reduce the tasks imposed on the labourers.⁷⁸

2.20 The economy of the Chagos Archipelago was closely linked to the main island of Mauritius. The coconut oil extracted from the copra (dried coconut flesh) produced in the Chagos Archipelago, and the copra itself, were shipped to Mauritius for sale.⁷⁹ Some of the copra shipped to Mauritius was then sold for export.⁸⁰ The harvesting of coconuts represented the major economic activity in the Chagos Archipelago, but efforts were also made in the mid-nineteenth century to diversify the economy by introducing new crops such as maize, Indian corn, cotton, tobacco and citrus trees.⁸¹ Other products such as salted fish, sea slugs and rope were also exported to Mauritius.⁸² Goods and produce from the dependencies of Mauritius (including the Chagos Archipelago) transported on British vessels were admitted on the main island of Mauritius free of duty.⁸³

2.21 In the twentieth century, land in the Chagos Archipelago was owned by Diego Garcia Ltd., a Mauritian company. By 1958 this Mauritian company was in debt, and eventually sold its holdings in 1962 to the mixed Mauritian and Seychellois controlled Chagos Agalega Co.⁸⁴

2.22 In addition to the economic ties, the Chagos Archipelago also shared close cultural and social links with the main island of Mauritius. Mauritian entrepreneurs in the Chagos Archipelago adopted the same technology that was applied in the sugar plantations in Mauritius.⁸⁵ Workers employed on the plantations had free passage to Mauritius.⁸⁶ The creole spoken by the Chagossians was similar to that spoken on the main island of Mauritius.⁸⁷

2.23 Mauritian authorities provided schoolteachers, midwives and dispensers and established nurseries in the main islands of the Chagos Archipelago.⁸⁸ They provided a refuse removal service and maintained a meteorological station on Diego Garcia.⁸⁹ There was a visit to the Chagos Archipelago by an Assistant Entomologist from the

⁷⁸ Scott, R., *Limuria: The Lesser Dependencies of Mauritius* (Greenwood Press, Connecticut, 1961) (Extract): Annex 20, p. 140; Vine, p. 27: Annex 126.

⁷⁹ Edis, p. 33, 46, 58, 71: Annex 104; Vine, p. 26, 31: Annex 126.

⁸⁰ Note on copra production in the Chagos Archipelago, December 1932, CO 167/879/4: Annex 5.

⁸¹ Edis, p. 44: Annex 104.

⁸² See MM, para. 2.12.

⁸³ *An Account of the Island of Mauritius and its Dependencies*, By a late Official Resident, Anonymous, (London, 1842), p. 46: Annex 1: "All goods, the produce of the dependencies of Mauritius, or the Island of Madagascar, with the exception of ebony, if imported in British bottoms, are admitted free of duty."

⁸⁴ 250 of the shares of the Chagos Agalega Co. were held by the Colonial Steam Co. of Mauritius (see MM, Annex 2, paras. 10-12).

⁸⁵ Vine, p. 25: Annex 126.

⁸⁶ *Ibid.*, p. 35.

⁸⁷ *Ibid.*, p. 29.

⁸⁸ MM, Annex 2, para. 52.

⁸⁹ Vine, p. 35: Annex 126; MM, Annex 2, para. 52.

Mauritian Department of Agriculture, and missions to survey health conditions, visits by officials from the Mauritian Labour Office, and visits by various technical officers.⁹⁰

2.24 As described in the Memorial, authorities in Mauritius occasionally sent police forces to the Chagos Archipelago to quell disturbances.⁹¹ A police presence from Mauritius is first recorded in 1885 in Minni Minni (Diego Garcia), made up of an inspector, a sergeant and six constables.⁹² In 1931, during an insurgency by a group of labourers, a Magistrate from Mauritius with ten constables, two inspectors and two officers was sent to the Chagos Archipelago.⁹³

(c) *Before the detachment of the Chagos Archipelago, the UK acted in a manner that implied recognition of the Chagos Archipelago as an integral part of Mauritius.*

2.25 In the two and a half years prior to the detachment, representatives at the highest levels of the British Government considered that the Chagos Archipelago was part of the territory of Mauritius. At the request of the Defence and Overseas Policy Committee, on 27 April 1965 the Colonial Secretary circulated a note on the legal status of the Chagos Archipelago, Aldabra, Farquhar and Desroches, according to which: “they are all legally established as being parts of the Colonies of Mauritius or Seychelles”.⁹⁴ In a telegram to the UK Embassy in Washington just three days later, the Foreign Office stated: “It is now clear that in each case the islands are legally part of the territory of the colony concerned”.⁹⁵ On 30 July 1965, a Colonial Office official writing to the Treasury stated that: “We are all agreed that the Islands must be constitutionally separate from the Colonies of which at present they form part.”⁹⁶

2.26 Prior to the detachment of the Chagos Archipelago, the UK consulted the Mauritian Premier and the Council of Ministers. Mauritius denies that this consultation was adequate, but it nevertheless indicates that the UK recognised the real interest of Mauritius in the Chagos Archipelago. It was to Mauritius that the former inhabitants of the Chagos Archipelago (“Chagossians”) were taken when they were forcibly removed by the UK from the Archipelago. It was in Mauritius that most of the Chagossians were resettled. It was with Mauritius that talks were carried on about the future of the Chagossians and in respect of which some measure of compensation was paid. There

⁹⁰ Alfred J.E. Orian, Assistant Entomologist, Department of Agriculture, Mauritius, Report on a visit to Diego Garcia, 9-14 October 1958: Annex 17; Vine, p. 28: Annex 126; MM, Annex 2, para. 52.

⁹¹ MM, para. 2.27.

⁹² Edis, p. 50: Annex 104. While the police presence was withdrawn three years later on grounds of cost, Special Constables were appointed as needed.

⁹³ Vine, p. 33: Annex 126.

⁹⁴ Note dated 27 April 1965 by the Secretary of State for the Colonies to the Defence and Overseas Policy Committee, “Defence Interests in the Indian Ocean: Legal Status of Chagos, Aldabra, Desroches and Farquhar”, para. 2: Annex 31.

⁹⁵ Telegram No. 3582 dated 30 April 1965 to the UK Embassy in Washington, para. 3: MM, Annex 9.

⁹⁶ Letter dated 13 July 1965 from Trafford Smith, Colonial Office to J.A. Patterson, Treasury, FO 371/184524, para. 3: Annex 33.

was recognition by the UK that the former inhabitants of the Archipelago were the concern of Mauritius. As the representative of Tanzania said in the UNGA Committee of 24:

“The United Kingdom representative had said that the British Indian Ocean Territory was not part of Mauritius and the Seychelles. The Tanzanian delegation rejected that argument, since the United Kingdom Government would not have agreed to pay compensation to the inhabitants of the islands concerned if those islands were not an integral part of Mauritius and the Seychelles.”⁹⁷

2.27 Because the UK recognised that the former inhabitants of the Chagos Archipelago had close ties with mainland Mauritius, it made legal provision for them to become Mauritian citizens automatically on the independence of Mauritius.⁹⁸ This was an exceptional provision in UK eyes. If there had been a link only “for administrative convenience” between the main Island of Mauritius and the Chagos Archipelago, there would have been no need to make this citizenship provision.

2.28 The UK also undertook that the Chagos Archipelago would revert to Mauritius when it is no longer required for defence purposes.⁹⁹ Neither this nor the other statements and actions by the UK mentioned above are compatible with a view of the Chagos Archipelago which does not recognise the close links between the main Island of Mauritius and the Archipelago, or the legal interest of the former in the latter, or the fact that they have always been treated in substance as part of the same territory.

(d) The international community recognised the Chagos Archipelago as part of the territory of Mauritius

2.29 As described in detail in Mauritius’ Memorial, the dismemberment was subject to the condemnation of the international community before and after the Chagos Archipelago was detached by the UK.¹⁰⁰ As is noted in the Max Planck Encyclopaedia:

“The creation of BIOT was strongly condemned by the international community (UNGA Res 2066 (XX)...; UN GA res 2232 (XX)...; UNGA Res 2357 (XXII)...) for its violation of the principles guiding decolonisation (UNGA Res 1514 (XV)...), in particular the prohibition of

⁹⁷ United Nations General Assembly, Twenty-first Session, Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples’, UN Doc. A/6300/Rev.1 (1966), Chapter XIV, para. 176: Annex 50 (emphasis added).

⁹⁸ This was by virtue of Section 20(4) of the Independence Constitution of Mauritius set out in the Schedule to the Mauritius Independence Order, 1968, which provided in effect that with the exception of persons with fathers born in Seychelles, a person born in the Chagos Archipelago before the “BIOT” was created was to be regarded as having been born in Mauritius and therefore automatically entitled to Mauritian citizenship on independence: Annex 65.

⁹⁹ MM, paras. 1.8, 6.40, 6.50.

¹⁰⁰ MM, paras. 3.43-3.52, and para. 2.84 below.

dismembering non-self-governing territories prior to their independence...”¹⁰¹

III. Independence was conditioned on Ministers’ Agreement to the Detachment of the Chagos Archipelago

2.30 The detachment of the Chagos Archipelago from Mauritius was carried out by the UK by means of an Order in Council on 8 November 1965. The UK argues that the Mauritian Council of Ministers secured a “deal” and thus agreed to the detachment.¹⁰² The evidence advanced by Mauritius in the Memorial clearly shows that this is not accurate. The only “deal” – if it can be described as such – was that if Ministers agreed to the detachment, they would be able to return to Mauritius having secured independence from the UK. The “agreement” was obtained under conditions of duress, and cannot be considered a true expression of the wishes of the people of Mauritius.¹⁰³ Contemporaneous records of meetings and correspondence, and the ensuing debates in the Mauritian Parliament, all confirm that the detachment of the Chagos Archipelago from Mauritius was a condition of the grant of independence.

2.31 The detachment of the Chagos Archipelago from Mauritius should be seen against the background of the US plans to use the Chagos Archipelago for defence purposes and the concurrent efforts by Mauritian Ministers to obtain independence from the UK. At the first round of formal UK-US talks on US defence interests in the Indian Ocean in early 1964, the parties decided that the Chagos Archipelago would have to be excised from Mauritius and placed under direct UK administration.¹⁰⁴

2.32 In order to secure the agreement of the local leaders in Mauritius, the UK Secretary of State for Foreign Affairs and the UK Secretary of State for Defence considered that the UK Government would have to compensate Mauritius generously.¹⁰⁵ In addition to compensation, the Colonial Secretary raised the possibility of offering concessions to Mauritius on such matters as immigration to the UK, and of seeking a quota for the export of sugar from Mauritius to the US.¹⁰⁶

2.33 On 19 July 1965 the Governor of Mauritius was instructed by the Colonial Office to open discussions with the Mauritius Council of Ministers on the UK proposal

¹⁰¹ E. Afsah, ‘Diego Garcia (British Indian Ocean Territory)’, in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (2012), vol. III, para. 8, available at: <http://opil.ouplaw.com>.

¹⁰² See UKCM, paras. 2.50-2.66.

¹⁰³ MM, paras. 6.25-6.30, and paras. 5.23-5.26 below.

¹⁰⁴ MM, paras. 3.3-3.5.

¹⁰⁵ Memorandum by the Secretary of State for Foreign Affairs and the Secretary of State for Defence to the Defence and Oversea Policy Committee, “Defence Facilities in the Indian Ocean”, 7 April 1965, para. 9: Annex 29. See also Foreign Office telegram No. 3582 to Washington, 30 April 1965, FCO 371/184523: MM, Annex 9, para. 3.

¹⁰⁶ Extract from Minutes of 21st Meeting of the Defence and Oversea Policy Committee held on 12 April 1965, Cabinet Office, 13 April 1965, p. 11: Annex 30.

for the detachment of the Chagos Archipelago from Mauritius. He was informed that the purpose of the discussions was also:

“to attempt to clarify likely compensation demands so as to enable [the UK Government] to gauge what it might be necessary to offer to secure willing and public acquiescence in proposed developments.”¹⁰⁷

2.34 As noted in the Counter-Memorial, the proposal for detachment was first put to the Mauritius Council of Ministers on 23 July 1965. The UK’s account of the Ministers’ initial reaction does not reflect the fact that while Ministers were “prepared to play their part in the defence of the Commonwealth and the free world”, they were fundamentally opposed to the detachment of the Chagos Archipelago. It was not the case that Ministers “prefer[red] a long-term lease”, but rather that the Ministers strongly objected to the detachment.¹⁰⁸ The record also reveals that when proposals were put to Mauritian Ministers for the first time, the Governor told Ministers that the UK viewed the detachment of the Chagos Archipelago as “essential”.¹⁰⁹

2.35 One week after the Governor made his initial proposal, the Premier of Mauritius suggested that there should be discussion with representatives of the UK and the US Governments, either on the occasion of or before the Mauritius Constitutional Conference scheduled for September 1965.¹¹⁰ At the request of the Colonial Secretary, the Governor reiterated to the Mauritian Ministers that a lease was not possible. The Ministers continued to oppose the detachment of the Chagos Archipelago, and renewed suggestions for talks with representatives of the UK and US Governments.¹¹¹

2.36 In its Counter-Memorial, the UK claims that the process of independence for Mauritius was straightforward and entirely separate from the detachment of the Chagos Archipelago.¹¹² Neither of these claims is accurate. In the run-up to, during, and even after the Constitutional Conference in September 1965, independence was not assured. Moreover, the record makes clear that Mauritian Ministers could only have obtained independence for Mauritius by expressing their ‘consent’ to the detachment of the Chagos Archipelago.

¹⁰⁷ Colonial Office Telegram No. 198 to Mauritius, No. 219 to Seychelles, 19 July 1965, FO 371/184526: MM, Annex 10, para. 5.

¹⁰⁸ UKCM, para. 2.51. See Mauritius Telegram No. 175 to the Colonial Office, 30 July 1965, FO 371/184526: MM, Annex 13, para. 2 (“Ministers objected however to detachment which would be unacceptable to public opinion in Mauritius”) and Mauritius Telegram No. 170 to the Colonial Office, 23 July 1965, FO 371/184526, MM Annex 12 in which the Premier of Mauritius and the leader of the *Parti Mauricien Social Démocrate* (PMSD) “expressed dislike of detachment”. See also MM, Annex 17: under the heading “The Mauritius reaction” it is stated that Ministers “cannot contemplate detachment”.

¹⁰⁹ Mauritius Telegram No. 170 to the Colonial Office, 23 July 1965, FO 371/184526, MM Annex 12, para. 2: “Dislike for detachment was expressed both by Premier and Duval though I explained this was regarded as essential.”

¹¹⁰ Mauritius Telegram No. 175 to the Colonial Office, 30 July 1965, FO 371/184526: Annex 13, para. 4.

¹¹¹ MM, para. 3.21.

¹¹² See UKCM, paras. 2.40-2.45, 2.50, 2.54.

(a) *The road to independence*

2.37 In Chapter 2 of the Counter-Memorial the UK purports to describe the “constitutional history of Mauritius in so far as may be relevant to the present proceedings.”¹¹³ Mauritius does not accept the UK’s characterisation of Mauritius’ constitutional history, and in particular the impression given that the move towards independence was unencumbered, and distinct from the detachment of the Chagos Archipelago. The struggle for independence and the relevant constitutional history of Mauritius were described in Chapter 2 of the Memorial.¹¹⁴

2.38 The Mauritius Constitutional Conference was held in London from 7 to 24 September 1965. The UK Counter-Memorial gives the impression that the question of independence lay solely in the hands of the Mauritian Ministers attending the Conference. The UK states that “any concerns about moving forward to independence came from Mauritian politicians, not from the United Kingdom Government...”¹¹⁵ This is simply not true. Contemporaneous records of the Conference reveal that independence for Mauritius was far from certain. In May 1965, the Foreign Office informed the UK Embassy in Washington that the outcome of the impending Constitutional Conference was “unlikely to take Mauritius further than full internal self-government. It is impossible to estimate when or indeed if Mauritius will achieve full independence.”¹¹⁶

2.39 Only one month before the Conference, a Colonial Office official, writing to a colleague at the Ministry of Defence, provided this account:

“The Mauritian political parties are divided over the question of long-term status. Some are demanding independence within the Commonwealth; others look to some form of continued association with Britain. We doubt whether it will be possible for the conference to resolve these differences, but it might succeed in arriving at definitions of “independence” and “free association” which could in due course be put to the Mauritius electorate, and in deciding that the future status of the island should depend on the outcome of an election or a referendum.”¹¹⁷

2.40 The record of a meeting between officials at the Colonial Office and the Ministry of Defence on 26 August 1965 (only two weeks before the Conference) reveals that the prevailing view at the Colonial Office was that independence was unlikely to be granted:

¹¹³ UKCM, para. 2.40. See UKCM Chapter II, Part C.

¹¹⁴ MM, paras. 2.29-2.40.

¹¹⁵ UKCM, para. 2.61.

¹¹⁶ Telegram No. 3665 dated 3 May 1965 from UK Foreign Office to UK Embassy, Washington, para. 1: Annex 32.

¹¹⁷ Letter dated 11 August 1965 from R. Terrell, Colonial Office to P.H. Moberly, Ministry of Defence, FO 371/184527, para. 2: Annex 37.

“MR SMITH (Colonial Office) outlined the present position in Mauritius and the possible outcome of the Constitutional Conference [...] The outcome of the Conference was uncertain and his Secretary of State had stated that he was open to consider any kind of solution. The most likely course of events was that the Conference was unlikely to agree on full autonomy, but would accept that Mauritius should proceed to full internal self-government, with the possibility of further progress after a future referendum.”¹¹⁸

2.41 Even after the Conference had started, British officials were pessimistic about the prospects of Mauritius achieving independence. A Colonial Office note of 16 September 1965 concludes that “it seems that the strength of feeling against independence may make it impossible for the Conference to accept a programme by which Mauritius would proceed straightforwardly to independence.”¹¹⁹

2.42 The UK relies on a brief prepared by the Colonial Office, and states that “A key reason for not conveying certainty as to Her Majesty’s Government’s position as regards independence was not detachment but the terms of the constitution: it might have been necessary to press the Premier ‘to the limit to accept maximum safeguards for minorities’.”¹²⁰ This assertion is simply not supported by the brief on which the UK relies.

2.43 The brief was prepared by the Colonial Office for the UK Prime Minister in advance of his meeting with the Premier of Mauritius on 23 September 1965.¹²¹ While it makes clear that the protection of minorities was of concern to the Colonial Office, the issue of the detachment of the Chagos Archipelago was of far greater importance, and the majority of the three-page note addresses this issue. The Prime Minister was in fact told that “The key sentence in the brief is the last sentence of it on page three.”¹²² That “key sentence” reads: “The Prime Minister may therefore wish to make some oblique reference to the fact that H.M.G. have the legal right to detach Chagos by Order in Council, without Mauritius consent, but this would be a grave step.”¹²³ The brief also explains that

“[t]he gap between the parties led by Sir S. Ramgoolam wanting independence, and the Parti Mauricien and its supporters who seek continuing association with Britain, will not be closed by negotiation. H.M.G. will have to impose a solution.”¹²⁴

¹¹⁸ Report submitted by Chiefs of Staff on 26 August 1965 for 1965 Mauritius Constitutional Conference, CO 1036/1150, p. 6: Annex 38.

¹¹⁹ Points for the Secretary of State at D.O.P. meeting, 9.30 a.m. Thursday, September 16th, Pacific and Indian Ocean Department, 15 September 1965, CO 1036/1146, para. 4: Annex 44.

¹²⁰ UKCM para. 2.54 (footnote omitted).

¹²¹ MM, Annex 17.

¹²² *Ibid.*

¹²³ *Ibid.*, (emphasis in the original).

¹²⁴ *Ibid.*, p. 2.

2.44 The sum of the evidence above makes clear that there is no basis for the UK to assert that “any concerns about moving forward to independence came from Mauritian politicians, not from the United Kingdom Government”.¹²⁵ British doubts about the grant of independence to Mauritius were expressed at the highest levels.

(b) *Independence was granted on condition that Mauritian Ministers agreed to the excision of the Chagos Archipelago*

2.45 In the days leading up to the Constitutional Conference, officials at the Colonial Office proposed various tactics and strategies as to how to introduce the subject of the detachment of the Chagos Archipelago. A plan was devised by which talks on the detachment would take place “in parallel (and in a smaller group) with the constitutional talks, the object being to link both up in a possible package deal at the end.”¹²⁶ It was decided that the small group would be chaired by the Colonial Secretary and made up of the Premier, Mauritian party leaders, the Governor and his advisers.¹²⁷

2.46 The first two meetings on the detachment of the Chagos Archipelago took place on 13 and 20 September 1965, during which the Premier and the other Ministers expressed their opposition to detachment, proposing a long-term lease instead. They even raised the possibility of making the Archipelago available free of charge to the US Government.¹²⁸

2.47 During the second meeting on 20 September, the Premier of Mauritius reiterated that excision was not an option and that his government “would stand out for a 99-year lease.”¹²⁹ The four other Ministers shared this view. That evening, the Colonial Secretary met with the British Prime Minister and the Defence Secretary. The record of that meeting states that:

“The Colonial Secretary reported on the latest stage of the Constitutional Conference on Mauritius. He said that the Mauritians had opened their mouths very wide over compensation for the detachment of Diego Garcia. It was agreed that the Prime Minister would have a private word with Sir R.[sic] Ramgoolam on the following day.”¹³⁰

¹²⁵ UKCM, para. 2.61.

¹²⁶ Minute dated 3 September 1965 from E.H. Peck to Mr. Graham, FO 371/184527, p. 2, paras. 1-2: Annex 42.

¹²⁷ *Ibid.*

¹²⁸ MM, paras. 3.22-3.24.

¹²⁹ MM Annex 16, pp 2-3, 5. See MM paras. 3.23-3.24.

¹³⁰ Note for the Record relating to a Meeting held at No. 10 Downing Street on 20 September 1965 between the UK Prime Minister, the Colonial Secretary and the Defence Secretary, paras. 1-2: Annex 45. The meeting was not held the following day, but three days later on 23 September 1965. Contrary to what is suggested by the UK at paragraph 2.53 of its Counter-Memorial, it is evident that the meeting was not held at the instigation of the Premier of Mauritius. The meeting was in fact arranged by the Private Secretary of the UK Prime Minister following the report made by the Colonial Secretary to the Prime Minister on the latest stage of the Mauritius Constitutional Conference.

2.48 It is evident from this note that the overriding purpose of the Prime Minister’s meeting and “private word” with the Premier was to compel Sir Seewoosagur Ramgoolam to agree to the detachment. The meeting between the Premier and the British Prime Minister was a turning point in the efforts of the UK Government to secure the agreement of Mauritian political leaders to the detachment of the Chagos Archipelago.

2.49 The UK argues that during the meeting, the Premier:

“sought support for independence from the British Government to strengthen his political position against the *Parti Mauricien*, which did not want independence, as well as to extract as much value as possible from the agreement on detachment...”¹³¹

This interpretation by the UK of what happened at the meeting is erroneous, and based on a selective reading of the relevant documents.

2.50 It is telling that the UK completely ignores the key memo addressed to the British Prime Minister to brief him for the meeting with the Premier. This memo is set out at paragraph 3.25 of the Memorial, and is not addressed at any point by the UK in the Counter-Memorial. The memo is instructive because it sets out, in plain language, the objective of the meeting between the British Prime Minister and the Mauritian Premier:

“Sir Seewoosagur Ramgoolam is coming to see you at 10.00 tomorrow morning. The object is to frighten him with hope: hope that he might get independence; Fright lest he might not unless he is sensible about the detachment of the Chagos Archipelago. I attach a brief prepared by the Colonial Office, with which the Ministry of Defence and the Foreign Office are on the whole content. The key sentence in the brief is the last sentence of it on page three.”¹³²

2.51 The UK ignores this note, including the two underlined sentences which admit of no doubt as to what is being said. Instead, the UK quotes extensively from the record of the meeting between the Mauritian Premier and the British Prime Minister, but does so selectively, and again chooses to ignore those parts of the document that are unhelpful. It skirts past one key passage, omitting in the passage quoted below the words that are underlined:

“The Prime Minister said that he knew that the Colonial Secretary, like himself, would like to work towards Independence as soon as possible,

¹³¹ UKCM, para. 2.55.

¹³² Colonial Office, Note for the Prime Minister’s Meeting with Sir Seewoosagur Ramgoolam, Premier of Mauritius, 22 September 1965, PREM 13/3320: MM Annex 17. See MM, para. 3.25 *et seq.* The signature at the bottom of the note appears to be that of “Jow”. Although it is not possible to be certain, Mauritius believes this note was probably written by John Oliver Wright, the Principal Private Secretary of the then British Prime Minister (Harold Wilson), who also attended the meeting between the British Prime Minister and the Premier of Mauritius on 23 September 1965.

but that we had to take into consideration all points of view. He hoped that the Colonial Secretary would shortly be able to report to him and his colleagues what his conclusion was...¹³³

2.52 It is striking that the UK has quoted eight paragraphs from the record of this meeting and yet chosen to exclude these twelve words. The UK obviously recognises that the omitted words are unhelpful to its case. Given that this was a meeting focusing exclusively on the question of the detachment of the Chagos Archipelago, the obvious implication of those twelve words is that the Colonial Secretary might not decide to grant independence unless the Premier agreed to the excision. This implication is confirmed by what the Prime Minister said towards the end of the meeting, making clear the direct connection between independence and detachment:

“The Prime Minister went on to say in theory, there were a number of possibilities. The Premier and his colleagues could return to Mauritius either with Independence or without it. On the Defence point, Diego Garcia could either be detached by Order in Council or with the agreement of the Premier and his colleagues. The best solution of all might be Independence and detachment by agreement, although he could not of course commit the Colonial Secretary at this point.”¹³⁴

2.53 Mauritius invites the Tribunal to read the record of this meeting in its entirety, as well as the accompanying notes submitted to the UK Prime Minister in preparation of that meeting (set out at Mauritius Memorial, Annexes 17 and 18). The Premier’s agreement to the detachment must be understood in the context of the not-so-thinly veiled threat that independence would not be granted unless the Ministers agreed to the detachment. Sir Seewoosagur Ramgoolam understood perfectly well what was at stake: if he did not agree to detachment, Mauritius would not obtain independence.

2.54 At a second meeting held in the afternoon of 23 September 1965 between the Colonial Secretary and Mauritian political leaders (except for the leader of the PMSD), the Premier made one last attempt to reject the detachment proposal by asking whether the Archipelago could be leased. The Colonial Secretary told him that this was “not acceptable.”¹³⁵ Consequently, and against this background of pressure amounting to duress, Sir Seewoosagur Ramgoolam reluctantly agreed to the detachment of the Chagos Archipelago. He knew full well that in the absence of such an agreement, Mauritius would not obtain independence.¹³⁶ It is noteworthy that after the meeting, contrary to what is asserted by the UK at paragraph 2.58 of its Counter-Memorial, the

¹³³ See UKCM, para. 2.55, citing the Record of a Conversation between the Prime Minister and the Premier of Mauritius, at No. 10, Downing Street, at 10 a.m. on Thursday, 23 September 1965, FO 371/184528: MM, Annex 18, p. 1.

¹³⁴ Record of a Conversation between the Prime Minister and the Premier of Mauritius, at No. 10, Downing Street, at 10 a.m. on Thursday, 23 September 1965, FO 371/184528: MM, Annex 18, p. 3

¹³⁵ Record of a Meeting held in Lancaster House at 2.30 p.m. on Thursday 23rd September [1965], Mauritius Defence Matters, CO 1036/1253: MM, Annex 19, paras. 3 and 16.

¹³⁶ *Ibid.*

Colonial Office struggled to secure the agreement of the Premier and his colleagues to the record of the meeting.¹³⁷

2.55 Based on all the available evidence, there is no basis on which the UK can reasonably assert that independence and detachment were not connected.¹³⁸ In particular:

- (i) The question of whether to grant independence to Mauritius and the detachment of the Chagos Archipelago were inextricably linked, because the British Government believed that it would be their only opportunity to convince Ministers to agree to detachment. In a letter dated 26 July 1965 to the UK Mission to the UN, a Foreign Office official stated:

“... we believe that it will get progressively more difficult to detach the islands if Mauritius gets nearer to independence and impossible to do so if she becomes full independent....”¹³⁹

This view is also shared by the Deputy Secretary of State for Defence and the Parliamentary Under-Secretary of State for Foreign Affairs, who stated the following in a Memorandum dated 26 August 1965:

“...the line taken by the Colonial Secretary with Mauritius leaders at the Conference on future defence arrangements will profoundly affect our chances of carrying them with us in the proposed detachment of Diego Garcia and the Chagos Archipelago. If we fail to persuade them now, we may never again be in a position to do so at an acceptable cost. Indeed if Mauritius opts for independence at this conference, this will be our last chance to secure the Chagos Archipelago.”¹⁴⁰

- (ii) The record of a meeting held one week before the Constitutional Conference reveals that the British Prime Minister considered it essential that a decision on detachment be taken before the end of the Conference:

“The Prime Minister, summing up the discussion, ... A decision on whether or not we should detach the islands in question by Order in Council if the agreement of Mauritius Ministers could not be obtained to this course need not be taken at this stage, and until we could see how the forthcoming conference progressed. It was, however, essential that our position on the detachment of the islands should in no way be prejudiced

¹³⁷ Letter dated 8 October 1965 from the UK Colonial Office to the UK Foreign Office, FO 371/184529: MM, Annex 22, para. 2.

¹³⁸ UKCM paras. 2.54 and 2.61.

¹³⁹ Letter dated 26 July 1965 from S. Falle, UK Foreign Office to F.D.W. Brown, UK Mission to the United Nations, New York, FO 371/184526, para 2: Annex 35.

¹⁴⁰ Memorandum by the Deputy Secretary of State for Defence and the Parliamentary Under-Secretary of State for Foreign Affairs to the Defence and Oversea Policy Committee, “Defence Facilities in the Indian Ocean”, 26 August 1965, para. 3: Annex 39.

during its course and the Colonial Secretary should bring the matter back to the Committee in good time for a decision to be reached on this issue before the conference reached any conclusion.”¹⁴¹

- (iii) The records available to Mauritius also reveal that, contrary to the UK’s arguments in its Counter-Memorial, the grant of independence was very much dependent on the agreement of Mauritian Ministers to the detachment of the Chagos Archipelago. In a Minute sent during the Constitutional Conference, a Foreign Office official explained to the Foreign Secretary that detachment would be presented as a “package deal” during the Conference:

“... I learn from the Colonial Office that the defence facilities question is being treated in a small group consisting of the Colonial Secretary, the Governor and four of the principal Mauritian political leaders. Though the question has been mentioned in general terms, I understand that it has not been grasped and various side issues such as an increased U.S. sugar and immigration quotas are being explored. It seems likely that the detachment of the islands may have to be arranged in a package deal at the conclusion of the Constitutional Talks.”¹⁴²

An official at the Commonwealth Office also shared the view that detachment had been part of a “package deal”:

“... I am told ... that in addition H.M.G.’s decision to come out publicly in favour of independence for Mauritius was part of the deal between our own present Prime Minister and the Premier of Mauritius regarding the detachment of certain Mauritius dependencies for Biot...”¹⁴³

- (iv) The UK also informed the US that Mauritius would not get independence unless it agreed to the detachment. The record of a meeting of the Defence and Overseas Policy Committee provides this account:

“THE COMMONWEALTH SECRETARY said that at the time when the agreement for the detachment of BIOT was signed in 1965, Mauritian Ministers were unaware of our negotiations with the United States Government for a contribution by them towards the cost of compensation for detachment. They were further told that there was no question of a further contribution to them by the United States Government since this was a matter between ourselves and Mauritius, that the £3 million was the maximum we could afford, and that unless they accepted our

¹⁴¹ Extract from Minutes of 37th Meeting of Defence and Overseas Policy Committee held on 31 August 1965, p. 7: Annex 41.

¹⁴² Minute dated 15 September 1965 from E.H. Peck, UK Foreign Office to Secretary of State, para. 1: Annex 43.

¹⁴³ Minute dated 14 February 1967 from M.Z. Terry to Mr. Fairclough, Mauritius: Independence Commitment, FCO 32/268, para. 4: Annex 57.

proposals we should not proceed with the arrangements for the grant to them of independence...”¹⁴⁴

2.56 In its Counter-Memorial the UK argues that the issue of detachment was entirely separate from the question of independence and that:

“[i]f the full complement of Ministers had refused on 5 November 1965 to agree to detachment to the terms negotiated by the party leaders in September in London, the move towards independence would not have come to a halt.”¹⁴⁵

This statement is obviously inaccurate in light of the overwhelming evidence set out above and the conditions attached by the UK to the granting of independence to Mauritius.

2.57 The UK also suggests that the illegal detachment of the Chagos Archipelago was somehow legitimised by the subsequent “agreement” of the Council of Ministers on 5 November 1965, and that that “agreement” was freely given. However, this assertion does not reflect the true circumstances surrounding the Ministers’ “agreement” to detachment. In his announcement at the close of the Constitutional Conference, the Colonial Secretary indicated that the accession of Mauritius to independence was subject to certain conditions, namely that a general election would have to be held under a new electoral system, followed by the formation of a new government and the passing of a resolution by the new Assembly, asking for independence.¹⁴⁶ In the absence of fulfilment of these conditions, Mauritius would not have become independent. It was plain, therefore, that even though the agreement of the Council of Ministers was sought six weeks after the Colonial Secretary made his announcement, Mauritian Ministers still needed to agree to the detachment of the Chagos Archipelago so that Mauritius could obtain independence from the UK.

2.58 Moreover, while the UK contends that the Ministers were the democratically elected representatives of the Mauritian population,¹⁴⁷ it fails to mention that at the time the Mauritius Council of Ministers considered the proposal for the detachment of the Chagos Archipelago, it was presided over by the Governor, who was British.¹⁴⁸ The Council of Ministers was not fully autonomous and independent, and lacked the legal capacity to consent to the detachment of the Chagos Archipelago.

¹⁴⁴ Extract from Minutes of 20th Meeting of Defence and Oversea Policy Committee held on 25 May 1967, p. 2, para. 1: Annex 59. See also paragraph 3 of MM, Annex 20: “Mr. Fairclough then explained the position reached in the Mauritius constitutional conference. The British side had tried to keep the independence issue which the conference was really meant to deal with, separate from the defence project, but the outcome of the latter was found to depend partly on the former problem. (Record of a Meeting with an American Delegation headed by Mr. J.C. Kitchen, on 23 September, 1965, pages 1-2, para. 3)

¹⁴⁵ UKCM, para. 2.61.

¹⁴⁶ Report of Mauritius Constitutional Conference 1965: UKCM, Annex 11, para. 20.

¹⁴⁷ UKCM, para. 2.61.

¹⁴⁸ Section 68(1) of the Constitution of Mauritius set out in Schedule 2 to the Mauritius (Constitution) Order 1964: Annex 28.

(c) The evidence relied on by the UK

2.59 To support its argument that Mauritian Ministers agreed to the detachment, the UK relies on four parliamentary statements in the Mauritius Legislative Assembly, as well as the 1983 Report of the Select Committee on the Excision of the Chagos Archipelago. When read in their proper context, which the UK conveniently ignores, none of these assists the UK's case.

2.60 The UK refers to a parliamentary question in the Legislative Assembly from Mr Duval, the leader of the PMSD, and claims that Mr Forget's response "affirmed the existence of an agreement". However, Mr Forget's response does not confirm any of the assertions made by the UK in paragraph 2.61 of the Counter-Memorial. The response does no more than set out Mr Forget's understanding of the terms set out at paragraph 22 of the Record of the Meeting held on 23 September 1965.¹⁴⁹

2.61 Likewise, the statement by the Prime Minister of Mauritius in the Legislative Assembly on 26 June 1974 quoted in the Counter-Memorial does not support any of the UK's assertions.¹⁵⁰ The relevant passage reads:

"First of all, Sir, with regard to the ceding of Diego Garcia by this Government, I will actually say that it is not what my hon. friends opposite are saying. I will refer them to the Colonial Boundaries Act of 1895 which confers on Her Majesty the Queen... the power to alter the boundaries of colonies by order in Council, or letters patent, with the proviso that the consent of the self governing Colony, shall be required for the alteration of the boundaries thereof.

It is by this that Seychelles and Mauritius were separated. It is by this that Diego was separated from Mauritius. By an Order in Council in 1965, dated 8th November, Her Majesty the Queen ordered that the British Indian Ocean Territory be constituted consisting of certain islands included in the dependencies of Mauritius and of other territories.

The Government of Mauritius was nevertheless informed, after we had discussed in England, that this had taken place, and we gave our consent to it. It was done like this, but the day it is not required it will revert to Mauritius... That is the position. Even if we did not want to detach it, I think, from the legal point of view, Great Britain was entitled to make arrangements as she thought fit and proper. This in principle was agreed even by the P.M.S.D. who was in Opposition at the time; and we had

¹⁴⁹ See UKCM, Annex 15 and Record of a Meeting held in Lancaster House at 2.30 p.m. on Thursday 23rd September [1965], Mauritius Defence Matters, CO 1036/1253: MM, Annex 19.

¹⁵⁰ UKCM, para. 2.62; MM, Annex 71.

consultations, and this was done in the interest of the Commonwealth, not of Mauritius only”.¹⁵¹

While the Mauritian Prime Minister explained that “we gave our consent” to the excision of the Chagos Archipelago, he reveals that Ministers “did not want to detach it”.

2.62 The UK also quotes from a statement by Sir Harold Walter at a parliamentary debate on 26 June 1980 to the effect that “it was by consent that [the Chagos Archipelago] was excised” and that “BIOT” “forms part of Great Britain and its overseas territories, just as France has *les Dom Tom*; it is part of British territory and there is no getting away from it [...]”¹⁵² However, these two short passages quoted by the UK are taken out of context and do not reflect the point that Sir Harold Walter was making. These passages, when read in context, simply acknowledge the fact that the UK had detached the Chagos Archipelago to create a new “Overseas Territory”. Sir Harold Walter was quite clear in his statement that Ministers did not freely agree to the detachment:

“What the Prime Minister has been saying all along is that at the moment that Britain excised Diego Garcia from Mauritius, it was by an Order in Council! The Order in Council was made by the masters at that time! What choice did we have? We had no choice! We had to consent to it because we were fighting alone for independence! There was nobody else supporting us on that issue! We bore the brunt!”¹⁵³

2.63 This is also reflected in a statement of the Mauritian Prime Minister in Parliament on 11 April 1979. When a member of the Opposition stated during a debate that the Mauritian Labour Party had given its consent to the detachment of the Chagos Archipelago, the Prime Minister simply responded: “We had no choice.”¹⁵⁴

2.64 Statements made during that debate by the Leader of the Opposition and the Minister of Economic Planning and Development also provide an account that is at odds with that portrayed by the UK:

Leader of the Opposition (Mr A. Jugnauth)

“...we maintain that, being given that we were still a colony, and being given that the United Nations Resolution, that, before a colony is granted its freedom, the power which had colonised that country has no right to extract any part of its territory, therefore we consider that it was something completely unilateral and has no

¹⁵¹ Mauritius Legislative Assembly, 26 June 1974, Committee of Supply, cols 1946-1947: MM, Annex 71 (footnotes omitted).

¹⁵² UKCM, para. 2.62(c).

¹⁵³ UKCM, Annex 35, col 3413. The record of this parliamentary debate is also at MM, Annex 92.

¹⁵⁴ MM Annex 85, col. 456.

validity whatsoever; and we, in the Opposition, have made it very clear, we have even written to the British Government stating our position in the MMM, and that if we ever come to power in this country, what stand we are taking as regards the Chagos Archipelago.”¹⁵⁵

Minister of Economic Planning and Development (Mr R. Ghurburun)

“There is no doubt that, when the islands were excised, it was done through an undue influence. England was a metropolis, we were a Colony. Even all our leaders who were there, even if they consented to it, their consent was viciated [sic], because of the relationship. The major issue was to gain independence, and therefore the consent was viciated [sic], there was no consent at all.”¹⁵⁶

2.65 The UK relies on an exchange between Mr. Boodhoo and the Prime Minister of Mauritius. The passage quoted by the UK is as follows:

“Mr Boodhoo: Was the excision of these islands a precondition for the independence of this country?

Prime Minister: Not exactly.

Mr Bérenger: Since the Prime Minister says to-day that his agreement was not necessary for the “excision” to take place, can I ask the Prime Minister why then did he give his agreement which was reported both in Great Britain and in this then – Legislative Council in Mauritius?

Prime Minister: It was a matter that was negotiated, we got some advantage out of this and we agreed.”¹⁵⁷

However, the very next question posed by Mr Bérenger (not quoted by the UK) reveals the true circumstances surrounding the Prime Minister’s “agreement” to the excision:

Mr Bérenger: Can the Prime Minister confirm having said to the Christian Science Monitor this month the following:

“There was a nook around my neck. I could not say no. I had to say yes, otherwise the noose would have tightened.”¹⁵⁸

2.66 To support its claim that Mauritian Ministers agreed to the detachment of the Chagos Archipelago, the UK also refers to the report of the Select Committee of the

¹⁵⁵ Mauritius Legislative Assembly, 26 June 1980: MM Annex 92, col. 3318.

¹⁵⁶ *Ibid.*, col. 3399.

¹⁵⁷ See UKCM, para. 2.62, citing Mauritius Legislative Assembly, 25 November 1980: MM, Annex 96.

¹⁵⁸ Mauritius Legislative Assembly, 25 November 1980, col 4223, MM, Annex 96.

Mauritius Legislative Assembly on the Excision of the Chagos Archipelago. It quotes selectively from the report to gloss over the duress under which consent was obtained. It states that “Sir Seewoosagur Ramgoolam is recorded by the Select Committee as refusing to describe the deal as blackmail”.¹⁵⁹ That Sir Seewoosagur Ramgoolam did not describe the “deal” as blackmail does not mean that what had occurred was not blackmail, as clearly borne out by UK documents relating to the detachment of the Chagos Archipelago, which were declassified years after the setting up of the Select Committee. The Select Committee did in fact conclude that there was “a blackmail element which strongly puts into question the legal validity of the excision”¹⁶⁰, and the UK omits to mention that the Select Committee stated the following:

“What is of deeper concern to the Select Committee is the indisputable fact that a choice was offered through Sir Seewoosagur to the majority of delegates supporting independence and which attitude cannot fall outside the most elementary definition of blackmailing. Sir Harold Walter, deponing before the Select Committee on 11th January 1983, will even go to the length of stating that the position was such that, had Diego Garcia which ‘was, certainly, an important tooth in the whole cogwheel leading to independence’ not been ceded, the grant of national sovereignty to Mauritius ‘would have taken more years probably.’”¹⁶¹

2.67 The UK also relies on part of a statement made by the Prime Minister of Mauritius in a parliamentary debate on 6 July 1982. The UK quotes the passage below in its Counter-Memorial, but it has omitted the words that are underlined:

“The Government – if I may call it so because we were still under the colonial rule – those persons who were then in the Legislative Council (or Assembly, as it was called, I am not so sure), who were supposed to represent the people of this country – to facilitate the process of independence, had forgone part of the territory and it seemed that they accepted that the British Indian Ocean Territory be created.”¹⁶²

2.68 Once again, the UK omits words from passages it cites because those words undermine its case. The Prime Minister’s statement is consistent with Mauritius’ argument: first, the “agreement” was necessary to achieve independence (it was “to facilitate the process of independence”) and second, that “agreement” was not a true expression of the wishes of the people of Mauritius.

2.69 In the light of the foregoing, contrary to what has been contended by the UK in paragraph 2.61 of its Counter-Memorial:

- (i) The Mauritius Council of Ministers did not freely give its “consent” to the detachment of the Chagos Archipelago;

¹⁵⁹ UKCM, para. 2.63.

¹⁶⁰ UKCM, Annex 46, pp. 36-37.

¹⁶¹ *Ibid.*

¹⁶² UKCM, Annex 43; col 336.

- (ii) The Council of Ministers did not secure “benefits” in return for its “consent”. The compensation provided by the UK Government and the other “benefits” were in fact inducements meant for securing the “consent” of the Council of Ministers to the detachment of the Chagos Archipelago;
- (iii) The Council of Ministers was not an independent body that could validly give its consent to the detachment of the Chagos Archipelago from the territory of Mauritius;
- (iv) While Mauritian Ministers might have suggested that discussions of the UK proposal for the detachment of the Chagos Archipelago from Mauritius take place in London during the Mauritius Constitutional Conference, the UK Government devised tactics to ensure that it would secure their “agreement” to the detachment of the Chagos Archipelago before the end of the Conference. The UK Government exploited the disagreement between the main Mauritian political parties on whether Mauritius should obtain independence and on the holding of a referendum on the future constitutional status of Mauritius, and made the grant of independence to Mauritius conditional on the detachment of the Chagos Archipelago; and
- (v) The accession of Mauritius to independence was conditional on the fulfilment of certain prerequisites: the move toward independence would have come to a halt if the Mauritius Council of Ministers had refused to agree to the detachment of the Chagos Archipelago.

IV. Reaction at the UN and Subsequent Protest By Mauritius

2.70 Five years before the detachment of the Chagos Archipelago, on 14 December 1960, the UN General Assembly adopted Resolution 1514 (XV). Operative paragraph 6 of that resolution provides:

“Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.”¹⁶³

The United Kingdom cannot assert – and it has not asserted – that it was unaware of this fundamental requirement, or that it was unable to give effect to it.

2.71 As acknowledged by the UK in its Counter-Memorial, the UN General Assembly subsequently adopted three resolutions addressing the detachment of the Chagos Archipelago: 2066 (XX), 2232 (XXI) and 2357 (XXII).¹⁶⁴ The adoption of these

¹⁶³ MM, Annex 1.

¹⁶⁴ UKCM, para. 2.67.

resolutions, and the fierce criticism faced by the UK after the establishment of the “BIOT”, is described at paragraphs 3.43-3.52 of Mauritius’ Memorial.

2.72 An article by Professor S. A. de Smith, on which the UK relies in its Counter-Memorial, gives a flavour of the criticism faced by the UK after the creation of the “BIOT”:

“Mauritius was first discussed at the United Nations in 1964, and then only in a perfunctory way. The creation of the British Indian Ocean Territory was naturally condemned: it involved the dismemberment of existing colonial territories and the establishment of a new colony with a view to its use for ‘foreign bases.’ Indeed, the Committee of Twenty-Four has refused to recognise the existence of the new colony as a legitimate entity.”¹⁶⁵

2.73 On 16 December 1965, just over one month after the creation of the “BIOT”, the General Assembly adopted resolution 2066 (XX). The resolution states (in part):

“[...]

Recalling its resolution 1514 (XV) of 14 December 1960 containing the Declaration on the Granting of Independence to Colonial Countries and Peoples,

Regretting that the administering Power has not fully implemented resolution 1514 (XV) with regard to that Territory,

Noting with deep concern that any step taken by the administering Power to detach certain islands from the Territory of Mauritius for the purpose of establishing a military base would be in contravention of the Declaration, and in particular of paragraph 6 thereof,

[...]

2. *Reaffirms* the inalienable right of the people of the Territory of Mauritius to freedom and independence in accordance with General Assembly resolution 1514 (XV);

3. *Invites* the Government of the United Kingdom to take effective measures with a view to the immediate and full implementation of resolution 1514 (XV);

4. *Invites* the administering Power to take no action which would dismember the Territory of Mauritius and violate its territorial integrity;

¹⁶⁵ UKCM, Annex 22, p. 611.

5. *Further invites* the administering Power to report to the Special Committee and to the General Assembly on the implementation of the present resolution;

[...]¹⁶⁶

Describing this resolution, the UK argues that:

“As a resolution of the General Assembly, resolution 2066 (XX) was not legally binding but recommendatory. The United Kingdom did not accept the invitation contained in its operative paragraph 4. It did not accept that the Chagos Islands were an integral part of the territory of Mauritius, nor were they considered to be of any economic relevance to Mauritius.”¹⁶⁷

Mauritius notes that, as described above, the Chagos Archipelago has always unquestionably been part of the territory of Mauritius, and was also of economic relevance to Mauritius until its unlawful detachment.

2.74 While operative paragraph 4 of resolution 2066 (XV) is not legally binding, as a paragraph in a General Assembly resolution, this does not deprive it of legal consequences. Furthermore, resolution 2066 (XX) read alongside resolutions 1514 (XV), 2232 (XXI), 2357 (XXII) and the views expounded by representatives in the Fourth Committee, indicates that the great majority of States regard as legally valid Mauritius’ stand that the Chagos Archipelago has always been, and is, an integral part of Mauritius, and that its excision was unlawful.

2.75 In its Counter-Memorial, the UK makes much of the fact that resolution 2066 (XX) was adopted “after the establishment of the BIOT on 8 November 1965.”¹⁶⁸ Although this is true, it merely reflects the UK’s strategy in 1965 to present the UN with a *fait accompli* with regard to the establishment of the “BIOT”. As noted in the Memorial, in the weeks after the Constitutional Conference in September 1965 the UK was worried that its plans to establish the “BIOT” would be derailed. Writing to the UK Mission at the UN, the Foreign Office explained that “We are concerned lest any hostile reference to these proposals in the Fourth Committee might jeopardize final discussions in the Mauritius Council of Ministers...”¹⁶⁹

2.76 The UK Colonial Secretary’s solution was to avoid widespread condemnation at the UN by pressing ahead quickly and establishing the “BIOT” as a *fait accompli*. As set out in the Memorial, the Colonial Secretary wrote to the UK Prime Minister and explained that:

¹⁶⁶ UNGA 2066 (XX), MM, Annex 38.

¹⁶⁷ UKCM, para. 2.74.

¹⁶⁸ UKCM, para. 2.73.

¹⁶⁹ MM, para. 3.36 and MM, Annex 23.

“6. From the United Nations point of view the timing is particularly awkward. We are already under attack over Aden and Rhodesia, and whilst it is possible that the arrangements for detachment will be ignored when they become public, it seems more likely that they will be added to the list of ‘imperialist’ measures for which we are attacked. We shall be accused of creating a new colony in a period of decolonisation and of establishing new military bases when we should be getting out of the old ones. If there were any chance of avoiding publicity until this session of the General Assembly adjourns at Christmas there would be advantage in delaying the Order in Council until then. But to do so would jeopardise the whole plan.

7. The Fourth Committee of the United Nations has now reached the item on Miscellaneous Territories and may well discuss Mauritius and Seychelles next week. If they raise the question of defence arrangements on the Indian Ocean Islands before we have detached them, the Mauritius Government will be under considerable pressure to withdraw their agreement to our proposals. Moreover we should lay ourselves open to an additional charge of dishonesty if we evaded the defence issues in the Fourth Committee and then made the Order in Council immediately afterwards. It is therefore important that we should be able to present the U.N. with a fait accompli.”¹⁷⁰

The Colonial Secretary also explained that by arranging for the Order in Council to be made on 8 November 1965:

“we shall have a good chance of completing the operation before discussion in the Fourth Committee reached the Indian Ocean Islands. We shall then be better placed to meet the criticism which is inevitable at whatever time we detach these islands from Mauritius and Seychelles.”¹⁷¹

2.77 UK representatives openly discussed the possibility of delaying discussion of the Indian Ocean Islands “e.g. by prolongation of Rhodesia debate or resumption of discussion on Aden.”¹⁷² The “*fait accompli*” of separation was also recognised in a letter by a UK representative at the UN to the Colonial Office: “Many delegations may not

¹⁷⁰ Minute dated 5 November 1965 from the Secretary of State for the Colonies to the Prime Minister, FO 371/184529: Annex 26, pp. 3-4; MM, para. 3.38.

¹⁷¹ Minute dated 5 November 1965 from the Secretary of State for the Colonies to the Prime Minister, FO 371/184529: Annex 26, para. 9. See also: Foreign Office Telegram No. 4104 to the UK Mission to the United Nations, New York, 27 October 1965: MM, Annex 23; UK Mission to the United Nations, New York, Telegram No. 2697 to the Foreign Office, 28 October 1965: MM, Annex 24; Foreign Office Telegram No. 4310 to the UK Mission to the United Nations, New York, 6 November 1965: MM, Annex 28; Foreign Office Telegram No. 4327 to the UK Mission to the United Nations, New York, 8 November 1965: MM, Annex 30; UK Mission to the United Nations, New York, Telegram No. 2837 to the Foreign Office, 8 November 1965: MM, Annex 31; Foreign Office Telegram No. 4361 to the UK Mission to the United Nations, New York, 10 November 1965: MM, Annex 33.

¹⁷² UK Mission to the United Nations, New York, Telegram No. 2697 to the Foreign Office, 28 October 1965: MM, Annex 24.

have tumbled to the fait accompli of separation.”¹⁷³ In addition, a 1966 briefing paper prepared by the Foreign Office in consultation with the Commonwealth Office and Ministry of Defence explains (under the heading “tactics”) that:

“So far, the United Nations has dealt with the subject of B.I.O.T. almost entirely in the context of Mauritius. In last year’s Fourth Committee and General Assembly no cognisance was taken of the existence of B.I.O.T. as a separate entity and many delegations may not have tumbled to the fait accompli of separation.”¹⁷⁴

2.78 These records indicate that the UK acted in a manner calculated to conceal the detachment from the UN. In its Counter-Memorial the UK does not challenge this account, and it is difficult to see how it could do so. It is plain, too, that the UK would not have acted as it did unless it had foreseen that the detachment would attract widespread criticism and condemnation. The UK’s remark at paragraph 2.73 that resolution 2066 (XX) was adopted after the detachment of the Chagos Archipelago has no bearing on the illegality of such conduct. Rather than assist the UK, the remark highlights the fact that the UK deliberately established the “BIOT” as a *fait accompli* to seek to avoid international condemnation.

2.79 At paragraph 2.69 of its Counter-Memorial, the UK gives this account of proceedings at the Fourth Committee:

“The detachment of the Chagos Archipelago was discussed in the Fourth Committee of the United Nations General Assembly on 16 November 1965, after the establishment of the BIOT. The real concern of the few speakers who addressed the topic (Tanzania, Cuba, India and Yugoslavia) seemed to be the establishment of a military base in the Indian Ocean, rather than any breach of the principle of self-determination.”¹⁷⁵

2.80 Once again, the UK has resorted to a selective reading of the text, providing a partial and factually inaccurate account of the proceedings. Mauritius has already referred to the General Assembly resolutions condemning the dismemberment of Mauritius.¹⁷⁶ While at times the criticisms in the Fourth Committee were directed to the dismemberment of non-self-governing territories for the purpose of establishing military bases, it is clear that they were also opposed to dismemberment *per se*. Each of the four speakers referred to by the UK did allude to the military installations, but among their real concerns was unquestionably the unlawful excision of the Chagos Archipelago from Mauritius. In relation to all four delegations, their objections to the creation of the

¹⁷³ Despatch dated 2 February 1966 from F.D.W. Brown, UK Mission to the United Nations, New York to C.G. Eastwood, Colonial Office, MM, Annex 40, para. 3 (emphasis in the original).

¹⁷⁴ Note by UK Foreign Office, ‘Presentation of British Indian Ocean Territory in the United Nations,’ 8 September 1966, FCO 141/1415, para. 13: Annex 54.

¹⁷⁵ UKCM, para. 2.69 (footnotes omitted).

¹⁷⁶ MM, paras. 6.20-6.22.

“BIOT” related to resolution 1514 (XV) and the violation of the right of self-determination: the records of these discussions are considered further in Chapter 5.¹⁷⁷

2.81 Moreover, the UK’s own report of the Fourth Committee meeting on 16 November 1965 clearly shows that the “real concern” of the four abovementioned speakers was not “the establishment of a military base on the Indian Ocean, rather than any breach of the principle of self-determination.”¹⁷⁸ The UK Mission to the UN wrote to the Foreign Office on the same day as the meeting, giving this account:

“Fourth Committee – British Indian Ocean Territory.

This was raised in today’s debate by Tanzania, Cuba, Yugoslavia and in passing by India [sic]. Speakers quoted Press reports of the United Kingdom announcement of 10 November and concentrated on:

- (a) creation of a new ‘colony’;
- (b) inadmissibility of detaching land from a colonial Government regardless of compensation (‘hush money’) paid;
- (c) damage to interests of a minority even if representatives of the majority has been persuaded to agree; and
- (d) violation of Resolution 1514 (xv)”¹⁷⁹

2.82 This contemporaneous account of the Fourth Committee meeting by UK representatives totally contradicts the account now offered by the UK in its Counter-Memorial.¹⁸⁰ The widespread condemnation of the dismemberment of Mauritius is set out in detail in Mauritius’ Memorial.¹⁸¹

2.83 In addition to protests at the UN, the Mauritius Memorial¹⁸² explained that there has been sustained condemnation of the UK’s unlawful excision of the Chagos Archipelago within the Non-Aligned Movement (“NAM”),¹⁸³ the Africa-South America

¹⁷⁷ Paras. 5.27-5.30 below.

¹⁷⁸ UKCM, para. 2.69.

¹⁷⁹ MM, Annex 35.

¹⁸⁰ See also MM, Annexes 42, 43 and 47, in which the UK reports on other UN debates at which representatives criticised the UK for detaching the Chagos Archipelago from the territory of Mauritius for the purpose of establishing a military facility on Diego Garcia.

¹⁸¹ MM, paras. 3.43-3.52.

¹⁸² See MM, paras 3.109-3.111.

¹⁸³ MM, Annex 104.

Summit,¹⁸⁴ the Organization of African Unity,¹⁸⁵ the African Union¹⁸⁶ and the Group of 77 and China.¹⁸⁷

2.84 Since the filing of the Memorial on 1 August 2012, the Group of 77 has issued two further Ministerial Declarations, noting that the Chagos Archipelago was “unlawfully excised from the territory of Mauritius in violation of international law and United Nations General Assembly resolutions 1514 (XV) of 14 December 1960 and 2066 (XX) of 16 December 1965”¹⁸⁸ The Final Document issued at the 16th Summit of Heads of State or Government of the Non-Aligned Movement also reaffirmed that the Chagos Archipelago was detached from Mauritius in violation of resolutions 1514 (XV) and 2066 (XX). The Heads of State or Government of the NAM also:

“noted with grave concern that despite the opposition expressed by the Republic of Mauritius, the United Kingdom purported to establish a marine protected area around the Chagos Archipelago, further infringing upon the territorial integrity of the Republic of Mauritius and impeding the exercise of its sovereignty over the Chagos Archipelago as well as the exercise of the right to return of Mauritian citizens who were forcibly removed from the Archipelago by the United Kingdom.”¹⁸⁹

Likewise, the Malabo Declaration issued at the Third Africa-South America Summit reaffirmed that:

“the Chagos Archipelago, including Diego Garcia, which was unlawfully excised by the former colonial power from the territory of the Republic of Mauritius in violation of international law and UN Resolutions 1514 (XV) of 14 December 1960 and 2066 (XX) of 16 December 1965, forms an integral part of the territory of the Republic of Mauritius. In this regard, *we note with grave concern* that despite the strong opposition of the Republic of Mauritius, the United Kingdom purported to establish a ‘marine protected area’ around the Chagos Archipelago which contravenes international law and further impedes the exercise by the Republic of Mauritius of its sovereignty over the Archipelago and the right of return of Mauritian citizens who were forcibly removed from the Archipelago by the United Kingdom. *We resolve* to fully support all peaceful and legitimate measures already taken and which will be taken by the Government of Mauritius to effectively exercise its sovereignty over the Chagos Archipelago and, in this respect, *call upon* the United

¹⁸⁴ MM, Annex 149.

¹⁸⁵ MM, Annex 93, 112 and 117.

¹⁸⁶ MM, Annex 168 and 170

¹⁸⁷ MM, Annex 174.

¹⁸⁸ Extracts from Declarations adopted by the Thirty-Sixth and Thirty-Seventh Annual Meetings of Ministers for Foreign Affairs of the Member States of the Group of 77 held in New York on 28 September 2012 and 26 September 2013 respectively: Annex 171.

¹⁸⁹ Extract from Final Document adopted by the 16th Summit of Heads of State or Government of the Non-Aligned Movement, Tehran, 26-31 August 2012: Annex 170.

Kingdom to expeditiously end its unlawful occupation of the Chagos Archipelago...”¹⁹⁰

At their last Summit held in May 2013 in Addis Ababa, the Heads of State and Government of the African Union adopted a Solemn Declaration on the occasion of the 50th Anniversary of the OAU/AU, in which they reaffirmed their call for an expeditious end to the unlawful occupation of the Chagos Archipelago.¹⁹¹ They also reiterated their support for the sovereignty of Mauritius over the Chagos Archipelago in their “Declaration on the Report of the Peace and Security Council on its Activities and the State of Peace and Security in Africa”.¹⁹²

2.85 In the forty-eight years since the detachment of the Chagos Archipelago, Mauritius has asserted its sovereignty over the Chagos Archipelago on numerous occasions. It has consistently asserted its rights in statements to the UN General Assembly since 1980 (see Mauritius Memorial Annex 95, which contains extracts from 28 such statements). Most recently, at the General Debate of the 68th Session of the UN General Assembly on 28 September 2013, the Prime Minister of Mauritius made the following statement:

“The dismemberment of part of our territory, the Chagos Archipelago – prior to independence – by the then colonial power, the United Kingdom, in clear breach of international law, leaves the process of decolonisation not only of Mauritius but of Africa, incomplete.

Yet, the United Kingdom has shown no inclination to engage in any process that would lead to a settlement of this shameful part of its colonial past.

I am confident that the UK and the US would want to be on the right side of history.

States which look to the law and to the rules of the comity of nations for the resolution of disputes should not be frustrated by the lack of avenues under international law for settlement of these disputes.”¹⁹³

2.86 Mauritius has also consistently asserted its sovereignty over the Chagos Archipelago in bilateral communications with the UK,¹⁹⁴ and has protested the UK’s

¹⁹⁰ Extract from the Malabo Declaration adopted by the Third Africa-South America Summit held on 20-22 February 2013, Malabo, Equatorial Guinea: Annex 173.

¹⁹¹ African Union Assembly of Heads of State and Government, 50th Anniversary Solemn Declaration, 26 May 2013, Addis Ababa, p. 3: Annex 175.

¹⁹² African Union Assembly of Heads of State and Government, Declaration on the Report of the Peace and Security Council on its Activities and the State of Peace and Security in Africa, Assembly/AU/Decl.1(XXI), 27 May 2013, Addis Ababa, p. 4: Annex 176.

¹⁹³ Statement by the Prime Minister of Mauritius at the General Debate of the 68th Session of the United Nations General Assembly, New York, 28 September 2013, p. 8: Annex 180.

¹⁹⁴ See MM, para. 3.73 and fn 234, referring to MM Annex 106, 111, 113, 116, 157, 162, 167, 172 and 173.

creeping assertion of maritime zones around the Chagos Archipelago.¹⁹⁵ Referring to the statement made by the Prime Minister of Mauritius at the UN General Assembly on 9 October 1980, the UK argues that it is unspecific and “was no more than a claim to Diego Garcia and an acknowledgement that the United Kingdom had agreed that it would revert to Mauritius at a future date.”¹⁹⁶ The UK further argues that the statement “was not to be construed as an assertion by Mauritius that, as of 1980, it already enjoyed current sovereignty.”¹⁹⁷ Mauritius does not agree. The 1980 statement reflects the Prime Minister’s belief that the UK recognised that Mauritius enjoyed sovereignty over the Chagos Archipelago:

“Here it is necessary for me to emphasise that Mauritius, being in the middle of the Indian Ocean, has already ... reaffirmed its claim to Diego Garcia, and the PM of Great Britain in a parliamentary statement has made it known that the island will revert to Mauritius when it is no longer required for the global defence of the West. Our sovereignty having thus been accepted, we should go further than that and disband the BIOT and allow Mauritius to come into its natural heritage as before independence.”¹⁹⁸

2.87 The UK also refers to subsequent occasions between 1982 and 1998 when Mauritius referred to the Chagos Archipelago in the UN General Assembly’s annual general debate. The UK argues that the speeches between 1982 and 1998 “were consistent with present United Kingdom sovereignty over the Chagos Archipelago” and implies that, suddenly, in 1999 the language used by Mauritius changed, requiring a further reply from the UK.¹⁹⁹

2.88 This is not an accurate portrayal of Mauritius’ protests at the UN. The references to the Chagos Archipelago in speeches between 1982 and 1998 were not in any way “consistent with present United Kingdom sovereignty over the Chagos Archipelago”, as is obvious to any reader. Mauritius has consistently rejected the UK’s claim to sovereignty over the Chagos Archipelago, and asserted that the UK has acted in contravention of international law and General Assembly Resolutions 1514 (XV) and 2066 (XX). The following three statements made at the General Assembly illustrate this point:²⁰⁰

- (i) Statement by Hon. Anerood Jugnauth, Prime Minister, at the 37th Session of the United Nations General Assembly (15 October 1982):

“At this juncture I should like to dwell on an issue which affects the vital interests of Mauritius; I mean the

¹⁹⁵ See MM, Chapter 4 and MM, Chapter 6, para. 6.31.

¹⁹⁶ UKCM, para. 2.83.

¹⁹⁷ *Ibid.*

¹⁹⁸ MM, Annex 95; UKCM, para. 2.82.

¹⁹⁹ UKCM, paras. 2.85-2.86.

²⁰⁰ MM, Annex 95.

Mauritian claim of sovereignty over the Chagos Archipelago, which was excised by the then colonial Power from the territory of Mauritius in contravention of General Assembly resolutions 1514 (XV) and 2066 (XX).”

- (ii) Statement by Sir Satcam Boolell QC, Minister of External Affairs and Emigration, at the 42nd Session of the United Nations General Assembly (9 October 1987):

“I should like to remind this Assembly in this connection that the Chagos Archipelago, which belonged to Mauritius, was excised from our territory before we obtained independence, in clear violation of the principles of the United Nations.”

- (iii) Statement by Sir Satcam Boolell QC, Deputy Prime Minister and Minister of External Affairs and Emigration, at the 44th Session of the United Nations General Assembly (27 September 1989):

“As the Assembly is aware, the Government and people of Mauritius have not accepted the fact that an important part and parcel of their territory has been excised by the former colonial Power in contravention of United Nations General Assembly resolutions 1514 (XV) and 2066 (XX). The dismemberment of Mauritian territory constitutes an unacceptable affront to our sovereignty. Mauritius cannot and will not remain silent until Diego Garcia and the Chagos Archipelago, as well as the Tromelin Island, are returned to us.”

2.89 These three examples show that, contrary to the UK’s assertion, Mauritius’ statements between 1982 and 1998 firmly rejected the notion of UK sovereignty over the Chagos Archipelago and (in two of the examples above) explicitly referred to resolutions 1514 (XV) and 2066 (XX). Moreover, in its bilateral communications with the UK during this period, Mauritius reaffirmed its sovereignty over the Chagos Archipelago.²⁰¹ There was no change of language in the 1999 statement, as the UK argues, eliciting further reply from the UK. The statement of 30 September 1999 by the then Deputy Prime Minister of Mauritius is entirely consistent with the pre-1999 statements:

“We have consistently drawn the attention of the Assembly to the issue of the Chagos Archipelago, which was detached from Mauritius by the

²⁰¹ See Note Verbale dated 10 February 1984 from Ministry of External Affairs, Tourism and Emigration, Mauritius to British High Commission, Port Louis, No. 6/84(1197/12): Annex 89; Note Verbale dated 10 May 1985 from Ministry of External Affairs, Tourism and Emigration, Mauritius to British High Commission, No. 12/85(1197): Annex 91; Note Verbale dated 5 July 1990 from Ministry of External Affairs and Emigration, Mauritius to British High Commission, No. 31/90(1197): Annex 95.

former colonial Power prior to our independence in 1968, and also to the plight of over 2000 people who were forced to leave the land of their birth, where they had lived for generations, for resettlement in Mauritius. This was done in total disregard of the United Nations declaration embodied in resolution 1514 (XV), of 14 December 1960 and resolution 2066 (XX), of 16 December 1965, which prohibit the dismemberment of colonial Territories prior to independence.”²⁰²

2.90 The UK also makes reference to the period between Mauritius’ independence on 12 March 1968 and 1980, when Mauritius first raised the Chagos Archipelago at the United Nations. This twelve-year period covered the first years of Mauritian independence, and was one in which Mauritius was reliant (and dependent) on the largesse of its former colonial master. A report by J.E. Meade submitted to the Governor of Mauritius in September 1960 explained that Mauritius was a most extreme form of mono-crop economy, and that sugar accounted for 99% of the total value of its exports.²⁰³ At the time of independence, and in the period after, Mauritius was regarded as:

“a strong candidate for membership in the developing world’s club of ‘basket cases’. Its economy was extremely fragile, depending almost entirely upon sugar plantations, and it was plagued by what appeared to be irresolvable ethnic conflicts.”²⁰⁴

2.91 In the period immediately after independence, Mauritius faced a high rate of unemployment and had few natural resources. The main priority of the Government of Mauritius post-independence was the economic and social development of the country. Sir Seewoosagur Ramgoolam travelled to London in early 1969, to seek assistance for the development of Mauritius. Capital grants and other forms of financing from the United Kingdom played a vital role in financing the annual budgets of Mauritius in the late 1960s and early 1970s. The Overseas Development Administration and the Commonwealth Development Corporation financed projects in Mauritius, including key infrastructure projects such as the Northern Plains Irrigation Project and the construction of the M1 pipeline.

2.92 Mauritius was also highly dependent on the United Kingdom for foreign exchange earnings. More than 70% of its export earnings were derived from trade with the United Kingdom. Other forms of assistance received by Mauritius from the United Kingdom included food aid, training of specialist doctors, scholarships to Mauritian students for higher studies in British Universities, and support to research institutions such as the Mauritius Sugar Industry Research Institute.

2.93 Until the expiry of the Commonwealth Sugar Agreement in 1974, Mauritius sold 60% of its sugar to the United Kingdom at a negotiated price, thereby benefiting from a

²⁰² MM, Annex 95.

²⁰³ J. E. Meade *et al.*, *The Economic and Social Structure of Mauritius*, London: Frank Cass, 1968.

²⁰⁴ B. W. Carroll & T. Carroll, “State and Ethnicity in Botswana and Mauritius: A Democratic Route to Development?” *Journal of Development Studies*, vol. 33, No. 4, April 1997, pp. 464-486.

stable source of revenue that was dependent on UK support. This was done under the Commonwealth Sugar Agreement, which would come to an end with the UK's accession to the European Economic Community ("EEC") in 1973. Mauritius was relying on preferential access and a guaranteed market under the new Sugar Protocol to be negotiated with the EEC, and had to ensure the support of the UK in obtaining the best possible terms for its sugar exports. Under the Sugar Protocol, which was signed in 1975, Mauritius continued to export most of its sugar to the United Kingdom, at a guaranteed price.

2.94 In understanding what was – and was not – done during the period from 1968 to 1980, these circumstances have to be taken into account. Mauritius was confronted with a difficult socio-economic situation, and heavily dependent on its former colonial master to emerge from underdevelopment and become a strong independent State. Any protest by Mauritius during this period could have had far-reaching consequences, and would almost certainly have done so. As noted in para. 5.31 below, protest from Mauritius has on occasion resulted in threats from the UK that aid projects would be cancelled. While Mauritius did not raise the Chagos Archipelago in the United Nations until 1980, as early as 1977 Mauritian Ministers began referring to efforts to bring the Chagos Archipelago under its effective control in Parliamentary debates.²⁰⁵ Moreover, Mauritius first established an EEZ around the Chagos Archipelago in 1977.²⁰⁶

V. The United Kingdom's undertakings with regard to fishing, mineral and oil rights

2.95 The UK's undertakings with regard to fishing, mineral and oil rights are described in Chapter 3 of Mauritius' Memorial.²⁰⁷ The Counter-Memorial gives the impression that it is only "now" that Mauritius seeks to assert its fishing, mineral and oil rights.²⁰⁸ This is plainly wrong, as the evidence shows, and as the new documents which were readily available and known to the UK when it prepared its Counter-Memorial (but which it chose to withhold from this Tribunal) make clear. Mauritius has consistently reminded the UK of its undertaking to preserve the fishing rights of Mauritius in the waters of the Chagos Archipelago.²⁰⁹ In particular, Mauritius' right to fish in the waters of the Chagos Archipelago is set out in Mauritian legislation²¹⁰ and

²⁰⁵ In response to a parliamentary question on 8 November 1977, the Mauritius Minister of Finance stated that "...taking all factors into consideration, the way of trying to recuperate Diego Garcia is by patient diplomacy at bilateral and international levels, and no opportunity is lost by the Government to this end." (MM, Annex 82). Prime Minister Ramgoolam used the same language in response to a parliamentary question on 20 November 1979 (MM, Annex 88). In addition, when asked by Mr. Boodhoo on 27 November 1979 whether Diego Garcia still belongs to Mauritius, Prime Minister Ramgoolam responded "I would assume that, Sir." (MM, Annex 89, p. 5170).

²⁰⁶ MM, para. 4.2

²⁰⁷ MM, paras. 3.85-3.108.

²⁰⁸ UKCM, para. 2.92.

²⁰⁹ MM, para. 3.97.

²¹⁰ Section 3(6)(c) of the Mauritius Fisheries Act 1980, Act No. 5 of 1980: MM, Annex 91; Sections 37 and 39 of Fisheries and Marine Resources Act 1998: Annex 105; Part VI of Fisheries and Marine Resources Act 2007: Annex 113.

has been reaffirmed during parliamentary debates.²¹¹ Mauritius has also raised the issue of fishing, mineral and oil rights in bilateral exchanges with the UK.²¹²

(a) Fishing rights

2.96 The UK acknowledges the undertaking which was given to Mauritius in respect of fishing rights during the meeting held on 23 September 1965 at Lancaster House, and explains that British officials took steps to meet the commitment recorded in paragraph 22(vi) of the record of the Lancaster House meeting with respect to the fishing rights of Mauritius.²¹³ The UK has recognised Mauritian fishing rights in the Chagos Archipelago long before the creation of the “BIOT”, and it implicitly acknowledges in its Counter-Memorial that Mauritius has fishing rights. Mauritius set out a detailed account of its fishing rights at paragraphs 3.86-3.102 of the Memorial.

2.97 The UK Counter-Memorial refers to the Fisheries Limit Ordinance, No. 2 of 1971, section 4 of which was intended to preserve the fishing rights of Mauritius in the Chagos Archipelago.²¹⁴ With regard to this Ordinance, the UK argues that:

“The limitation to fishing in the contiguous zone reflected the defence and security preference of the United States and section 4 of the 1971 Immigration Ordinance prohibiting any person from entering or remaining in the Territory without a permit.”²¹⁵

However, the limitation to fishing by Mauritian fishing boats in the contiguous zone cannot be explained by the defence and security preference of the US. Bilateral UK-US correspondence reveals that the US had expressed no objection to the full 12-mile zone

²¹¹ Mauritius Legislative Assembly, 26 June 1974, Committee of Supply: MM, Annex 71, p. 1947; Mauritius Legislative Assembly, 5 July 1978, Committee of Supply: MM, Annex 84, p. 3116; Mauritius Legislative Assembly, 13 May 1980, Second Reading of the Fisheries Bill (No. IV of 1980), Statement by the Minister of Fisheries and Cooperative Development: MM, Annex 90, pp. 934-935.

²¹² See for example: Note Verbale dated 19 November 1969 from the Prime Minister’s Office (External Affairs Division), Mauritius to the British High Commission, Port Louis, No. 51/69 (17781/16/8): MM, Annex 54; Letter dated 4 September 1972 from the Prime Minister of Mauritius to British High Commissioner, Port Louis: MM, Annex 67; Letter dated 24 March 1973 from the Prime Minister of Mauritius to the British High Commissioner, Port Louis: MM, Annex 69; Letter dated 1 December 2005 from the Prime Minister of Mauritius to the Prime Minister of the United Kingdom: MM, Annex 132; Letter dated 13 December 2007 from the Prime Minister of Mauritius to the Prime Minister of the United Kingdom: MM, Annex 135; Note Verbale dated 23 November 2009 from the Ministry of Foreign Affairs, Regional Integration and International Trade, Mauritius to the UK Foreign and Commonwealth Office, No. 1197/28/10: MM, Annex 155; Letter dated 30 December 2009 from the Minister of Foreign Affairs, Regional Integration and International Trade, Mauritius to the UK Secretary of State for Foreign and Commonwealth Affairs: MM, Annex 157; Letter dated 19 February 2010 from the Secretary to Cabinet and Head of the Civil Service, Mauritius to the British High Commissioner, Port Louis: MM, Annex 162.

²¹³ UKCM, para. 2.93.

²¹⁴ MM, para. 3.94 and also UKCM, paras. 2.97-2.99: (“although it was intended that the [“BIOT”] Commissioner should designate Mauritius under section 4 to enable fishing by Mauritian vessels in the 3nm-12nm contiguous zone, this was not in fact done. However, the understanding was that Mauritian-flagged vessels were designated to fish in the 3nm-12nm contiguous zone.”)

²¹⁵ UKCM, para. 2.97.

being open to Mauritian vessels. In September 1968, the US was consulted on the UK proposal to establish the following three fishing zones in the “BIOT” waters:

- “(a) a full 12 mile zone open to unrestricted exploitation by Seychelles and (for Chagos only) Mauritius vessels before any defence interests become alive;
- (b) an inner 6 mile zone open to Seychelles and (for Chagos only) Mauritius vessels on a restricted access basis following defence arrangements, such restriction to be the minimum compatible with security requirements;
- (c) an outer 6 mile zone open to foreign vessels for a phase-out period. (This zone would remain open to Seychelles and Mauritius vessels after the phase-out period had been completed, unless security requirements made this impossible.)”²¹⁶

2.98 The US subsequently advised the UK that it had no objection to the establishment of the proposed fishing zones, subject to the limits not being defined by reference to defence arrangements or security interests.²¹⁷ When instructions were conveyed by the Foreign and Commonwealth Office on 28 April 1969 to the “BIOT” Administrator for the drafting of an Ordinance setting out the fishing regime to be established for the “BIOT”, the main points of the fishing regime were recapitulated as follows:

- “(a) a 12 mile fishing zone to be established around BIOT islands composed of an inner 3 mile zone and an outer 9 mile zone.
- (b) the outer 9 mile zone will be open for a phase out period of a year to any foreign fishing vessels who have established habitual fishing rights in BIOT waters. (We understand the only foreigners who may have done so are the Japanese and Taiwanese.)
- (c) Seychelles fishing vessels will be granted fishing rights within both inner and outer zones except that the Commissioner of BIOT may at any time after the expiry of the phase out period place restrictions on their fishing activities within the inner 6 mile zone.
- (d) Mauritian fishing vessels will likewise be granted fishing rights within both inner and outer zones around the islands of the Chagos Archipelago (ex-Mauritius) except that the BIOT Commissioner may at any time after the expiry of the phase out

²¹⁶ Letter dated 6 September 1968 from A. Brooke Turner, UK Foreign Office to K.M. Wilford, British Embassy, Washington, FCO 31/134, para. 3: Annex 68.

²¹⁷ Telegram No. 3129 dated 22 October 1968 from British Embassy, Washington to UK Foreign and Commonwealth Office, FCO 141/1437: Annex 69.

period place restrictions on their activities within the inner 6 mile zone.

- (e) it is intended that the restrictions on Seychelles and Mauritian fishing vessels will only be made in the immediate vicinity of islands which might in future be used for defence purposes by either ourselves or the Americans and would be kept to the minimum compatible with our security requirements. The Americans have however requested (Washington telegram No. 3129 of 22 October 1968) that references to defence arrangements and security requirements should not be included in the Ordinance.”²¹⁸

2.99 In light of these instructions, the Commissioner for the “BIOT” established, by Proclamation No. 1 of 1969 on 10 July 1969, a fisheries zone contiguous to the territorial sea of the “BIOT”.²¹⁹ The Fishery Limits Ordinance, No. 2 of 1971, preserving Mauritian fishing rights in the Chagos Archipelago, was subsequently enacted.²²⁰

2.100 While it appears that the Commissioner for the “BIOT” may not have made an order designating Mauritius under section 4 of the Fishery Limits Ordinance 1971, the Government of Mauritius was informed by the British High Commission on 15 July 1971 that the Commissioner would use his powers under section 4 of the Ordinance to enable Mauritian fishing boats to continue fishing in the 9-mile contiguous zone in the waters of the Chagos Archipelago.²²¹ It was therefore an oversight that Mauritius was not informed by the UK that Mauritian fishing vessels could also continue to fish in the inner 3-mile zone of the Chagos Archipelago. As indicated earlier, the US had expressed no objection to Mauritian fishing vessels accessing the full 12-mile zone. This omission was subsequently rectified when fishing was also allowed in the inner 3-mile zone under the Fishery Limits Ordinance of 1984²²² and the successor Ordinances.²²³ This is not contested by the UK.²²⁴

2.101 Recent correspondence and internal Foreign Office emails confirm that in the years and months immediately preceding the announcement of the “MPA”, the UK

²¹⁸ Despatch dated 28 April 1969 from J.W. Ayres, Foreign and Commonwealth Office to J.R. Todd, Administrator, “BIOT”, FCO 31/2763: MM, Annex 52.

²¹⁹ MM, Annex 53.

²²⁰ MM, Annex 60.

²²¹ MM, para. 3.95; MM, Annex 64,

²²² Section 4, “BIOT Ordinance No. 11 of 1984”: UKCM, Annex 49; “British Indian Ocean Territory” Notice No. 7 of 1985: MM, Annex 98.

²²³ “British Indian Ocean Territory” Ordinance No. 1 of 1991: MM, Annex 102; “British Indian Ocean Territory” Ordinance No. 4 of 1998: UKCM, Annex 69; “British Indian Ocean Territory” Ordinance No. 5 of 2007: UKCM, Annex 79.

²²⁴ UKCM, para. 2.100. See also inshore fishing vessel licences issued to Mauritian fishing vessels in 1997, 1999 and 2006 (Inshore fishing licences issued to Mauritian fishing vessels by the Director of Fisheries on behalf of the Commissioner for the “British Indian Ocean Territory” in 1997, 1999 and 2006: Annex 102).

recognised that Mauritius had fishing rights in the Chagos Archipelago.²²⁵ These documents (considered in greater detail in Chapter 3) were made available to the English Administrative court in London, but not to this Tribunal. They plainly undermine the United Kingdom argument in its Counter-Memorial:

- (i) In a letter to Baroness Amos on 10 April 2008, Prime Minister Gordon Brown wrote: “I am keen that we maintain good relations with Mauritius. Aside from a potential formal Treaty on sovereignty, there are areas on fishing rights and extension of the continental shelf under UNCLOS that we might discuss.”²²⁶
- (ii) In an email sent on 22 April 2008 following meetings with Pew about a possible MPA, Joanne Yeadon (the “BIOT” administrator) wrote: “Mauritius and inshore fishing: we explained Mauritius did have some rights but had not exercised them recently. But this was a loophole that would need looking at.”²²⁷
- (iii) Prior to discussions with Mauritius over the Chagos Archipelago, Joanne Yeadon wrote in an email on 21 November 2008: “There are issues on BIOT that we can discuss with Mauritius e.g., traditional fishing rights.”²²⁸
- (iv) In an email to Colin Roberts (the Director of the Overseas Directorate at the Foreign Office) on 14 July 2009, Joanne Yeadon explained: “Mauritian fishing rights were never defined in the Lancaster House side meetings, but what it boils down to is free access to BIOT waters. This has translated over the years, to Mauritians being obliged to apply for a permit but getting it free.”²²⁹
- (v) On 6 January 2009, less than 15 months before the announcement of the “MPA”, in preparation for the first round of bilateral talks between Mauritius and UK on the Chagos Archipelago, the UK Foreign Office wrote to the Mauritian High Commission in London proposing the

²²⁵ The UK has also recognised Mauritius’ fishing rights in earlier bilateral correspondence: see for example the letter dated 12 December 2003 from the Minister responsible for Overseas Territories, UK Foreign and Commonwealth Office to the Minister of Foreign Affairs and Regional Cooperation, Mauritius: MM, Annex 124.

²²⁶ Letter dated 10 April 2008 from the UK Prime Minister to Baroness Amos and letter dated 14 March 2008 from Baroness Amos to the UK Prime Minister: Annex 119.

²²⁷ Email exchange between Andrew Allen, Overseas Territories Directorate, and Joanne Yeadon, Head of “BIOT” & Pitcairn Section, UK Foreign and Commonwealth Office, 22 April 2008: Annex 120.

²²⁸ Email dated 21 November 2008 from Joanne Yeadon, Head of “BIOT” & Pitcairn Section, UK Foreign and Commonwealth Office: Annex 124.

²²⁹ Email exchange between Colin Roberts, Director, Overseas Territories Directorate, and Joanne Yeadon, Head of “BIOT” & Pitcairn Section, UK Foreign and Commonwealth Office, 13-14 July 2009: Annex 138.

fishing rights of Mauritius in the Chagos Archipelago as one of the items on the proposed agenda.²³⁰

2.102 The UK's approach to the evidence in the Counter-Memorial is striking and merits close attention. In one instance at least, the UK gives a completely misleading and inaccurate account of a Mauritian Note Verbale. At paragraph 2.108 of the Counter-Memorial, the UK states:

“Mauritius protested the creation of the FCMZ on the grounds of Mauritian sovereignty over the Chagos Archipelago, but did not refer to the 1965 fishing rights understanding or the practice of issuing licenses free of charge to Mauritian vessels.”²³¹

2.103 To support this statement, the UK refers to a Note Verbale sent by the Mauritian Ministry of External Affairs to the British High Commission in Port Louis on 7 August 1991. The third paragraph of that Note Verbale states:

“The Ministry furthermore wishes to point out that, in the light of the above, the Government of Mauritius does not ipso facto accept the validity of the offer of free licences for inshore fishing.”²³²

2.104 In light of this document, Mauritius does not see how the UK could possibly have reached the conclusion that Mauritius “did not refer to the 1965 fishing rights understanding or the practice of issuing licences free of charge to Mauritian vessels”. This is all the more so in view of the brevity and clarity of the Note Verbale (four short paragraphs on one page).

2.105 In the very next paragraph of its Counter-Memorial the UK makes the following (unsupported) assertion:

“Initially there was some debate within the Foreign and Commonwealth Office as to whether Mauritian-flagged tuna fishing vessels applying for long-line or purse seine tuna fishing licences to fish in the FCMZ would also receive them free of charge. In the end it was decided in May 1992 that, for political reasons and because it was unlikely to be a particular burden (there were only three Mauritian-flagged tuna vessels), commercial tuna fishing licenses would also be issued free of charge to Mauritian-flagged vessels that applied for them.”²³³

The UK does not provide any evidence in support of its contention that this decision was taken “for political reasons”, rather than on the basis of Mauritius' rights to fish in the waters of the Chagos Archipelago. However, Mauritius has identified in the

²³⁰ Note Verbale dated 6 January 2009 from UK Foreign and Commonwealth Office to Mauritius High Commission, London, No. OTD 01/01/09: Annex 127.

²³¹ UKCM, para. 2.108 (footnotes omitted).

²³² MM, Annex 100 (emphasis in the original).

²³³ UKCM, para. 2.109.

materials disclosed to the English court earlier this year at least one contemporaneous document that describes the “debate” within the Foreign Office to which the UK refers, and undermines the UK assertion.

2.106 In October 1996 the African Research Group at the Foreign Office circulated a draft research paper titled “BIOT/Mauritius: fishing rights”. In relation to the initial proposal for a 200-mile fishing limit in 1991, the FCO research paper notes that “A necessary concession would be to continue to issue free licences to Mauritian fishermen, and to extend their existing access to BIOT inshore waters in the new 200 mile limit.”²³⁴ Furthermore, describing the process leading to the 1991 Ordinance, the FCO research paper states that:

“... while the BIOT Administration wished to extend free or subsidized licences to the Mauritians, they also recognised the practical difficulties likely to be caused by interested companies seeking to register in Mauritius. In the event, though, re-examination of HMG’s 1965 undertaking on fishing ruled out any alternative.”²³⁵

This contemporaneous account by Foreign Office researchers shows that free licences continued to be issued to Mauritian-flagged vessels after 1991, not for “political reasons”, as alleged by the UK in the Counter-Memorial, but because of the UK’s 1965 undertaking, of which it was well aware.

2.107 The FCO research paper is relevant to these proceedings because it sets out the UK’s interpretation of Mauritian fishing rights in the Chagos Archipelago. Mauritius invites the Tribunal to read the document carefully (it is at Annex 101). One of the concluding remarks in the last section of the paper states that:

“The system of free licensing of Mauritian boats to fish in Chagos waters has never been abused by them in pursuit of their sovereignty dispute (e.g. by seeking to infiltrate Ilois, or attract publicity by causing incidents on the islands). Therefore HMG’s interpretation of its 1965 undertaking has tended towards a liberal, or permissive, interpretation – as in the licensing of Mauritian purse-seiners.”²³⁶

2.108 The FCO research paper also reveals that when Japanese and Korean companies made requests in 1972 and 1977 respectively for permission to fish in the Chagos Archipelago:

²³⁴ UK Foreign and Commonwealth Office, African Research Group Research Analysts Paper, “BIOT/Mauritius: Fishing Rights”, 11 October 1996, para. 14: Annex 101. The FCO research paper first came to light in April 2013 during the course of proceedings in *Bancoult v Secretary of State for Foreign and Commonwealth Affairs* before the Administrative Court in London. The UK had reason to know of its existence because it was attached to a witness statement of Colin Roberts, the then Director of the Overseas Territories Directorate at the Foreign Office.

²³⁵ UK Foreign and Commonwealth Office, African Research Group Research Analysts Paper, “BIOT/Mauritius: Fishing Rights”, 11 October 1996, para. 15: Annex 101 (emphasis added).

²³⁶ *Ibid.*, para. 26.

“on both occasions these requests were turned down; the Japanese told that ‘no fishing can be allowed within fishing limits of the Territory except for fishing by Mauritian fisherman who have traditionally fished in the area’.”²³⁷

2.109 The FCO research paper was apparently ignored by the UK in the preparation of its Counter-Memorial because it does not support its partial and selective account of Mauritian fishing rights in the Counter-Memorial. Yet there can be no doubt that those who drafted the Counter-Memorial were aware of the document, which was disclosed in the English proceedings, because at least one counsel acts for the UK in both proceedings. The research paper undeniably confirms that in 1996 Foreign Office officials fully recognised Mauritian fishing rights in the Chagos Archipelago.

2.110 In Chapter 2 of its Counter-Memorial, the UK does not deny the existence of Mauritius’ fishing rights in the Chagos Archipelago. Instead, the UK attempts to minimise Mauritius’ historic fishing rights by falsely suggesting they were exercised only on a *de minimis* scale. The UK argues that:

- (i) Fishing in the Chagos Archipelago prior to 1965 was carried out only for consumption by the islands’ inhabitants;²³⁸
- (ii) After the creation of the “BIOT” there was little desire from Mauritian fishing companies to fish in the Chagos Archipelago;²³⁹
- (iii) Since 1996 there has been a decrease in the uptake of free licences by Mauritian-flagged vessels.²⁴⁰

2.111 On the basis of these factual assertions, the UK comes to the conclusion that “by the time the MPA proposal was first being considered by the BIOT in 2008 [...] the take up of commercial fishing licences by Mauritian-flagged vessels was very low, in some years nil.”²⁴¹ This is manifestly inaccurate and based on a selective reading of the relevant documents. Mauritius addresses each of the three factual assertions in turn.

- (1) *Fishing in the Chagos Archipelago prior to 1965 was carried out only for consumption by the islands’ inhabitants*

2.112 It is not disputed that hand line fishing was practised in the waters of the Chagos Archipelago, with some basket and net fishing by the local population for its own

²³⁷ *Ibid.*, para. 4.

²³⁸ See UKCM, paras. 2.95-2.96.

²³⁹ See UKCM, paras. 2.98-2.99.

²⁴⁰ See UKCM, paras. 2.106, 2.110-2.111.

²⁴¹ UKCM, para. 2.111.

consumption.²⁴² However, the UK's reliance on Mr Forget's statement in the Mauritian Parliament is misguided. Mr Forget, answering for the Premier, stated (in part) that:

“...So far as I am aware the only fishing that now take place in the territorial waters of Diego Garcia is casual fishing by those employed there and as the Hon Member is aware, they will be resettled elsewhere.”²⁴³

Mr Forget's answer, which was in reply to a question as to whether all fishing facilities around Diego Garcia would be safeguarded, does not acknowledge that there were also Chagossians living (and fishing) on other islands of the Chagos Archipelago, including Peros Banhos and the Salomon Islands.

2.113 While fishing prior to 1965 was primarily carried out by the inhabitants of the Chagos Archipelago, shortly after detachment British authorities recognised the importance of the waters of the Chagos Archipelago, not only as an existing resource for Mauritius, but also for the future. In a letter written one year after the detachment, the British Governor in Mauritius wrote:

“...it could certainly be argued that the increasing population of Mauritius and the restricted potential for the production of protein foods in the island made the Chagos Archipelago of importance to Mauritius.”²⁴⁴

2.114 Less than two years after the detachment, the Commonwealth Office wrote to the British Governor in Mauritius with regard to fishing limits and the limits of territorial waters in the “BIOT”. The Commonwealth Office stressed that it was “very much concerned to keep in mind the importance of fishing in the Chagos as a source of food, in view of the rapidly increasing population.”²⁴⁵ A Draft Minute in response to that letter addressed to the “BIOT Commissioner” states that:

“It is apparent that the area is potentially rich and that we should safeguard the future interests of Mauritius [...] in whatever development takes place, both to provide opportunities for local companies and to ensure our future fish supply.”²⁴⁶

2.115 This correspondence demonstrates that, regardless of the extent of Mauritian fishing in the waters of the Chagos Archipelago prior to 1965, British officials were conscious of Mauritius' traditional fishing rights and recognised the importance of those rights and future interests of Mauritius.

²⁴² MM, para. 3.88 and UKCM, para. 2.94. See also Witness Statement of Sylvestre Sakir, 17 August 2011: Annex 166 and Witness Statement of Louis Joseph Volly, 19 September 2011: Annex 167.

²⁴³ UKCM, Annex 15.

²⁴⁴ Letter dated 25 April 1966 from the Governor of Mauritius: UKCM, Annex 17.

²⁴⁵ Letter dated 12 July 1967 from the UK Commonwealth Office to the Governor of Mauritius, FCO 16/226: MM Annex 50, para. 2; see MM, para. 3.91.

²⁴⁶ Minute addressed to the “BIOT” Commissioner, 1967: UKCM, Annex 18, para. 4.

- (2) *After the creation of the “BIOT” there was little desire from Mauritian fishing companies to fish in the Chagos Archipelago*

2.116 In its Counter-Memorial, the UK presents as definite the information about the Mauritian fishing ventures operating in 1966 in the Chagos Archipelago. The UK states that the British Governor in Mauritius “recorded that there were three fishing ventures operating from Mauritius, but that none fished in the waters of the Chagos Archipelago.”²⁴⁷ However, the UK’s account does not acknowledge that the Governor was not sure about this information. He stated that “So far as I know, none of these ventures fishes in the waters of the Chagos Archipelago but the point will have to be checked.”²⁴⁸

2.117 The UK seeks to show that there was little desire from Mauritian fishing companies to fish in the Chagos Archipelago. This is not accurate, and as described below, the data compiled by the Ministry of Fisheries of Mauritius shows that there have been catches by Mauritian fishing vessels since at least 1977.

2.118 In its Counter-Memorial, the UK states that:

“The Mauritian Minister of Fisheries in a parliamentary debate of 5 July 1978 referred to fishing in the Chagos by the *MV Nazareth*, but then went on to say that, as the fish from BIOT waters were not consumed by Mauritians ‘the proprietors of our companies are not interested in catching the fish which are found in abundance there.’”²⁴⁹

Mauritius notes that this statement does not support the UK’s position, because it acknowledges that at least one vessel registered in Mauritius was fishing in the waters of the Chagos Archipelago prior to 1978.

2.119 Once again, the UK has resorted to a selective reading of the evidence. It ignores the fact that, in the same paragraph, the Minister confirmed that (a) fish from the Chagos Archipelago was brought to Mauritius; (b) this fish could possibly be sold in foreign markets; and (c) by virtue of traditional fishing rights, Mauritian companies were free to fish in the waters of the Chagos Archipelago:

“The last time when a few tons [of fish] were brought, they were salted instead of being sold to the public. But there are other species that could be caught and converted to be sold perhaps to other countries. But the point is that the fishing rights are still there and our companies are free to go and fish there.”²⁵⁰

²⁴⁷ UKCM, para. 2.96, referring to UKCM, Annex 17.

²⁴⁸ UKCM, Annex 17, (emphasis added).

²⁴⁹ UKCM, para. 2.99, citing MM, Annex 84, col. 3116.

²⁵⁰ MM, Annex 84, col. 3116.

(3) *Since 1996 there has been a decrease in the uptake of free licences by Mauritian-flagged vessels*

2.120 The UK argues that fishing by Mauritian vessels in the waters of the Chagos Archipelago was limited and that “the number of Mauritian-flagged vessels applying for inshore fishing licenses fell sharply after 1996.”²⁵¹ The UK also argues that “[t]here is [fish] catch data for 1977 only, and none again until 1981”²⁵² and refers in footnote 120 of its Counter-Memorial to a document entitled “A summary of historical information relating to the BIOT inshore fishery”, purportedly attached to the Joint Communiqué of the second meeting of the British/Mauritian Fisheries Commission held on 17 March 1995.²⁵³ In its Counter-Memorial, the UK does not explain how a decrease in the number of licenses has an impact on Mauritius’ traditional fishing rights. In any event, its account of Mauritian fishing in the waters of the Chagos Archipelago is incomplete.

2.121 Prior to 1977, the Ministry of Fisheries of Mauritius did not collect fish catch data. Therefore, such official data is only available from 1977 onwards. However, this does not mean that no Mauritian vessels fished in the waters of the Chagos Archipelago prior to 1977. There had already been a number of decades of fishing in the waters of the Chagos Archipelago by both local inhabitants and commercial vessels from Mauritius. The atolls of the Chagos Archipelago were producers of salt fish, mainly from the demersal fishery.²⁵⁴ The 1996 FCO research paper (described above) explains that an increase in surveillance in 1983 revealed that two Mauritian vessels were engaged in fishing and the collection of coconuts without the knowledge of the “BIOT” authorities.²⁵⁵

2.122 Until the establishment of the “MPA” by the UK, Mauritian vessels had mainly fished on the following banks and reefs of the Chagos Archipelago and around the following atolls of the Chagos Archipelago:

Banks: Great Chagos Bank, Cauvin Bank, Centurion Bank, Ganges Bank, Pitt Bank, Speakers Bank and Victory Bank;
Reefs: Blenheim Reef and Colvocoresses Reef;
Atolls: Egmont Islands, Peros Banhos and Salomon Islands.

2.123 The inshore fishery in the Chagos Archipelago waters related mainly to demersal species, principally lutjanids, lethrinids and serranids. Mauritian fishing

²⁵¹ UKCM, para. 2.106.

²⁵² UKCM, para. 2.99 (footnote omitted).

²⁵³ Mauritius wishes to point out that this document is not annexed to the Joint Communiqué.

²⁵⁴ C.C. Mees, G.M. Pilling and C.J. Barry, “Commercial inshore fishing activity in the British Indian Ocean Territory”, in *Ecology of the Chagos Archipelago* (ed. C.R.C. Sheppard & Mr. R.D. Seaward), 1999, pp. 327-328.

²⁵⁵ UK Foreign and Commonwealth Office, African Research Group Research Analysts Paper, “BIOT/Mauritius: Fishing Rights”, 11 October 1996, para. 3: Annex 101: “A slight increase in surveillance of BIOT waters in July/August 1983 brought to light illegal intrusions by two Mauritian vessels, the Romaya and the Nazareth, to collect coconuts on Peros Banhos and to fish in the adjacent sea respectively.”

vessels had also fished for tuna and billfish outside the 12-mile fishing zone initially established in the waters of the Chagos Archipelago. The period during which Mauritian fishing vessels were allowed to engage in inshore fishing extended from 1 April to 31 October. A maximum of six licences was initially issued to Mauritian fishing vessels for inshore fishing, and this number was subsequently reduced to four.²⁵⁶ The duration of the fishing licences was initially 60 days, and was subsequently extended to 80 days.

2.124 Catch data compiled by the Ministry of Fisheries of Mauritius show that there have been catches by Mauritian fishing vessels in Chagos Archipelago since at least 1977. The mean annual catch is 164 tons:²⁵⁷

²⁵⁶ UKCM, para. 3.13.

²⁵⁷ Source: Ministry of Fisheries, Mauritius

Year	Catch (t)
1977	32
1978	-
1979	-
1980	-
1981	81
1982	135
1983	-
1984	143
1985	163
1986	127
1987	237
1988	314
1989	133
1990	300
1991	319
1992	317
1993	196
1994	307
1995	218
1996	321
1997	306
1998	120
1999	127
2000	312
2001	191
2002	223
2003	235
2004	117
2005	-
2006	136
2007	130
2008	-
2009	161

2.125 The figures above do not support the UK’s conclusion that by the time the “MPA” proposal was first considered by the “BIOT” Administration in 2008, “the take-up of commercial fishing licences by Mauritian-flagged vessels was very low, in some years nil.”²⁵⁸ While the number of vessels applying for fishing licences may have decreased, Mauritius continued to exercise its traditional fishing rights in the waters of

²⁵⁸ UKCM, para. 2.111.

the Chagos Archipelago until the purported establishment of the “MPA” in 2010. The catch in 2009 was the highest since 2003, and higher than in 1984.

2.126 At paragraph 2.110 of the Counter-Memorial, the UK argues that the reasons for the decline in applications for free fishing licences after 1996 were economic, reflecting a decrease in Mauritius’ ability to exploit the fish stock. However, Mauritius has made it clear to the UK that there were other factors involved. In bilateral talks on the Chagos Archipelago in January 2009:

“The Mauritians explained that their lack of interest in taking up fishing rights (free licences) [...] was that they felt this impacted their position on sovereignty.”²⁵⁹

2.127 Moreover, it is not clear to Mauritius how a downward trend in the number of licences issued could have any impact on Mauritius’ right to fish in the Chagos Archipelago, given that the right is not conditional upon frequent, regular or increasing use. This view is shared by MRAG Ltd., the company employed by the UK to manage fisheries in the Chagos Archipelago. In a report to the FCO in advance of the public consultation process on the “MPA”, MRAG Ltd stated that “Whilst the number of vessels applying for licences has decreased this right continues to be exercised and the most recent licences issued to Mauritian-flagged vessels were during 2009.”²⁶⁰

2.128 Mauritius has also issued licences under the Fisheries Act 1980, the Fisheries and Marine Resources Act 1998 and the Fisheries and Marine Resources Act 2007 to fishing vessels to fish in the waters of Mauritius, including the territorial sea and the exclusive economic zone around the Chagos Archipelago. This implies that Mauritius has retained fishing rights in the Chagos Archipelago waters.

2.129 Over the last decade Mauritius has focused its efforts on developing a seafood hub that ensures resource sustainability and in this regard, attaches much importance to its fishing rights in the Chagos Archipelago waters.²⁶¹ The seafood hub has in recent years attracted substantial foreign investment. A Mauritian-flagged fishing vessel has been put in service in September 2013, while another one will start its operations by the end of this year and three others will follow in the next two years.

(b) Mineral and oil rights

2.130 The UK acknowledges that at the meeting held on 23 September 1965 at Lancaster House, an undertaking was given by the UK “that the benefit of any minerals or oil discovered in or near the Chagos Archipelago should revert to the Mauritius

²⁵⁹ UK Foreign and Commonwealth Office, Overseas Territories Directorate, “British Indian Ocean Territory: UK/Mauritius Talks”, 14 January 2009, under section 6, “Access to natural resources” (Annex 128).

²⁶⁰ See First Witness Statement of Richard Patrick Dunne, 8 October 2012, para 37: Annex 172.

²⁶¹ Letter dated 1 December 2005 from the Prime Minister of Mauritius to the Prime Minister of the United Kingdom: MM, Annex 132; <http://fisheries.gov.mu/English/DOCUMENTS/SEAFOOD.PDF>.

Government.”²⁶² The UK seeks to qualify this undertaking by asserting that it had also indicated its intention of not permitting prospecting for minerals and oil as long as the islands are required for defence purposes.²⁶³ However, the UK’s interpretation of its undertaking relating to mineral and oil rights was vehemently contested by Sir Seewoosagur Ramgoolam. At a meeting held at the Foreign and Commonwealth Office in February 1970, he pointed out that his interpretation of the Lancaster House discussions was different and “maintained that oil and mineral rights had, at the Lancaster House talks, been expressly reserved to the Mauritius Government.”²⁶⁴ He considered that:

“Para. 23 (viii) of the Record meant that the British Government would not oppose the grant of prospecting rights for minerals or oil, for how otherwise would the benefit from any minerals or oil discovered there revert to the Mauritians?”²⁶⁵

2.131 On being shown the correspondence exchanged between the Governor of Mauritius and the Colonial Office subsequent to the meeting of 23 September 1965, the Mauritian Prime Minister emphatically stated that he could not accept such correspondence, which had been conducted without his knowledge or consent, or that of the Mauritius Council of Ministers.²⁶⁶

2.132 Sir Seewoosagur Ramgoolam also pointed out that he had no knowledge of the reply given by Mr Forget to a parliamentary question on 21 December 1965 on, *inter alia*, the issue of mineral rights, and that it had not been discussed by him and the Mauritius Council of Ministers. He averred that the reply “must have been prepared by the Governor and handed over to Mr Forget for delivery in the House”.²⁶⁷

2.133 Mauritius has subsequently reaffirmed its mineral and oil rights in the Chagos Archipelago and its maritime zones, including in correspondence addressed to the UK²⁶⁸ and during parliamentary debates.²⁶⁹ More recently, Mauritius submitted in May 2009 to

²⁶² UKCM, para. 2.112.

²⁶³ UKCM, para. 2.115.

²⁶⁴ Record of discussions between Mr. Foley and the Prime Minister of Mauritius on Oil Exploration in the Chagos Archipelago at meetings held on 4 and 5 February 1970, FCO 32/724, (4 February 1970), para. 2: Annex 72.

²⁶⁵ *Ibid.*, (5 February 1970), para. 3: Annex 72.

²⁶⁶ *Ibid.*, para. 1.

²⁶⁷ *Ibid.*, para. 2.

²⁶⁸ Note Verbale dated 19 November 1969 from the Prime Minister’s Office (External Affairs Division), Mauritius to the British High Commission, Port Louis, No. 51/69 (17781/16/8): MM, Annex 54; Letter dated 4 September 1972 from the Prime Minister of Mauritius to British High Commissioner, Port Louis: MM, Annex 67; Letter dated 24 March 1973 from the Prime Minister of Mauritius to the British High Commissioner, Port Louis: MM, Annex 69.

²⁶⁹ Mauritius Legislative Assembly, 26 June 1974, Committee of Supply: MM, Annex 71, p. 1947; Mauritius Legislative Assembly, 10 July 1979, Reply to PQ No. B/754: MM, Annex 86, p. 3877; Mauritius Legislative Assembly, 13 November 1979, Reply to PQ No. B/844: MM, Annex 87, p. 4857; Mauritius Legislative Assembly, 27 November 1979, Reply to PQ No. B/982: MM, Annex 89, p.5170; Second Reading of Maritime Zones Bill (No. I of 2005), 15 February 2005: Annex 111.

the UN Commission on the Limits of the Continental Shelf Preliminary Information concerning the Extended Continental Shelf in the Chagos Archipelago Region.²⁷⁰ The United Kingdom has not objected to the submission of that Preliminary Information, and in its Counter-Memorial does not challenge the right of Mauritius, as a coastal State, to have made the submission. Mauritius cannot, therefore, accept the UK's position on the mineral and oil rights of Mauritius in paragraphs 2.113-2.116 of its Counter-Memorial.

VI. Conclusion

2.134 Mauritius does not accept the UK's portrayal of the factual and historical background in Chapter 2 of the Counter-Memorial. The UK's factual assertions are based on a selective reading of limited material, and the UK has chosen to ignore any material it deems unhelpful to its case. Chapter 2 of the Counter-Memorial is deeply flawed and presents a partial and factually inaccurate account. As a result, the legal conclusions drawn by the UK in the latter chapters of the Counter-Memorial are equally flawed. Mauritius regrets that the UK should have presented to this Tribunal an account that might be seen as misleading.

2.135 The unambiguous evidence advanced by Mauritius in chapters 2 and 3 of its Memorial, and Chapter 2 of this Reply makes clear that:

- (i) The Chagos Archipelago is, and has always been, an integral part of the territory of Mauritius. The UK's formalistic approach to this issue in the Counter-Memorial is detached from reality and overlooks the close legal and factual nexus between the Chagos Archipelago and the main island of Mauritius. As shown above, the UK's position in the Counter-Memorial is at odds with its own conduct, and with the views expressed by *inter alia* the UN General Assembly, the Heads of State of Government of the Non-Aligned Movement, the Ministers of Foreign Affairs of the Member States of the Group of 77, the African Union and the Africa-South America Summit.
- (ii) The detachment of the Chagos Archipelago from the territory of Mauritius was a condition *sine qua non* for independence. UK officials and representatives at the highest levels devised a strategy by which Mauritian Ministers could only have obtained independence by agreeing to the detachment. Mauritian Ministers were made well aware of the "package deal" on offer, and "agreed" to the detachment only because there was no other choice. This "agreement" was sought by the UK in an attempt to diffuse criticisms it faced by creating the "BIOT".

²⁷⁰ MM, para. 4.32; MM, Annex 144.

- (iii) After the creation of the “BIOT” the UK was widely condemned in the United Nations for *inter alia* acting in disregard of the right to self-determination and in violation of resolutions 1514 (XV) and 2066 (XX). Mauritius has vehemently protested against the creation of the “BIOT” and reaffirmed its sovereignty over the Chagos Archipelago on the international plane and in bilateral communications with UK.

- (iv) Mauritius has rights in the Chagos Archipelago, in relation to, *inter alia*, traditional fishing, mineral and oil rights. The UK has consistently recognised the existence of Mauritius’ rights even before the creation of the “BIOT”. A reduction in the number of fishing licences issued to Mauritian fishing boats by the “BIOT” administration does not nullify Mauritius’ traditional fishing rights in the Chagos Archipelago waters.

CHAPTER 3: CREATION OF THE “MARINE PROTECTED AREA”

I. Introduction

3.1 In Chapter 4 of its Memorial, Mauritius set out the facts leading up to the creation of the “MPA”, on the basis of the evidence then available to it. The present chapter responds to a range of factual assertions made by the United Kingdom in Chapter III of its Counter-Memorial, in particular relating to the process by which the “MPA” was considered and adopted. Mauritius considers that, particularly in light of additional documents which have come into the public domain in 2013,²⁷¹ the picture presented by the United Kingdom in this chapter is misleading, based on a selective presentation of the evidence.

3.2 The evidence demonstrates that the UK fully recognised Mauritius’ specific rights in the Chagos Archipelago (such as fishing and mineral rights), both internally and in bilateral relations. Despite this, it imposed the “MPA” unilaterally, after a manifestly inadequate consultation which bypassed ongoing bilateral talks with Mauritius. This was a highly political decision, rushed through by the UK Foreign Secretary against the advice of senior officials. Three and a half years later, the UK has still not enacted any legislation to implement that decision.

II. UK and international environmental policy

3.3 At section B of Chapter 3, the UK reviews the history of its policies on the environment in respect of the Overseas Territories, and at Section C sets out the international history of Marine Protected Areas. Mauritius considers these general matters to be of little relevance to the present dispute. There is no dispute between the parties as to the importance of environmental protection in general, or the environmental significance of the Chagos Archipelago in particular. Like the UK, Mauritius is a party to the various instruments referred to in UKCM 3.7: the Convention on Biological Diversity 1992; the Convention on International Trade in Endangered Species of Wild Flora and Fauna 1973; the Convention on Wetlands of International Importance 1971; the Convention on the Conservation of Migratory Species of Wild Animals 1979; the 2001 Memorandum of Understanding on the Conservation and Management of Marine Turtles and Their Habitats of the Indian Ocean and South-East Asia; the 1995 Straddling Stocks Agreement.²⁷²

3.4 As detailed in Chapter 4 of Mauritius’ Memorial and considered further below, throughout the “MPA” process Mauritius was consistently receptive to, and supportive

²⁷¹ Through the judicial review claim brought by a former resident of the Chagos Archipelago in respect of the decision to declare the “MPA”: *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2013] EWHC 1502 (Admin).

²⁷² For an up to date summary of Mauritius’ policies and activities in relation to environmental protection and sustainable development, see National Report submitted in July 2013 by the Republic of Mauritius in view of the Third International Conference on Small Island Developing States due to be held from 1-4 September 2014 in Apia, Samoa (Annex 177).

of, the principle of protecting the environment of the Chagos Archipelago, as long as its rights and interests were fully respected. The question is whether the UK was entitled to declare an “MPA”. The compatibility of that decision with the provisions of UNCLOS is dealt with in Chapters 6 and 7 of Mauritius’ Memorial, and Chapters 5 and 6 below.

3.5 At UKCM 3.11-3.18, the UK sets out the history of previous maritime zones in respect of the Chagos Archipelago. At MM 4.3-4.28, Mauritius has set out the consistent history of its protests in respect of the declaration of such zones.

III. The creation of the “MPA”

(a) 1996 and 2004 analyses of Mauritius’ rights over the Chagos Archipelago

3.6 Although the UK account of the creation of the “MPA” begins in 2007,²⁷³ the record shows that Mauritius’ rights over the Archipelago had been recognised and acknowledged by the UK from 1965 onwards, well before they came to be considered in the context of the proposed “MPA”.²⁷⁴

3.7 Two additional FCO documents illustrate the UK’s thinking in the period before the “MPA” came to be considered. A report from the African Research Group (author’s name redacted), dated 11 October 1996, entitled “BIOT/Mauritius: Fishing Rights”,²⁷⁵ provides historical background to the development of fishing policy in the Chagos Archipelago (and was relied on in the process of considering the “MPA” proposal: see para. 3.42 below). The author indicates that s.4 of the Fishery Limits Ordinance 1971 (which empowers the Commissioner of “BIOT” to designate any country as entitled to fish in the “BIOT”, “for the purpose of enabling fishing traditionally carried on in any area within the contiguous zone to be continued”):

“was framed with Mauritian boats in mind. It was the Commissioner’s expressed intention to use his powers under section 4 of the Ordinance to officially designate Mauritians as traditional fishermen in Chagos waters. Indeed, the Mauritius Government was informed in 1971 that such an Order had been made. However, by oversight none was then made and gazetted.”²⁷⁶

3.8 According to this report it was only in 1983, during an FCO review of policy towards Mauritian fishing in the Chagos Archipelago (due to two apparently unauthorised incursions by Mauritian vessels) that “it was discovered that Mauritians had not actually been designated traditional fishermen, contrary to what the Mauritian

²⁷³ UKCM, para. 3.31ff.

²⁷⁴ See MM, paras. 3.31, 3.86-3.108, 6.42-6.52, 7.22-7.35.

²⁷⁵ UK Foreign and Commonwealth Office, African Research Group Research Analysts Paper, “BIOT/Mauritius: Fishing Rights”, 11 October 1996, Annex 101.

²⁷⁶ *Ibid.*, para. 2: see also MM, paras. 3.94-3.96.

Government had been told.”²⁷⁷ Apparently Japanese fishing companies asked for permission to fish in the “BIOT” 12-mile limit in 1972, and were told that “no fishing can be allowed within the fishing limits of the Territory except for fishing by Mauritian fishermen who have traditionally fished in the area.”²⁷⁸ In 1982 a licensing system was then proposed: this “was, it was accepted [by the Legal Advisers], no more than to legitimize activities which had previously passed unobserved.”²⁷⁹

3.9 A further note from Henry Steel, then Principal Legal Adviser to the Government of the “BIOT”, dated 2 July 2004, is headed “Fishing by Mauritian Vessels in BIOT Waters.”²⁸⁰ After noting the key passage of the 1965 agreement, Mr Steel states that:

“The phrase ‘Fishing Rights’ was interpreted to refer to ‘traditional’ fishing – the alternative phrase ‘artisanal fishing’ is sometimes to be found in the relevant FCO papers – and was treated as therefore covering fishing in BIOT’s inshore waters (other than in the vicinity of Diego Garcia). Accordingly, when BIOT first established a fisheries zone in 1969 (a 9-mile zone contiguous to the 3-mile territorial sea) and subsequently, in 1971, prohibited fishing in it by outsiders, Mauritian fishing vessels were exempted from the prohibition. When, in 1984, a proper licensing system was introduced, the practice was then adopted of requiring Mauritian vessels to obtain licences for fishing in the 12-mile zone but to issue them free. It was also decided that there was no reason not to issue such licences to Mauritian vessels engaged in purse-seine fishing for tuna in that zone (though this would presumably not have been ‘traditional’ fishing for them). When, finally, the 200-mile Fisheries (Conservation and Management) Zone was established in 1991, the practice eventually adopted (apparently after some confusion or uncertainty) was to extend the existing system (i.e. to require licences for Mauritian vessels but to issue them free) to cover all Mauritian vessels seeking to fish in the zone, including those engaged in tuna-fishing. That remains the practice.”

3.10 These documents indicate the historical and policy background against which the “MPA” proposal came to be considered, including the clear recognition by UK officials that Mauritius had rights in the Chagos Archipelago and that those rights had to be accommodated.

(b) *The approach by Pew in 2007/2008*

3.11 At 3.30-3.37, the UK sets out the way in which various environmental groups, in particular Pew, promoted the idea of an MPA around the Chagos Archipelago.

²⁷⁷ *Ibid.*, para. 3.

²⁷⁸ *Ibid.*, para. 4.

²⁷⁹ *Ibid.*, para. 5.

²⁸⁰ Note dated 2 July 2004 by Henry Steel, “Fishing by Mauritian Vessels in BIOT Waters”, Annex 109.

Notwithstanding the enthusiasm of those groups, however, the decision to declare and implement the “MPA” is the sole responsibility of the UK. The full factual record, considered below, shows the way in which those groups’ proposals were taken up by the UK without adequate consultation with Mauritius, in the face of what the FCO knew to be Mauritius’ rights over the Archipelago, and taking account of the UK’s own political and diplomatic objectives in relation to the Chagos Archipelago.

3.12 At 3.30-3.37, the UK sets out the approaches from Pew in 2007 and 2008. It has provided the note of the meeting between Pew and “BIOT” officials on 22 April 2008.²⁸¹ The note, written by Joanne Yeadon, then “BIOT” Administrator in the UK FCO, is quoted at UKCM 3.33, but is worth considering in full:

“You explained that while their idea of creating a no fishing zone had its attractions, BIOT could be difficult politically. We were committed to the environment but had not been able to do too much about it. The Pew idea was an attractive vision was [sic] in line with HMG’s thinking. But there were obstacles: the first being: **Mauritius**. Mauritius had nationalistic and economic reasons for potentially not liking Pew’s views. They wanted the islands back and would probably want to exploit them for tourism. HMG was, if you like, a *temporary freeholder* as we have said that we will return the islands to Mauritius once they are no longer needed for defence purposes. So, any agreement between the UK Government and Pew Trust may falter when Mauritius regains sovereignty.

[...]

Mauritius and inshore fishing: we explained that Mauritius did have some rights but had not exercised them recently. But this was a loophole that would need looking at.

Legal Issues: they asked for a document explaining the ramifications of *the Mauritius problem* and details of the land tender.”

[Bold and underlining in original; italics added]

3.13 The description of the UK as a “temporary freeholder” is highly significant, indicating recognition of Mauritius’ ongoing rights and interests, along with the recognition of Mauritian fishing rights (despite the fact that these were viewed as a mere “loophole” or “problem”.)

3.14 Ms Yeadon communicated the Pew proposal to the Foreign Secretary by memorandum of 28 April 2008.²⁸² About Pew, she stated that “Their thinking is at an

²⁸¹ Email exchange dated 22 April 2008 between Andrew Allen, Overseas Territories Directorate, UK Foreign and Commonwealth Office and Joanne Yeadon, Head of “BIOT” & Pitcairn Section, UK Foreign and Commonwealth Office, UKCM, Annex 87.

²⁸² Information Note dated 28 April 2008 from Joanne Yeadon, Overseas Territories Directorate, UK Foreign and Commonwealth Office to Meg Munn, Annex 121.

early stage and there is no need to respond to them formally now. But given their size and contacts book, we can expect the proposal to return.” She repeated the “temporary freeholder” comment; noted in respect of the Chagossians’ desire to return that “Any agreement undertaken by the UK Government which prevented this would be a red rag to a bull”; and noted that the matter could not move forward until the judgment of the House of Lords in the autumn. “In the meantime, Pew have asked us to provide further information, e.g. fish catches, income etc much of which we can provide as it is in the public domain. If the proposal looks as though it might have legs, we will come back to you.” The memorandum does not mention Mauritius’ rights over the Chagos Archipelago.

3.15 As the UK implicitly acknowledges at 3.36, the Pew discussions were allowed to progress until they surfaced in the press, without any attempt to inform Mauritius of the ongoing discussions. Mauritius was not consulted along with the “interested stakeholders” referred to at 3.35, despite the FCO’s clear awareness of Mauritius’ rights and the UK’s limited status as a “temporary freeholder”.

(c) *The 2009 bilateral talks*

(1) *Events preceding the talks*

3.16 Before considering the 2009 talks in detail, they must be placed in the context of previous bilateral communications and internal FCO analysis. These include express Mauritian assertions, at the highest level, of rights in the Chagos Archipelago, in the period leading up to the talks. On 13 December 2007, the Mauritian Prime Minister wrote to his UK counterpart following their meeting in the margins of the Commonwealth Heads of Government Meeting in Kampala, Uganda.²⁸³ Prime Minister Ramgoolam recorded that:

“During our meeting I also raised with you the question of our fishing rights in the waters of the Chagos Archipelago excluding of course the immediate vicinity of Diego Garcia for obvious security reasons. Mauritius had historically exercised such rights over the waters of the Chagos Archipelago.”

3.17 This discussion was known to those within the FCO: following the CHOGM, Tony Humphries, the Head of the “BIOT” and Pitcairn Section of the Overseas Territories Directorate at the FCO, reported in an internal email of 29 November 2007 that:

“I meant to mention to you that the Prime Minister met the Mauritian Prime Minister in the margins of the Commonwealth Heads of Government Meeting in Uganda over the weekend. [Redacted] Ramgoolam also wants to revive Mauritian claims to rights on the

²⁸³ MM, Annex 135.

fishing permits in BIOT and indicated that he wanted to resurrect the British Mauritian Fishing Commission.”²⁸⁴

3.18 In response to this message, Chris Mees of MRAG²⁸⁵ responded on 30 November with an account of the history of the British-Mauritian Fisheries Commission, and noted that:

“With respect to ‘Mauritian claims to rights on the fishing permits in BIOT’ UK recognised the historical fishing rights of Mauritius and has granted licences to Mauritian flagged fishing vessels free of charge.”²⁸⁶

3.19 On 4 January 2008, a desk officer for Mauritius among other areas [name redacted] emailed Ms Yeadon, apparently in response to a draft letter to Prime Minister Ramgoolam relating to a forthcoming meeting:

“Can we maybe try to make it a little more positive by mentioning fishing as Ramg [sic] mentions in his letter? Perhaps a second line here with something about ‘certain areas we can discuss such as fishing?’”²⁸⁷

3.20 This wording found its way into the letter from the UK Prime Minister to Prime Minister Ramgoolam of 7 February 2008: “There are certainly many other issues relating to the British Indian Ocean Territory that we can discuss such as fishing.”²⁸⁸

3.21 Discussions then took place between Prime Minister Ramgoolam and various UK officials at the celebrations in Mauritius on 12-13 March 2008, to mark the 40th anniversary of Mauritian independence. The UK Prime Minister wrote to Baroness Amos, the UK representative at the celebrations and surrounding discussions:

“I am keen that we maintain good relations with Mauritius. Aside from a potential formal Treaty on sovereignty,²⁸⁹ there are areas on fishing rights and extension of the continental shelf under UNCLOS that we might discuss. The latter would benefit Mauritius, not the UK. This way ahead formed the basis of my agreement with Ramgoolam in the margins

²⁸⁴ Email exchange between Chris C. Mees, MRAG Ltd and Tony Humphries, Head of “BIOT” and Pitcairn Section, UK Foreign and Commonwealth Office, 29-30 November 2007, Annex 116.

²⁸⁵ A consultancy firm which had, since 1991, contracted with the “BIOT” Administration to run the ‘BIOT’ fisheries (UKCM, footnote 273).

²⁸⁶ Email exchange between Chris C. Mees, MRAG Ltd and Tony Humphries, Head of “BIOT” and Pitcairn Section, UK Foreign and Commonwealth Office, 29-30 November 2007, Annex 116.

²⁸⁷ Email exchange between Africa Directorate and Joanne Yeadon, Head of “BIOT” & Pitcairn Section, UK Foreign and Commonwealth Office, 4 January 2008, Annex 117.

²⁸⁸ Letter dated 7 February 2008 from the UK Prime Minister to the Prime Minister of Mauritius, Annex 118.

²⁸⁹ See paras. 3.24-3.25 below.

of CHOGM, and I look forward to hearing the outcome of bilateral discussions on these topics.”²⁹⁰

3.22 This high-level bilateral contact indicates that Mauritius consistently emphasised its rights over the Chagos Archipelago, including fishing rights, and that these were consistently recognised by the UK.

(2) *January 2009*

3.23 The UKCM deals extremely briefly with the January 2009 talks, at fn 223 p. 74,
3.40. The UK simply states that:

“the agenda of the first [i.e. January] meeting, at the United Kingdom’s suggestion, included matters on which the United Kingdom considered there might be fruitful co-operation between the two countries: cooperation over fishing rights in the form of a revived British-Mauritian Fisheries Commission or something similar (although the United Kingdom was aware Mauritius was seeking an arrangement for the joint issue of commercial tuna fishing licences to third countries to fish in BIOT waters and sharing of licence fees under this agenda item, which the United Kingdom would not accept) and a joint submission on the continental shelf to the Commission.”

3.24 The UK provides no documents to support this record of events, or its contention that the inclusion of “fishing rights” on the agenda should be understood in the limited sense claimed. However, internal FCO correspondence sheds more light on the FCO’s preparations for the talks. On 31 October 2008, Ms Yeadon wrote that:

“As discussed briefly yesterday, the agenda is not going to live up to Mauritian expectations. What we are willing to discuss is fishing rights and a potential Treaty on sovereignty. At one point we were looking at the possibility of the extension of the continental shelf under UNCLOS which would benefit Mauritius when we reach the point of ceding²⁹¹ the territory, but this would be astronomically expensive so I am not convinced it is on the cards. But ceding any part of the archipelago is, for the time being, a non-starter.”²⁹²

²⁹⁰ Letter dated 10 April 2008 from the UK Prime Minister to Baroness Amos and letter dated 14 March 2008 from Baroness Amos to the UK Prime Minister, Annex 119.

²⁹¹ The UK previously used the more appropriate term “revert”, denoting a handing back of effective control over the Chagos Archipelago, but subsequently began to use the term “cede”.

²⁹² Email exchange between Joanne Yeadon, Head of “BIOT” & Pitcairn Section and Head of the Southern Africa Section, Africa Department, UK Foreign and Commonwealth Office, 31 October 2008, Annex 122 (emphasis added).

3.25 On 5 November 2008²⁹³, Ms Yeadon again noted the limitations of talks, given the parties' positions on sovereignty, but that "Subjects we can talk about are fishing rights and the possibility of drawing up of [sic] a Treaty confirming our commitment to cede the Territory to Mauritius when it is no longer needed for defence purposes. We are open to other suggestions."

3.26 Ms Yeadon emailed again on 21 November 2008, stating that:

"The Mauritians may bill these talks as 'Discussions on Sovereignty of BIOT with the UK.' I would like to reassure you that we have no intention of ceding any part of the Chagos Archipelago to Mauritius until they are no longer needed for the defence purposes of the UK and US. However, there are issues on BIOT that we can discuss with Mauritius, e.g. traditional fishing rights, formalizing the sovereignty issue in a treaty (as I explained there has never been an Exchange of Notes or a formal Treaty arrangement with the Mauritians.)"²⁹⁴

3.27 In a further email of 31 December 2008, Ms Yeadon discussed the agenda, including:

"(iv) Fishing rights / protection of the environment [Means of discussing current / possible Mauritian rights in BIOT waters and introducing discussion of Pew ideas, if not name]; (v) Possibility of any application for an extension of the continental shelf under UN Commission on the Limits of the Continental Shelf; [We need to find out what their plans are]."²⁹⁵

3.28 These documents make clear that the UK entered those talks on the express basis that Mauritius had rights in the Chagos Archipelago. The repeated and free-standing references to "fishing rights" and "traditional fishing rights" cannot be confined, as the UK now attempts to do, to a proposal to revive the British-Mauritian Fisheries Commission.

3.29 The joint communiqué of the January 2009 meeting was discussed in Mauritius' Memorial.²⁹⁶ The UK has disclosed the internal FCO record of the meeting. It is apparent from this record that there was detailed discussion of fishing rights (section 6 of the minute) and of the continental shelf (section 7). This includes the following:

²⁹³ Email dated 5 November 2008 from Joanne Yeadon, Head of "BIOT" & Pitcairn Section, UK Foreign and Commonwealth Office to John Murton, British High Commissioner to Mauritius, Annex 123 (emphasis added).

²⁹⁴ Email dated 21 November 2008 from Joanne Yeadon, Head of "BIOT" & Pitcairn Section, UK Foreign and Commonwealth Office, Annex 124 (emphasis added).

²⁹⁵ Email dated 31 December 2008 from Andrew Allen, Overseas Territories Directorate, to Joanne Yeadon, Head of "BIOT" & Pitcairn Section, UK Foreign and Commonwealth Office, Annex 125.

²⁹⁶ MM, para. 4.37; Joint Communiqué, Bilateral Talks between Mauritius and the UK on the Chagos Archipelago, 14 January 2009, MM, Annex 137.

“The Mauritians explained that their lack of interest in taking up fishing rights (free licences) & continuing with the British Mauritian Fisheries Commission was that they felt this impacted on their position on sovereignty. They were, however, prepared to have a fresh look to ensure that the resources of the Chagos Archipelago were exploited in an equitable and responsible manner. This could be the subject of further talks. It became apparent during the rest of this discussion that the Mauritians were under the illusion that we were agreeing to share resources. The UK pointed out again that this was not the case. We were talking about privileged access only. We added, too, that the BMFC had been constructed under a bullet-proof sovereignty umbrella.”²⁹⁷

3.30 This makes it clear, as Mauritius has consistently done, that it considers the issue of fishing rights in the Chagos Archipelago to be intertwined with the question of sovereignty. The close connection between the two issues, as they have been pursued by Mauritius in bilateral relations, is important for consideration of the requirements of Article 283 (considered in Chapter 4 below). It is also important when considering the contents of the two rounds of 2009 talks: as the above extract shows, the UK officials were aware at the time that Mauritius’ overarching position on sovereignty placed limitations on its ability to pursue fishing rights as a separate issue. It is also significant in light of the emphasis placed by the UK on the small numbers of fishing licences granted to Mauritian boats in recent years: see UKCM 3.41.

(3) *Events taking place between the January and July 2009 bilateral talks*

3.31 At 3.38, the UK states that “It was not until 6 May 2009 that the Secretary of State for Foreign and Commonwealth Affairs adopted a policy of giving consideration to the possibility of creating a large-scale BIOT MPA. [fn 220: “Drawing upon the scoping work carried out by BIOT and OTD officials since July the previous year and following a full, one hour, visual presentation by Professor Sheppard.”] No documents are provided to shed light on how this policy came to be adopted. The following, however, can be established from the internal FCO documentation.

3.32 Shortly before the “policy” was adopted on 6 May 2009, Joanne Yeadon emailed Colin Roberts to note that a Mauritian vessel had applied for a licence to fish in “BIOT” waters:

“As agreed with the Mauritians previously, no fee has been charged. I flag this up in the context of the proposed Chagos Marine Park – the Mauritians have got historic fishing rights and now, for the first time in years, have used them. This may well be a one-off. It is one vessel not a fleet! Also interesting in view of the Mauritian line at the January talks,

²⁹⁷ UK Foreign and Commonwealth Office, Overseas Territories Directorate, “British Indian Ocean Territory: UK/Mauritius Talks”, 14 January 2009, Annex 128 (emphasis added).

i.e. that they wouldn't apply for licences as it would be tantamount to an admission of UK sovereignty.²⁹⁸

3.33 This underlines, again, that the UK officials concerned with the “MPA” proposals were, on the eve of the decision formally to consider declaring an “MPA”, well aware that (a) Mauritius had “historic fishing rights”; and (b) Mauritius’ position on sovereignty was the reason for the limited take-up of free fishing licences.

3.34 On 5 May 2009, Colin Roberts presented a briefing paper to the Foreign Secretary, entitled “British Indian Ocean Territory: The World’s Largest Marine Reserve”²⁹⁹

- (i) This sets out the proposal, discusses the “reputational / political benefits” (“it should also help to promote a positive image of the overseas territories in the public’s mind and offset some of the negative associations with Diego Garcia”).³⁰⁰
- (ii) It notes “Security benefits: overall the creation of a reserve could involve greater control over access to the territory. This would bring a net security benefit.”
- (iii) There is a section on Mauritius, which notes the position on sovereignty: “They have formally stated their opposition on grounds of sovereignty, but we know they are also bothered by the risk of losing forever the chance to exploit the fishery.” The memo notes that it would be “possible, if very difficult, to convince the government of Mauritius that creation of a marine reserve would be in its interest”, by measures including “heavy lifting by the Foreign Secretary and possibly the Prime Minister; possibly some other sweetener.”

²⁹⁸ Email dated 21 April 2009 from Joanne Yeadon, Head of “BIOT” & Pitcairn Section, to Colin Roberts and Andrew Allen, Overseas Territories Directorate, UK Foreign and Commonwealth Office, Annex 130 (emphasis added).

²⁹⁹ Paper submitted on 5 May 2009 by Colin Roberts, Director, Overseas Territories Directorate, to the Private Secretary to the Foreign Secretary, “Making British Indian Ocean Territory the World’s Largest Marine Reserve” There are two versions of this document in the public domain following the hearing in the case of *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2013] EWHC 1502 (Admin) in April 2010. Both contain redactions: on one version (Annex 133), the final sentence of the fourth page is redacted (paragraph beginning “Mauritius claims sovereignty over BIOT...”), while on the other the unredacted sentence appears: “The position is complicated by a side deal done at the time of excision which gave Mauritius the right to apply for fishing licences free of charge.” (Annex 132)

³⁰⁰ When cross-examined about this part of the briefing paper, at the hearing in the case of *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2013] EWHC 1502 (Admin), Mr Roberts stated: “I go back to the – one of the origins of our proposals in relation to strengthening environmental protection in the British Indian Ocean Territory. We recognised that the government was in a very difficult public position. Not only was there a great deal of political pressure relating to the Chagosian movement but we also were dealing with a series of allegations relating to rendition and we were looking to see what we could do to try and improve the reputation of the government in relation to the British Indian Ocean Territory specifically but also other territories.” (Extract of Transcript, *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs*, Examination and Cross-Examination of Mr. Colin Roberts, 15-17 April 2013, Annex 174, Day 1, p.147 line 22).

- (iv) Under the heading “The Chagossian movements”, the memo states that “Assuming we win in Strasbourg (contingency for losing the case is dealt with in earlier submissions), we should be aiming to calm down the resettlement debate. Creating a reserve will not achieve this, but it could create a context for a raft of measures designed to weaken the movement.”³⁰¹
- (v) Under the heading “The US military”, the memo states that “We do not expect opposition from the US administration, but we expect we will have our work cut out to reassure the US military that creation of a reserve will not result in trouble for them.” (emphasis added)

3.35 As noted above in the discussion of the approach by Pew, this document demonstrates that, regardless of the original source of the “MPA” proposal, the decision to adopt it was made by UK on the basis of a range of considerations, including those wholly unrelated to the environment, and that the ultimate decision was a highly political one, taking into account factors such as “security benefits” and the desire to “weaken” the movement supporting the right of return of the former residents of the Chagos Archipelago.

3.36 It appears that Mr Roberts’ paper was presented to the UK Foreign Secretary at a meeting on 6 May 2009, the date on which the UK Foreign Secretary adopted the policy referred to at UKCM 3.38. An email from Colin Roberts on 7 May records the next steps as including the following: “to devise a public consultation process which takes account of the key legal and political risks identified, but is not dependent on resolution of all issues.” The response was that:

“The Foreign Secretary was really fired up about this after the meeting, and is enthusiastic that we press ahead with this. So do press ahead as you suggest, but my advice would be to keep the timelines taut, to keep him involved, and to ensure that the creation / announcement of the reserve is scheduled within a reasonable timescale.”³⁰²

3.37 It is striking that the UK Foreign Secretary’s office was pressing for the “creation / announcement of the reserve” to take place “within a reasonable timescale” at the point when the public position of the UK was simply that this was the start of a consultation process which would review all options.

³⁰¹ When cross-examined about this part of the briefing paper, at the hearing in the case of *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2013] EWHC 1502 (Admin), Mr Roberts described this proposal as “speculative and hypothetical”, and stated that “it is suggesting that in a situation where the government has won its case in Strasbourg, we might want to present some evidence to help convince the supporters of resettlement that there is still a major problem.” (Extract of Transcript, *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs*, Examination and Cross-Examination of Mr. Colin Roberts, 15-17 April 2013, Annex 174, Day 1, p.150 line 24).

³⁰² Email exchange between Colin Roberts, Director, Overseas Territories Directorate, and Matthew Gould, Principal Private Secretary to the Foreign Secretary, UK Foreign and Commonwealth Office, 7 May 2009: Annex 134 [See also Email exchange between Joanne Yeadon, Head of “BIOT” & Pitcairn Section, UK Foreign and Commonwealth Office and Ian [surname redacted], 4 June 2009: Annex 135).

3.38 As to the ongoing political considerations, an email from Ms Yeadon of 4 June 2009 sets out an account of the meeting between Colin Roberts and two officials from the US Embassy on 12 May 2009 [names redacted], in which Mr Roberts sought to reassure them that the “MPA” proposal had no impact on US military activities in the Chagos Archipelago.³⁰³ The recipient of the email [name redacted: from the context it appears to be a person in the office of the UK Foreign Secretary; email copied to Mr Allen and Mr Roberts] responds with several questions, including “Separately, and I ask this as a complete novice, but doesn’t a marine park enjoy some sort of environmental protections? In which case there seems to me to be some inconsistency in saying that military vessels can trundle in and out (presumably polluting as they go).” In reply, Ms Yeadon’s comments include that “We have not yet engaged with Mauritius on the proposal but we will be doing so soon. They have already expressed concern but more for sovereignty reasons than anything else – they do not, for example, often exploit their historical inshore fishing rights.” This shows, again, clear awareness within the FCO of the fact that Mauritius had rights over the Chagos Archipelago.

3.39 MRAG, the company which administered the licence system in the Chagos Archipelago, sought to remind the FCO of Mauritius’ rights in the Archipelago. When asked to comment in advance of the public consultation, MRAG provided the FCO, through Ms Yeadon, with detailed and far-reaching criticisms of the proposal.³⁰⁴ MRAG expressed the view that “Closure of the BIOT FCMZ will not address all conservation concerns; after the initial political impact, the conservation outcomes of the closure are likely to fall short of expectations and may be negative in some cases.”³⁰⁵

3.40 The report also drew attention to legal considerations in Section 4, under the heading “Legal and historical obligations may pose a constraint on declaring the whole FCMZ as a closed area. UNCLOS requires that coastal states make provision for access to its EEZ by foreign fishers; Mauritius has historical agreements to fish inside the BIOT FCMZ.” In Section 4a, MRAG drew attention to the UK’s obligations under UNCLOS, citing Articles 56, 62, 69, 70, 71 and 300. Section 4b, entitled “Mauritian historical fishing rights”, states that:

“In addition to UNCLOS article 62 which refers to States whose nationals have habitually fished in the zone, the right of Mauritians to fish in BIOT waters was enshrined in the agreements made between UK and Mauritius in 1965. The 1971 ordinance on fishing also left an exception for certain foreign vessels to fish. This ‘right to fish’ has been

³⁰³ Email exchange between Joanne Yeadon, Head of “BIOT” & Pitcairn Section, UK Foreign and Commonwealth Office and Ian [surname redacted], 4 June 2009, Annex 135. This is the meeting also recorded in the US cable discussed at MM, paras. 4.45-4.49, in which the US author records Mr Roberts as having assured him that “establishing a marine park would, in effect, put paid to resettlement claims of the archipelago’s former residents.” In the 4 June email, Ms Yeadon also notes that ‘I told Chris [presumably the name of a US official] that any marine park established in BIOT would have to be administered in accordance with UNCLOS which insisted on the right of innocent passage.’

³⁰⁴ Email dated 9 July 2009 from Development Director of MRAG to Joanne Yeadon, Head of “BIOT” & Pitcairn Section, UK Foreign and Commonwealth Office, & “MRAG Comments on the proposal to designate the BIOT FCMZ as a marine reserve”, Annex 137.

³⁰⁵ Section 2: the response goes on to set out detailed reasons for this conclusion.

put into practice since the declaration of the FCMZ in 1991 as ‘free licences’ although the BIOT Administration reserves the right to limit the number of licences issued relative to the surplus allowable catch. For the banks (inshore) fishery a limit of six eighty-day licences has been applied. There is documentary evidence of Mauritian fishing in the Chagos archipelago since at least 1977.”

3.41 By email of 3 July 2009, Colin Roberts asked Joanne Yeadon to analyse a number of issues, including, in respect of Mauritius:

“a full analysis of the history of fishing and environmental protection in BIOT. You and [name redacted] have already done some work on this, but we need to have an authoritative statement of what we think are Mauritius’ rights today to fish in BIOT waters. We also need to understand the significance of the different environmental regimes currently applied to different parts of the territory. What, for example, is the significance of the EPPZ designation?”³⁰⁶

3.42 Ms Yeadon responded on 14 July 2009:

“Mauritian fishing rights were never defined in the Lancaster House side meetings but what it boils down to is free access to BIOT waters. This has translated over the years to the Mauritians being obliged to apply for a permit but getting it free. You have already seen the Research Analyst 1996 paper on the history of fishing³⁰⁷ and now Chris Mees has provided a snapshot in his recent paper on the marine park. I will also send a copy of an analysis MRAG have prepared on Mauritian fishing activities since 1991.”³⁰⁸

(4) *The bilateral talks in July 2009*

3.43 The UK claims that “by the time the United Kingdom delegation arrived in Mauritius for the second round of bilateral talks their understanding was that Mauritius did not have legal rights to fish in BIOT waters, whether as a result of the 1965 understanding or otherwise, that prevented the United Kingdom from establishing a MPA, including a no-take MPA.” [3.40] No documents are provided to substantiate this assertion. Moreover, the sentence is ambiguous. It is unclear whether this sentence means that the UK considered that (a) Mauritius had *no* legal rights to fish in the waters of the Chagos Archipelago, or that (b) Mauritius *did* have legal rights to fish in the waters of the Chagos Archipelago, but those rights were not such as to prevent the UK

³⁰⁶ Email exchange between Colin Roberts, Director, Overseas Territories Directorate, and Joanne Yeadon, Head of “BIOT” & Pitcairn Section, UK Foreign and Commonwealth Office, 13-14 July 2009, Annex 138.

³⁰⁷ See para. 3.7 above.

³⁰⁸ Email exchange between Colin Roberts, Director, Overseas Territories Directorate, and Joanne Yeadon, Head of “BIOT” & Pitcairn Section, UK Foreign and Commonwealth Office, 13-14 July 2009, Annex 138.

from establishing an MPA, including a no-take MPA. Logically, however, the sentence must mean the former, since it is difficult to understand how the existence of *any* Mauritian fishing rights in the area proposed to be subject to an MPA would be compatible with a no-take regime. Where a State has fishing rights over a particular area, it cannot be compatible with those rights for another State to purport to prevent that State from carrying out any fishing in that area.

3.44 This statement as to the UK delegation's state of mind is misleading, it is submitted, in light of the record of internal discussions and analysis preceding the July talks (summarised above). Moreover, that the UK officials concerned *did* consider Mauritius to have fishing rights in the "MPA"-affected area is underlined by their analysis and discussion following the July talks, right up to and beyond the "MPA" declaration on 1 April 2010. Those further materials are considered below.

3.45 The UK attempts to circumscribe the relevance of the understanding of those involved in the talks, by stating that "The relevance of the understanding of the BIOT officials involved in the MPA proposal process is simply that they were conscious of the issue and would have picked up on any remarks from Mauritian officials related to it." [3.40] However, it is submitted that the materials summarised above indicate that those concerned were more than "conscious of the issue" of Mauritius' rights over the Chagos Archipelago: they were fully aware that those rights existed. Moreover, those rights had also been consistently asserted and accepted in bilateral communications between the two States.

3.46 There followed the July 2009 bilateral meeting. The UK account is at UKCM 3.42-3.49. The FCO record of the meeting includes a section headed "Access to Fishing Rights":

"There was a short discussion about access to fishing rights. The Mauritians wanted to manage jointly the resources. This was simply put on the table for the UK to consider. Comment: this all seemed a bit surreal when we'd spent the last half hour discussion [sic] the possible ban on any fishing in the territory but the Mauritians had warned us that this would remain an agenda item. We agreed to consider the idea but would need to take into consideration the implications of a proposed marine protected area."³⁰⁹

3.47 An FCO eGram relating to the meeting gives a less detailed account, but interestingly, in light of the UK's attempt to portray Mauritius as uninterested in asserting its fishing rights over the Archipelago, states that "it is ... sovereignty concerns that have long prevented Mauritian fishermen from making large-scale use of fisheries in BIOT waters."³¹⁰ Again, this undermines the UK's attempts to attach

³⁰⁹ UK Foreign and Commonwealth Office, Overseas Territories Directorate, "UK/Mauritius Talks on the British Indian Ocean Territory", 24 July 2009, Annex 143.

³¹⁰ eGram dated 21 July 2009 from John Murton, British High Commissioner to Mauritius to UK Foreign and Commonwealth Office, Annex 141.

significance to the relatively limited number of licences issued to Mauritian vessels in recent years.

3.48 At 3.46, the UK attempts to explain the fact that, as at the January meeting, fishing rights were clearly discussed by the delegations. The explanation given is that “Mauritius wanted the BIOT to consider jointly issuing fishing licences to third countries, but this was not understood by the BIOT delegation as relating to any Mauritius ‘fishing rights’ under the 1965 understanding and the free licensing arrangements (the discussion was not about fishing but the licensing process) but to Mauritius’ wish to establish a sovereignty ‘win’.” However, the UK provides no evidence of the understanding of the UK delegation that the discussion of fishing rights could be constrained in that way; the internal records summarised above do not support such a narrow understanding of the nature of Mauritius’ rights, especially since they had been asserted in unqualified terms in bilateral communications, including those at Prime Ministerial level in 2007 (see para. 3.16 above).

3.49 The UK goes on to argue that “If any one of the Mauritian representatives met with on 21 July 2009 thought Mauritius had fishing rights or other rights under UNCLOS that would be interfered with by a possible MPA, including a complete no-take marine reserve, it is strange that they did not raise these points in the bilateral talks or during either of the meetings held earlier that day, which were an obvious opportunity for them to do so.”³¹¹ However, at the first round of talks in January, Mauritius had referred to the inducements offered to the Mauritian delegates at the Lancaster House meeting of 23 September 1965 and pointed out that these inducements included fishing rights. As Mauritius had referred to these matters at the first round of talks, it did not deem it necessary specifically to refer to the undertaking again when the issue of fishing rights was discussed at the July talks.

3.50 As the Joint Communiqué of the meeting made clear,³¹² Mauritius was supportive in principle of the idea of strengthening the protection of the environment in the Chagos Archipelago, and agreed that a team of officials and marine scientists from both sides would meet to examine the implications of the concept with a view to informing the next round of talks. This did not translate into Mauritian support for a unilaterally-imposed no-take “MPA” (as Mauritius subsequently made clear in response to the consultation document: see para. 3.55 below). Since the UK had indicated that “not many details [of the “MPA” proposal] were available”³¹³, and it was agreed that a joint team would explore the proposal further, the Mauritius delegation did not consider it appropriate to engage in further discussions on the matter. It was considered more appropriate to raise issues such as fishing, mineral and oil rights at the meeting of officials and marine scientists. However, this meeting never took place because, as detailed below and in Chapter 4 of Mauritius’ Memorial, the UK cut across the bilateral talks by launching a consultation on the “MPA” proposal.

³¹¹ UKCM, para. 3.49.

³¹² Joint Communiqué, Second round of bilateral talks between Mauritius and the UK on the Chagos Archipelago, 21 July 2009, Port Louis, Mauritius, Annex 142.

³¹³ UKCM, para. 3.45.

(d) Further developments in 2009

3.51 Based on the report of the workshop held by the National Oceanography Centre on 5-6 August 2009, the UK argues that “the scientific arguments were strongly in favour of a large scale marine protected area covering the BIOT’s entire 200 nm FCMZ/EPPZ.” [3.54]³¹⁴ This overlooks:

- (i) The detailed scientific criticisms put forward by MRAG, based on first-hand knowledge of the administration of fisheries in the Chagos Archipelago: see para. 3.39 above.
- (ii) Subsequent concerns voiced within the FCO about the inadequate and rushed scientific assessment of the proposal: see para. 3.67 below.
- (iii) The conclusion of the workshop itself that:

“Ultimately the decision on the extent of the open ocean no-take zone within a potential BIOT MPA will be a political one. [...] The issue of Mauritian fishing rights was also considered to be a political one, that could only be resolved by negotiation and international agreement.”
[See MM 4.54]

3.52 This makes clear that the workshop delegates did not consider that the question of an “MPA” could be resolved without regard to the rights of Mauritius.

3.53 The “BIOT” Administration produced a further paper on 7 September 2009, entitled “BIOT Marine Reserve Proposal: implications for US activities in Diego Garcia and British Indian Ocean Territory.” This addressed potential US concerns about the declaration of an “MPA”, including concerns expressed about the right of innocent passage under UNCLOS:

“The US have expressed concern over the right of innocent passage and whether it would have any impact on Diego Garcia. However, the Law of the Sea Convention already applies in BIOT. It is not something new the UK is considering for any proposed marine protected area. The whole point of innocent passage is that it applies to foreign flag vessels in the territorial seas of a coastal state. In BIOT, the UK is the coastal state, and we can permit US warships etc to enter BIOT territorial seas carrying arms, ammunition etc. In any case, giving consent to movement of ships that might otherwise violate the principle of innocent passage is the prerogative of the coastal state.”³¹⁵

³¹⁴ See also MM, para. 4.54.

³¹⁵ Submission dated 7 September 2009 from “BIOT” Administration, “BIOT Marine Reserve Proposal: Implications for US Activities in Diego Garcia and British Indian Ocean Territory”, Annex 145.

3.54 Ms Yeadon produced a further paper on 29 October 2009 entitled “British Indian Ocean Territory: Public Consultation on Proposed Marine Protected Area.”³¹⁶ This addressed the possible media strategy relating to the consultation and the risks of opposition from Mauritius and the US.

(e) The process leading to the announcement of the “MPA”

3.55 There followed the consultation exercise detailed in Mauritius’ Memorial.³¹⁷ The Memorial makes it clear that, contrary to the position taken in the UKCM, Mauritius did not consider that it had been adequately consulted before the launch of the consultation exercise.³¹⁸ Nor did it consider that the consultation document as originally launched accurately reflected Mauritius’ position on the proposed “MPA”: it claimed that Mauritius had welcomed the “MPA” proposal at the July 2009 talks, while in fact, as the Joint Communiqué made clear, the correct position was that Mauritius welcomed the general principle of environmental protection in the Chagos Archipelago, and that a joint team of scientists would examine the issue further with a view to its being discussed further at the next round of the bilateral talks. Given the clearly-stated joint position that the “MPA” proposal should be discussed through bilateral talks, it is hardly surprising that, as the UK details at UKCM 3.50-3.51, Mauritius declined to participate in a “consultation exercise” which bypassed the talks to which both parties had agreed. As Mauritius made clear:

“The Government of Mauritius considers that an MPA project in the Chagos Archipelago should not be incompatible with the sovereignty of the Republic of Mauritius over the Chagos Archipelago and should address the issues of resettlement, access to the fisheries resources, and the economic development of the islands in a manner which would not prejudice an eventual enjoyment of sovereignty. A total ban on fisheries exploitation and omission of those issues from any MPA project would not be compatible with the long-term resolution of, or progress in the talks on, the sovereignty issue. The stand of the Government of Mauritius is that the existing framework for talks on the Chagos Archipelago and the related environmental issues should not be overtaken or bypassed by the consultation launched by the British Government on the proposed MPA.”³¹⁹

³¹⁶ Submission dated 29 October 2009 from Joanne Yeadon, Head of “BIOT” & Pitcairn Section to Colin Roberts, Director, Overseas Territories Directorate, and the Private Secretary to the Foreign Secretary, “British Indian Ocean Territory (BIOT): Public Consultation on Proposed Marine Protected Area”, Annex 147.

³¹⁷ MM, paras. 4.55-4.76.

³¹⁸ MM, paras. 4.56-4.59.

³¹⁹ MM, para. 4.58 and MM, Annex 155.

3.56 As for the meetings of 22 and 23 October, detailed at UKCM 3.51, the Mauritian Prime Minister’s Chief of Staff, Kailash Ruhee, records what took place:³²⁰

- (i) “[O]n the 22nd of October at a meeting in the office of the Prime Minister which I attended, the Prime Minister informed the High Commissioner that he takes serious exception to the proposal for the setting up of an MPA and expressed his firm intention to take this matter up with Prime Minister Gordon Brown at [the Commonwealth Heads of Government Meeting] that was scheduled to take place in Trinidad and Tobago from 27 to 29 November 2009.”
- (ii) As for the 23 October meeting between Mr Ruhee and the British High Commissioner, “I told him that nobody would dispute the setting up of an MPA on strictly environmental grounds but that we should look into all its implications including the issue of sovereignty of Mauritius. I also told him that the ‘Shoals of Capricorn’, which is a scientific NGO, was working with the lessee of St Brandon on the setting up of an MPA.”

3.57 On 5 November 2009, Mauritius informed the UK that the dates it had proposed for the third round of talks were not convenient to the Mauritian authorities in view of the presentation of the national budget on 18 November 2009.³²¹ Since the UK failed to give satisfactory clarification and assurances in respect of issues which Mauritius had raised on 23 November 2009 in respect of the proposed “MPA”, Mauritius informed the UK on 30 December 2009 that it would not be possible to hold the third round of bilateral talks in January 2010.³²²

3.58 When the UK wrote to Mauritius on 15 February 2010 to enquire when the third round of bilateral talks could be rescheduled,³²³ Mauritius responded that it was keen to resume the bilateral talks, on condition that the public consultation be halted and the consultation withdrawn, and that any proposal for the protection of the marine environment in the Chagos Archipelago be compatible with and meaningfully take on board the position of Mauritius on sovereignty over the Chagos Archipelago, and address the issues of resettlement and access by Mauritians to the fisheries resources in that area.³²⁴ Since the UK refused to stop the public consultation, Mauritius was unable to agree to participate in the third round of bilateral talks.

3.59 The fact that the UK did not genuinely intend the consultation exercise to run “alongside” the discussions with Mauritius [3.51] is underlined by the circumstances in which the “MPA” was hastily declared very shortly after the closure of the consultation exercise, in circumstances in which no further talks with Mauritius had in fact taken place.

³²⁰ Memorandum dated 18 July 2013 from Mr Kailash Ruhee, Chief of Staff of the Prime Minister of Mauritius to the Secretary to Cabinet, Mauritius, 18 July 2013, Annex 178.

³²¹ MM, Annex 150.

³²² MM, Annex 157.

³²³ MM, Annex 161.

³²⁴ MM, Annex 162.

3.60 The meeting between the UK and Mauritius Prime Ministers on 27 November 2009 is addressed at UKCM 3.63, where the UK claims that “when the allegation first arose in late December 2009 that the United Kingdom Prime Minister had given any such undertaking to withdraw the public consultation, the Prime Minister was asked whether he had: he said he had not.” The UK does not provide any document in support of that assertion. The meeting in question is described in the Statement of the Prime Minister of Mauritius dated 6 November 2013.³²⁵ Prime Minister Ramgoolam indicates that the meeting was formal and pre-arranged. After some initial discussion,

“10. ... [Mr Brown] reiterated his thanks and his invitation to assist me. I therefore took the opportunity to convey to Mr Brown the deep concern of Mauritius over the proposal of the United Kingdom to establish a ‘marine protected area’ around the Chagos Archipelago and the launching of a public consultation by the UK Foreign and Commonwealth Office on 10 November 2009, just two weeks earlier, in this regard. That announcement had been the subject of media attention. I indicated to Mr Brown that when the British High Commissioner in Mauritius had called on me on 22 October 2009 to announce the UK’s proposal, I had expressed surprise that he was not able to offer me any document in relation to that proposal and told him that I would raise the matter with the British Prime Minister during the forthcoming CHOGM in Port of Spain. I had made very clear the objection of Mauritius to the UK’s proposal.

11. I also conveyed to Mr Brown that since the bilateral talks between Mauritius and the United Kingdom were intended to deal with all issues relating to the Chagos Archipelago, they were the only proper forum in which there should be further discussions on the proposed ‘marine protected area’.

12. I further pointed out that the issues of sovereignty and resettlement remained pending and that the rights of Mauritius in the Chagos Archipelago waters had to be taken into consideration.

13. In response, Mr Brown asked me once again: ‘What would you like me to do?’ I remember these words clearly.

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

15. Mr Brown then said: ‘I will put it on hold.’ He told me that he would speak to the British Foreign Secretary. He also assured me that the proposed ‘marine protected area’ would be discussed only within the framework of the bilateral talks between Mauritius and the UK.”

³²⁵ Statement of Dr the Honourable Navinchandra Ramgoolam, Prime Minister of the Republic of Mauritius, 6 November 2013, Annex 183.

3.61 However, the UK went ahead with the “MPA” proposal in the face of this clear commitment by the UK Prime Minister.

3.62 On 30 March 2010, Ms Yeadon submitted a memo to the Foreign Secretary entitled “British Indian Ocean Territory (BIOT): Proposed Marine Protected Area (MPA): Next Steps.”³²⁶ This recommended that the Foreign Secretary announce the publication of the responses to the consultation exercise, stating that “he believes that the establishment of an MPA is the way ahead for the protection of the Territory and that he will ask officials to work towards this. But he should stop short of announcing that he is going to ask the BIOT Commissioner to declare an MPA in the Territory at this stage.” The report also noted that:

“Mauritius’ position hardened notably following the *tete-a-tete* between Gordon Brown and PM Ramgoolam and CHOGM. PM Ramgoolam has, historically, been moderate on BIOT. But he insists that Gordon Brown promised to halt the MPA consultation at CHOGM and he briefed the Mauritian press accordingly following his return from Port of Spain. [Redaction] He believes the FCO has ignored Gordon Brown’s promise and this causes him greatly to distrust our position, especially in an election year.

[...]

We do not need Mauritius’ agreement to declare an MPA. Indeed they have never expressed any interest in any of the many environmental protection measures taken in BIOT in recent years (although these were taken before the establishment of the bilateral dialogue). Nevertheless, it is clear that any move to establish an MPA before their elections [words redacted] and may lead them to consider and possibly even attempt some form of international legal challenge.”

3.63 An email from the Assistant Private Secretary to the Parliamentary Under Secretary of State in the FCO, dated 30 March 2010, responded to this memo:

“The Minister was grateful for your submission. His inclination is to be bolder in our statement. He does not think that it is likely we will be able to persuade the Mauritians or those fighting the Chagossian cause otherwise, but since the proposed MPA does not conflict with either our position on Mauritius or Chagossian rights, that we should actually decide to go ahead.”³²⁷

³²⁶ Submission dated 30 March 2010 from Joanne Yeadon, Head of “BIOT” & Pitcairn Section, to Colin Roberts, Director, Overseas Territories Directorate, the Private Secretary to Parliamentary Under Secretary Chris Bryant and the Private Secretary to the Foreign Secretary, “British Indian Ocean Territory (BIOT): Proposed Marine Protected Area (MPA): Next Steps”, Annex 152.

³²⁷ Email exchange between Sarah Clayton, Assistant Private Secretary to the Parliamentary Under Secretary of State Chris Bryant, and Joanne Yeadon, Head of “BIOT” & Pitcairn Section, UK Foreign and Commonwealth Office, 30 March 2010, Annex 153.

3.64 This met with concern within the FCO. In an email of 31 March 2010, John Murton stated that:

“I think Miliband will be seeing a balanced view of where we stand. I’ve no idea if he’ll follow the recommendation or not. If he DOES then we’ll be in a position of ‘looking favourably’ on an MPA but having to work through ‘issues’ relating to Chagossians / Mauritius. I think this would be good and would provide the basis for a resumption of talks following both elections. If he goes for the Park straight away, we’ll face problems.”³²⁸

3.65 The Foreign Secretary’s office, in an email of the same date, indicated that the Foreign Secretary “has decided to instruct Colin Roberts to declare the full MPA (option one) on 1 April.”³²⁹ An email of later that day from Ms Yeadon indicates that:

“The Private Office have just telephoned. The Foreign Secretary is minded to ask Colin to declare an MPA and go for option 1 (full no-take zone). BUT FINAL DECISION NOT YET TAKEN. ... He has asked for ideas, whether the move is feasible, what are the implications? His objective is to find a way to mitigate the Mauritian reaction. We need to get something to him this afternoon.

Our initial reaction here is that the Mauritians [redacted] and insisting that any MPA must deal with sovereignty and resettlement, they will find it hard to backtrack especially as the UK will not be able to move on sovereignty/resettlement. Also, if the Mauritian election is called today, as suggested in an earlier telecom, when will the election be held? Will it be possible for the Mauritians to undertake such talks. [sic] Would they be willing? But would be grateful for your views.

Alongside this, we will need to stress that we are also concerned about the reaction from Parliament, Chagossians and threat of legal action & to stress the point about funding again.”³³⁰ [Capitalisation in original]

3.66 Colin Roberts replied swiftly, suggesting that the Foreign Secretary needed “a clearer steer” and suggesting five steps, including the Foreign Secretary announcing that he “notes that there are a number of issues to resolve, some of which have come up in

³²⁸ Email dated 31 March 2010 from John Murton, British High Commissioner to Mauritius to Ewan Ormiston, British High Commission, Port Louis, Annex 154.

³²⁹ Email exchange between Catherine Brooker, Private Secretary to the Foreign Secretary and Joanne Yeadon, Head of “BIOT” & Pitcairn Section, UK Foreign and Commonwealth Office, 30-31 March 2010, Annex 155.

³³⁰ Email exchange between Andrew Allen, Overseas Territories Directorate, Colin Roberts, Director, Overseas Territories Directorate, Joanne Yeadon, Head of “BIOT” & Pitcairn Section, UK Foreign and Commonwealth Office and Ewan Ormiston, British High Commission, Port Louis, 31 March 2010, Annex 157.

the consultation process, and that therefore there should be a staged approach and transitional arrangements leading to a full no-take MPA in three years time.”³³¹

3.67 Andrew Allen [Head of the Southern Oceans Team at the FCO and Ms Yeadon’s line manager] replied to that email shortly afterwards, stating that:

“I think this approach risks deciding (and being seen to decide) policy on the hoof for political timetabling reasons rather than on the basis of expert advice and public consultation. That’s a very different approach to the one we recommended yesterday and which the FS is still considering. (i) and (ii) [in Mr Roberts’ email] are essentially what we have already recommended (but without the 3 year timeline). But (ii) [sic] to (vi) are elements which you would expect, along with others, to be developed over time with the involvement of many stakeholders – and to be based on science as well as politics. That is why yesterday we said it needed time (as well as money that we don’t currently have and see no source for within Government). I also think this approach would give much greater scope for the expected legal challenge as we wouldn’t have sound arguments on which we could say we based these recommendations – one day after we had recommended something else.

I continue to think we have a better chance of getting a better result if we give ourselves a chance to work the many risks through. Some will never go away. But there are a lot we ought to be able to manage down if we don’t get pushed by an election timetable. If the FS chooses to push faster, then so be it. But I don’t think we should be encouraging him to think it is the best option; and I do think we should be flagging up risks – which will be with us for months/years to come.”³³²

3.68 John Murton sent an email shortly afterwards agreeing with Andrew Allen’s analysis and setting out further concerns of his own:

“The Foreign Secretary should be made aware that the timing could absolutely not be worse locally than to declare a full no-take MPA today. The only thing that could darken things further would be if any announcement also excluded Diego Garcia from the MPA. This would cause uproar to be focused on not just us but on our US colleagues.

[...]

³³¹ Email exchange between Andrew Allen, Overseas Territories Directorate, Colin Roberts, Director, Overseas Territories Directorate, Joanne Yeadon, Head of “BIOT” & Pitcairn Section, UK Foreign and Commonwealth Office and Ewan Ormiston, British High Commission, Port Louis, 31 March 2010, Annex 157.

³³² Email exchange between Andrew Allen, Overseas Territories Directorate, Colin Roberts, Director, Overseas Territories Directorate, Joanne Yeadon, Head of “BIOT” & Pitcairn Section, UK Foreign and Commonwealth Office and Ewan Ormiston, British High Commission, Port Louis, 31 March 2010, Annex 157.

Obviously the Foreign Secretary is free to make whatever decision he chooses. However I would insist that he be made aware that to declare the MPA today could have very significant negative consequences for the bilateral relationship. It would be seen by the Government here in general, and by PM Ramgoolam in particular, as exceedingly damaging timing. The opposition MMM (who would be unlikely to win on their own against a Labour-MSM alliance) would welcome the announcement as an electoral gift. They would push Ramgoolam very hard to commit to taking legal action to challenge the establishment of an MPA. Ramgoolam would greatly resent our timing and we would feel the consequences if he is re-elected as we anticipate.

The ‘three months’ or ‘twelve months’ to hammer out details of management would not fly. Ramgoolam would not be able to commit to negotiating in this framework if we had already declared an MPA. Any such offer would be seen as insulting and demeaning and likely to antagonize even further: it would be seen as a gun to the head. The same is true of any proposal to have a longer transition framework: Ministers here know well enough that the UK Government faces its own compressed timetable ahead of elections and that the key announcement is that of the MPA itself, which has to be done before the dissolution of our own Government. They will be looking for the underlying decision, not the wrapping.

[...]

If FS announces an MPA today without even a courtesy call to Ramgoolam or Boolell then this will further poison the atmosphere.”³³³

3.69 Ms Yeadon circulated a minute on the same date, summarising these concerns. This included, in relation to Mauritius, the following observations:

“What might work in Mauritius is the announcement as suggested in my submission of 30 March. Our High Commissioner thinks that there *might* be a market for a proposal to work with Mauritius as a privileged partner on management issues but this would need to be done prior to a final decision and such talks would have to precede any formal announcement of an MPA. If Mauritius were not prepared to engage in any sensible way, we would want to press on without them, but we would want to give them time to reflect and ourselves time to manage the negative consequences.”³³⁴ [emphasis in original]

³³³ Email dated 31 March 2010 from John Murton, British High Commissioner to Mauritius, to Colin Roberts, Director, Overseas Territories Directorate and Joanne Yeadon, Head of “BIOT” & Pitcairn Section, UK Foreign and Commonwealth Office, Annex 156.

³³⁴ Minute dated 31 March 2010 from Joanne Yeadon, Head of “BIOT” & Pitcairn Section, UK Foreign and Commonwealth Office to Colin Roberts, Director, Overseas Territories Directorate and the Private

3.70 A memo from the FCO Global Response Centre of 1 April 2010 sets out a record of the Foreign Secretary's conversation of that date with Prime Minister Ramgoolam, referred to at UKCM 3.66, informing him of the decision to declare the MPA:

“Ramgoolam said that he was disappointed that there had not been bilateral discussions. He asked if it might be possible to delay the announcement until after the Mauritius elections. It was a controversial issue in Mauritius. The Foreign Secretary said that the consultation had been thorough and there had already been an extension to the consultation period. It would not be possible to delay the announcement.”³³⁵

3.71 The documents summarised above indicate that, contrary to the picture which the UK seeks to present, the “MPA” was hastily declared by the UK Foreign Secretary after what the officials most closely concerned considered to have been an inadequate period of research and consultation, leaving the UK, in their view, vulnerable to legal challenge by Mauritius.

(f) The nature and purpose of the “MPA”

3.72 As noted above, in the three and a half years since it declared the “MPA”, the UK has failed to enact any legislation to implement it. The UK simply states that “A comprehensive MPA Ordinance is in the course of being prepared”³³⁶; it offers no reason for the lengthy delay (which is particularly inexplicable given how swiftly the UK has implemented previous maritime zones in domestic legislation.³³⁷)

3.73 The international understanding of the meaning and purpose of the term “Marine Protected Area” is examined in Chapter 7, which makes clear the strong international understanding – supported by the UK – that the purpose of such measures is environmental.³³⁸ In its arguments on jurisdiction, the UK has sought to portray the “MPA” as a fisheries measure. This attempt is undermined by the Counter-Memorial itself, which states that the future “MPA” Ordinance “will replace the existing BIOT legislation protecting the environment, flora and fauna of the islands and their waters.”³³⁹ As well as running contrary to the general meaning of the term “MPA”, the UK's attempt is also undermined by the evidence of how the UK has, internally and

Secretary to the Foreign Secretary, “British Indian Ocean Territory: MPA: Next Steps: Mauritius”, Annex 158.

³³⁵ UKCM, Annex 114.

³³⁶ UKCM, para. 3.3.

³³⁷ See UKCM, para. 3.13.

³³⁸ See also the section entitled “MPA definition and global context” in the minutes of the NOC workshop of 7 September 2009: Draft report of workshop held on 5-6 August 2009 at National Oceanography Centre Southampton, “Marine Conservation in British Indian Ocean Territory (BIOT): science issues and opportunities”, 7 September 2009, Annex 146.

³³⁹ UKCM, para. 3.3, emphasis added.

publicly, characterised the “MPA”, both before and after it purported to create it.³⁴⁰ This includes:

- (i) The minutes of the Chagos Environmental Network meeting at the FCO on 23 April 2009³⁴¹, attended by Colin Roberts and Andrew Allen. These minutes make it clear that the proposal being put forward by the NGOs related to all aspects of the ecosystem of the Chagos Archipelago, including habitat protection for species such as birds and turtles, and coral reef regeneration.
- (ii) The note by Colin Roberts of 5 May 2009³⁴², which poses the question “What, in a nutshell, is the marine reserve proposal?” The answer given is: “In practical terms the broad concept would be to declare the entirety of BIOT’s EEZ a no-take Marine Protected Area (MPA), bring an end to fishing and legislate for the protection of the seas and atolls.”³⁴³ The note goes on to set out a number of conservation, climate change and scientific benefits which would flow from the proposal.
- (iii) The internal FCO memo of 7 September 2009 entitled “BIOT marine reserve proposal: implications for US activities in Diego Garcia and British Indian Ocean Territory (BIOT)”: see paragraph 5, which notes the need for protection of the “islands, reef systems and waters of BIOT.”
- (iv) The Consultation Document,³⁴⁴ which notes that the pre-existing EPPZ was implemented by legislation which included “strict controls over fishing, pollution (air, land and water), damage to the environment, and the killing, harming or collecting of animals. Some of the most important land and sea areas have already been set aside for additional protection.” The purpose of the proposed “MPA” is said to be to build on those measures, “to include not only protection for fish-stocks but also to strengthen conservation of the reefs and land areas.”³⁴⁵
- (v) The statement of the UK Foreign Secretary announcing the creation of the “MPA” on 1 April 2010³⁴⁶, in which he stated that “Its creation is a

³⁴⁰ As well as the documents cited below, see paras. 7.89-101 below.

³⁴¹ Email dated 1 May 2009 to Joanne Yeadon, Head of “BIOT” and Pitcairn Section, UK Foreign and Commonwealth Office & Minutes of a meeting between the Chagos Environment Network and the UK Government held at 11:30 hrs on 23 April 2009, Annex 131.

³⁴² Paper submitted on 5 May 2009 by Colin Roberts, Director, Overseas Territories Directorate, to the Private Secretary to the Foreign Secretary, “Making British Indian Ocean Territory the World’s Largest Marine Reserve”, Annex 133; see para. 3.34 above.

³⁴³ Emphasis added.

³⁴⁴ MM Annex 152. See also Annex D to the Consultation Document [p.17]: “UK Policy on Marine Protected Areas”.

³⁴⁵ *Ibid.*, p.9.

³⁴⁶ MM, Annex 165.

major step forward for protecting the oceans, not just around BIOT itself, but also throughout the world. This measure is a further demonstration of how the UK takes its international environmental responsibilities seriously.”³⁴⁷

- (vi) Proclamation No. 1 of 2010³⁴⁸, which refers to “the protection and preservation of the environment of the Marine Protected Area”. The Proclamation indicates that the “implications for fishing and other activities in the Marine Protected Area and the Territory will be addressed in future legislation of the Territory.” This makes clear that the measure, while it may have “implications” for fishing, is environmental in purpose.
- (vii) A written statement from the FCO in response to a Parliamentary question dated 21 October 2010, indicating that “The Government believe ... that the Marine Protected Area (MPA) proclaimed in the British Indian Ocean Territory (BIOT) on 1 April 2010 by the BIOT Commissioner is the right way forward for furthering the environmental protection of the territory and encouraging others to do the same in important and vulnerable areas under their control.”³⁴⁹

(g) *Internal recognition of Mauritian rights following the announcement of the “MPA”*

3.74 Mauritius’ reaction to the declaration of the “MPA”, and subsequent bilateral contact between the announcement and the initiation of these proceedings, are considered in the context of Article 283. For present purposes, two internal FCO documents demonstrate that the UK officials most closely concerned in the process continued to take the view, even after the “MPA” was announced, that Mauritius had rights in the Chagos Archipelago:

- (i) Memo from Joanne Yeadon to the Private Secretary to the FS, dated 19 July 2010, entitled “British Indian Ocean Territory: Secondary Issues and Next Steps.”³⁵⁰ This includes the following:

“Fishing Rights

³⁴⁷ The “Further Information” notes following the statement note that “Pollutant levels in Chagos waters and marine life are exceptionally low, mostly below detection levels at 1 part per trillion using the most sensitive instrumentation available, making it an appropriate global reference baseline. Scientists also advise us that BIOT is likely to be key, both in research and geographical terms, to the repopulation of coral systems along the East Coast of Africa and hence to the recovery in marine food supply in sub-Saharan Africa.”

³⁴⁸ MM, Annex 166.

³⁴⁹ MM, Annex 169.

³⁵⁰ Submission dated 19 July 2010 from Joanne Yeadon, Head of “BIOT” & Pitcairn Section, UK Foreign and Commonwealth Office, to the Private Secretary to Henry Bellingham, “British Indian Ocean Territory: BIOT Policy”, Annex 162.

Mauritius (not Chagossians) has historical fishing rights in BIOT. Negotiations in 1965 to get Mauritian Ministers' consent to the excision of the Chagos Archipelago took place in side meetings during constitutional talks at Lancaster House. HMG gave an undertaking to ensure that certain facilities, including fishing rights, would remain available to the Mauritian government as far as was practicable. This was written into the agreed record of the meeting. Since the establishment of the Territory's Fishing and Conservation Management Zone in 1991, these fishing rights have meant free licences to Mauritian-flagged vessels. Therefore, any Chagossian owning a fishing vessel which is flagged to Mauritius has been entitled to a free licence. The income from the issuing of these licences was nil (since they were free). However, the income from the tuna fishery as a whole amounted to £800,000 to £1 million per annum and went towards the financing of the BIOT Patrol vessel.

We should make clear the distinction between Mauritius and Chagossian rights. We may have to consider agreeing to any inshore fishing licence requests from Mauritian-flagged vessels in line with historical fishing rights.” [Underlining in original]

- (ii) Memo from Joanne Yeadon to the Foreign Secretary dated 1 September 2010, entitled: “British Indian Ocean Territory (BIOT): Marine Protected Area: Implementation and Financing.”³⁵¹ This makes clear, again, the lack of structure to implement and fund the “MPA”. It includes a section entitled “Mauritius”, which again raises the issue of fishing rights, in similar terms to the memo of 19 July 2010:

“There is a slim chance that Mauritius may raise the issue of their historical fishing rights in the Territory. During negotiations over the excision of the Chagos Archipelago between Mauritius and the UK in 1965, the UK gave an undertaking that HMG would use their good offices with the US government to ensure that certain facilities including fishing rights in Chagos would remain available ‘as far as was practicable.’ Over the years, these rights have come to mean free fishing licences to Mauritian-flagged vessels upon application. In our exchanges on the MPA to date the Mauritians have never raised the question of fishing rights. This may be because they see it as inconsistent with their sovereignty claim. Mauritius has shown interest only in trying to secure a percentage of the fishing licence money generated by the Territory’s fisheries. They do not accept our figures which show that the fishery

³⁵¹ Submission dated 1 September 2010 from Joanne Yeadon, Head of “BIOT” & Pitcairn Section, to Colin Roberts, Director, Overseas Territories Directorate, UK Foreign and Commonwealth Office, the Private Secretary to Henry Bellingham and the Private Secretary to the Foreign Secretary, “British Indian Ocean Territory (BIOT): Marine Protected Area (MPA): Implementation and Financing”, Annex 164. The section at paragraph 8, headed “legal risks”, was redacted by the UK in the course of the recent *Bancoult* judicial review proceedings.

operates at a substantial loss. Very few Mauritian-flagged vessels have fished in the Territory's Fishing (Conservation and Management) Zone. Only a couple of Mauritian-flagged vessels are run by Chagossians and their 'rights' are being taken up in the Judicial Review into the MPA case being brought by Clifford Chance against the Secretary of State.

CHAPTER 4: THE EXCHANGES OF THE PARTIES, AND ARTICLE 283(1)

I. Introduction

4.1 As Mauritius set out in its Memorial, there is a dispute between the Parties as to whether (a) the UK is entitled as a coastal State for the purposes of the Convention to declare the “MPA” or any other maritime zone in the waters of the Chagos Archipelago; and separately (b) whether the “MPA” as declared violates a number of provisions of the Convention, and Article 7 of the 1995 Agreement. The Memorial demonstrates that Mauritius repeatedly brought both disputes to the UK’s attention, and engaged in attempts to resolve them diplomatically. Having no prospect of achieving a negotiated solution, however, Mauritius was constrained to invoke the dispute resolution procedures available to it under Part XV of the Convention.

4.2 The UK argues in Chapter V of its Counter-Memorial that the Tribunal lacks jurisdiction because Mauritius has failed to meet the requirements of Article 283(1). This argument is plainly without merit, and is based on two closely related, flawed assertions. First, the UK argues that there is no dispute between the Parties concerning the interpretation or application of the Convention because Mauritius allegedly did not, in its bilateral discussions with the UK, refer expressly to the Convention and/or to the specific provisions of the Convention which form the subject of Mauritius’ claims in this arbitration. Second, the UK maintains that, because Mauritius allegedly did not raise a dispute in regard to the interpretation or application of the Convention, it could not have engaged in an exchange of views to settle the dispute prior to invoking the dispute resolution procedures available under Part XV.³⁵²

4.3 The UK is wrong on both accounts. Mauritius repeatedly raised with the UK in direct, face-to-face bilateral negotiations, in meetings and telephone calls at the Prime Ministerial and Foreign Ministerial levels, and in written diplomatic communications, the subject matter of all claims in these proceedings. Such communications in relation to the subject matter of the disputes related to:

- (i) whether the UK is a coastal State that is entitled under the Convention to declare maritime zones in the waters of the Chagos Archipelago; and
- (ii) whether the “MPA” violates Mauritius’ rights under the Convention with regard to Part II, Part V, Part VI, Part XII, Part XVI, and under Article 7 of the 1995 Agreement.

By the spring of 2010 the UK was well aware of the possibility of international litigation proceedings being launched by Mauritius. It is thus disingenuous for the UK to suggest it “had no idea what the subject-matter of the dispute was until it received

³⁵² UKCM, para. 5.39.

Mauritius' Notification and Statement of Claim," and that it did not have a robust exchange of views with Mauritius.³⁵³

4.4 In fact, the UK knew very well that Mauritius would object to the "MPA" before it came to Mauritius' attention, and anticipated some of the legal bases for Mauritius' objections before proceedings were initiated. The relevant internal communications have been discussed in Chapter 3 of this Reply. Nineteen months before Mauritius learned of the proposal for the "MPA" (when it was first reported in the press), the UK official responsible for the "BIOT" advised that "a no fishing zone" faced "obstacles," the "first being Mauritius" because "Mauritius did have some rights" to "fishing" in the Chagos Archipelago.³⁵⁴ (As described in the Memorial and this Reply, the dispute relates to the creation of a "nature reserve", and is not limited to or properly characterised as being about fishing rights). The UK also knew that the dispute over the "MPA" was of such seriousness that it risked causing Mauritius to commence legal proceedings. The day before the "MPA" was declared, and after Mauritius had on numerous occasions engaged with the UK on the problems of the "MPA", the British High Commissioner in Port Louis warned of Mauritius "taking legal action to challenge the establishment of the MPA."³⁵⁵ He was not the only British official to give this warning. The same day, the UK's "BIOT" Administrator cautioned about an impending "threat of legal action."³⁵⁶ Such concerns were – and could only have been – based on communications with representatives of Mauritius.

4.5 In short, and as detailed below, prior to the commencement of this arbitration, the UK was well aware that it was in dispute with Mauritius concerning subjects requiring the interpretation and application of the Convention; that it had exchanged views with Mauritius over the dispute; and that there was no realistic prospect for a diplomatic solution. Article 283(1) poses no obstacle to the exercise of this Tribunal's jurisdiction.

II. The Dispute and Exchange of Views Over Entitlement as a Coastal State To Declare Maritime Zones

4.6 In its Preliminary Objections to Jurisdiction, submitted on 31 October 2012, the UK did not contest that Mauritius had discharged its obligation under Article 283(1) with regard to the dispute over whether the UK is a "coastal State" entitled to declare maritime zones in the waters of the Chagos Archipelago.

³⁵³ UKCM, para. 5.49.

³⁵⁴ Email from Joanne Yeadon, Head of "BIOT" and Pitcairn Section, to Andrew Allen, 22 April 2008, UKCM, Annex 87.

³⁵⁵ Email dated 31 March 2010 from John Murton, British High Commissioner to Mauritius, to Colin Roberts, Director, Overseas Territories Directorate and Joanne Yeadon, Head of "BIOT" & Pitcairn Section, UK Foreign and Commonwealth Office: Annex 156.

³⁵⁶ Email dated 31 March 2010 from John Murton, British High Commissioner to Mauritius, to Colin Roberts, Director, Overseas Territories Directorate and Joanne Yeadon, Head of "BIOT" & Pitcairn Section, UK Foreign and Commonwealth Office: Annex 156.

4.7 The UK has now changed course. Its Counter-Memorial argues that Article 283(1) has not been satisfied in regard to this claim because “Mauritius never raised its sovereignty claim as a breach of UNCLOS: that is, its dispute over sovereignty was never formulated ... as being that it was Mauritius and not the United Kingdom that was the ‘coastal State’ for the purposes of UNCLOS.”³⁵⁷ In other words, the UK now argues that it is not enough for Mauritius to have raised a dispute with the UK and to have had an exchange of views in regard to sovereignty over the Chagos Archipelago, which Mauritius has undeniably done numerous times over a period of decades. Rather, the UK maintains that the dispute must be expressly articulated as a dispute over the UK’s entitlements as a “coastal State” under the Convention.

4.8 This is incorrect. A dispute over sovereignty obviously implies and concerns a dispute over which State is entitled as a coastal state to declare maritime zones under the Convention. Moreover, the UK is mistaken in regard to the content of the Parties’ diplomatic exchanges. Mauritius did explicitly formulate the dispute in terms of the entitlement of a “coastal State” to declare maritime zones in the waters of the Chagos Archipelago.³⁵⁸

4.9 This is evident in the Parties’ diplomatic correspondence in connection with their respective declarations of maritime zones and related deposits of charts and coordinates with the United Nations. On 13 August 2003, the UK informed Mauritius of its intention to declare an Environmental (Protection and Preservation) Zone within 200 nautical miles of the Chagos Archipelago.³⁵⁹ The UK cited as purported authority for its entitlement to do so the “UN Convention on the Law of the Sea,” and specifically those provisions that entitle “States to establish an exclusive economic zone (EEZ), extending 200 nautical miles from the territorial sea baselines, within which they may exercise certain sovereign rights and jurisdiction.” Further, confirming that it was exercising its purported entitlement under the Convention as a coastal State, the UK stated that it would deposit the relevant Proclamation and charts and co-ordinates with the UN “under Article 75 of UNCLOS.”

4.10 Mauritius’ Minister of Foreign Affairs objected in a letter addressed to the UK Foreign Secretary dated 7 November 2003.³⁶⁰ After recalling its often-repeated “position regarding our sovereignty or territorial and maritime jurisdiction over the Chagos Archipelago and its surrounding waters,” the Mauritian Foreign Minister stated:

³⁵⁷ UKCM, para. 5.20.

³⁵⁸ Note Verbale dated 14 April 2004 from the Permanent Mission of the Republic of Mauritius to the United Nations, New York, to the Secretary General of the United Nations, No. 4780/04 (NY/UN/562), MM, Annex 126, and Extract from Law of the Sea Bulletin No. 54, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, 2004: Annex 108; Note Verbale dated 20 April 2004 from the Mauritius High Commission, London to the UK Foreign and Commonwealth Office, Ref. MHCL 886/1/03, MM, Annex 127; Note Verbale dated 9 June 2009 from Permanent Mission of the Republic of Mauritius to the United Nations, New York to the Secretary General of the United Nations, No. 107853/09, MM, Annex 147.

³⁵⁹ Letter dated 13 August 2003 from the Director of Overseas Territories Department, UK Foreign and Commonwealth Office, to the Mauritius High Commissioner, London, MM, Annex 120.

³⁶⁰ Letter dated 7 November 2003 from the Minister of Foreign Affairs and Regional Cooperation, Mauritius to the UK Secretary of State for Foreign and Commonwealth Affairs, MM, Annex 122.

“In view of the above, I earnestly request the UK Government not to proceed with the issue of a Proclamation establishing an Environmental (Protection and Preservation) Zone around the Chagos Archipelago and not to deposit a copy thereof together with copies of the relevant charts and coordinates with the UN under Article 75 of UNCLOS. As you are aware, Article 75 falls under Part V of UNCLOS which deals solely with EEZs. Depositing copies of relevant charts and coordinates with the UN under Article 75 of UNCLOS would in effect amount to a declaration of an EEZ around the Chagos Archipelago, something the UK undertook not to do in the letter of 1 July 1992...”

4.11 The UK’s response of 12 December 2003 maintained that the UK was entitled to declare the EPPZ within 200 miles of the Chagos Archipelago.³⁶¹ Shortly thereafter, the UK declared the EPPZ in effect and deposited the Proclamation establishing it, as well as the relevant charts and coordinates, with the UN pursuant to Article 75 of the Convention.³⁶²

4.12 This prompted a strong protest from Mauritius. In a diplomatic note addressed to the UN Secretary-General, Mauritius was explicit that its objection was founded on the fact that the UK is not a coastal State in regard to the Chagos Archipelago, and as such is not entitled to declare an EEZ.³⁶³

4.13 Mauritius reiterated that the UK is not a coastal State entitled to declare maritime zones in the waters of the Chagos Archipelago in a diplomatic note from its High Commission in London to the UK FCO, dated 20 April 2004.³⁶⁴ The Note stated that Mauritius “reserves its right to resort to appropriate legal action for the full enjoyment of its sovereignty over the Chagos Archipelago, should the need be so felt.”

4.14 The Parties’ dispute over the UK’s claim to entitlement as a coastal State is also reflected in diplomatic exchanges following Mauritius’ deposit with the United Nations of geographical coordinates on 26 July 2006. This information was deposited after the Maritime Zones Act 2005 reaffirmed Mauritius’ entitlement to maritime zones in the waters of the Chagos Archipelago.³⁶⁵

³⁶¹ Letter dated 12 December 2003 from the Minister responsible for Overseas Territories, UK Foreign and Commonwealth Office to the Minister of Foreign Affairs and Regional Cooperation, Mauritius, MM, Annex 124.

³⁶² Hansard, House of Lords, 31 March 2004, col. WS62, Statement of Baroness Symons of Vernham Dean, MM, Annex 125.

³⁶³ Note Verbale dated 14 April 2004 from the Permanent Mission of the Republic of Mauritius to the United Nations, New York, to the Secretary General of the United Nations, No. 4780/04 (NY/UN/562), MM, Annex 126, and Extract from Law of the Sea Bulletin No. 54, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, 2004: Annex 108.

³⁶⁴ Note Verbale dated 20 April 2004 from the Mauritius High Commission, London to the UK Foreign and Commonwealth Office, Ref. MHCL 886/1/03, MM, Annex 127.

³⁶⁵ Mauritius Maritime Zones Action 2005, MM, Annex 131. Note Verbale of 26 July 2006 from the Permanent Mission of Mauritius to the United Nations, New York, to the UN Secretary General, No. 4678/06, MM, Annex 134. See also Note Verbale dated 20 June 2008 from Permanent Mission of Mauritius to the United Nations, New York to the Secretary General of the United Nations, No. 10260/08

4.15 Manifesting the UK's recognition that a dispute existed over its entitlement as a coastal State to declare maritime zones, the UK declared that "no other State is entitled to claim maritime zones deriving from the British Indian Ocean Territory."³⁶⁶ This elicited another protest from Mauritius, which, in a diplomatic note dated 9 June 2009 to the UN Secretary-General, reiterated that it is entitled as a coastal State to declare "maritime zones generated from the Chagos Archipelago, which forms part of the national territory of Mauritius."³⁶⁷ Further underlining the dispute over entitlement as a coastal State, Mauritius referred to its prior note of 14 April 2004, which had protested the UK's deposit of its Proclamation and related charts and coordinates for the purported EPPZ around the Chagos Archipelago. That note, as already indicated, declared that the UK was acting unlawfully because it was "purporting to exercise over that zone rights which only a coastal state may have over its exclusive economic zone."³⁶⁸

4.16 In sum, the Parties' diplomatic correspondence demonstrates beyond any doubt that at the time this arbitration was commenced the Parties were in dispute over whether the UK is entitled as a coastal State to declare maritime zones in the waters of the Chagos Archipelago, and that they had engaged in a full exchange of views.

III. The Dispute and Exchange of Views Over the Compatibility of the "MPA" with the Convention and the Rights of Mauritius

(a) Communications between 2005 and 2008

4.17 The Parties have also plainly engaged in an exchange of views with regard to the dispute over the incompatibility of the "MPA" with Mauritius' rights under the Convention. The diplomatic exchanges on this issue, discussed in greater detail in Chapter 4 of the Memorial and Chapter 3 above, include a number at Prime Ministerial level. On 1 December 2005, the Prime Minister of Mauritius, in a letter to his British counterpart, Tony Blair, stressed the importance of Mauritian rights in the waters of the Chagos Archipelago: "I look forward to discussing with you in the near future the important issue of fishing rights of Mauritius in the Chagos waters," a matter which had "become particularly important in view of the plans of my Government to turn

(NY/UN/395), MM, Annex 136; Note Verbale dated 19 March 2009 from the United Kingdom Mission to the United Nations, New York to the Secretary General of the United Nations, No. 26/09, MM, Annex 141.

³⁶⁶ Note Verbale dated 19 March 2009 from the United Kingdom Mission to the United Nations, New York to the Secretary General of the United Nations, No. 26/09, MM, Annex 141.

³⁶⁷ Note Verbale dated 9 June 2009 from Permanent Mission of the Republic of Mauritius to the United Nations, New York to the Secretary General of the United Nations, No. 107853/09, MM, Annex 147.

³⁶⁸ Note Verbale dated 14 April 2004 from the Permanent Mission of the Republic of Mauritius to the United Nations, New York, to the Secretary General of the United Nations, No. 4780/04 (NY/UN/562), MM, Annex 126), and Extract from Law of the Sea Bulletin No. 54, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, 2004: Annex 108.

Mauritius into a seafood hub.”³⁶⁹ This elicited the response from Prime Minister Blair, in a letter dated 4 January 2006, that “[t]he question of fishing rights in the Archipelago and its implications needs to be talked through.”³⁷⁰

4.18 Mauritius’ rights in the Chagos Archipelago were taken up again by the Prime Minister of Mauritius in a meeting with British Prime Minister Gordon Brown, on 24 November 2007. The notes of that meeting record that two “main subjects” were discussed: “Mauritian Sovereignty over the Chagos Archipelago,” and separately, “Mauritian fishing rights over the Chagos Archipelago islands excluding Diego Garcia.” With regard to the latter subject, the Mauritian Prime Minister “brought up the question of the exercise of our fishing rights over the Chagos waters (i.e. the Chagos Archipelago), excluding Diego Garcia where there is an American presence. This will enable Mauritius to contribute meaningfully in the conservation of fish stocks and the exchange of commercial fisheries data.”³⁷¹

4.19 Following up on their discussions, on 13 December 2007 the Prime Minister of Mauritius sent a letter to the British Prime Minister raising “the question of our fishing rights in the waters of Chagos Archipelago excluding of course the immediate vicinity of Diego Garcia for obvious security reasons.”³⁷² The Mauritian Prime Minister expressly stated that “Mauritius had historically exercised such rights over the waters of the Chagos Archipelago.”³⁷³ In the UK’s response of 7 February 2008, Prime Minister Brown acknowledged that “fishing” was among the “issues relating to the British Indian Ocean Territory that we can discuss.”³⁷⁴

4.20 The fact that Mauritius had raised these rights in the Chagos Archipelago was acknowledged in the FCO’s internal documents, made available to the English courts. On 31 October 2008, Ms Joanne Yeadon, the “BIOT” Administrator, wrote, in connection with planning for talks with Mauritius, that “we are willing to discuss fishing rights.”³⁷⁵ Similarly, on 5 November 2008, she remarked that the “[s]ubjects we can talk about” include “fishing rights.”³⁷⁶ And, in an email dated 21 November 2008,

³⁶⁹ Letter dated 1 December 2005 from the Prime Minister of Mauritius to the Prime Minister of the United Kingdom, MM, Annex 132.

³⁷⁰ Letter dated 4 January 2006 from the Prime Minister of the United Kingdom to the Prime Minister of Mauritius, MM, Annex 133.

³⁷¹ Extract of Information Paper CAB (2007) 814 – Commonwealth Heads of Government Meeting, 29 November 2007: Annex 115.

³⁷² Letter dated 13 December 2007 from Prime Minister of Mauritius to Prime Minister of the United Kingdom, MM, Annex 135.

³⁷³ Letter dated 13 December 2007 from Prime Minister of Mauritius to Prime Minister of the United Kingdom, MM, Annex 135.

³⁷⁴ Letter dated 7 February 2008 from the UK Prime Minister to the Prime Minister of Mauritius: Annex 118.

³⁷⁵ Email exchange between Joanne Yeadon, Head of “BIOT” & Pitcairn Section and Head of the Southern Africa Section, Africa Department, UK Foreign and Commonwealth Office, 31 October 2008: Annex 122. See further above, paras. 3.16 ff.

³⁷⁶ Email dated 5 November 2008 from Joanne Yeadon, Head of “BIOT” & Pitcairn Section, UK Foreign and Commonwealth Office to John Murton, British High Commissioner to Mauritius: Annex 123.

Ms. Yeadon stated: “there are issues on BIOT that we can discuss with Mauritius, e.g. traditional fishing rights...”³⁷⁷

4.21 Thus, violation of the rights enjoyed by Mauritius in the Chagos Archipelago, including specifically “fishing rights”, had been raised as a matter of dispute between the Parties even before the proposed “MPA” had come to Mauritius’ attention, and the UK had agreed to engage with Mauritius over these rights.

(b) The 2009 bilateral talks

4.22 The Prime Ministers’ meeting and exchange of letters over the dispute led to direct bilateral talks, the first round of which took place on 14 January 2009 at the Office of the FCO in London.³⁷⁸ Reflecting Mauritius’ request that its package of rights in the Chagos Archipelago be discussed, the agenda included “Fishing rights/protection of the environment,” as well as “Co-operation on continental shelf.”³⁷⁹

4.23 The UK understood that the dispute under discussion could result in international legal proceedings. Upon learning that the Mauritian delegation would include Professor Ian Brownlie, Andrew Allen, the Deputy Commissioner of the “BIOT”, remarked: “We clearly need a lawyer present!”³⁸⁰

4.24 As considered in greater detail in Chapter 3 above, the Counter-Memorial provides an incomplete account of the ensuing first round of bilateral talks. Contrary to the UK’s account of the meeting, Mauritius did raise and discuss with the UK a number of legal disputes, including the UK’s refusal to give full effect to Mauritian fishing rights by wrongfully requiring Mauritians to obtain licences from the “BIOT” authorities.

4.25 The fact that these matters were discussed, and the Parties’ respective views exchanged, is reflected in the Joint Communiqué.³⁸¹ Further, the UK’s internal notes confirm that the Parties discussed their dispute over what is referred to as Mauritius’ “fishing rights” in the Chagos Archipelago.³⁸²

4.26 Mauritius repeated these points in a legal memorandum entitled “The Legal Position of Mauritius,” prepared by Professor Ian Brownlie and submitted to the UK

³⁷⁷ Email dated 21 November 2008 from Joanne Yeadon, Head of “BIOT” & Pitcairn Section, UK Foreign and Commonwealth Office: Annex 124.

³⁷⁸ The two rounds of bilateral talks have been considered in MM, paras. 4.36-4.38 and 4.50-4.53, and in paras. 3.23-3.30 and 3.43-3.50 above.

³⁷⁹ Email dated 5 November 2008 from Joanne Yeadon, Head of “BIOT” & Pitcairn Section, UK Foreign and Commonwealth Office to John Murton, British High Commissioner to Mauritius: Annex 123.

³⁸⁰ Email dated 31 December 2008 from Andrew Allen, Overseas Territories Directorate, to Joanne Yeadon, Head of “BIOT” & Pitcairn Section, UK Foreign and Commonwealth Office: Annex 125.

³⁸¹ Joint Communiqué of meeting of 14 January 2009, MM, Annex 137.

³⁸² Record of the meeting of 14 January 2009 prepared by the Overseas Territories Directorate dated 15 January 2009. UKCM, Annex 94.

during the meeting.³⁸³ Referring to the “position of Mauritius” that had been set out at the first round of talks earlier that month, the memorandum stated that “it is necessary for the UK side to understand the legal framework” under which Mauritius’ views should be assessed. These included, among other things, Mauritius’ rights under “public international law” with respect to “fishing rights” as well as “protection of the environment” and “the resources of the continental shelf.”

4.27 As at the first round of bilateral talks, Mauritius’ legal memorandum invoked the UK’s package of undertakings, which it described as the “legal framework” set out in “the talks at Lancaster House in 1965, and the arrangements which resulted.” These comprised what Mauritius described as “a series of inducements offered to the delegation of Mauritius” that had been “adopted by successive Governments of the United Kingdom over a long period of time.” The “existence of these promises,” Mauritius said, “is of obvious relevance for present purposes.” In that connection, Mauritius referred, among other things, to the UK’s undertaking with respect to “Fishing Rights,” which it included among the undertakings that especially “stand out.”

4.28 The UK understood that the position Mauritius set out at the first round of bilateral talks, and in its subsequent legal memorandum, in regard to its package of rights in the Chagos Archipelago, was fundamentally inconsistent with the as yet undisclosed “MPA” proposal. In fact, the UK anticipated that Mauritius would object to the “MPA”, knowing that it amounted to a repudiation of the rights which Mauritius enjoys in the Chagos Archipelago.³⁸⁴

4.29 With these concerns doubtless in mind, the FCO’s Andrew Allen told Ms Yeadon that the proposed agenda for the first round of bilateral talks should include as a single item “Fishing rights/protection of the environment.” This, he explained, would be a “[m]eans of discussing current/possible Mauritian rights in BIOT waters and introducing discussion of Pew ideas, if not name.”³⁸⁵ Thus, when Mauritius explained how its rights in regards to the natural resources of the Chagos Archipelago were being violated by the existing regime, the UK understood the necessary implication that Mauritius would view the proposed “MPA” as equally unlawful.

4.30 Three weeks after the first round of bilateral talks, Mauritius learned about the “MPA” proposal in the 9 February 2009 edition of *The Independent*.³⁸⁶ This came as a surprise to Mauritius since the UK had not mentioned the “MPA” during the previous month’s negotiations, despite the fact that the UK was, at the time, engaged in discussions with its proponents and despite the obvious implications of the “MPA” for the enjoyment of the package of rights upon which the Mauritian delegation had placed such emphasis.

³⁸³ “The Legal Position of Mauritius”, Professor Ian Brownlie CBE QC (registered January 2009), UKCM, Annex 92.

³⁸⁴ See paras. 3.12, 3.34, 3.38, 3.40-3.42, 3.62-3.71 above.

³⁸⁵ Email dated 31 December 2008 from Andrew Allen, Overseas Territories Directorate, to Joanne Yeadon, Head of “BIOT” & Pitcairn Section, UK Foreign and Commonwealth Office: Annex 125.

³⁸⁶ MM, para. 4.39.

4.31 As described in the Memorial and in Chapter 3 above, news of the proposed “MPA” prompted diplomatic protest by Mauritius.³⁸⁷ The legal basis for Mauritius’ objection to the “MPA” was self-evident: only weeks beforehand, Mauritius had expressly invoked its rights under the Convention and the UK’s undertakings in regard to the Chagos Archipelago, and the UK had itself linked the discussion of “Fishing rights/protection of the environment” to the “MPA” proposal (even though the UK had elected not to mention the proposal during the talks).³⁸⁸

4.32 The UK’s awareness that the “MPA” was irreconcilable with Mauritius’ position regarding its rights in the waters of the Chagos Archipelago was openly recognised by the FCO. When a Mauritian-flagged vessel invoked its right to exercise Mauritius’ fishing rights in the waters of the Chagos Archipelago,³⁸⁹ the FCO immediately recognised that this highlighted the incompatibility of the proposed “MPA” with the rights of Mauritius. Ms Yeadon reported to her colleagues: “I flag this up in the context of the proposed Chagos Marine Park - the Mauritians have got historic fishing rights and now, for the first time in years, have used them”³⁹⁰ (she was wrong in respect of the allegation of years of non-use, as the table set out at paragraph 2.124 above makes clear).

4.33 The UK’s discussions with external proponents of the “MPA” also demonstrates its knowledge that Mauritius disputed the lawfulness of the “MPA”. As addressed in Chapter 3 above,³⁹¹ on 23 April 2009, the Chagos Environmental Network met with the UK Government at the FCO in London. The need to respect Mauritius’ fishing rights was addressed explicitly at the meeting. The minutes record the understanding that although it would be “best to set out for a complete no-take zone,” this would likely need to accommodate “Mauritian artisanal fishing.”³⁹²

4.34 The FCO’s internal documents reflect the same understanding. In a memorandum dated 5 May 2009 by Mr Roberts, the FCO acknowledged that the “MPA” would have to comply with the Convention.³⁹³ The memorandum shows that the FCO had no doubt that Mauritius’ dispute in regard to the “MPA” was legal in nature. It expressed concern that Mauritius “could well succeed in securing a UN General Assembly Resolution for an ICJ Advisory Opinion,” and emphasised that “[w]e need to deter this.”

³⁸⁷ MM, para. 4.40; para. 3.55 above.

³⁸⁸ Para. 4.29 above.

³⁸⁹ Email dated 21 April 2009 from Joanne Yeadon, Head of “BIOT” & Pitcairn Section, to Colin Roberts and Andrew Allen, Overseas Territories Directorate, UK Foreign and Commonwealth Office: Annex 130.

³⁹⁰ Email dated 21 April 2009 from Joanne Yeadon, Head of “BIOT” & Pitcairn Section, to Colin Roberts and Andrew Allen, Overseas Territories Directorate, UK Foreign and Commonwealth Office: Annex 130.

³⁹¹ Para. 3.73.

³⁹² Email dated 1 May 2009 to Joanne Yeadon, Head of “BIOT” and Pitcairn Section, UK Foreign and Commonwealth Office & Minutes of a meeting between the Chagos Environment Network and the UK Government held at 11:30 hrs on 23 April 2009: Annex 131.

³⁹³ Paper submitted on 5 May 2009 by Colin Roberts, Director, Overseas Territories Directorate, to the Private Secretary to the Foreign Secretary, “Making British Indian Ocean Territory the World’s Largest Marine Reserve”: Annex 133.

4.35 In the days before the second round of bilateral talks, the incompatibility of the “MPA” with Mauritius’ rights in the Chagos Archipelago featured high in the FCO’s internal discussions. In accordance with instructions from Mr Roberts, on 6 July 2009 Ms. Yeadon directed the UK Government’s fisheries advisers, MRAG Ltd, to provide a “full history of fishing in BIOT by Mauritian vessels.”³⁹⁴

4.36 The MRAG response confirmed what the FCO already knew: “Legal and historical obligations may pose a constraint on declaring the whole FCMZ as a closed area.”³⁹⁵ In particular, MRAG advised that “UNCLOS requires that coastal states make provision for access to its EEZ by foreign fishers” and that “Mauritius has historical agreements to fish inside the BIOT FCMZ.”

4.37 Based on the report by MRAG, as well as her own research, Ms. Yeadon reported back to her FCO colleagues on 14 July 2009. She stated that “Mauritian fishing rights were never defined in the Lancaster House side meetings but what it boils down to is free access to BIOT waters. This has translated over the years, to the Mauritians being obliged to apply for a permit but getting it free.”³⁹⁶

4.38 Against this backdrop, the second round of bilateral talks was held on 21 July 2009 at the Prime Minister’s Office in Port Louis. The Parties both understood that the framework set out in the first round would inform their further talks. The UK’s internal notes from the meeting record that the agenda of the first round discussions “would serve for further talks.” The UK agreed to the agenda as set out in Mauritius’ proposal, responding that it could “confirm its agreement with the proposed agenda.”³⁹⁷ Thus, “[a]ccess to natural resources”, “[f]ishing”, “[e]nvironmental issues”, and “EEZ Delimitation and Extended Continental Shelf” were all placed on the agenda.³⁹⁸

4.39 The Counter-Memorial provides an incomplete and misleading account of the second round of bilateral talks.³⁹⁹ In fact, as the UK expected, Mauritius once again made clear that the proposed “MPA” had to accommodate the package of rights it possessed in the Chagos Archipelago. The fact that Mauritius’ position on its rights had to be reconciled with the proposed “MPA” was plain: the Joint Communiqué records that the UK “stated that such examination would also have to include consideration of

³⁹⁴ Email dated 6 July 2009 from [redacted]@mrag.co.uk to Joanne Yeadon, Head of “BIOT” and Pitcairn Section, UK Foreign and Commonwealth Office, “Summary of the activities of Mauritian Fishing Vessels”: Annex 136. See further paras. 3.41-3.42 above.

³⁹⁵ Email dated 9 July 2009 from Development Director of MRAG to Joanne Yeadon, Head of “BIOT” & Pitcairn Section, UK Foreign and Commonwealth Office, & “MRAG Comments on the proposal to designate the BIOT FCMZ as a marine reserve”: Annex 137.

³⁹⁶ Email exchange between Colin Roberts, Director, Overseas Territories Directorate, and Joanne Yeadon, Head of “BIOT” & Pitcairn Section, UK Foreign and Commonwealth Office, 13-14 July 2009: Annex 138. See para. 3.42 above.

³⁹⁷ Note Verbale dated 20 July 2009 from the British High Commission, Port Louis to the Ministry of Foreign Affairs, Regional Integration and International Trade, Mauritius, No. 37/2009: Annex 140.

³⁹⁸ Note Verbale dated 16 July 2009 from the Ministry of Foreign Affairs, Regional Integration and International Trade, Mauritius to the British High Commission, Port Louis, No. 29/2009 (1197/28/4): Annex 139.

³⁹⁹ UKCM, paras. 3.42-3.49.

the implications of the proposed marine protected area.”⁴⁰⁰ The Joint Communiqué also records discussion of the “extended continental shelf,” as well as Mauritius’ insistence that consideration of the “MPA” proposal include ongoing bilateral consultations.

4.40 The fact that Mauritius’ dispute with the UK was the subject of an exchange of views during the second round of bilateral talks is further confirmed in the internal UK record of those discussions.⁴⁰¹ More detail of Mauritius’ position is provided in Mauritius’ own notes of those talks.⁴⁰²

4.41 None of this came as a surprise to the UK. As already indicated, at the previous round of bilateral talks Mauritius had set out its rights in the Chagos Archipelago, based on the Convention and the UK’s 1965 undertakings, and had vigorously asserted that the UK was violating these rights by requiring Mauritians to apply to “BIOT” authorities for fishing licences, even though the licences were given at no charge and granted automatically. Given the UK’s awareness that Mauritius considered the *pro forma* licensing regime to be in breach of the UK’s international obligations, the proposed unilateral imposition of a no-catch “MPA” could only have been understood as something that Mauritius opposed as an even more serious violation of those same rights.

(c) Events in 2009 following the bilateral talks

4.42 The second round of bilateral talks left the UK with no doubt that Mauritius considered the proposed “MPA” to violate its package of rights in the waters surrounding the Chagos Archipelago. This is clear from the report of the workshop held at the UK’s National Oceanography Centre on 5-6 August 2009, just two weeks after the second round of talks. The resulting report described, in the section entitled “Fishery issues”, the Chagos Archipelago’s fisheries as including “Mauritian inshore fishing, through historical rights.”⁴⁰³ The report then stated that the participants “considered the Mauritian fishing rights to be a political one,” *i.e.*, non-scientific, which “could only be resolved by negotiation and international agreement.” It was thus understood that a no-catch “MPA” could only be implemented if Mauritius agreed to it.

4.43 The report’s reference to “Mauritian fishing rights” was deliberate, and approved by the FCO. Ms Yeadon reviewed and edited the report. A preliminary version, marked “3rd Draft,” states in the “Fishery Issues” section:

“The situation for the BIOT area is complicated by: i) modest recreational fishing activity in Diego Garcia and from visiting yachts ii)

⁴⁰⁰ Joint Communiqué of meeting on 21 July 2009, UKCM Annex 100.

⁴⁰¹ Overseas Territories Directorate record of discussion in Port Louis on 21 July 2009 dated 24 July 2009, UKCM Annex 101: see para. 3.46 above.

⁴⁰² Information Paper by the Prime Minister of Mauritius, Second Meeting at Senior Officials’ Level between Mauritius and UK on the Chagos Archipelago, CAB (2009) 624, 12 August 2009: Annex 144.

⁴⁰³ National Oceanography Centre final report of workshop held on 5-6 August 2009, p. 8, UKCM Annex 102. See para. 3.51 above.

Mauritian/Chagossian historical fishing rights, at present regulated through free licences...”⁴⁰⁴

As shown below, Ms Yeadon circled the word “Chagossian” and wrote next to it: “NO!” However, she retained the word “Mauritian.” The clear implication is that the FCO understood that Mauritius – as opposed to the Chagossians – possessed rights in the “BIOT area.”

whilst in others e.g. the Kiribati MPA, artisanal fishing is still permitted. The situation for the BIOT area is complicated by: i) modest recreational fishing activity in Diego Garcia and from visiting yachts ii) Mauritian/Chagossian historical fishing rights, at present regulated through free licences (with the numbers of licences based on assessments of surplus allowable catch); iii) the migrations of the currently commercially-fished species (yellowfin, skipjack and bigeye tuna), that might only spend 1-2 months per year in the BIOT area; and iii) arrangements for the basin-wide, international management of tuna stocks by the Indian Ocean Tuna

4.44 Ms Yeadon made a similar revision to the phrase “Mauritian/Chagossian fishing rights.” As shown below, she circled and crossed-out the word “Chagossian,” so that the phrase read: “Mauritian fishing rights.”

The issue of Mauritian ~~Chagossian~~ fishing rights was also considered to be a political one, that could only be resolved by negotiation and international agreement.

4.45 Mauritius again made clear its opposition to the “MPA” and to the unilateral approach being followed by the UK at a meeting between the Prime Minister of Mauritius and the British High Commissioner in Port Louis on 22 October 2009: see para. 3.56 above. As discussed in the Memorial and in Chapter 3 above,⁴⁰⁵ Mauritius continued to raise its dispute with the UK over the following months: see for example Mauritius’ Note Verbale of 10 November 2009,⁴⁰⁶ the note of the 10 November 2009 telephone conversation between the UK Foreign Secretary and the Prime Minister of Mauritius⁴⁰⁷, and Mauritius’ Note Verbale of 23 November 2009.⁴⁰⁸

⁴⁰⁴ Paper submitted on 5 May 2009 by Colin Roberts, Director, Overseas Territories Directorate, to the Private Secretary to the Foreign Secretary, “Making British Indian Ocean Territory the World’s Largest Marine Reserve”: Annex 133.

⁴⁰⁵ MM paras. 4.55 to 4.76; paras. 3.57-3.60 above.

⁴⁰⁶ Note Verbale dated 10 November 2009 from the Ministry of Foreign Affairs, Regional Integration and International Trade, Mauritius to the UK Foreign and Commonwealth Office, No. 1197/28/10, MM, Annex 151.

⁴⁰⁷ Record of telephone call between Foreign Secretary and Mauritian Prime Minister, 10 November 2009, UKCM Annex 106.

⁴⁰⁸ Note Verbale dated 23 November 2009 from the Ministry of Foreign Affairs, Regional Integration and International Trade, Mauritius to the UK Foreign and Commonwealth Office, No. 1197/28/10 MM, Annex 155.

(d) *The meeting between the Prime Ministers of Mauritius and the UK on 27 November 2009*

4.46 As set out above,⁴⁰⁹ on 27 November 2009, Prime Minister Ramgoolam met with British Prime Minister Gordon Brown in the margins of the Commonwealth Heads of Government Meeting at Port of Spain, Trinidad and Tobago. The meeting in question is described in the Statement of the Prime Minister of Mauritius dated 6 November 2013.⁴¹⁰ Prime Minister Ramgoolam indicates that the meeting was formal and pre-arranged. After some initial discussion,

“10. ... [Mr Brown] reiterated his thanks and his invitation to assist me. I therefore took the opportunity to convey to Mr Brown the deep concern of Mauritius over the proposal of the United Kingdom to establish a ‘marine protected area’ around the Chagos Archipelago and the launching of a public consultation by the UK Foreign and Commonwealth Office on 10 November 2009, just two weeks earlier, in this regard. That announcement had been the subject of media attention. I indicated to Mr Brown that when the British High Commissioner in Mauritius had called on me on 22 October 2009 to announce the UK’s proposal, I had expressed surprise that he was not able to offer me any document in relation to that proposal and told him that I would raise the matter with the British Prime Minister during the forthcoming CHOGM in Port of Spain. I had made very clear the objection of Mauritius to the UK’s proposal.

11. I also conveyed to Mr Brown that since the bilateral talks between Mauritius and the United Kingdom were intended to deal with all issues relating to the Chagos Archipelago, they were the only proper forum in which there should be further discussions on the proposed ‘marine protected area’.

12. I further pointed out that the issues of sovereignty and resettlement remained pending and that the rights of Mauritius in the Chagos Archipelago waters had to be taken into consideration.

13. In response, Mr Brown asked me once again: ‘What would you like me to do?’ I remember these words clearly.

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

15. Mr Brown then said: ‘I will put it on hold.’ He told me that he would speak to the British Foreign Secretary. He also assured me that the

⁴⁰⁹ Para. 3.60.

⁴¹⁰ Statement of Dr the Honourable Navinchandra Ramgoolam, Prime Minister of the Republic of Mauritius, 6 November 2013, Annex 183. See also the account given in the Information Paper CAB (2009)953: Annex 148.

proposed ‘marine protected area’ would be discussed only within the framework of the bilateral talks between Mauritius and the UK.”

4.47 As Prime Minister Ramgoolam’s statement makes clear, the commitment by Prime Minister Brown was expressed in the clearest possible terms. As set out in Chapter 6 below,⁴¹¹ the UK’s failure to honour this commitment forms the basis of a violation of the Convention.

(e) Exchanges during the remainder of 2009

4.48 As Prime Minister Ramgoolam had indicated to Prime Minister Brown, Mauritius continued to object to the holding of public consultations on the proposed “MPA”, rather than discussing the proposal only within the framework of bilateral talks with Mauritius. The UK acknowledged its awareness of Mauritius’ views in the UK Foreign Secretary’s letter to the Mauritian Foreign Minister on 15 December 2009:

“I very much welcomed the opportunity to meet you at CHOGM. We had a useful discussion on the proposal for a Marine Protected Area in the British Indian Ocean Territory.... At our meeting, you mentioned your concerns that the UK should have consulted Mauritius further before launching the consultation exercise.... I would like to reassure you again that the public consultation does not in any way prejudice or cut across our bilateral intergovernmental dialogue with Mauritius on the proposed Marine Protected Area.”⁴¹²

4.49 In his reply of 30 December 2009, the Mauritian Minister of Foreign Affairs wrote:

“I would like to refer to your letter dated 15 December 2009 on the proposed establishment of a Marine Protected Area around the Chagos Archipelago.

During our recent meeting in the margins of the Commonwealth Heads of Government Meeting, I had expressed the concerns of the Government of Mauritius about the Marine Protected Area project. I had stated that it was inappropriate for the British authorities to embark on consultations on the matter outside the bilateral Mauritius-United Kingdom mechanism for talks on issues relating to the Chagos Archipelago.”⁴¹³

⁴¹¹ Para. 6.65 ff.

⁴¹² Letter dated 15 December 2009 from the UK Secretary of State for Foreign and Commonwealth Affairs to the Minister of Foreign Affairs, Regional Integration and International Trade, Mauritius, MM, Annex 156. (emphasis added).

⁴¹³ Letter dated 30 December 2009 from the Minister of Foreign Affairs, Regional Integration and International Trade, Mauritius to the UK Secretary of State for Foreign and Commonwealth Affairs, MM, Annex 157 (emphasis added).

4.50 On the “substance of the proposal”, the Mauritian Foreign Minister reiterated that “access to the fisheries resources” was a matter of “high priority to the Government of Mauritius,” and that the “exclusion of such important issues in any discussion relating to the proposed establishment of a Marine Protected Area would not be compatible with resolution of the issue of sovereignty over the Chagos Archipelago and progress in the ongoing talks between Mauritius and the United Kingdom.”⁴¹⁴ He also stated: “[Y]ou will no doubt be aware that, in the margins of the last CHOGM, our respective Prime Ministers agreed that the Marine Protected Area project be put on hold and that this issue be addressed during the next round of Mauritius-United Kingdom bilateral talks.”⁴¹⁵

(f) Exchanges in 2010 up to the announcement of the “MPA”

4.51 Mauritius further raised the issue by Note Verbale of 30 December 2009, referring back to its Note Verbale of 23 November 2009⁴¹⁶. Mauritius’ position was made clear again on 18 January 2010 in a reply given by the Prime Minister of Mauritius to a Private Notice Question in Parliament.⁴¹⁷ The Prime Minister stated that “It was my clear understanding ... that, at the end of the meeting with the British Prime Minister ... that the Marine Protected Area project would be put on hold.” Further, and reflecting Mauritius’ complaints regarding the inadequacy of consultations, the Prime Minister of Mauritius indicated that the British Prime Minister had agreed that the “MPA” “would only be discussed during the bilateral talks between Mauritius and the UK.”

4.52 Mauritius again raised the dispute over its package of rights in the Chagos Archipelago and the UK’s failure to consult adequately on 19 February 2010. In a diplomatic note addressed to the British High Commissioner in Port Louis, Mauritius reiterated that the “MPA” denied “access by Mauritians to fisheries resources in that area.” Mauritius also said that the UK had failed to consult adequately, criticising the UK’s “unilateral” approach, which it said was “prejudicial to the interests of Mauritius.”⁴¹⁸ Mauritius stressed that it was “keen to resume the bilateral talks on the premises outlined above.”

4.53 On 30 March 2010, the FCO’s internal advice acknowledged that Mauritius was in dispute with the UK in regard to the adequacy of the consultation process. A

⁴¹⁴ Letter dated 30 December 2009 from the Minister of Foreign Affairs, Regional Integration and International Trade, Mauritius to the UK Secretary of State for Foreign and Commonwealth Affairs, MM, Annex 157.

⁴¹⁵ Letter dated 30 December 2009 from the Minister of Foreign Affairs, Regional Integration and International Trade, Mauritius to the UK Secretary of State for Foreign and Commonwealth Affairs, MM, Annex 157.

⁴¹⁶ Note Verbale dated 30 December 2009 from the Ministry of Foreign Affairs, Regional Integration and International Trade, Mauritius to the UK Foreign and Commonwealth Office, No. 1197/28/4, MM, Annex 158.

⁴¹⁷ National Assembly of Mauritius, 18 January 2010, Reply to Private Notice Question: Annex 151.

⁴¹⁸ Letter dated 19 February 2010 from the Secretary to Cabinet and Head of the Civil Service, Mauritius to the British High Commissioner, Port Louis, MM, Annex 162.

memorandum by Ms Yeadon states that: “The Mauritian Government accepts the underlying objective of strengthening environmental stewardship in the region but they remain unhappy with what they see as the unilateral FCO consultation...”⁴¹⁹

4.54 On 31 March 2010 – the day before declaring the “MPA” – the UK had no doubt that Mauritius considered it to violate its legal rights, and acknowledged in its internal deliberations that it could cause Mauritius to commence legal proceedings. In an email marked as high importance, Ms Yeadon “stress[ed] that we are also concerned about ... [the] threat of legal action.”⁴²⁰ This was repeated the same day by the UK’s High Commissioner in Port Louis, who advised against declaring the “MPA” since it could force Mauritius “to commit to taking legal action to challenge the establishment of the MPA.”⁴²¹ He stated that the UK risked “significantly increas[ing] the eventual chance of a legal challenge to the MPA (and sovereignty itself) from the next Government of Mauritius.”⁴²²

(g) *Mauritius’ reaction to the announcement of the “MPA”*

4.55 As addressed in Chapter 3 above, the UK disregarded these warnings, as well as its Prime Minister’s commitment to Mauritius to put the project on hold, and declared the “MPA” the following day. When the UK Foreign Secretary so informed the Prime Minister of Mauritius, the latter reacted by denouncing the UK’s failure to engage in adequate consultations. This is reflected in the UK’s record of the conversation, which states that the Prime Minister “said that he was disappointed that there had not been bilateral discussions.”⁴²³ The UK Foreign Secretary’s response acknowledges that the Parties were in dispute on the adequacy of their consultations: “While recognising the disagreement with the Mauritius Government on the process leading up to the establishment of the MPA, he hoped that this could bring the two governments closer together to work in the best interests of the environment.” This constitutes a formal recognition of the dispute between the Parties.

⁴¹⁹ Submission dated 30 March 2010 from Joanne Yeadon, Head of “BIOT” & Pitcairn Section, to Colin Roberts, Director, Overseas Territories Directorate, the Private Secretary to Parliamentary Under Secretary Chris Bryant and the Private Secretary to the Foreign Secretary, “British Indian Ocean Territory (BIOT): Proposed Marine Protected Area (MPA): Next Steps”: Annex 152.

⁴²⁰ Email dated 31 March 2010 from John Murton, British High Commissioner to Mauritius, to Colin Roberts, Director, Overseas Territories Directorate and Joanne Yeadon, Head of “BIOT” & Pitcairn Section, UK Foreign and Commonwealth Office: Annex 156.

⁴²¹ Email dated 31 March 2010 from John Murton, British High Commissioner to Mauritius, to Colin Roberts, Director, Overseas Territories Directorate and Joanne Yeadon, Head of “BIOT” & Pitcairn Section, UK Foreign and Commonwealth Office: Annex 156.

⁴²² Email dated 31 March 2010 from John Murton, British High Commissioner to Mauritius, to Colin Roberts, Director, Overseas Territories Directorate and Joanne Yeadon, Head of “BIOT” & Pitcairn Section, UK Foreign and Commonwealth Office: Annex 156.

⁴²³ Notes of telephone call from Foreign Secretary to Mauritius’ Prime Minister of 1 April 2010 in email of 1 April 2010 from Global Response Centre: UKCM, Annex 114.

4.56 The UK's understanding that it was in dispute in regard to the "MPA" is confirmed by Prime Minister Ramgoolam's statement, which describes his conversation with the British Foreign Secretary, David Miliband, as follows:

"Mr Miliband called me on that very day [1 April 2010] to announce his decision. I told him that I was totally surprised to hear that a 'marine protected area' would purportedly be created by the United Kingdom around the Chagos Archipelago. I expressed to him my strong disapproval of such a decision being taken in spite of the clear commitment given to me by Mr Brown that the proposed 'marine protected area' would be put on hold. This was a commitment on which I placed reliance."

4.57 Mauritius raised the dispute again in the following day, in a Note Verbale which "conveyed its strong opposition to such a project," referring back to its Notes Verbales of 23 November and 30 December 2009. The 2 April 2010 Note again underlined the UK's failure to consult, condemning the "MPA" for having been "undertaken without consultation with ... the Government of the Republic of Mauritius."⁴²⁴ In a clear reference to the possibility of instituting the dispute resolution procedures under Part XV of the Convention, Mauritius informed the UK that it "will look into legal and other options that are now open to it."⁴²⁵ This did not come as a surprise to the UK, since only days earlier the FCO had been expressly warned that the UK risked causing Mauritius to commence "legal action to challenge the establishment of the MPA."⁴²⁶

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

"expressed concern over the decision of the former UK Government to proceed with the establishment of a Marine Protected Area around the Chagos Archipelago despite the undertaking given by the then British Prime Minister that the project would be put on hold and brought up for consideration under the bilateral talks between the UK and Mauritius on the Chagos issue."⁴²⁷

⁴²⁴ Note Verbale dated 2 April 2010 from the Ministry of Foreign Affairs, Regional Integration and International Trade, Mauritius to the British High Commission, Port Louis, No. 11/2010 (1197/28/10), MM, Annex 167.

⁴²⁵ Note Verbale dated 2 April 2010 from the Ministry of Foreign Affairs, Regional Integration and International Trade, Mauritius to the British High Commission, Port Louis, No. 11/2010 (1197/28/10), MM, Annex 167. See also Letter dated 8 April 2010 from the Minister of Foreign Affairs, Regional Integration and International Trade, Mauritius to Hon. Edward Davey MP: Annex 159; Letter dated 8 April 2010 from the Minister of Foreign Affairs, Regional Integration and International Trade, Mauritius to Rt. Hon. William Hague MP: Annex 160.

⁴²⁶ Letter dated 8 April 2010 from the Minister of Foreign Affairs, Regional Integration and International Trade, Mauritius to Hon. Edward Davey MP: Annex 159.

⁴²⁷ Extract of Information Paper CAB (2010) 295 – Official Mission to France and the United Kingdom, 9 June 2010: Annex 161.

The Prime Minister further reported: “I pointed out that, according to legal advice obtained, the decision of the UK Government to proceed with the creation of the Marine Protected Area could be tainted with illegality.”

4.59 The inadequacy of the UK’s consultation process was also raised by the Mauritius High Commissioner in London in a meeting with the FCO on 15 June 2010. The UK’s notes of the meeting record that the High Commissioner “said that Mauritius was not against the principle of establishing a Marine Protected Area, but disagreed with what it saw as the unilateral nature of this process.”⁴²⁸ Mauritius took the same position at a meeting on 22 July 2010, when its Foreign Minister informed the FCO that, as recorded by notes prepared by the UK, “Mauritius was not against environmental protection or the principle of an MPA, but wanted to be involved in the policy discussion.”⁴²⁹

4.60 That Mauritius and the UK were in dispute was raised publicly by the Mauritian Prime Minister again on 27 July 2010, when he informed the Parliament of Mauritius that the UK had acted “unilaterally and in total disregard of the discussions at the second round of bilateral talks between Mauritius and the UK on the Chagos Archipelago held on 21 July 2009,” and observed that “[o]n several occasions, the Government of Mauritius conveyed its opposition to the UK proposal for the establishment of a Marine Protected Area around the Chagos Archipelago.”⁴³⁰ Because the UK had disregarded these objections, Mauritius was compelled “not to recognise the existence of the Marine Protected Area.”⁴³¹ The Prime Minister explained that among the reasons why Mauritius considered the “MPA” to be “totally unacceptable” was that it “impedes the use by Mauritius of the fisheries and other marine resources of the ocean around the Chagos Archipelago.” The Prime Minister also “expressed concern over the decision of the former UK Government to establish” the “MPA” “despite the undertaking given by the former British Prime Minister that the project would be put on hold and discussed within the framework of the bilateral talks between Mauritius and the UK.” In short, he repeated, “the decision is tainted with illegality.”

4.61 Similar comments were made by the Mauritian Prime Minister on 9 November 2010. He reported that:

- (i) Mauritius had “conveyed on several occasions its opposition to the project”;
- (ii) The “MPA” was “unilateral and prejudicial to the interests of Mauritius”;
- (iii) The “British Government did not halt the public consultation ... despite the assurances given to me by the Former British Prime Minister at the last Commonwealth Heads of Government Meeting that the creation of

⁴²⁸ United Kingdom record of meeting on 15 June 2010, UKCM, Annex 117.

⁴²⁹ United Kingdom record of meeting on 22 July 2010, UKCM, Annex 118.

⁴³⁰ National Assembly of Mauritius, 27 July 2010, Reply to PQ No. 1B/324: Annex 163.

⁴³¹ *Ibid.*

the marine protected area would be put on hold and discussed within the framework of the bilateral talks between Mauritius and the UK”;

- (iv) The “MPA” was “totally unacceptable” because it “prevents the use by Mauritius of the fisheries and other marine resources of the ocean around the Chagos Archipelago”;
- (v) The “decision of the former UK Government is tainted with illegality”;
and
- (vi) The “new British Government does not hold a different view from the previous Government on the issue of the marine protected area.”⁴³²

4.62 “In the circumstances,” the Prime Minister said, “the Government of Mauritius is now considering other options to counter the unilateral establishment by the UK Government of a marine protected area around the Chagos Archipelago.”⁴³³

4.63 Mauritius commenced the present arbitration the following month. Given the UK’s violation of the commitment given at the highest level, it was plain that no diplomatic solution was possible. It would therefore have been futile to continue exchanges on the issue.

IV. The Requirements of Article 283(1)

4.64 Article 283(1) provides:

“When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.”

4.65 The UK argues that Article 283(1) has not been satisfied because there was no dispute in regard to the interpretation or application of the Convention at the time when Mauritius initiated this arbitration, and relatedly, that there could have been no exchange of views.

4.66 The Parties agree that, for the purposes of Article 283(1), a dispute is “a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons,”⁴³⁴ and that “[w]hether there exists an international dispute is a matter for objective determination”,⁴³⁵ which is not to be based on the subjective views of the

⁴³² National Assembly of Mauritius, 9 November 2010, Reply to PQ No. 1B/540: Annex 165.

⁴³³ National Assembly of Mauritius, 9 November 2010, Reply to PQ No. 1B/540: Annex 165.

⁴³⁴ *Mavrommatis Palestine Concessions*, 1924 P.C.I.J. (ser. A), Judgment No. 2, p. 11.

⁴³⁵ *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion, ICJ Reports 1950, p. 65, para. 74; *East Timor (Portugal v Australia)*, Judgment, ICJ Reports 1995, p. 90, para. 22; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)*, Preliminary Objections,

Parties.⁴³⁶ In determining whether there is a dispute, an international court or tribunal should consider “not only” the Application and final submissions, but also “diplomatic exchanges, public statements and other pertinent evidence,” as well as the conduct of the Parties both prior to and after the commencement of legal proceedings.⁴³⁷ Whether there is a dispute is a question of substance, not form.⁴³⁸

4.67 The requirement under Article 283(1) that the Parties engage in an “exchange of views” is not an onerous burden. International courts and tribunals have long recognised that “[n]egotiations do not of necessity always presuppose a more or less lengthy series of notes and despatches; it may suffice that a discussion should have commenced, and this discussion may have been very short.”⁴³⁹ States themselves are “in the best position to judge as to political reasons which may prevent the settlement of a given dispute by diplomatic negotiations.”⁴⁴⁰

4.68 These principles apply in relation to Article 283(1). In the *Land Reclamation* case, ITLOS held that a State “is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted.”⁴⁴¹ Thus, Article 283 was satisfied even though Malaysia “abruptly broke off [two-day negotiations] by insisting on the immediate suspension of the reclamation works as a precondition on further talks,”⁴⁴² and stating that “a further exchange of views could not

Judgment, ICJ Reports 1998, p. 9, para. 22; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)*, Preliminary Objections, Judgment, ICJ Reports 1998, p. 275, para. 87; *Certain Property (Liechtenstein v Germany)*, Preliminary Objections, Judgment, ICJ Reports 2005, p. 6, para. 24; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 2006, para. 90; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)*, Preliminary Objections, Judgment, ICJ Reports 2011, p. 70, para. 30, UKCM, Authority 37.

⁴³⁶ *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)*, Preliminary Objections, Judgment of 21 December 1962: ICJ Reports 1962, p. 319, at p. 328:

“[I]t is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence.” See also *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, ICJ Reports 1950, at p. 74: “The mere denial of the existence of a dispute does not prove its non-existence.”

⁴³⁷ *Fisheries Jurisdiction (Spain v Canada)*, Jurisdiction of the Court, Judgment, ICJ Reports 1998, p. 432, para. 31; *Nuclear Tests (Australia v France)*, Judgment, ICJ Reports 1974, p. 253, paras. 29-31.

⁴³⁸ *Georgia v Russian Federation*, para. 30. UKCM, Legal Authority 37.

⁴³⁹ *Mavrommatis Palestine Concessions*, at p.13.

⁴⁴⁰ *Mavrommatis Palestine Concessions*, at p.15.

⁴⁴¹ *Case Concerning Land Reclamation by Singapore In and Around the Straits of Johor (Malaysia v Singapore)*, ITLOS Case No. 12, Request for Provisional Measures, Order of 8 October 2003, para. 47; *The Mox Plant Case (Ireland v United Kingdom)*, ITLOS Case No. 10, Request for Provisional Measures, Order of 3 December 2001, para. 60; *Southern Bluefin Tuna Cases*, Order of 27 August 1999, para. 60 (“[A] State Party is not obliged to pursue procedures under Part XV, section 1, of the Convention when it concludes that the possibilities of settlement have been exhausted”); *Southern Bluefin Tuna Cases (New Zealand and Japan; Australia and Japan)*, ITLOS Cases Nos. 3 and 4, Request for Provisional Measures, Order of 27 August 1999, para. 60.

⁴⁴² *Land Reclamation*, para. 43.

be expected while the reclamation works were continuing.”⁴⁴³ Malaysia, ITLOS held, was “not obliged to continue with an exchange of views when it conclude[d] that the possibilities of reaching agreement [had] been exhausted.”⁴⁴⁴

4.69 The UK does not dispute this. It concedes that “a party is not obliged to continue with an exchange of views when the possibilities of settlement have been exhausted.”⁴⁴⁵ Rather, the UK simply falls back on its untenable view that no dispute had been raised by Mauritius in order to suggest, equally without foundation, that there was an inadequate exchange of views. The Counter-Memorial states the UK’s argument as follows:

“[The] contention is that Mauritius cannot even establish that it raised the UNCLOS claims which it now raises, let alone that an exchange of views had taken place and that the possibilities of a settlement had been exhausted.”⁴⁴⁶

4.70 Significantly, the UK also concedes that it is “not necessary” for “a State to refer to a specific treaty in its exchanges with the other State in order to enable it to later invoke that instrument before the given court or tribunal.”⁴⁴⁷ Nonetheless, in arguing that there is no dispute, the UK applies the very standard it has already acknowledged as not being required. The UK’s erroneous approach is reflected in its blanket assertion at paragraph 5.24 that “[s]o far as concerns the documents in the period 2009-2010, UNCLOS is not once referred to...”,⁴⁴⁸ a point that is wholly irrelevant (and wrong in the sense that, as noted above, various exchanges had indeed referred to the Convention). It then applies this incorrect standard to the Parties’ numerous diplomatic exchanges. For example, it asserts that a Note Verbale from Mauritius that denounced the “MPA” for prohibiting Mauritius’ “access to the fisheries resources” of “the Chagos Archipelago” did not evidence a dispute in regards to Mauritius’ rights in the territorial sea and EEZ because “UNCLOS was not mentioned” and the Note did not expressly “raise[] the MPA’s unlawfulness under the provisions of UNCLOS.”⁴⁴⁹ Similarly, the UK dismisses the significance of another diplomatic note because there “was no reference to UNCLOS or Mauritian rights under UNCLOS based on the 1965 understandings.”⁴⁵⁰

4.71 The UK’s approach is inconsistent with the rule that “it is not necessary that a State must expressly refer to a specific treaty in its exchanges with the other State to be able later to invoke that instrument before the Court.”⁴⁵¹ It follows *a fortiori* that a State

⁴⁴³ *Land Reclamation*, para. 44.

⁴⁴⁴ *Land Reclamation*, para. 44.

⁴⁴⁵ UKCM, para. 5.50.

⁴⁴⁶ UKCM, para. 5.50.

⁴⁴⁷ UKCM, para. 5.8.

⁴⁴⁸ UKCM, para. 5.23.

⁴⁴⁹ UKCM, para. 5.29(c).

⁴⁵⁰ UKCM, para. 5.39.

⁴⁵¹ *Georgia v Russia*, para. 30. UKCM, Authority 37.

need not refer to specific articles of a treaty either. Rather, “the exchanges must refer to the subject-matter of the treaty with sufficient clarity to enable the State against which a claim is made to identify that there is, or may be, a dispute with regard to that subject-matter.”⁴⁵²

4.72 This is not a new rule. In *Nicaragua v United States*, the United States raised the same jurisdictional objection as the UK when it argued that Nicaragua could not base jurisdiction on the Parties’ 1956 FCN Treaty because Nicaragua allegedly had not “raised in negotiations with the United States the application or interpretation of the Treaty to any of the factual or legal allegations in its Application.”⁴⁵³ The Court rejected this argument. It held that:

“In the view of the Court, it does not necessarily follow that, because a State has not expressly referred in negotiations with another State to a particular treaty as having been violated by conduct of that other State, it is debarred from invoking a compromissory clause in that treaty. The United States was well aware that Nicaragua alleged that its conduct was a breach of international obligations before the present case was instituted; and it is now aware that specific articles of the 1956 Treaty are alleged to have been violated. It would make no sense to require Nicaragua now to institute fresh proceedings based on the Treaty, which it would be fully entitled to do. As the Permanent Court observed, “the Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the party concerned.”⁴⁵⁴

4.73 In *Guyana v Suriname*, the Annex VII Tribunal likewise rejected the argument that specific treaty provisions must be cited in order to satisfy the requirements of Article 283. Suriname asserted a jurisdictional objection under Article 283 in relation to Guyana’s claims, based on Suriname’s unlawful threat of force against a drilling rig operating in waters claimed by both Parties, on the ground that before “the application was filed” Guyana had not “informed Suriname that Guyana believed that Suriname had violated Articles 279 or 301, or even that it had violated the Law of the Sea Convention generally by Suriname’s conduct.”⁴⁵⁵ Suriname argued that: “By failing to fulfil that obligation, Guyana did not undertake recourse to the Section 1 Procedures, and because of that failure to take recourse to Section 1 procedures, Guyana cannot avail itself of the Section 2 compulsory dispute jurisdiction.”⁴⁵⁶ The Tribunal unanimously rejected Suriname’s position, ruling that Guyana was not required to cite Articles 279 and 301 in its diplomatic exchanges in order subsequently to assert claims thereunder.⁴⁵⁷

4.74 The same approach to Article 283(1) was taken by ITLOS in the *Land Reclamation* case, where Malaysia was not required to invoke the Convention at all,

⁴⁵² *Georgia v Russia*, para. 30. UKCM, Authority 37.

⁴⁵³ *Nicaragua v United States (Jurisdiction)*, para. 81.

⁴⁵⁴ *Nicaragua v United States (Jurisdiction)*, para. 83.

⁴⁵⁵ *Guyana v Suriname*, Annex VII Arbitral Tribunal, Award of 17 September 2007, para. 407.

⁴⁵⁶ *Guyana v Suriname*, para. 408.

⁴⁵⁷ *Guyana v Suriname*, paras. 408-410.

much less its specific provisions. It was sufficient for Malaysia to have “informed Singapore of its concerns about Singapore’s land reclamation in the Straits of Johor.” That Malaysia had not “detailed its specific concerns” until the institution of proceedings was no obstacle to the exercise of jurisdiction.⁴⁵⁸

4.75 Similarly, in the recent *Louisa* case, Article 283(1) was satisfied because Saint Vincent and the Grenadines had informed Spain of its objection to the “detention of the ships the *M.V. Louisa* and its tender, the *Gemini III*” and the alleged failure to notify “the flag country of the arrest as required by Spanish and international law.”⁴⁵⁹ The Tribunal had no cause to decline jurisdiction for failure to comply with Article 283(1), simply because the Applicant had not referred to the specific provisions of the Convention upon which its claims were based.

4.76 It follows from the foregoing jurisprudence that the standard for whether a dispute exists over the interpretation or application of the Convention is whether the Parties’ exchanges addressed the subject-matter of the dispute, not whether the Convention itself, or specific provisions of it, were cited.

4.77 Mauritius’ claims in this arbitration satisfy this test, because has it raised, on many occasions and in a variety of fora, the subject-matters of the Convention upon which those claims are based. These include the dispute over whether the UK is a “coastal State” that is entitled under the Convention to declare maritime zones in the waters of the Chagos Archipelago, as well as the UK’s breach of obligations:

- (i) under Part II, in relation to Mauritius’ rights in the territorial sea, including with respect to its fishing and mineral rights and the right to be consulted about matters that can affect its rights;
- (ii) under Part V, in relation to Mauritius’ rights in the Exclusive Economic Zone, including with respect to its fishing and mineral rights and the right to be consulted about matters that can affect its rights;
- (iii) under Part VI, in relation to Mauritius’ rights in the continental shelf, including with respect to its right to exploit the living resources located therein (including sedentary species) and its right to declare an extended continental shelf beyond 200 miles;
- (iv) under Part XII, in relation to the UK’s failure to harmonise with Mauritius its policies in regard to measures to prevent, reduce and control pollution of the marine environment, and its unjustifiable interference with activities carried out by Mauritius in the exercise of its own rights;

⁴⁵⁸ *Land Reclamation (2003)*, paras. 39, 41.

⁴⁵⁹ *The M/V “Louisa” Case (Saint Vincent and the Grenadines v Kingdom of Spain)*, ITLOS Case No. 18, Request for Provisional Measures, Order of 23 December 2010, para. 60, UKCM, Authority 35.

- (v) under Part XVI, in relation to the UK's exercise of rights, jurisdiction and freedoms recognised in the Convention in a manner that constitutes an abuse of rights; and
- (vi) under Article 7 of the 1995 Agreement in relation to the UK's failure to consult with Mauritius in regard to measures for the conservation of fish stocks.

4.78 As shown above, Mauritius raised all of these subject-matters prior to commencing this arbitration.

V. Conclusions

4.79 In the present case, the facts speak for themselves: Mauritius repeatedly made clear to the UK that it considered that the UK lacked sovereignty over the Chagos Archipelago and, accordingly, was not entitled to declare maritime zones around the Archipelago. Mauritius further made clear that it considered the "MPA" to be unlawful because it violated the rights of Mauritius in the territorial sea, the EEZ and the continental shelf of the Chagos Archipelago. Mauritius engaged in a series of diplomatic exchanges in a fruitless attempt to resolve the dispute, including at the very highest levels of government. It obtained a commitment from the UK Prime Minister that the "MPA" would be put "on hold", and was disappointed and surprised by the decision of the UK Foreign Secretary on 1 April 2010 to establish the "MPA". It was plain by then that the UK knew it was in a dispute with Mauritius about matters falling within the subject matter of the Convention, and that it expected legal proceedings to be initiated. Despite all of Mauritius' efforts, the UK committed itself to a unilateral approach, to the exclusion of meaningful consultations and negotiations and in blatant disregard of Mauritius' rights under the Convention. In the circumstances, Mauritius had no choice but to institute arbitral proceedings.

CHAPTER 5: THE UK IS NOT A COASTAL STATE ENTITLED TO DECLARE THE “MPA”

5.1 As set out in its Memorial, it is Mauritius’ case that the “MPA” has been imposed by a State which has no authority to act as it has done.⁴⁶⁰ First, the UK does not have sovereignty over the Chagos Archipelago and is not “the coastal State” for the purposes of the Convention; the detachment of the Chagos Archipelago from the Colony of Mauritius and the purported retention of the Archipelago as part of another colony when Mauritius became independent were carried out in contravention of the fundamental right of the people of Mauritius to self-determination. Further, as a result of the acknowledgement by the UK of the rights and legitimate interests of Mauritius in relation to the Chagos Archipelago, the UK is not entitled in law under the Convention to impose the “MPA”, or establish maritime zones, over the objections of Mauritius.

5.2 This chapter responds to the UK’s assertions in its Counter-Memorial regarding both of these issues: first, with regard to the right of self-determination of the people of Mauritius; and second, with regard to the rights of Mauritius flowing from the undertakings made by the UK in 1965. As a preliminary matter, Mauritius notes the points on which the UK has made no reply to Mauritius’ case. The UK has not denied, for example, the account given by Mauritius⁴⁶¹ of the efforts made by the UK to rush through the detachment of the Chagos Archipelago in order to present the United Nations “with a *fait accompli*”. Nor has it denied the claim that it attempted to avoid accusations of “creating a new colony in a period of decolonisation and of establishing new military bases when we should be getting out of the old ones”, or that it made false statements to the UN that the islands “have virtually no inhabitants” while internal documents made clear that there was “a more or less settled population”.

I. Self-determination

5.3 The UK makes two principal contentions.⁴⁶² First, it contends that in November 1965 there was no rule of international law concerning self-determination binding on the UK which would have precluded the establishment of the “BIOT”; second, it contends that even if there were such a rule it did not contravene a right of Mauritius to self-determination, because (i) the Chagos Archipelago was not an integral part of Mauritius, and (ii) the then representatives of Mauritius had agreed to detachment.⁴⁶³ As set out below, Mauritius maintains:

5.4 As to the first proposition:

- (i) that the right to self-determination was clearly established in international law;

⁴⁶⁰ MM, paras. 1.3 and 6.2.

⁴⁶¹ MM, paras. 3.36 to 3.48.

⁴⁶² UKCM, para. 7.14.

⁴⁶³ UKCM, paras. 7.22-3.

- (ii) that the UK was not able to be a “persistent objector” in relation to the establishment of the right, since the concept of persistent objection does not apply to fundamental norms;
- (iii) that in any event the UK did not consistently object to the development of the right, and was on record as accepting and applying it in certain circumstances before 1965, and certainly before 1968 when Mauritius achieved independence; and
- (iv) that the territorial integrity of non-self-governing territories was an essential aspect of the right of self-determination, to be waived only by the freely expressed wish of the people.

As to the second proposition:

- (i) that the Chagos Archipelago has always been an integral part of Mauritius and was therefore part of the territorial unit in respect of which the people of Mauritius enjoyed the right of self-determination;
- (ii) that the alleged “agreement” of the representatives of Mauritius to detachment of the Archipelago was not sufficient to waive by a free expression of their wishes the right of the people of Mauritius to territorial integrity;
- (iii) that the international community condemned the UK’s action of excision of the Chagos Archipelago from Mauritius and affirmed Mauritius’ sovereignty over the Archipelago;
- (iv) that Mauritius continued to protest against the assertion by the UK of sovereignty; and
- (v) that the principle of *uti possidetis* did not give a right to a colonial power to dismember a dependent territory before independence.

(a) *The right to self-determination was clearly established*

5.5 The detachment of the Chagos Archipelago from the then colony of Mauritius in November 1965, and the purported retention of the Archipelago as part of the “BIOT” in March 1968, when Mauritius achieved independence, was contrary to the right of the people of Mauritius to self-determination. The right is discussed at paras. 6.10 to 6.22 of Mauritius’ Memorial, but in the light of the denial by the UK that it was opposable to the UK in international law, it is necessary to elaborate further.

5.6 As a legal right enjoyed by “peoples”, self-determination developed from the wording of Articles 1(2) and 73 of the UN Charter; in the view of some writers the right can be dated back to the coming into force of the Charter.⁴⁶⁴ Indeed, the French

⁴⁶⁴ Having discussed early formulations of the concept, Oeter states in reference to Article 1(2), “With the new formula, it was put beyond doubt that in principle colonial peoples had a right to self-determination, but it was left to the discretion of the governing powers to decide when these peoples

text of Article 1(2) – “*principe de l’égalité des droits des peuples et de leur droit à disposer d’eux-mêmes*”, with its clear reference to the *right* to self-determination – is as authoritative as the English – “principle of equal rights and self-determination of peoples”.

5.7 Whether or not it was clear as from the adoption of the Charter that there was a legal right to self-determination, in the practice of States the Charter was soon interpreted in this way. As long ago as 1950 the UN General Assembly referred to the “right of peoples and nations to self-determination”, when it mandated the study of means to ensure the right.⁴⁶⁵ In 1952, the Assembly decided to include in the Covenants on Human Rights a provision on the right, in the following words:

“Whereas the General Assembly at its fifth session recognized the right of peoples and nations to self-determination as a fundamental human right (resolution 421 D (V) of 4 December 1950),

...

1. Decides to include in the International Covenant or Covenants on Human Rights an article on the right of all peoples and nations to self-determination in reaffirmation of the principle enunciated in the Charter of the United Nations. This article shall be drafted in the following terms: “All peoples shall have the right of self-determination”, and shall stipulate that all States, including those having responsibility for the administration of Non-Self-Governing Territories, should promote the realization of that right, in conformity with the Purposes and Principles of the United Nations, and that States having responsibility for the administration of Non-Self-Governing Territories should promote the realization of that right in relation to the peoples of such Territories...”⁴⁶⁶ (Underlining added.)

5.8 The negotiation of the Covenants led to discussions in the early 1950s about the nature of the concept of self-determination. The divisions of opinion⁴⁶⁷ between

would be ready for full self-government.” Stefan Oeter, “Self-Determination” in Bruno Simma et al. (eds) *The Charter of the United Nations: A Commentary* (2012), p.319. See also p. 315: “Subsequent development in the UN, in particular the practice of decolonisation, transformed the old (political) principle of self-determination into a collective right – a trend which became more or less irrefutable with the codification of the right of self-determination in the two UN Human Rights Covenants of 1966 ... Although Art.1(2) ... cannot define in detail the content and scope of a right to self-determination, it sets forth beyond dispute that it forms part of the law of the Charter and is binding upon all members of the UN.”

⁴⁶⁵ GA res. 421 (V) (1950), entitled “Draft International Covenant on Human Rights and measures of implementation: future work of the Commission on Human Rights”: the GA:

“6. *Calls upon* the Economic and Social Council to request the Commission on Human Rights to study ways and means which would ensure the right of peoples and nations to self-determination, and to prepare recommendations for consideration by the General Assembly at its sixth session GA res. 421 (V) (1950), section D.”

⁴⁶⁶ GA res. 545 (VI).

⁴⁶⁷ In a document prepared by the UN Secretariat on the negotiations on the Covenants, the divisions of opinion are described thus: “3. One school of thought maintained that self-determination was a political principle of the highest importance, but not a right in the strict legal sense, not a human right or an

those who saw it as a political principle and those who maintained that it was a legal right were resolved early in the negotiations in favour of the latter. And at the same time as the Covenants were being negotiated, the General Assembly was adopting resolutions which referred to the right of self-determination, and various aspects of that right such as the right freely to determine political status and the right to territorial integrity. By the time the Declaration on the granting of independence to colonial countries and peoples (GA res. 1514 (XV)) was adopted in 1960, with its statement “All peoples have the right to self-determination”, it was legitimate to reach the view adopted by Dame Rosalyn Higgins, who wrote as early as 1963 that the Declaration “taken together with seventeen years of evolving practice by United Nations organs, provides ample evidence that there now exists a legal right of self-determination.”⁴⁶⁸ The Declaration was regarded in many respects as an authoritative interpretation of the Charter. General Assembly resolutions are not in general binding, but:

“State practice is just as much State practice when it occurs in the context of the General Assembly as in bilateral forms. The practice of States in assenting to and acting upon law-declaring resolutions may be of probative importance, in particular where that practice achieves reasonable consistency over a period of time. In Judge Petren’s words, where a resolution is passed by “a large majority of States with the intention of creating a new binding rule of law” [*Fisheries Jurisdiction* 1974 p3, at 162] and is acted upon as such by States generally, their action will have quasi-legislative effect. The problem is one of evidence and assessment.”⁴⁶⁹

individual right... 4. Another school of thought maintained that self-determination was a ‘right’ as well as a ‘principle’ and that it was indeed the most fundamental of all human rights... The General Assembly, the highest organ in the international community, had already recognised the right of peoples and nationals to self-determination; the next step was to formulate an appropriate article by which States would undertake a solemn obligation to promote and respect that right.” Draft International Covenants on Human Rights –Annotation, UN Doc. A/2929, 1 July 1955, Annex 15, Chapter IV.

⁴⁶⁸ Rosalyn Higgins, *Development of International Law through the Political Organs of the United Nations* (1963), Annex 24, p.103. See also her review of the practice of the General Assembly and other UN organs on self-determination, in which she concludes that: “It therefore seems inescapable that self-determination has developed into an international legal right, and is not an essentially domestic matter. The extent and scope of the right is still open to some debate.” (p. 104). See also D. Raic, *Statehood and the Law of Self-determination* (2002); Raic concludes, after discussing the practice of the GA from 1952, that it “seems tenable that Resolution 1514 reflected an existing rule of customary law as far as a right of self-determination for colonial countries and peoples is concerned.” (p. 215)

⁴⁶⁹ J. Crawford, *The Creation of States in International Law* (2nd ed.) (2006) p. 114. See also advice by the UN Office of Legal Affairs: “there is probably no difference between a ‘recommendation’ or a ‘declaration’ in UN practice as far as strict legal principle is concerned. A ‘declaration’ or a ‘recommendation’ is adopted by resolution of a UN organ. As such it cannot be made binding upon Member States, in the sense that a treaty or convention is binding upon the parties to it, purely by the device of terming it a ‘declaration’ rather than a ‘recommendation’. However, in view of the greater solemnity and significance of a ‘declaration’, it may be considered to impart, on behalf of the organ adopting it, a strong expectation that Members of the international community will abide by it. Consequently, in so far as the expectation is gradually justified by State practice, a declaration may become recognised as laying down rules binding upon States.” United Nations Economic and Social

5.9 A collection of the resolutions of all UN organs reciting the right of self-determination would be unwieldy; a few are referred to in the Appendices to this Chapter. They illustrate the very common reliance in General Assembly practice on the right of self-determination as enunciated in the 1960 Declaration. The General Assembly and its organs asserted the right in the 1950s and 1960s; they were joined by the Security Council.⁴⁷⁰ The adoption by consensus in 1966 of the Covenants on Human Rights, each of which includes in its first Article the confirmation that “All peoples have the right of self-determination”, was in accordance with the general trend. What can be seen here is a large number of resolutions, the 1960 Declaration, official statements, and the 1966 Covenants, all of which indicate practice and *opinio iuris* that amounts to customary international law by the beginning, or at the very latest, by the middle, of the 1960s, on the right of self-determination. The norm evolved into one of *ius cogens*⁴⁷¹, and as such it affects the UK’s continuing responsibility to recognise Mauritius’ sovereignty over the Chagos Archipelago.

(b) The UK was not able to be a “persistent objector” in relation to the establishment of the right

5.10 The UK maintains⁴⁷² that it is to be regarded as a persistent objector to the development of the right to self-determination. But it is not possible to be a persistent objector to this right. That persistent objection to fundamental rules of customary international law cannot prevent the binding application of those rules to the objector was made clear by the UK itself in its pleadings in the *Fisheries* case, when it stated that a State cannot be a persistent objector to a “fundamental principle”.⁴⁷³ In 1950, at the time it made that statement, it could not have been referring to *ius cogens*; it was

Council, Commission on Human Rights, Eighteenth Session, “Use of the Terms ‘Declaration’ and ‘Recommendation’”, UN Doc. E/CN.4/L.610, 2 April 1962: Annex 22.

⁴⁷⁰ For SCR 183 (1963) and SCR 232 (1966), see Appendix 1.

⁴⁷¹ MM, para. 6.15.

⁴⁷² UKCM, para. 7.17.

⁴⁷³ *Fisheries (United Kingdom v Norway)*, Reply of the United Kingdom (28 November 1950), Pleadings, vol. II, p.429. The UK argued, in the context of rules regarding baselines and the delimitation of the territorial sea (*ibid*, 428-9), as follows:

“The right of a State to dissent from a customary rule is not absolute; account must be taken of the rights of the international community

162. ...[T]he trend in international relations has been towards an increased regard for majority opinion. Precisely how far this trend has affected or may affect the formation of customary law it is unnecessary here to consider. It is enough to say that the right of a State to dissent from a customary rule cannot be regarded as absolute. There is universal agreement that a new State has no option but to adhere to generally accepted customary law. In addition, where a fundamental principle is concerned, the international community does not recognize the right of any State to isolate itself from the impact of the principle. On the other hand, a State may acquire an exceptional position with regard to some general rule of customary law by some process which is analogous to that of acquiring an historic title.”

The point concerned the drawing of baselines and the delimitation of territorial waters, and the UK went on to say:

“163...the view representing a practice generally accepted by other States and preserving the interests of the international community as a whole must prevail over the view of an individual State – unless the latter can show acquiescence in its exceptional claim.”

speaking of a “fundamental” principle in the sense, presumably, of its significance and importance to the international community. The point is also made by Professor Cassese:

“By contrast some fundamental principles of international law, say the seven basic principles laid down in the Declaration on Friendly Relations adopted by the U.N. General Assembly ... plus the principle on respect for human rights, are universal; that is, they are binding on all member States of the international community. I think that even South Africa is bound by the general principle of respect for human rights or the principle of self-determination, and could not claim the role of “persistent objector”.”⁴⁷⁴

(c) *The UK did not in any event consistently object to the development of the right*

5.11 The persistent objector rule requires a State to display persistent objection during the formation of the norm in question. The objection must be expressed: it is not sufficient for government officials to voice objections to themselves, but not communicate them outside the confines of their home working environment. The UK cites an internal document which, it claims, shows its objection to the right.⁴⁷⁵ Whatever may have been the view expressed in the internal workings of government, the UK has provided little evidence that it voiced any objection externally. Indeed the UK did from time to time object to the “right” of self-determination while admitting the existence of a “principle”, but its practice was inconsistent and its representatives sometimes spoke interchangeably about right and principle. Further, it was on some occasions unclear whether the reason for the objection was simply that the right, although accepted in principle, was difficult to define, in which case its views would not have qualified it as a persistent objector.⁴⁷⁶ In Appendix III are noted various examples of statements of the UK which illustrate inconsistencies and occasions on which the right was apparently accepted. The examples include statements made in relation to Declaration of 1960, GA res. 1514 (XV), where the UK abstained from the vote rather than casting a negative vote. Such an act was not an effective way of indicating objection to what was by then a widely held view of the law.

⁴⁷⁴ A. Cassese and J. H. H. Weiler (eds), *Change and Stability in International Law-Making* (1988), p. 23. This was a comment made by Cassese in a discussion group. Similarly, *Brownlie* states that “with the increasing emergence of communitarian norms, reflecting the interests of the international community as a whole, the incidence of the persistent objector rule may be limited”: J. Crawford, *Brownlie’s Principles of Public International Law* (2012), p. 28.

⁴⁷⁵ UKCM, para. 7.25.

⁴⁷⁶ See J. Crawford, *Brownlie’s Principles of Public International Law* (2012), p. 28. After observing that the incidence of persistent objection may be limited with the increasing emergence of communitarian norms, it is stated that “[m]ore common may be disagreement as to the meaning or scope of an accepted rule, as to which the views of particular disputing states will not be decisive.”

(1) *Friendly Relations Declaration*

5.12 The UK seeks to create the impression that a step towards acceptance of the right to self-determination was not taken until 1970, when the Friendly Relations Declaration was adopted.⁴⁷⁷ If there was such a step (that is, if States changed their position), it occurred earlier, in 1967 at the latest. To quote Rosenstock in full, he states that:

“As can be seen from the initial paragraph of the formulation on this principle, the Committee recognized that peoples have the right of self-determination, that it is a universal right of all peoples, and that every state has the duty to respect this right. This represents a significant step in the progressive development of international law when compared with the positions taken in 1964. Many states had never before accepted self-determination as a right.”⁴⁷⁸

5.13 Clearly, the words in this paragraph which, in Rosenstock’s view, represent the “significant step” from States’ 1964 positions are: “all peoples have the right freely to determine, without external interference, their political status”. The UK had already expressly recognised that right in the course of the drafting negotiations in 1967. The UK made a proposal at some point in 1967 which stated:⁴⁷⁹

“1. Every State has the duty to respect the principle of equal rights and self-determination of peoples and to implement it with regard to the peoples within its jurisdiction, inasmuch as the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation. The principle is applicable in the case of a colony or other non-self-governing territory, a zone of military occupation, or a Trust Territory, or, subject to para. 4 below, a territory which is geographically distinct and ethnically or culturally diverse from the remainder of the territory of the State administering it.

2. In accordance with the above principle:

⁴⁷⁷ UKCM, para. 7.26.

⁴⁷⁸ R. Rosenstock, “The Declaration of Principles of International Law Concerning Friendly Relations: A Survey”, (1971) 65 *AJIL* 713, 731. The “initial paragraph” referred to states:

“By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter; GA res. 2625 (XXV) (1970), annex, principle 5, para. 1.”

⁴⁷⁹ The proposal was submitted by the UK at the at the Special Committee’s session, UN doc. A/7619, 51 (United Nations General Assembly, Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States (1969), UN Doc. A/7619: Annex 71)

...

(b) Every State shall accord to peoples within its jurisdiction, in the spirit of the Universal Declaration of Human Rights, a right freely to determine their political status and to pursue their social, economic and cultural development without distinction as to race, creed or colour.⁴⁸⁰

5.14 At a meeting of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States on 4 August 1967, the representative of the UK (Iain Sinclair) stated:

“Paragraph 2 (b) of the proposal had been carefully drafted in an endeavour to reconcile the differences on the question whether the concept of self-determination was to be regarded as a right or a principle. In the past his delegation had opposed its being formulated in terms of a right, primarily because of the almost insuperable difficulty of defining or identifying the category of persons possessing the right. The new proposal was a serious and far-reaching attempt to overcome that difficulty. If the essential element of the principle were expressed in the form of a duty imposed on a State to accord to peoples within their jurisdiction, in the spirit of the Universal Declaration of Human Rights, the right freely to determine their political status, the Committee would be able to avoid most of the serious conceptual and logical problems involved. The wording of paragraph 2 (b) largely avoided those problems by expressing self-determination as a fundamental human right and by imposing upon States the duty to accord that right to peoples within their jurisdiction. His Government hoped that that new initiative, which meant holding in abeyance the views it had consistently maintained in the past, would meet with understanding.”⁴⁸¹

Whatever holding “in abeyance” may mean here, this clearly indicated a decision not to continue to object to the right to self-determination. The words “a right freely to determine their political status and to pursue their social, economic and cultural development” are the recognised definition of self-determination, as set out in the 1960 Declaration.

(2) *Covenants on Human Rights*

5.15 The UK signed the two Covenants on 16 September 1968. Its declaration on signature and again on ratification of the two Covenants, referred to by the UK⁴⁸², is irrelevant so far as its view on self-determination is concerned. There is no conflict between UN Charter obligations and the Covenants: the two are compatible and can

⁴⁸⁰ *Ibid.*, emphasis added. The full text of the UK’s proposal is included in Appendix IV below.

⁴⁸¹ United Nations General Assembly, Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, Summary Record of the Sixty-Ninth Meeting, 4 August 1967, 10.30 a.m., UN Doc. A/AC.125/SR.69: Annex 61, p.18 (emphasis added).

⁴⁸² UKCM, para. 7.24.

be read together. Insofar as the UK's internal interpretation of its own declaration goes beyond the express wording of its declaration – as to which Mauritius expresses no opinion – that internal interpretation cannot be regarded as binding on, or of any relevance to, the international community, which until now has presumably not had sight of it.

5.16 In brief, the record shows a mixed picture of objections by the UK to a right to self-determination. The inconsistent practice and the lack of clarity as to what was being objected to – the difficulty of definition or the right itself – disqualify the UK from being a persistent objector to the formation of the rule of customary international law. As from the early 1950s, culminating in its express words in 1967, the UK failed to show a persistent objection sufficient to avoid the binding application to itself of the rules on self-determination. It will be recalled that the date of Mauritius' independence in 1968 is the relevant date for the assessment of the law.

(d) *The territorial integrity of non-self-governing territories is an essential aspect of the right of self-determination, to be waived only by the freely expressed wish of the people*

5.17 The UK states⁴⁸³ that the right of self-determination is a right of peoples, not of States or territories. This is true, but as Raic says:

“In sum, the right of self-determination, which in this context has been referred to as “a right to decolonization” was applied to *all inhabitants* of a *colonial territory* and not to minority groups or segments of the population within that territory... Therefore, as a general rule, self-determination had to be granted to Trust Territories and Non-Self-Governing Territories as a whole. But exceptions were accepted. The United Nations' insistence on the preservation of the territorial integrity of a dependent or colonial territory did not form a bar to partition, but only if that was the clear wish of the majority of all inhabitants of the territory in question.”⁴⁸⁴

5.18 Mauritius draws the attention of the Tribunal to paragraphs 6.15 to 6.18 of its Memorial regarding the unit of self-determination, where it emphasises the importance of paragraph 6 of GA resolution 1514(XX) on territorial integrity. The UK dismisses the reliance by Mauritius upon paragraph 6 on the ground that the paragraph “was aimed at securing the political objective of precluding demands for decolonisation leading to the dismemberment of the territory of a sovereign State”, and argues that the paragraph is thus not relevant to the circumstances of the detachment of the Chagos Archipelago.⁴⁸⁵ That is an astonishing claim by the UK, in view of the number of times over the years that the UK itself relied upon the

⁴⁸³ UKCM, para. 7.13.

⁴⁸⁴ David Raic, *Statehood and the Law of Self-determination* (2002), p. 209. See also Simma's *Commentary on the UN Charter*: “‘people’ in the sense of self-determination [in the case of non-self-governing territories] is the autochthonous population of the non-self-governing territory that has been grouped together to a polity by carving out a certain territory in colonial times in order to form a distinct political entity.” p. 325.

⁴⁸⁵ UKCM, para. 7.21.

paragraph as preserving the territorial integrity of non-self-governing territories. For example, in a statement on the situation of Gibraltar before the Committee of 24 at the 19th session the UK representative stated that:

“There could be no doubt about the meaning of paragraph 6 of resolution 1514 (XV), which obviously referred to attempts in the future to disrupt the national unity and territorial integrity of a country and could not be twisted to justify attempts by countries to acquire sovereignty over fresh areas of territory under centuries-old disputes. The paragraph in question was clearly aimed at protecting colonial territories or countries which had recently become independent against attempts to divide them or to encroach on their territorial integrity at a time when they were least able to defend themselves because of the stresses and strains of approaching or newly achieved independence.”⁴⁸⁶

5.19 Again in relation to Gibraltar, the UK made the position admirably clear before the Committee of 24:

“30. The Spanish Government’s concern with resolution 1514 (XV) seemed to rest exclusively on paragraph 6 of the Declaration. However, it was clear that, in framing paragraph 6, its authors had been essentially concerned not with the risks of dismemberment in sovereign States but with the possibility of dismemberment of existing Non-Self-Governing territories or of countries such as the Democratic Republic of the Congo which, in December 1960, had barely emerged from colonial status. ...”⁴⁸⁷

On another occasion, this time in relation to Venezuela’s claims concerning the boundary with British Guiana, before the Fourth Committee the UK representative stated that:

“34. ... he was surprised that the Venezuelan representative had cited in support of his argument paragraph 6 of General Assembly resolution 1514 (XV), which provided that any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country was incompatible with the purposes and principles of the Charter of the United Nations. As the United Kingdom delegation had previously demonstrated, that paragraph referred to efforts that might be made to disrupt the territorial integrity of colonial territories, but clearly it was Venezuela which was now intent on dismembering its

⁴⁸⁶ United Nations General Assembly, Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, UN Doc. A/5800/Rev.1 (1964-1965), Chapter X: Annex 26, para. 148 (underlining added).

⁴⁸⁷ United Nations General Assembly, Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, UN Doc. A/6700/Add.9 (1967), Chapter X: Annex 56, para. 30 (underlining added).

weak neighbour on the very eve of independence, on the basis of unfounded claims.⁴⁸⁸

5.20 That the principle of territorial integrity applies also to non-self-governing territories and not simply to States has been further recognised by the United Kingdom in its past practice.⁴⁸⁹ And on numerous occasions the General Assembly has addressed the issue of territorial integrity in the context of self-determination for non-self-governing territories.⁴⁹⁰

5.21 Further, paragraph 6 of resolution 1514(XX) merely affirms what can be elicited from other sources. As indicated in para. 5.17 above, international law and practice understood a “people” in largely territorial terms, so that the right of self-determination inhered in a colonial people within the framework of the existing territorial unit. In the case of Mauritius, the “people” comprised the whole of the people of the mainland and the Chagos Archipelago. Accordingly, the dismemberment of Mauritius was roundly condemned by speakers in 1967 in Sub-Committee I of the Committee of 24.⁴⁹¹ For example the representative of Tanzania said:

“14. ... [The General Assembly] had also invited that Government to take no action which would dismember the Territories or violate their territorial integrity. The United Kingdom Government had, however, completely ignored the Organization’s decisions. ...

15. He protested against the creation of the new colony which constituted a violation of the legitimate interests and inalienable rights of the inhabitants. ... The dismemberment of a Territory violated the express provisions of operative paragraph 6 of General Assembly resolution 1514 (XV) and those of the United Nations Charter. Moreover, the creation of the new colony ran counter to the declared wishes of the peace-loving peoples of Africa and Asia. It could be regarded as a hostile act against those peoples who were in the immediate vicinity of the military installations in the Indian Ocean.

⁴⁸⁸ Official Records of United Nations General Assembly, Twentieth Session, Fourth Committee, 1577th Meeting, 7 December 1965, 11 a.m., UN Doc. A/C.4/SR.1577: Annex 48, para. 34 (underlining added).

⁴⁸⁹ For example, with regard to Swaziland, the UK stated: “The United Kingdom would fulfil its responsibilities for protecting the territorial integrity of Swaziland until it became independent, but believed that there was no evidence of any territorial ambitions on the part of South Africa.” (United Nations Yearbook, Chapter II, “Declaration on Independence for Colonial Countries and Peoples”, 1968: Annex 64, 756) With regard to Belize, the UK introduced in the Fourth Committee the draft of what became GA res. 3480 (XXX): “2. Declares that the inviolability and territorial integrity of Belize must be preserved; 3. Calls upon all States to respect the right of the people of Belize to self-determination, independence and territorial integrity and to facilitate the attainment by them of their goal of a secure independence...” (GA res. 3432 (XXX), paras. 2-3).

⁴⁹⁰ Examples between 1960 and 1967 are resolutions on Algeria, SW Africa, Basutoland, Bechuanaland and Swaziland, Oman, Aden, Equatorial Guinea, Gibraltar, Nauru, and 26 non-self-governing territories including Mauritius; see Appendix II below.

⁴⁹¹ For reaction in the UN to the dismemberment, see also MM, paras. 3.43-3.52, and paras. 2.70-2.82 above.

16. ... Lastly, the United Kingdom was openly violating the principles of the Charter and the resolutions of the General Assembly by dismembering Mauritius and the Seychelles and building military installations there with the help of the United States.

17. ... It was not enough to reaffirm the right of peoples to self-determination and independence; immediate measures should be taken to ensure that those rights were respected...⁴⁹²

II. The detachment of the Chagos Archipelago contravened the right of the people of Mauritius to self-determination

(a) The Chagos Archipelago has always been part of the territory of Mauritius

5.22 The UK argues that the Chagos Archipelago was not an integral part of the Colony of Mauritius.⁴⁹³ Mauritius does not accept this version of the facts. That the Archipelago has always been an integral part of the territory of Mauritius is plain from the law and the facts set out in Part II of Chapter 2 above. As there described, the legal position of the former colony, and the close cultural, social and economic links between the mainland and the Archipelago, provide clear evidence of the true position. The General Assembly and its committees also recognised the Chagos Archipelago as part of Mauritius' territory. The practice of the UK itself was incompatible with an understanding that the Archipelago did not form an integral part of Mauritius. It is inconceivable that the UK would have entered into undertakings to Mauritius with regard to fishing interests, oil and mineral rights and the reversion of the Archipelago to Mauritius if the UK had in fact regarded the Archipelago as simply joined to Mauritius for administrative purposes not in reality part of the territory of Mauritius. The facts in this case truly speak for themselves.

(b) The people of Mauritius did not waive their right to territorial integrity by a free expression of their wishes

5.23 The "agreement" of the Ministers of Mauritius contemporaneously with and subsequent to the Constitutional Conference in 1965 was not a true expression of the wishes of the people of Mauritius, obtained as it was in conditions amounting to duress. Mauritius refers again to its Memorial on this point.⁴⁹⁴ The UK argues that detachment of the Archipelago was not made a condition for independence⁴⁹⁵, but Mauritius would refer the Tribunal again to the contemporaneous records of the

⁴⁹² United Nations General Assembly, Report of Sub-Committee I: Mauritius, Seychelles and St Helena, UN Doc. A/AC.109/L.398, 17 May 1967, Annex 58 (annex to United Nations General Assembly, Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, UN Doc. A/6700/Add.8 (1967), Chapter XIV: Annex 62) paras. 14-17 (underlining added).

⁴⁹³ UKCM, para. 7.34.

⁴⁹⁴ MM, paras. 6.25-30.

⁴⁹⁵ UKCM, paras. 2.54, 2.61.

meetings during and after the Constitutional Conference. It should be noted that it could not be assumed that independence would be the outcome: that is clear from what the Foreign Office gave as the objectives of the Conference:

“to decide whether full independence or some form of special association with Britain would be the ultimate goal towards which Mauritius should move; to settle the timing of the transition to this goal and to decide what (if any) prior population consultation should be stipulated; and to secure the maximum possible measure of agreement between the Mauritian political parties on the provisions of the new Constitution.”⁴⁹⁶

The Mauritius Prime Minister had a real concern that independence would not be granted. Although the UK repeatedly stressed that there was no connection between the question of detachment of the Archipelago and independence, the records show that the two were connected.⁴⁹⁷

5.24 There was no other attempt by the UK to secure information on the wishes of the people of Mauritius. The UK states⁴⁹⁸ that the Prime Minister was strongly opposed to a referendum. A referendum on independence was indeed opposed by the Prime Minister, on the ground that it would unhelpfully split the country. There was no opposition to a referendum on detachment, however, since the possibility was never mentioned to Mauritius. It must have been considered within the UK administration, since they had to respond to a query from Canada about the matter. The Canadian Department of External Affairs had asked whether the UK envisaged a referendum on the issue of detachment:

“...The Department of External Affairs would be grateful for more information about how consultation with Mauritius and the Seychelles would be conducted. Would the Legislative Assembly of Mauritius and the Legislative Council of the Seychelles be consulted and if so were the inhabitants of the islands ear-marked for detachment directly represented in those bodies? Did we contemplate some method of direct consultation with the inhabitants of the islands in question?”

⁴⁹⁶ FO Guidance Teln. 401, quoted in African Section Research Department, Detachment of the Chagos Archipelago: Negotiations with the Mauritians (1965), 15 July 1983, para. 6: Annex 87.

⁴⁹⁷ African Section Research Department, Detachment of the Chagos Archipelago: Negotiations with the Mauritians (1965), 15 July 1983: Annex 87: “Detachment of the Chagos Archipelago: Negotiations with the Mauritians (1965)”: para.12 records the meeting with the UK Prime Minister and the Prime Minister of Mauritius: the former “emphasised that the question of the detachment of Chagos was a completely separate matter from the question of Mauritius’ constitutional future. He warned that because of American interest, the Mauritians might be raising their bids too high and went on to say that: ‘On the Defence point, Diego Garcia could either be detached by Order in Council or with the agreement of the Premier and his colleagues. The best solution of all might be Independence and detachment by agreement...’”

⁴⁹⁸ UKCM, para. 7.41.

Satisfactory answers to these questions might well make it easier for Canada to help us at the United Nations...”⁴⁹⁹

In its reply to the British High Commission on 2 August 1965, the Commonwealth Relations Office mentioned that as yet the Governor of Mauritius and the Acting Governor of Seychelles had been instructed to consult only the Council of Ministers and the Executive Council respectively, and that those consultations were on a strictly confidential basis.⁵⁰⁰ As the records show, the proposal for detachment was indeed being kept secret by the UK in order to avoid expected criticism, in particular at the United Nations.

“We count on United States support in the United Nations and elsewhere to defend this project against criticism with which we may be faced once it becomes public. We hope to keep it confidential for the moment, at least until the agreement of the Seychelles and Mauritius Governments has been formally confirmed.”⁵⁰¹

5.25 The reference by the UK⁵⁰² to a purported analogy with the Vienna Convention on the Law of Treaties regarding consent to treaties illustrates the fundamentally misconceived approach of the UK to the question of the consent of the people of Mauritius. It was the responsibility of the UK as the administering power to ensure a proper implementation of the right of self-determination by ensuring that if the territorial integrity of the former colony was not to be preserved, that would be only with the freely expressed consent of the people. But the UK did not wish to undertake wider consultations because of its desire to rush through in secret the detachment of the Chagos Archipelago. Once more, the facts speak for themselves.

5.26 The UK was aware from its own practice and the practice of the General Assembly of the possibility of holding plebiscites and referenda for obtaining the consent of a colonial people. By 1968, plebiscites had been used to ascertain the wish of a people in relation to the division of their territory in: the Netherlands Indies (Dutch NSGT), British Cameroons (a Trust Territory administered by the UK) and St Kitts-Nevis-Anguilla (originally part of the UK NSGT of the Leeward Islands). After that date, plebiscites were also used in relation to Gilbert and Ellice Islands Colony, the Trust Territory of the Pacific Islands and Comoros. As Raic says, the

“United Nations insistence on the preservation of the territorial integrity of a dependent or colonial territory did not form a bar to

⁴⁹⁹ Letter dated 22 July 1965 from E.J. Emery, British High Commission, Ottawa to J.S. Champion, UK Commonwealth Relations Office: Annex 34, para. 3.

⁵⁰⁰ Letter dated 2 August 1965 from J.S. Champion, UK Commonwealth Relations Office to E.J. Emery, British High Commission, Ottawa, Annex 36.

⁵⁰¹ Additional Brief for Secretary of State’s visit to Washington, 10-11 October 1965: Annex 46, para. 3. See also Brief submitted by G.G. Arthur, UK Foreign Office for Secretary of State for use at D.O.P. Meeting held on 31 August 1965, FO 371/184527: Annex 40, para. 3: “Even if Mauritius does not opt for full independence at this conference – and it seems unlikely that she will do so – it is unlikely that we shall be able to keep consultations with Mauritius confidential for much longer. Widespread public discussion of the proposal before agreement had been reached would make the achievement of a successful conclusion much more difficult.”

⁵⁰² UKCM, fn 570.

partition ... only if that was the clear wish of the majority of all inhabitants of the territory in question.”⁵⁰³

In the case of Mauritius, although the UK stated that there was a “final general election in which all the people were able freely to express their views before independence was achieved”,⁵⁰⁴ in that election the people were not able to express a view on the issue of detachment, which had already occurred.

(c) *The international community condemned the UK’s action*

5.27 Mauritius has already referred to the General Assembly resolutions condemning the dismemberment of Mauritius.⁵⁰⁵ The UK alleges that the principal concern of the speakers in the Fourth Committee debate about the draft of what became resolution 2066 (XX) was the establishment of a military base in the Indian Ocean rather than the principle of self-determination.⁵⁰⁶ The draft was proposed in the Fourth Committee by Tanzania and India. While at times the criticisms by these two States were directed to the dismemberment of non-self-governing territories for the purpose of establishing military bases, it is clear that they were also opposed to dismemberment *per se*. The representative of Tanzania stated (in relevant part):

“2 ... There were the gravest misgivings about the method by which independence would be granted. Freedom was indivisible and it would be a denial of freedom to grant independence while attaching to it obligations or conditions which would result in a loss of that independence.

3. The United Kingdom Government had spoken of its vested legal rights in some of the islands of Mauritius and had mentioned divisions of administrative and other responsibilities. Operative paragraph 6 of resolution 1514 (XV) contained a clear statement on the territorial integrity of colonial Territories and it must be interpreted unequivocally, without legal quibbles. ... To dismember the territory of Mauritius and to create a new colonial entity and establish a military base there would create a point of tension which would be detrimental to the peaceful transition of a colonial Territory and people of freedom and independence.”⁵⁰⁷

The representative of India:

⁵⁰³ Raic at 209. Some exceptions are admitted.

⁵⁰⁴ Official Records of United Nations General Assembly, Twenty-Second Session, 1643rd Plenary Meeting, 24 April 1968, 3 p.m., UN Doc. A/PV.1643, Annex 67, para. 87.

⁵⁰⁵ MM, paras. 6.20-6.22.

⁵⁰⁶ UKCM, para. 2.29.

⁵⁰⁷ Official Records of United Nations General Assembly, Twentieth Session, Fourth Committee, 1566th Meeting, 24 November 1965, 11 a.m., UN Doc. A/C.4/SR.1566: Annex 47, paras. 2-3 (underlining added).

“associated himself with the remarks made by the Tanzanian representative... The steps taken by the administering Power concerning the constitutional future of the Territory had been noted. He drew particular attention to the last preambular paragraph of the draft resolution, which recalled paragraph 6 of resolution 1514 (XV). Operative paragraph 4 of the draft resolution invited the administering Power to take no action which would contravene that provision. From any point of view, military or economic, dismemberment was undesirable and contrary to resolution 1514 (XV).”⁵⁰⁸

5.28 It is important also to note the conclusions of the Report of Sub-Committee I on Mauritius, Seychelles and St. Helena, which preceded the debate in the General Assembly. It includes a conclusions section and specific recommendations to the Committee of 24. The conclusions of the Report included:

“53. The study of the situation in Mauritius, Seychelles and St. Helena shows that the administering Power has so far not only failed to implement the provisions of resolution 1514 (XV) in these Territories, but has also violated the territorial integrity of two of them by creating a new territory, the British Indian Ocean Territory, composed of islands detached from Mauritius and Seychelles, in direct contravention to resolution 2066 (XX) of the General Assembly.”⁵⁰⁹

5.29 At its 22nd session the wording of the relevant conclusion was stronger:

“126. By creating a new territory, the British Indian Ocean Territory, composed of islands detached from Mauritius and Seychelles, the administering power continues to violate the territorial integrity of these Non-Self-Governing Territories and to defy resolutions 2066 (XX) and 2232 (XXI) of the General Assembly.”⁵¹⁰

The Committee of 24 adopted a resolution stating that it:

“6. *Deplores* the dismemberment of Mauritius and Seychelles by the administering Power which violates their territorial integrity, in contravention of General Assembly resolutions 2066 (XX) and 2232 (XXI), and calls upon the administering Power to return to these Territories the islands detached therefrom...”⁵¹¹

⁵⁰⁸ *Ibid.*, paras. 5-6 (underlining added).

⁵⁰⁹ United Nations General Assembly, Report of Sub-Committee I: Mauritius, Seychelles and St. Helena, UN Doc. A/AC.109/L.335, 27 September 1966: Annex 55, para. 54 (underlining added).

⁵¹⁰ United Nations General Assembly, Report of Sub-Committee I: Mauritius, Seychelles and St. Helena, UN Doc. A/AC.109/L.398, 17 May 1967: Annex 58 (annex to United Nations General Assembly, Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, UN Doc. A/6700/Add.8 (1967), Chapter XIV: Annex 62), para. 126.

⁵¹¹ United Nations General Assembly, Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, UN Doc. A/6700/Add.8 (1967), Chapter XIV: Annex 62, para. 194.

After the vote on that resolution, the representative of Tanzania commented:

“192. ... As the representative of the United States had referred to the British Indian Ocean Territory, he pointed out that the United Nations had refused to recognize that Territory, the establishment of which was no more than a colonialist manoeuvre.”⁵¹²

5.30 The UK asserts that the fact that most of the world has accepted Mauritius’ sovereignty over the Chagos Archipelago is of no legal significance.⁵¹³ Mauritius is not of course claiming that the resolutions of the AU, the NAM, the ASA and the Group of 77 are themselves legally dispositive of the matter. Nevertheless, they do indicate that the stand of Mauritius regarding its sovereignty over the Chagos Archipelago – including the arguments on the right to self-determination and the consequences of a blatant violation of that right – is regarded as legally valid by the great majority of the States of the world.

(d) Protests by Mauritius

5.31 The continued assertion of its sovereignty by Mauritius is illustrated in para. 6.31 of the Memorial. The UK has stated that Mauritius has not always reacted to acts of sovereignty by the UK in respect of the “BIOT”.⁵¹⁴ In this connection Mauritius refers to chapter 2 above, which emphasises the heavy economic dependence of Mauritius on the UK in its first years as a new State. Further, it should be noted that firm protests from Mauritius have on occasion drawn threats of responses from the UK which, in view of the relative economic strength of the two countries, were serious indeed for Mauritius. For example, when Prime Minister Jugnauth protested against British policy towards the “BIOT” at the Commonwealth Heads of Government Meeting in 1991 and threatened to take the matter to the UN, the UK in response “postponed scheduled bilateral aid talks and cancelled signature on three aid projects”.⁵¹⁵ This kind of action helps to explain the background against which Mauritius had to consider the frequency and nature of its protests, particularly at a time when it was a newly independent State. An analogy may be drawn with the statement made by the International Court of Justice in the *Nauru* case.⁵¹⁶ In response to an argument by the Australian government that the passage of time had rendered Nauru’s claims inadmissible, Nauru argued *inter alia* that the “vicissitudes of international relations do not justify recourse to rigorous time limits, especially in the relations between small States and more powerful States.”⁵¹⁷ The Court found that Nauru’s application was not inadmissible because of the passage of time “given the nature of relations between Australia and Nauru, as well as the steps thus taken.”⁵¹⁸ In

⁵¹² *Ibid.*, para. 192.

⁵¹³ UKCM, para. 7.60.

⁵¹⁴ UKCM, paras. 2.81 and 7.66.

⁵¹⁵ UK Foreign and Commonwealth Office, African Research Group Research Analysts Paper, “BIOT/Mauritius: Fishing Rights”, 11 October 1996, Annex 101, para. 16

⁵¹⁶ *Case concerning certain Phosphate Lands in Nauru (Nauru v Australia)*, Preliminary Objections, Judgment, ICJ Reports 1992, p.240.

⁵¹⁷ Vol. II of Preliminary Objections by Australia; Written Statement of Nauru, para. 123.

⁵¹⁸ Judgment, para. 36.

considering the lack of protests in the early years of Mauritius' independence, the Tribunal will thus wish to take into account the dangers to Mauritius of alienating the previous colonial power.

(e) ***The principle of uti possidetis does not give a colonial power the right to dismember a dependent territory before independence***

5.32 The UK misreads Mauritius' reference to the principle of *uti possidetis*, and misinterprets the application of the principle in the context of the Chagos Archipelago. The Memorial states that:

“6.23 ... the relevant unit of self-determination must be identified: as the practice of the General Assembly shows, this unit is the whole of the territory in question. The recognition of this unit by UN Member States involves looking ahead to the recognition of the future independent State. There is a continuity in the process of independence: the new State is formed from the totality of the previous non-self-governing-territory.

6.24 The related principle in general international law is that of *uti possidetis...*”

5.33 The UK, on the other hand, appears to be relying on the principle to support its argument that a colonial power has the right to detach portions of its colonial territories before independence and keep them for itself in violation of its self-determination obligations.⁵¹⁹ Mauritius has already drawn attention to the principle of territorial integrity as a necessary part of the right of self-determination.⁵²⁰ In effect, the UK is denying the possibility of the full implementation of the right of self-determination in relation to the people of Mauritius.

5.34 The UK mentions the importance of the principle of *uti possidetis* for the OAU/African Union and for other organisations. These organisations do indeed regard the principle as highly significant: OAU/AU, NAM and G77 resolutions supporting Mauritius' sovereignty over the Chagos Archipelago⁵²¹ underline the fact that the principle does not stand in the way of an insistence on full implementation of the right of self-determination in the case of Mauritius.

III. Mauritius is entitled to the rights of a coastal State based on the undertakings of the United Kingdom

5.35 Mauritius is in no doubt of its sovereignty over the Chagos Archipelago and therefore its rights as the coastal State. But even from the point of view of the UK, the situation of the Chagos Archipelago is unique. In the eyes of the UK, this is a territory which is at present under its sovereignty but which it has agreed will “revert” to

⁵¹⁹ UKCM, paras. 7.42-7.47.

⁵²⁰ Para. 5.17 above and MM, paras. 6.15 to 6.18.

⁵²¹ MM, para. 6.33.

Mauritius in due course – an undertaking which the UK has offered to incorporate in a bilateral treaty.⁵²² This is a territory in respect of which the UK has made undertakings to Mauritius regarding rights in maritime zones, and in respect of which the UK has made no protest about the submission by Mauritius to the Commission on Limits of the Continental Shelf of preliminary information about the Chagos Archipelago continental shelf. Such information can only be submitted on the basis that the information is given by the coastal State. This is a territory, therefore, in respect of which there is a continuing recognition by the United Kingdom of legal rights and interests adhering in Mauritius, with a clear undertaking to relinquish effective control in the future. In UK eyes, as the new evidence confirms, it is no more than the “temporary freeholder”.⁵²³

5.36 Mauritius is not claiming that there should be a form of condominium over the Chagos Archipelago, as has been exercised in relation to various other territories. Nor is it claiming that a form of sovereignty akin to the reversion of a lease should be envisaged. The position here is unique, and there is no analogy which can be found. The United Kingdom has offered no analogous example, and has not identified a single example of a situation in which one State treats itself as a “temporary freeholder” and recognises the rights of another State in respect of that territory. It is the claim of Mauritius that it has rights and interests which the UK recognises Mauritius to hold, as confirmed in the 1965 undertakings and UK subsequent practice and the evidence tendered in this Reply. Such recognition, and the supporting practice and evidence, entitle Mauritius to avail itself of the rights of a coastal State under Part V (and the other Parts) of the Convention. As a result of these rights and interests, in the second limb of its argument Mauritius requests that if the Tribunal were to give deference to the UK’s physical possession of the Archipelago and the *de facto* exercise of its powers (which Mauritius argues it should not do), it should also decide that Mauritius should be entitled to avail itself of the rights of a coastal State under the Convention.

5.37 As a coastal State under the Convention, Mauritius is entitled to object to the claim by the United Kingdom that it is entitled to establish a “nature reserve” across most of the territory of the Chagos Archipelago, unilaterally or at all.

IV. Conclusion

5.38 Mauritius reiterates that the detachment of the Chagos Archipelago and the according of independence to Mauritius without the maintenance of its territorial integrity were in violation of the right of the people of Mauritius to self-determination. Mauritius is the “coastal State” of the Chagos Archipelago on the basis of its sovereignty.

⁵²² UK Foreign and Commonwealth Office, Overseas Territories Directorate, “British Indian Ocean Territory: UK/Mauritius Talks”, 14 January 2009: Annex 128, Subsection 4.

⁵²³ UKCM 3.33; Information Note dated 28 April 2008 from Joanne Yeadon, Overseas Territories Directorate, UK Foreign and Commonwealth Office to Meg Munn: Annex 121; Email exchange between Andrew Allen, Overseas Territories Directorate, and Joanne Yeadon, Head of “BIOT” & Pitcairn Section, UK Foreign and Commonwealth Office, 22 April 2008, Annex 120.

V. Appendix I to Chapter 5

Extracts from Security Council resolutions 183(1963) and 232 (1966) (see para. 5.9, footnote 11.)

SC res. 183 (1963) (territories under Portuguese administration).⁵²⁴

The resolution:

“4. *Reaffirms* the interpretation of self-determination laid down in General Assembly resolution 1514 (XV) as follows:

“All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”;

SC res. 232 (1966) (on Southern Rhodesia).⁵²⁵

The resolution:

“*Reaffirms* the inalienable rights of the people of Southern Rhodesia to freedom and independence in accordance with the Declaration on the Granting of Independence to Colonial Countries and Peoples contained in General Assembly resolution 1514 (XV) of 14 December 1960...”

(See also GA res. 2012 (XX) (Question of Southern Rhodesia):

“2. *Declares* that the perpetuation of such minority rule would be incompatible with the principle of equal rights and self-determination of peoples proclaimed in the Charter of the United Nations and in the Declaration on the Granting of Independence to Colonial Countries and Peoples contained in General Assembly resolution 1514 (XV) of 14 December 1960;”

⁵²⁴ As stated at the end of the resolution.

⁵²⁵ As stated at the end of the resolution.

VI. Appendix II to Chapter 5

Extracts from GA resolutions referring to the right of territorial integrity as part of the right of self-determination for non-self-governing territories (see para. 5.20, footnote 31)

(i) GA res. 1573 (XV) on Algeria.⁵²⁶

“Taking note of the fact that the two parties concerned have accepted the right of self-determination as the basis for the solution of the Algerian problem, ...

Convinced that all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory, ...

2. Recognises the imperative need for adequate and effective guarantees to ensure the successful and just implementation of the right of self-determination on the basis of respect for the unity and territorial integrity of Algeria; ...”

(ii) GA res. 1654 (XVI) on the implementation of GA res. 1514 (XV):

“Deeply concerned that, contrary to the provisions of paragraph 6 of the Declaration, acts aimed at the partial or total disruption of national unity and territorial integrity are still being carried out in certain countries in the process of decolonization, ... (underlining added)”

(iii) GA res. 1724 (XVI) on Algeria:

“Recalling further its resolution 1573 (XV) of 19 December 1960 by which it recognized the right of the Algerian people to self-determination and independence, the imperative need for adequate and effective guarantees to ensure the successful and just implementation of the right to self-determination on the basis of respect for the unity and territorial integrity of Algeria, and the fact that the United Nations has a responsibility to contribute towards the successful and just implementation of that right, ...

Calls upon the two parties to resume negotiations with a view to implementing the right of the Algerian people to self-determination and independence respecting the unity and territorial integrity of Algeria.”

(iv) GA res. 1899 (XVIII) on South West Africa (Trust Territory):

⁵²⁶ GA res. 1573 (XV), preamble. Although Algeria was part of French North Africa, only Morocco and Tunisia were listed in GA res. 66 (I).

“Considering that any attempt by the Government of South Africa to annex a part or the whole of the Territory of South West Africa would be contrary to the advisory opinion of the International Court of Justice of 11 July 1950 and would constitute a violation of the Government’s obligations under the Mandate and of its other international obligations, ...

4. *Considers* that any attempt to annex a part or the whole of the Territory of South West Africa constitutes an act of aggression; ... (underlining added)”

(v) GA res. 2063 (XX) on Basutoland, Bechuanaland and Swaziland

“Noting the resolutions adopted by the Assembly of Heads of State and Government of the Organization of African Unity at its first regular session in July 1964, and the Declaration adopted by the Second Conference of Heads of State or Government of Non-Aligned Countries in October 1964 to the effect that the United Nations should guarantee the territorial integrity of Basutoland, Bechuanaland and Swaziland and should take measures for their speedy accession to independence and for the safeguarding of their sovereignty, ...

Having regard to the grave threat to the territorial integrity and economic stability of these Territories constituted by the policies of the present régime in the Republic of South Africa, ...

5. Requests the Special Committee to consider, in co-operation with the Secretary-General, what measures are necessary for securing the territorial integrity and sovereignty of Basutoland, Bechuanaland and Swaziland, and to report to the General Assembly at its twenty-first session;...” (underlining added)

(vi) GA res. 2073 (XX) on Oman:⁵²⁷

“3. *Recognizes* the inalienable right of the people of the Territory as a whole to self-determination and independence in accordance with their freely expressed wishes; ...”

The reference to “Territory as a whole” (regarded as a reference to the Sultanate of Muscat and Oman) is notable because there was some suggestion that Oman was a separate state.⁵²⁸

(vii) GA res. 2074 (XX) on South West Africa (Trust Territory):

“5. *Considers* that any attempt to partition the Territory or to take any unilateral action, directly or indirectly, preparatory thereto constitutes a violation of the Mandate and of resolution 1514 (XV);

⁵²⁷ See GA res. 2073 (XX).

⁵²⁸ Crawford, *Creation*, p. 326. See also: United Nations Year Book, Chapter XI, “Questions concerning the Middle East”, 1964: Annex 27, pp. 186-8.

6. *Considers further* that any attempt to annex a part or the whole of the Territory of South West Africa constitutes an act of aggression;...” (underlining added)

(viii) GA res. 2183 (XXI) on Aden:

“*Having* taken note of the assurances given by the representative of the administering Power, on 10 November 1966, concerning the territorial integrity and unity of South Arabia as a whole,...”

The assurances were noted in the resolution as there was concern regarding the sincerity of the UK when it said that all the states of South Arabia, including Aden, would be included in the new independent state of South Arabia.⁵²⁹

(ix) GA res. 2230 (XXI) on Equatorial Guinea.⁵³⁰

“5. *Requests* the administering Power to ensure that the Territory accedes to independence as a single political and territorial unit and that no step is taken which would jeopardize the territorial integrity of Equatorial Guinea;...”

(x) GA res. 2232 (XXI) on 26 NSGTs, including Mauritius:

“*Deeply concerned* at the information contained in the report of the Special Committee on the continuation of policies which aim, among other things, at the disruption of the territorial integrity of some of these Territories and at the creation by the administering powers of military bases and installations in contravention of the relevant resolutions of the General Assembly, ...

4. *Reiterates* its declaration that any attempt aimed at the partial or total disruption of the national unity and territorial integrity of colonial Territories and the establishment of military bases and installations in these Territories is incompatible with the purposes and principles of the Charter of the United Nations and of General Assembly resolution 1514 (XV); ...” (underlining added)

(xi) GA res. 2238 (XXI) on Oman:

“2. *Reaffirms* the inalienable right of the people of the Territory as a whole to self-determination and independence...”

(xii) GA res. 2302 (XXII) on Oman:

⁵²⁹ Repertory of Practice of United Nations Organs, Supplement No. 4 (1966-1969), Article 73, Annex 49, paras. 285-9.

⁵³⁰ See e.g. GA res. 2230 (XXI), o.p. 2: “*Reaffirms* the inalienable right of the people of Equatorial Guinea to self-determination and independence in accordance with the Declaration on the Granting of Independence to Colonial Countries and Peoples contained in General Assembly resolution 1514 (XV)”.

“2. *Reaffirms* the inalienable right of the people of the Territory as a whole to self-determination and independence...”

(xiii) GA res. 2347 (XXII) on Nauru (Trust Territory):

“4. *Calls upon* all States to respect the independence and territorial integrity of the independent State of Nauru;...”

Nauru was not yet independent when the resolution was adopted.

(xiv) GA res. 2353 (XXII) on Gibraltar:

“*Considering* that any colonial situation which partially or completely destroys the national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations, and specifically with paragraph 6 of General Assembly resolution 1514 (XV), ...”

(xv) GA res. 2355 (XXII) on Equatorial Guinea :

“4. *Reiterates* its request to the administering Power to ensure that the Territory accedes to independence as a single political and territorial entity not later than July 1968; ...”

(xvi) GA res. 2357 (XXII) on 26 NSGTs including Mauritius:

“*Deeply concerned* at the information contained in the report of the Special Committee on the continuation of policies which aim, among other things, at the disruption of the territorial integrity of some of these Territories and at the creation by the administering powers of military bases and installations in contravention of the relevant General Assembly resolutions, ...

4. *Reiterates* its declaration that any attempt aimed at the partial or total disruption of the national unity and territorial integrity of colonial Territories and the establishment of military bases and installations in these Territories is incompatible with the purposes and principles of the Charter of the United Nations and of General Assembly resolution 1514 (XV); ...” (underlining added)

(xvii) GA res. 2372 (XXII) on South West Africa (Trust Territory):

“7. *Condemns* the action of the Government of South Africa designed to consolidate its illegal control over Namibia and to destroy the unity of the people and the territorial integrity of Namibia;...” (underlining added)

VII. Appendix III to Chapter 5

Examples of statements of the UK illustrating inconsistency with regard to acceptance of the right of self-determination and occasions on which it apparently accepted the right, indicating lack of persistent objection (see para. 5.11)

Statements made by the UK in relation to GA res. 421 (V) (1950)

The reference to the “right” of self-determination in this resolution was opposed by the representative of the UK in a statement which referred to the immediately-preceding statement by the representative of Turkey:

“48. Mr. SAVUT (Turkey) said that the question was not whether the right to self-determination should be recognized – undoubtedly it should be – but whether it should be included in the covenant. There were three categories of human rights. First, there were individual rights, such as those already embodied in the draft covenant. The draft covenant also included some rights which were exercised in groups, such as the right, stated in article 13, to freedom to manifest one’s religion, the right of peaceful assembly, stated in article 15, and the right of association, stated in article 16. Secondly, there were the rights recognized to groups of individuals and exercised by groups of individuals, such as the rights of associations as such, or trade union rights. Thirdly, there were the rights of nations, peoples or sovereign groups.

...

51. His delegation would, therefore, vote against the joint amendment (A/C.3/L.88), not because it was opposed to recognition of the right to self-determination but because it considered that that right fell outside the scope of the covenant and outside the field of activities of the Commission on Human Rights.⁵³¹ (underlining added)

The representative of the UK “wholeheartedly agreed with the explanation given by the Turkish representative. The Third Committee was not competent to deal with the right to self-determination. It was a question of the method to be employed.”⁵³² Despite the fact that in one

⁵³¹ Official Records of United Nations General Assembly, Fifth Session, Third Committee, 310th Meeting, 10 November 1950, 10:45 a.m., UN Doc. A/C.3/SR.310: Annex 9, paras. 48-51.

⁵³² *Ibid.*, para. 52: “Lord MACDONALD (United Kingdom): “While no delegation was more attached than his own to the principle involved, he felt that for the Third Committee to adopt it would merely mean duplication of the work of a more appropriate committee. To vote against the amendment was not a vote against the principle, which both opponents and proponents had equally at heart”. The UK ultimately voted against the amendment at the 311th meeting, where it was adopted nonetheless: Official Records of United Nations General Assembly, Fifth Session, Third Committee, 311th Meeting, 10 November 1950, 3 p.m., UN Doc. A/C.3/SR.311: Annex 10, para. 68. At the 312th meeting, the UK representative made another statement in which he made a passing reference to the “right” to self-determination: “some peoples under the control of the USSR did not enjoy the right of self-determination.” Official Records of United Nations General Assembly, Fifth Session, Third

of its statements the UK referred to the “principle” of self-determination, and the fact that the UK voted against the resolution, in none of its statements did the UK oppose the existence of a “right” to self-determination. The UK’s statement in referring back to the Turkish statement suggests that the UK accepted that there was a right, but considered that it was not appropriate to include it in the Covenants or to discuss it before the Third Committee.

Statements made in relation to the Declaration of 1960 GA res. 1514 (XV)

The UK abstained from the vote on adoption of GA res. 1514 (XV), rather than casting a negative vote: not an effective way of indicating objection to what was by then a widely held view of the law. In the plenary debates which preceded the adoption of the resolution the UK made statements at only two meetings. At the 925th meeting, the UK stated:

“50. In these territories, there is no argument about the right of the people to independence; there is no argument whether the people will be independent or not. Certainly they will. The only question is when...”⁵³³

After GA res. 1514 (XV) (1960) was adopted, at the 947th meeting the UK stated:

“53. ... paragraph 2 of the declaration [which refers to the “right to self-determination”] seems to my delegation to be out of place in this context. The United Kingdom, of course subscribes wholeheartedly to the principle of self-determination set out in the Charter itself, and we feel that we have done as much to implement this principle during the past fifteen years as any delegation in this Assembly. Nevertheless, members of the Assembly will be familiar **with** the difficulties which have arisen in connection with the discussion of the draft International Covenants on Human Rights and in defining the right to self-determination in a universally acceptable form. These difficulties have not yet been finally resolved by the Assembly, and we feel that it might

Committee, 312th Meeting, 13 November 1950, 10:45 a.m., UN Doc. A/C.3/SR.312: Annex 11, para. 15. In the vote against the adoption of the resolution, the UK did not refer to the right to self-determination (Official Records of United Nations General Assembly, Fifth Session, Third Committee, 318th Meeting, 17 November 1950, 3 p.m., UN Doc. A/C.3/SR.318: Annex 12, paras. 1-14). On adoption of the resolution in the GA, the representative of the UK made a statement explaining its negative vote, in which he made no reference to the right to self-determination. (Official Records of United Nations General Assembly, Fifth Session, 317th Plenary Meeting, 4 December 1950, 10.45 a.m., UN Doc. A/PV.317: Annex 13, paras. 26-29).

⁵³³ Preceded by: “46. So much for the smaller territories; let us look now at the nature of the problems in the larger territories which are still dependent. ... 49. ... In the neighbouring territories in this region of Africa certain fears still remain. The process is a delicate one. There are groups in all these countries, sometimes African, sometimes European, sometimes Asian, who fear that independence when it comes will hurt them. The task is to dispel this fear, as similar fears have been dispelled in countries which have already achieved independence.” Official Records of United Nations General Assembly, Fifteenth Session, 925th Plenary Meeting, 28 November 1960, 10.30 a.m., UN Doc. A/PV.925: Annex 18, paras. 46 and 49-50.

have been better not to make the attempt now in a rather different context.”

Paragraph 53 suggests that the UK considered the problem to be the precise *definition* of the right to self-determination (as opposed to its non-existence). In paragraph 50, the UK clearly acknowledged the existence of a “right” to “independence” in respect of at least some territories.

Statements with regard to Gibraltar

In the discussion of Gibraltar before the Committee of 24 in 1964-1965, the UK referred to the “principle” as well as referring to the “right” to self-determination several times:

“143. ... It was surely the ultimate irony not only that the representative of Spain should claim that the United Kingdom was trying to deceive the United Nations by fulfilling its obligations towards Gibraltar under the Charter, but also that Spain should attempt to take over the people of Gibraltar under the cover of General Assembly resolution 1514 (XV), which proclaimed the right of all peoples to self-determination.

...

148. The representative of Spain had also based his case for denying the application of the principle of self-determination to Gibraltar on his own interpretation of paragraph 6 of resolution 1514 (XV); he had quoted the interpretation of that paragraph which the United Kingdom delegation had given in Sub-Committee III during the discussion on the Falkland Islands (A/AC.109/102, p. 45) and he had suggested that the United Kingdom alone adhered to that interpretation. That was quite untrue. There could be no doubt about the meaning of paragraph 6 of resolution 1514 (XV), which obviously referred to attempts in the future to disrupt the national unity and territorial integrity of a country and could not be twisted to justify attempts by countries to acquire sovereignty over fresh areas of territory under centuries-old disputes. The paragraph in question was clearly aimed at protecting colonial territories or countries which had recently become independent against attempts to divide them or to encroach on their territorial integrity at a time when they were least able to defend themselves because of the stresses and strains of approaching or newly achieved independence. It was only necessary to recall that the question of the secession of Katanga had been before the General Assembly in 1960 when resolution 1514 (XV) had been prepared, discussed and adopted.

149. Contrary to what the representative of Spain had suggested, the interpretation of paragraph 6 given by the United Kingdom delegation was accepted by other delegations ... In 1960, when Guatemala had submitted amendments to paragraph 6 which would have laid it down that territorial claims took precedence over the principle of self-determination, the Soviet Union delegation had opposed those

amendments because they provided for a limitation of the fundamental right of all peoples to self-determination and were thus contrary to paragraph 2 of the proposed declaration, which quite rightly stated that all peoples had the right of self-determination (945th plenary meeting, para. 128).⁵³⁴

Again in relation to Gibraltar, when the UK voted against GA res. 2353 (XXII) (1967) in the plenary session, it stated:

“97. ... Throughout the debates in the Fourth Committee, both this year and before, we have emphasized that there are two basic principles which we cannot betray: first, the principle that the interest of the people must be paramount and, second, that the people have the right freely to exercise their own wishes as to their future. Those principles have guided us and will continue to guide us in our task of carrying out our responsibilities to the peoples of the dependent Territories for which we are responsible. In the whole process of decolonization we have adopted the methods of consultation and consent. We shall not abandon those principles in the few dependent Territories for which we are still responsible.”⁵³⁵

There is an implication here that the UK accepted the existence of the right to self-determination, but disagreed as to its meaning and scope; that would not qualify it as a persistent objector.

Before the Committee of 24 in 1967, the UK stated:

“36. There were other features of resolution 1514 (XV), besides paragraph 6 of the Declaration, that might be recalled. It was stated that all peoples had the right to self-determination and that the subjection of peoples to alien subjugation was a denial of fundamental human rights, and the importance of the freely expressed will of the peoples of Non-Self-Governing Territories was emphasized. It was against that background that one should view, first, the referendum, which allowed the people of Gibraltar to express their views as to where their interests lay in regard to one possible road to decolonization and, secondly, the Spanish proposition that such matters should be negotiated by the United Kingdom and the Spanish Governments.”⁵³⁶

This again implies a recognition, in the particular context under consideration, that there was a right to self-determination. The UK was effectively asking for its conduct

⁵³⁴ United Nations General Assembly, Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, UN Doc. A/5800/Rev.1 (1964-1965), Chapter X: Annex 26, paras. 143, 146, 148-9 and 151.

⁵³⁵ Official Records of United Nations General Assembly, Twenty-Second Session, 1641st Plenary Meeting, 19 December 1967, 3 p.m., UN Doc. A/PV.1641: Annex 63, para. 97.

⁵³⁶ United Nations General Assembly, Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, UN Doc. A/6700/Add.9 (1967), Chapter X, Annex 56, para. 36 (underlining added).

in holding the referendum to be considered as conduct taken in implementation of GA res. 1514 (XV) (1960).

Other examples

There have been other instances when the UK did not maintain an objection to the development of the right, using “principle” and “right” almost interchangeably, and making references to the right and to the concomitant right of a people freely to express its wishes. When discussing the situation of Oman before the Fourth Committee in 1963, the UK seemingly acknowledged the existence of the right to self-determination in the particular context under consideration, when it argued that the right did not apply to the Omani rebels, while referring to the “principle” of self-determination in the same statement:

“40. ... Moreover, armed rebellion against a legitimate government did not establish the right to self-determination on the part of the rebels, nor did it bring into play on their behalf the provisions of the Declaration on the granting of independence to colonial countries and peoples.

...

52. ... As for the question of self-determination, there was not even a *prima facie* cause for saying that the Omani rebels were a colonial people to whom self-determination should be applied. As the Special Rapporteur said in his report, all the people of the region were, ethnically speaking, of the same racial stock, used the same language and practised the same religion. In that connection, he entirely agreed with the view expressed during the sixteenth session by the Indian representative, speaking at the 305th meeting of the Special Political Committee, and quoted in paragraph 75 of the report, that the relevance of the principle of self-determination was not clear because that principle would apply if Oman was under colonial rule, but it was not.

53. In his view the conclusions to which the facts, as set out in the report, inevitably led were plain and inescapable: the Sultanate of Muscat and Oman was an independent sovereign State and not a United Kingdom colony; the Omani rebels were not a colonial people to whom the right of self-determination could apply...⁵³⁷

There are other resolutions which made reference to the right to self-determination which received a vote from the UK and no statement of reservation. One relates to

⁵³⁷ Official Records of United Nations General Assembly, Eighteenth Session, Fourth Committee, 1499th meeting, 3 December 1963, 3.50 p.m., UN Doc. A/C.4/SR.1499: Annex 25, paras. 40 and 52-3 (underlining added).

Tibet, where the relevant resolution is GA res. 1723 (XVI) (1961).⁵³⁸ In that resolution the General Assembly:

“2. *Solemnly renews* its call for the cessation of practices which deprive the Tibetan people of their fundamental human rights and freedoms, including their right to self-determination;...” (underlining added)

In its explanation of its vote, the UK did not make any reference to or reservation regarding the use of the term “right” to self-determination.⁵³⁹

Another such resolution was GA res. 1803 (XVII) (1962) on permanent sovereignty over natural resources, for which the UK also voted.⁵⁴⁰ That resolution refers in its preamble to the permanent sovereignty over natural wealth and resources as a basic constituent of the right to self-determination:

“*Bearing in mind* its resolution 1314 (XIII) of 12 December 1958, by which it established the Commission on Permanent Sovereignty over Natural Resources and instructed it to conduct a full survey of the status of permanent sovereignty over natural wealth and resources as a basic constituent of the right to self-determination, with recommendations, where necessary, for its strengthening, and decided further that, in the conduct of the full survey of the status of the permanent sovereignty of peoples and nations over their natural wealth and resources, due regard should be paid to the rights and duties of States under international law and to the importance of encouraging international co-operation in the economic development of developing countries,

...

Considering that it is desirable to promote international co-operation for the economic development of developing countries, and that economic and financial agreements between the developed and the developing countries must be based on the principles of equality and of the right of peoples and nations to self-determination, ...” (underlining added)

The UK made no comment or reservation regarding the use of the term “right” to self-determination when the matter was discussed before the Plenary or the Second Committee.

⁵³⁸ For the UK’s affirmative vote, see Official Records of United Nations General Assembly, Sixteenth Session, 1085th Plenary Meeting, 20 December 1961, 10 a.m., UN Doc. A/PV.1085: Annex 21, para. 108.

⁵³⁹ *Ibid.*, paras. 93-7. The draft resolution appears to have originated in the Plenary: United Nations Year Book, Chapter X, “Questions concerning Asia and the Far East”, 1961: Annex 19, 139. It was only discussed at one other meeting (the 1084th meeting), and the UK made no statement when the agenda item was discussed in that meeting.

⁵⁴⁰ Official Records of United Nations General Assembly, Seventeenth Session, 1194th Plenary Meeting, 14 December 1962, 8.30 p.m., UN Doc. A/PV.1194: Annex 23, para. 8.

VIII. Appendix IV to Chapter 5

Proposal submitted by the UK at the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, UN doc. A/7619, (see para. 5.13, footnote 20 of Chapter 5)

1. Every State has the duty to respect the principle of equal rights and self-determination of peoples and to implement it with regard to the peoples within its jurisdiction, inasmuch as the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation. The principle is applicable in the case of a colony or other non-self-governing territory, a zone of military occupation, or a Trust Territory, or, subject to para. 4 below, a territory which is geographically distinct and ethnically or culturally diverse from the remainder of the territory of the State administering it.
2. In accordance with the above principle:
 - (i) Every State shall promote, individually and together with other States, universal respect for and observance of human rights and fundamental freedoms.
 - (ii) Every State shall accord to peoples within its jurisdiction, in the spirit of the Universal Declaration of Human Rights, a right freely to determine their political status and to pursue their social, economic and cultural development without distinction as to race, creed or colour.
 - (iii) Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State.
 - (iv) Every State exercising authority over a colony or other Non-Self-Governing Territory, a zone of military occupation or a Trust Territory shall, in implementation of the principle, maintain a readiness to accord self-government through their free choice, to the peoples concerned, and to make in good faith such efforts as may be required to assist them in the progressive development of institutions of free self-government, according to the particular circumstances of each territory and its peoples and their varying stages of advancement; and, in the case of Trust Territories, shall conform to the requirements of Chapter XII of the Charter of the United Nations.
3. States exercising authority over colonies or other Non-Self-Governing Territories, zones of military occupation or trust territories shall be deemed to have implemented this principle fully with regard to the peoples of those territories upon the restoration of self-government or, in the case of territories which have not previously enjoyed self-government, upon its achievement, through the free choice of the peoples concerned. The achievement of self-government may take the form of emergence as a sovereign and independent

State; free association with an independent State; or integration with an independent State.

4. States enjoying full sovereignty and independence, and possessed of a representative government, effectively functioning as such to all distinct peoples within their territory, shall be considered to be conducting themselves in conformity with this principles as regards those peoples.

CHAPTER 6: THE “MPA” VIOLATES THE RIGHTS OF MAURITIUS UNDER THE CONVENTION

6.1 In Chapter 7 of its Memorial, Mauritius addressed those breaches of the Convention that are not dependent upon a determination that the UK is not a “coastal State”. These included obligations set forth in Parts II, V, VI, XII, and XVI of the Convention, and Article 7 of the 1995 Agreement. The UK responded to these claims in Chapter 8 of its Counter-Memorial, characterising them as claims relating to “fishing”, “consultation” and “abuse of rights”. The UK’s attempt to recharacterise the claims by Mauritius as relating exclusively to fisheries matters is misconceived. As described in this Chapter, nothing in the Counter-Memorial disproves that the UK has breached these obligations, or the other obligations which the UK has failed to address in relation to the full range of rights held by Mauritius in the waters of the Chagos Archipelago.

6.2 This Chapter is organised into three Sections. In Section I, Mauritius addresses the UK’s breaches of *inter alia* Part II (Article 2(3)); Part V (Articles 55 and 56(2)); Part VI (Article 78(2)); and Part XII (Article 194). As explained in Chapter 7, the UK does not argue that these claims are excluded from the Tribunal’s jurisdiction by Article 297. In Section II, Mauritius addresses the UK’s remaining breaches of Part V (Articles 63 and 64) and Article 7 of the 1995 Agreement. In Section III, Mauritius addresses the UK’s abuse of rights, under Part XVI (Article 300) of the Convention.

I. Violations not argued to be excluded by Article 297

(a) *Part II of the Convention*

6.3 The Counter-Memorial adopts a two-fold approach in seeking to defend the UK’s conduct in regard to the “MPA” in the territorial sea, under Part II of the Convention. First, it denies that the Convention establishes any relevant obligations: it maintains, contrary to the plain meaning of the Convention, that Article 2(3) does not impose an obligation to comply with any rules of international law. The UK asserts that it could not have breached Article 2(3) by failing to respect Mauritius’ traditional rights of access to the natural resources of the Chagos Archipelago, either by a failure to respect the undertakings it has given in relation to such rights, or by a failure adequately to consult with Mauritius in regard to actions that could affect these rights. Second, the UK denies that Mauritius has any rights of access or use, repudiates having ever undertaken to offer any rights, and disclaims any obligation to consult with Mauritius.

6.4 The UK’s approach is mistaken, both on the law and the facts. Article 2(3) plainly requires a coastal State to comply with the Convention and other rules of international law, and the *renvoi* thereto encompasses Mauritius’ rights of access, the obligation to consult, and the commitment given by the UK Prime Minister to put the “MPA” on hold. The UK is also wrong to suggest that Mauritius does not enjoy rights of access in the territorial sea to the natural resources of the Chagos Archipelago, and is wrong to suggest that it has consulted adequately with Mauritius in regard to the “MPA”.

(1) *The Obligations Imposed by Article 2(3)*

6.5 In its Memorial, Mauritius demonstrated that Article 2(3) limits a coastal State's exercise of sovereign rights over the territorial sea by requiring it to comply with obligations arising under both the Convention and "other rules of international law." These "other rules of international law" include: (i) the obligation to respect traditional rights to access natural resources; (ii) the obligation to comply with undertakings, including undertakings that protect fishing and mineral rights; (iii) the obligation to comply with the commitment given by the UK Prime Minister in November 2009; and (iv) the obligation to consult in regard to matters that can affect the rights of other States.⁵⁴¹

6.6 The UK denies that any obligations are imposed by Article 2(3). It claims, somewhat improbably, that that Article is merely part of the "description of the legal status of the territorial sea." It argues that that provision does not require compliance with the other rules of international law referred to therein, despite its acceptance that a coastal State's sovereignty over the territorial sea "is of course exercised subject to the rules of international law."⁵⁴²

6.7 The UK's view that Article 2(3) is merely a descriptive provision ignores the plain text of Article 2(3), contrary to the general rule of interpretation set out in Article 31 of the Vienna Convention on the Law of Treaties.⁵⁴³ Article 2(3) provides that:

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

The ordinary meaning of Article 2(3) is that the exercise of sovereignty in the territorial sea is to be subject to the Convention and to other rules of international law. The verb "exercise" is defined as "[t]o make use of; to put into action."⁵⁴⁴ Used in context, the phrase "subject to" means "bound by law" or "under obligation."⁵⁴⁵ Thus, when "is exercised" precedes both "subject to" and "this Convention and to other rules of international law," the construction as a whole means that, in putting into use sovereign rights in the territorial sea, a coastal State is bound by the Convention and other rules of international law, with which it is under an obligation to comply.

⁵⁴¹ MM, paras. 7.6-7.27.

⁵⁴² UKCM, para. 8.5(b). The UK contends that even though Article 2(3) states the "basic principle" that sovereignty over the territorial sea "is of course exercised subject to the rules of international law", this provision does not require compliance with rules of international law because it is merely a component of the description of the legal status of the territorial sea.

⁵⁴³ Article 31(1) of the VCLT provides that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." See *Territorial Dispute (Libya/Chad)*, Judgment of 3 February 1994, ICJ Reports (1994), para. 41.

⁵⁴⁴ *Black's Law Dictionary*, 9th ed.

⁵⁴⁵ Shorter Oxford English Dictionary (5th Edition, 2002), Vol.2, p. 3085.

6.8 This interpretation is consistent with the intention of the drafters of Article 2(3) to codify the general international law principle that a State's "possession of territorial sea entails not only rights but also obligations", and that these must be respected.⁵⁴⁶ As Judge Jessup observed, sovereignty over the territorial sea is "not an absolute concept," but "is limited by the restrictions of international law."⁵⁴⁷ Judge McNair made the same point in expressing the view that international law not only confers upon a coastal State certain rights arising out of the sovereignty which it exercises over its maritime territory, but also "imposes upon [that] State certain obligations."⁵⁴⁸

6.9 The intention to codify this principle may be seen as early as the League of Nations' codification exercise for the territorial sea, where it was observed that it is "obvious that in exercising sovereignty [over territorial waters] the State must respect the limitations imposed by international law."⁵⁴⁹ This objective was embodied in the ILC's Draft Articles Concerning the Law of the Sea, adopted in 1956. Article 1(2) of the Draft Articles provides that "sovereignty [over the territorial sea] is exercised subject to the conditions prescribed in these articles and by other rules of international law." The ILC's Commentary makes clear that this was intended to require States to respect such "other rules of international law," and explains that "sovereignty over the territorial sea cannot be exercised otherwise than in conformity with the provisions of international law."⁵⁵⁰ To say that sovereignty "cannot be exercised" in a manner that is not "in conformity with the provisions of international law" is a way of proscribing conduct which is inconsistent with those obligations. The same principle animates Article 2(3), as the *Virginia Commentary* makes clear, embodying the understanding set out in the ILC commentaries on Article 2(1) of the 1956 Articles.⁵⁵¹

6.10 The fact that Article 2(3) imposes an obligation of compliance is equally clear in the French text of the Convention,⁵⁵² which provides that:

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

In French, placing the verb "s'exerce" in the *indicatif présent* (the present tense) indicates the formulation of a legal norm that expresses an obligation. Thus, "s'exerce"

⁵⁴⁶ Oppenheim's International Law, Vol.1, p. 601.

⁵⁴⁷ Jessup, *Law of Territorial Waters and Maritime Jurisdiction* (1929), p. 104.

⁵⁴⁸ Dissenting Opinion of Sir Arnold McNair, *Fisheries (United Kingdom v Norway)*, 18 December 1951, p.48.

⁵⁴⁹ League of Nations Conference for the Codification of International Law, *Territorial Sea*, pp. 230, 322.

⁵⁵⁰ Commentary 3 to Article 1, ILC Commentary to the articles concerning the law of the sea (1956).

⁵⁵¹ See *Virginia Commentary*, Vol. 2, pp. 72-72.

⁵⁵² Article 320 of the Convention provides: "The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall ... be deposited with the Secretary-General of the United Nations." The Spanish text of Article 2(3) uses the same grammatical construction as the English text and thus confirms that sovereignty cannot be exercised other than in compliance with the Convention and other rules of international law ("La soberanía sobre el mar territorial *se ejerce con arreglo* a esta Convención y otras normas de derecho internacional.")

in the *indicatif présent*, when used in conjunction with “dans les conditions prévues par les dispositions de la Convention et les autres règles du droit international,” establishes an obligation to abide by the Convention and other rules of international law.

6.11 This is confirmed also by the Russian text of Article 2(3), which provides:

“Суверенитет над территориальным морем *осуществляется с соблюдением* настоящей Конвенции и других норм международного права.”

The verb “*осуществляется*” in Article 2(3) is cast in the obligatory modality and combined with the modifier “*с соблюдением*.” This grammatical construction makes clear that a coastal State is under an obligation to exercise its sovereignty over the territorial sea in compliance with the Convention and other rules of international law.

6.12 The UK is not assisted by arguing that Article 2(3) does not impose an obligation of compliance because the drafters used the words “is exercised” rather than “shall be exercised” (the former being, in the UK’s view, a “description”,⁵⁵³ while the latter is the “language of obligation”).⁵⁵⁴ To that end, the UK compares Article 2(3) to Article 56(3), which in the English text uses the phrase “shall be exercised.” A comparison between Articles 2(3) and 56(3) is indeed instructive, but only in establishing the opposite of what the UK intends. The English text of Article 56(3) provides:

“The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI.” (emphasis added)

The French text of that article uses the same verb - “s’exerce” – as it does in Article 2(3). Article 56(3) in French reads:

“Les droits relatifs aux fonds marins et à leur sous-sol énoncés dans le présent article s’exercent conformément à la partie VI.”

This plainly indicates that the drafters of the Convention intended both Article 2(3) and Article 56(3) to provide obligations of compliance. The point is confirmed by the Russian text of Article 56(3), as the same grammatical formulation is employed in that article as in Article 2(3).

6.13 Other provisions of the Convention make clear that there is nothing talismanic about the word “shall,” and that obligations of compliance may be adopted without using it. For instance, Article 87, like Article 2(3), is written in the present tense. It provides:

“The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law.”

⁵⁵³ UKCM, para. 8.5(b).

⁵⁵⁴ UKCM, para. 8.5(d).

Even though Article 87 does not use the word “shall,” it requires States to respect the freedom of the high seas. This was recognised in *Nicaragua v United States*, which confirmed that “freedom of navigation is guaranteed” by Article 87 “on the high seas.”⁵⁵⁵ For the same reason, notwithstanding the fact that in the *M/V Louisa* case Spain rejected the claim that it had breached Article 87 (because the detention at issue occurred in a Spanish port, not on the high seas), Spain nevertheless accepted that a “detention of a foreign vessel on the high seas, except in the cases described on the Convention, would represent a violation of the Convention.”⁵⁵⁶

6.14 The error of the UK’s approach is further illustrated by comparing Articles 95 and 96 of the Convention. Article 96 concerns the immunity on the high seas of governmental vessels used for non-commercial purposes. It uses “shall” (such vessels “shall ... have complete immunity”). By contrast, Article 95, which concerns the immunity of warships on the high seas, is written in the present tense, providing that they “have complete immunity...” Interpreting these provisions in the manner favoured by the UK would lead to the unintended result that States would be required under the Convention to respect the immunity of governmental vessels used for non-commercial purposes on the high seas, but they would not be required to do so for warships navigating the same waters. This cannot have been what the drafters intended.

6.15 The UK is not assisted by its alternative argument that Article 2(3)’s *renvoi* to “other rules of international law” is limited only to “general rules of international law” and thus does not cover the obligations upon which Mauritius’ claims are founded.⁵⁵⁷ Article 2(3) contains no such limitation, and the reference to “other rules of international law” is not modified by any qualifying word that might have the effect of narrowing its scope of application. As the UK states elsewhere, the text means what it says: Article 2(3) encompasses all other rules of international law, general or not.

6.16 The ILC commentaries on Article 1(2) of the 1956 Draft Articles confirm Mauritius’ interpretation. They make clear that “the limitations imposed by international law on the exercise of sovereignty in the territorial sea” which “are set forth in the present articles” cannot “be regarded as exhaustive.” For this reason, ““other rules of international law’ are mentioned in addition to the provisions contained in the present articles.” Moreover, as the ILC emphasised, draft Article 1(2) encompasses both obligations founded in general international law and specific arrangements entered into by the States:

“(5) It may happen that, by reason of some special relationship, geographical or other, between two States, rights in the territorial sea of one of them are granted to the other in excess of the rights recognised in the present draft. It is not the Commission’s intention to limit in any way

⁵⁵⁵ *Nicaragua v US (Merits)*, para. 214 (emphasis added).

⁵⁵⁶ *M/V Louisa*, Rejoinder of Spain, para. 53.

⁵⁵⁷ UKCM, para. 8.6.

any more extensive right of passage or other right enjoyed by States by custom or treaty.”⁵⁵⁸

6.17 The ILC clarified that the draft which became Article 2(3) encompasses obligations that arise from a “special relationship, geographical or other,” where one State recognises or grants another State rights in the territorial sea.⁵⁵⁹ This interpretation is confirmed by Birnie, Boyle and Redgwell, who observe that “UNCLOS establishes a twelve-mile limit for the territorial sea, over which the coastal state has sovereignty, subject to any requirements of the UNCLOS and other rules of international law, including any conservatory conventions to which that state is party and which by their terms apply within that area.”⁵⁶⁰ If the Convention requires compliance with treaty-based obligations to conserve resources in the territorial sea, it follows *a fortiori* that it also requires States to comply with international rules which require them to provide access to the same resources, as well as international rules which commit the UK to respect an undertaking to put the “MPA” on hold and not deprive Mauritius of the exercise of its rights in the territorial sea.

6.18 In any event, even if Article 2(3)’s *renvoi* to “other rules of international law” is limited to general rules of international law, the obligations that Mauritius seeks to enforce are part of general international law. General international law requires that acquired rights of access to natural resources be respected.⁵⁶¹ The obligation to comply with undertakings given is also a rule of general international law, founded in the general duty of good faith.⁵⁶² This applies in respect of undertakings whether they are given unilaterally⁵⁶³ or by mutual understanding.⁵⁶⁴ Moreover, the obligation to consult interested States in relation to matters that can affect their rights is a longstanding rule of general international law.⁵⁶⁵

6.19 In summary, there is no foundation for the UK’s attempts to avoid complying with the obligations imposed on it in the territorial sea by Article 2(3).

⁵⁵⁸ Report of the International Law Commission covering the work of its eighth session, 23 April-4 July 1956, Doc. A/3159, *YILC*, Vol. II, 253 at 265 (emphasis added).

⁵⁵⁹ See also the Annex VII tribunal decision in *Guyana v Suriname*, interpreting terms in Article 293 “other rules of international law” as encompassing both general international law and international treaties: para. 406.

⁵⁶⁰ P. Birnie, A. Boyle & C. Redgwell, *International Law & the Environment* (3rd ed.), p. 716 (emphasis added).

⁵⁶¹ MM, paras. 7.10-7.18.

⁵⁶² *Nuclear Tests*, para. 49 (“One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.”).

⁵⁶³ *Nuclear Tests (Australia v France)*, International Court of Justice, 1974 ICJ Reports 253, para. 43.

⁵⁶⁴ *Legal Status of Eastern Greenland (Norway v Denmark)*, 1933 PCIJ Ser. A/B, No. 53, 71.

⁵⁶⁵ MM, paras. 7.38-7.46.

(2) *The UK has Breached Article 2(3)*

6.20 Having failed to show that the Convention does not require States to comply with the rules of international law in the territorial sea, the UK asserts that: (i) it has not entered into any undertakings with Mauritius that give Mauritius rights to access the natural resources in the territorial sea of the Chagos Archipelago; (ii) Mauritius does not possess any fishing rights in the Chagos Archipelago's territorial sea; and (iii) the UK is not obliged to consult with Mauritius in regard to the "MPA", even though it plainly affects Mauritius' rights in the territorial sea of the Chagos Archipelago.

a. Undertakings

6.21 There are two categories of undertakings given by the UK: those given in 1965, and that given in November 2009 by Prime Minister Gordon Brown, in which he gave Mauritius a commitment to put the "MPA" on hold.

6.22 In the Memorial, Mauritius established that in September 1965, during the discussions over the excision of the Chagos Archipelago from the rest of Mauritius, the UK entered into a series of binding undertakings that, *inter alia*, require it to respect Mauritian rights to access the natural resources found in the waters of the Chagos Archipelago, and that these undertakings apply throughout the Chagos Archipelago's territorial sea. In particular, the record of the meeting sets out the following commitment:

"the British Government would use their good offices with the U.S. Government to ensure that the following facilities in the Chagos Archipelago would remain available to the Mauritius Government as far as practicable...(b) Fishing Rights..."⁵⁶⁶

6.23 The UK also gave a separate undertaking, equally applicable in the territorial sea, with respect to mineral and oil rights, whereby "the benefit of any minerals or oil discovered in or near the Chagos Archipelago should revert to the Mauritius Government."⁵⁶⁷

(i) The 1965 Undertakings Are Binding on the UK

6.24 Although the UK accepts that the undertaking with respect to mineral and oil rights is binding, it inexplicably denies this is the case for fishing rights.⁵⁶⁸ The Counter-Memorial thus seeks to redefine the UK's undertaking with respect to fishing rights by recharacterising it as a "recommendation," arguing, contrary to the historical record, that the UK did not intend to be bound by the promise it made to Mauritius in

⁵⁶⁶ Record of a Meeting held in Lancaster House at 2.30 p.m. on Thursday 23rd September, Mauritius Defence Matters, CO 1036/1253: MM Annex 19.

⁵⁶⁷ Record of a Meeting held in Lancaster House at 2.30 p.m. on Thursday 23rd September, Mauritius Defence Matters, CO 1036/1253: MM Annex 19.

⁵⁶⁸ UKCM, para. 8.20.

1965.⁵⁶⁹ But this was no mere recommendation, as demonstrated by the UK’s own interpretation of the statement, which has consistently been referred to as an “undertaking” and acknowledged as establishing a binding obligation. The evidence shows that the UK intended to be bound by the undertaking it gave, and that its own practice confirms its commitment to be so bound.

6.25 As the Tribunal is aware, an “undertaking” is a legal term that had, by 1965, a well-understood definition connoting a binding commitment.⁵⁷⁰ It is thus significant that the UK’s experienced diplomats and international lawyers deliberately chose to use that term to describe the undertaking made in regard to fishing rights. The UK began referring to its promise to respect Mauritius’ fishing rights as an “undertaking” almost immediately after the Lancaster House meeting. For instance, on 10 November 1965 the Secretary of State for the Colonies requested that the Governor of Mauritius provide information regarding fishing in the waters of the Chagos Archipelago.⁵⁷¹ He explained that the enquiry “related to the undertaking given to Mauritius Ministers in the course of discussions on the separation of Chagos from Mauritius.”⁵⁷²

6.26 The word was used again on 15 March 1966 in a note from the Colonial Office to the Governor of Mauritius, in regard to “fishing in the Chagos Archipelago.” The

⁵⁶⁹ UKCM, para. 8.11(a).

⁵⁷⁰ See for example the PCIJ decision in *Legal Status of Eastern Greenland (Norway v Denmark)*, which concerned a dispute between Denmark and Norway over sovereignty in Eastern Greenland. During negotiations, Denmark had offered certain concessions on another matter (Spitzbergen) important to Norway. In this context, the Norwegian Foreign Minister had made the “Ihlen Declaration”, as to which the PCIJ stated:

“The Declaration which the Minister for Foreign Affairs gave on July 22nd, 1919, on behalf of the Norwegian Government, was definitely affirmative: ‘I told the Danish Minister to-day that the Norwegian Government would not make any difficulty in the settlement of this question.’ The Court considers it beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs. ... It follows that, as a result of the undertaking involved in the Ihlen declaration of 22 July 1919, Norway is under an obligation to refrain from contesting Danish sovereignty over Greenland as a whole, and *a fortiori* to refrain from occupying a part of Greenland.” 1933 P.C.I.J. Ser. A/B, No. 53, 71 (emphasis added).

See also the ICJ decision in the *Nuclear Tests* case, where the Court described the declarations by the French government as unilateral binding undertakings:

“It is well recognised that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. ... When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding.” *Nuclear Tests Case (Australia v France)*, 1974 I.C.J. Reports 253, para. 43.

⁵⁷¹ Colonial Office Telegram No. 305 to Mauritius, 10 November 1965: MM, Annex 34.

⁵⁷² Letter dated 12 July 1967 from the UK Commonwealth Office to the Governor of Mauritius, FCO 16/226: MM, Annex 50, para. 2 (emphasis added).

Colonial Office referred to “the undertaking given to Mauritius Ministers in the course of discussions on the separation of Chagos from Mauritius.”⁵⁷³ It continued:

“The best way of dealing with the matter and at the same time fulfilling our Ministers’ undertaking to Mauritius Ministers may well be that during the period before defence installations are introduced into any of the islands of the Chagos Archipelago, an attempt should be made to clarify with the Americans the arrangements which would govern access by fishing vessels once any of the islands of the Archipelago are actually taken for defence use.”

6.27 The UK’s “undertaking” with respect to “fishing rights” was also acknowledged by the UK Ministry of Defence the same month in a memorandum entitled “BIOT Fishing Rights.” It refers to “the undertaking to use our good offices with the US government about safeguarding fishing rights.”⁵⁷⁴ The same commitment was made in a memorandum by the FCO’s East Africa Department to the Deputy Legal Adviser, dated 13 July 1983, which noted that “the Colonial Secretary gave an oral and confidential undertaking.”⁵⁷⁵

6.28 The UK also used the word “undertaking” in its diplomatic correspondence with Mauritius. In a letter to the Prime Minister of Mauritius dated 3 May 1973, the UK provided Mauritius with “an assurance that there is no change in the undertakings, given on behalf of the British Government and set out in the record, as then agreed, of the meeting at Lancaster House on 23 September 1965.”⁵⁷⁶ (Mauritius notes that the reference is to “undertakings” in the plural, which confirms that there was more than one). Three decades later nothing had changed: in a letter dated 12 December 2003 to Mauritius’ Minister of Foreign Affairs and Regional Co-operation that addressed, inter alia, “Mauritian fishing rights” in the FCMZ of the Chagos Archipelago, the UK’s Minister responsible for Overseas Territories referred to the “various undertakings and assurances that the Mauritius Government has received from the British Government about sovereignty over the Chagos Archipelago.”⁵⁷⁷

⁵⁷³ Minute by Mr Fairclough of the Colonial Office, 15 March 1966, UKCM, Annex 16 (emphasis added). The same was repeated on 12 July 1967, when the Commonwealth Office wrote to the Governor of Mauritius, referring to “the undertaking given to Mauritius Ministers in the course of discussions on the separation of Chagos from Mauritius, that we would use our good offices with the U.S. Government to ensure that fishing rights remained available to the Mauritius Government as far as practicable in the Chagos Archipelago.” The letter then states: “The best way of dealing with the matter and at the same time fulfilling our Ministers’ undertaking to Mauritius Ministers may well be that during the period before defence installations are introduced into any of the islands of the Chagos Archipelago, an attempt should be made to clarify the arrangements which would govern access by fishing vessels once any of the islands of the Archipelago are actually taken for defence use.” Letter dated 12 July 1967 from C.A. Seller to Sir John Rennie, Governor of Mauritius: Annex 60.

⁵⁷⁴ Letter dated 9 March 1966 from P.H. Moberly, UK Ministry of Defence to K.W.S. Mackenzie, Colonial Office: Annex 51. (emphasis added)

⁵⁷⁵ Minute dated 13 July 1983 from [name redacted], East African Department, UK Foreign and Commonwealth Office to Mr. Watts, Deputy Legal Adviser, “BIOT: Fishing Ordinance”: Annex 86.

⁵⁷⁶ Letter from United Kingdom to Mauritius, 3 May 1973 (emphasis added), UKCM, Annex 24.

⁵⁷⁷ MM, Annex 124 (emphasis added).

6.29 The UK's legal advisers understood that the UK had entered into a binding undertaking, and advised accordingly. The obligatory nature of the undertakings that were given is referred to in a February 1971 memorandum (marked "Secret"), headed "BIOT Resettlement: Negotiations with the Mauritius Government". It was written by Mr A. I. Aust, a (then) junior legal adviser to the UK. The memorandum stated:

"Failure of the Mauritius Government to agree to the resettlement of persons of Mauritian origin in Mauritius would entitle us to treat our other undertakings (e.g. as to oil and fishing rights) as no longer binding upon us, because the undertaking on resettlement is only part of a package deal and must be viewed as such."⁵⁷⁸

Plainly, Mr Aust considered the "undertakings" to be legally binding on the UK as a matter of international law.

6.30 Ten years later, on 13 October 1981, the FCO's Deputy Legal Adviser, Mr A.D. Watts, wrote: "An agreement was reached with Mauritius in 1965 on this matter, but it was not an Agreement in a tidy and formal sense."⁵⁷⁹ Although the Deputy Legal Adviser took the position that "precisely what fishing rights Mauritius has reserved to itself with our agreement is a matter which will need looking into," he had no doubt that Mauritius had at least some "fishing rights", in a sense that imposed binding obligations.

6.31 The views of the UK's legal advisers are also noted in a 1996 FCO memorandum entitled "BIOT/Mauritius: Fishing Rights," which sets out the relevant history in a section on "HMG's 1965 undertaking."⁵⁸⁰ This states that:

"Negotiations in 1965 to elicit Mauritian Ministers' consent to the excision of the Chagos Archipelago took place at side-meetings during the constitutional talks at Lancaster House. At a meeting on 23 September 1965 with the Mauritian Prime Minister, Sir Seewoosagar Ramgoolam, the Colonial Secretary (Mr Greenwood) gave a confidential undertaking that the HMG would use their good offices with the US Government to ensure that certain facilities, including fishing rights in the Archipelago, would remain available to the Mauritius Government as far as was practicable; this was written into the agreed record of the meeting."

The memorandum explains that the UK implemented this "confidential undertaking" by adopting a fisheries ordinance that empowered the UK to "officially designate Mauritians as traditional fishermen in Chagos waters." It then states, in relation to

⁵⁷⁸ Minute dated 26 February 1971 from A.I. Aust to Mr. D. Scott, "BIOT Resettlement: Negotiations with the Mauritius Government": Annex 73.

⁵⁷⁹ Minute dated 13 October 1981 from A.D. Watts to [name redacted], "Extension of the Territorial Sea: BIOT": Annex 83.

⁵⁸⁰ UK Foreign and Commonwealth Office, African Research Group Research Analysts Paper, "BIOT/Mauritius: Fishing Rights", 11 October 1996: Annex 101. See also paras. 3.7-3.8 above.

whether vessels from States other than Mauritius could fish within 12 nautical miles of the Chagos Archipelago, that “Legal Advisers pointed out that HMG’s undertaking to the Mauritians did not necessarily mean that no-one else could fish in BIOT waters; much would depend on the scale of Mauritian fishing in relation to fish stocks, and the location of that fishing as well as that of whatever might be proposed.” In other words, in the view of its legal advisers, the UK was obliged as a matter of law to allow Mauritian fishing, but was not obliged to do so for other States.

6.32 The obligatory nature of the undertaking is also made clear in a note on “Fishing by Mauritian Vessels in BIOT Waters,” dated 2 July 2004, by Henry Steel, the Principal Legal Adviser to the Government of the “BIOT”⁵⁸¹: see para. 3.9 above.

6.33 In light of the UK’s legal advice, it is not surprising that its internal and external correspondence consistently reflects an awareness that the undertaking regarding fishing rights is binding. This may be seen, for example, in a Note by the Head of the FCO’s East Africa Department dated 29 September 1980, entitled “Chagos Archipelago: Fishing and Mineral Rights.”⁵⁸² After recalling that during “the negotiations in 1965 to elicit Mauritian Ministers’ consent to the ‘excision’ of the Chagos islands” the UK had agreed to respect Mauritian “fishing rights,” the Note states that this agreement was put into effect in 1969 by allowing Mauritian fishing vessels to fish throughout the Archipelago’s 12 mile fishing zone. It then states that “The legal position has not altered.” Similarly, a UK memorandum on “Conservation of Fish Stocks in the British Indian Ocean Territory: The Need for a Buffer Zone,” states that “Licences are granted to Mauritians to satisfy a general undertaking given in 1965 following discussions with the Mauritius Council of Ministers on the detachment of the Chagos Archipelago.”⁵⁸³

6.34 On 1 July 1992, the British High Commission in Mauritius, referring to the 1965 undertaking with respect to fishing rights, stated that the UK has “honoured the commitments entered into in 1965,” citing in particular that it had “issued free licences for Mauritius fishing vessels to enter both the original 12 mile fishing zone of the territory and now the wider waters of the exclusive fishing zone.”⁵⁸⁴ Again, the reference to “commitments” having been “honoured” makes clear that these are mandatory obligations.

6.35 For its part, Mauritius has consistently reminded the UK of the binding nature of the 1965 undertakings. To cite but a few examples, on 4 September 1972 the Prime Minister of Mauritius stated that the payment of £650,000 by the UK Government to the Government of Mauritius for the resettlement of Mauritian citizens displaced from the Chagos Archipelago did not affect the UK’s obligations to accord to Mauritius “all sovereign rights relating to minerals, fishing, prospecting and other arrangements.”⁵⁸⁵

⁵⁸¹ Note dated 2 July 2004 by Henry Steel, “Fishing by Mauritian Vessels in BIOT Waters”: Annex 109.

⁵⁸² Note from East Africa Department, 29 September 1980, UKCM, Annex 41.

⁵⁸³ “Conservation of Fish Stocks in the British Indian Ocean Territory: The Need for a Buffer Zone”: Annex 92.

⁵⁸⁴ MM, Annex 103.

⁵⁸⁵ Letter dated 4 September 1972 from the Prime Minister of Mauritius to the British High Commissioner, Port Louis: MM, Annex 67.

Similarly, by letter dated 24 March 1973 to the British High Commissioner in Port Louis, the Prime Minister of Mauritius stated that the UK Government's payment "does not in any way affect the verbal agreement on minerals, fishing and prospecting rights reached at the meeting at Lancaster House on 23rd September, 1965, and is in particular subject to" *inter alia*, Mauritius' fishing and mineral rights.⁵⁸⁶ Further, during the first round of bilateral talks in January 2009, the Mauritian delegation referred to the "series of inducements" given by the UK at Lancaster House, including the commitment that the "territory to be ceded when no longer needed", and that fishing rights would remain available. The delegation stressed that because both "have the same status", they "cannot be severed" and "should be honoured."⁵⁸⁷

6.36 In summary, the UK is quite wrong to suggest that the 1965 undertaking to respect Mauritius' fishing rights in the territorial sea of the Chagos Archipelago was not a binding commitment. The UK's own interpretation of it demonstrates otherwise.

(ii) The undertaking is not limited to using the UK's good offices

6.37 Unable to show that the undertaking regarding fishing rights was simply a "recommendation," the Counter-Memorial offers a fall-back assertion to the effect that the undertakings were limited to promising to use the UK's good offices with the United States.⁵⁸⁸ Here again, the UK's own interpretation and practice contradict the Counter-Memorial. A striking example is the legal advice given to the Commonwealth Office shortly after the undertakings were given, as described in a memorandum of 24 April 1968 by its General and Migration Department (acting as the Department "responsible for 'Law of the sea,'" including "fishery limits").⁵⁸⁹ Written in connection with the extension of the fisheries limits of the "BIOT" to 12 nautical miles, the memorandum refers to the "opinion of the Legal Adviser to the General Department of the Foreign Office," and explains that "provision should be made for a reasonable phasing out for all foreign fishing." It indicates that this should not apply to Mauritian fishing vessels because "an undertaking was given to Mauritius Ministers to ensure that fishing rights remain available to Mauritius in the Chagos Archipelago as far as is practicable." The advice does not state or imply that the undertaking was limited to using "good offices" with the United States.

6.38 A decade later, the FCO was given the same legal advice. On 31 May 1977, the FCO's East Africa Department wrote to the Legal Advisers seeking advice on "the legal

⁵⁸⁶ Letter dated 24 March 1973 from the Prime Minister of Mauritius to the British High Commissioner, Port Louis: MM, Annex 69.

⁵⁸⁷ Ministry of Foreign Affairs, Regional Integration and International Trade, Mauritius, "Meeting of Officials on the Chagos Archipelago/British Indian Ocean Territory held at the Foreign and Commonwealth Office, London, Wednesday 14 January 2009, 10 a.m.", 23 January 2009: Annex 129.

⁵⁸⁸ UKCM, para. 8.11.

⁵⁸⁹ Letter dated 24 April 1968 from L.J.P.J Craig, General and Migration Department, Commonwealth Office to J.R. Todd, Office of the Administrator "BIOT": Annex 66.

import of our [1965] undertaking to the Mauritians.”⁵⁹⁰ The response came on 1 July 1977, and confirmed in clear terms that “the obligation was to ensure that fishing rights remain available.”⁵⁹¹ This meant that the UK was “bound not to give the rights or any part of them to a third party.”

6.39 The fisheries laws and regulations which the UK adopted for the waters of the Chagos Archipelago demonstrate that the UK was acting to fulfil its commitments under the 1965 undertaking. When the UK adopted the 1971 Fishery Limits Ordinance to introduce a licensing regime, correspondence between the Foreign Office and the “BIOT” administration confirmed that the regime preserved Mauritius’ fishing rights in the Chagos Archipelago, and was intended to “enable Mauritian fishing boats to fish within the contiguous zone in the waters of the Chagos Archipelago.”⁵⁹² The Foreign Office requested the British High Commission to describe the fishing regime to the Mauritius Government, and to confirm that an exemption from the fishing prohibition “stems from the understanding on the fishing rights reached between HMG and the Mauritius Government, at the time of the Lancaster House Conference in 1965.”⁵⁹³ On 15 July 1971 the British High Commission wrote:

“You will wish to know therefore that bearing in mind the understanding on fishing rights reached between HMG and the Mauritius Government at the time of the Lancaster House Conference in 1965, it is the intention of Sir Bruce Greatbatch to use his power under section 4 of the BIOT Ordinance to enable Mauritian fishing boats to continue fishing in the 9 mile contiguous zone of the Chagos Archipelago.”⁵⁹⁴

For the same reason the UK included a similar licensing regime in the 1984 “BIOT” Fishery Limits Ordinance. As previously, the “BIOT” Commissioner felt compelled to “enabl[e] fishing traditionally carried on in areas within the fishery limits to be continued by fishing boats registered in Mauritius.”⁵⁹⁵

6.40 Other UK documents also show that the UK did not interpret the undertaking as applying only to the use of its good offices. In a telegram dated 17 September 1981 regarding “Chagos Islands: Fishing Rights,” the UK repeated that “[a]s part of the 1965 agreement with Mauritius on the detachment of the Chagos Islands, we gave an undertaking to the Mauritians that their traditional fishing rights in the Chagos Archipelago would be upheld as far as is practicable.”⁵⁹⁶ Similarly, a memorandum by

⁵⁹⁰ Minute dated 31 May 1977 from [name redacted], East African Department, UK Foreign and Commonwealth Office to [name redacted], Legal Advisers, “BIOT: Fishery Restrictions”: Annex 77.

⁵⁹¹ Minute dated 1 July 1977 from [name redacted], Legal Advisers to Mr. [name redacted], East African Department, UK Foreign and Commonwealth Office, “BIOT: Fishing Rights”: Annex 79.

⁵⁹² Despatch dated 16 June 1971 from F.R.J. Williams, Seychelles to M. Elliott, UK Foreign and Commonwealth Office, BIOT/54/61: MM, Annex 62.

⁵⁹³ Despatch dated 16 June 1971 from F.R.J. Williams, Seychelles to M. Elliott, UK Foreign and Commonwealth Office, BIOT/54/61: MM, Annex 62.

⁵⁹⁴ Note from R.G. Giddens, British High Commission, Port Louis, 15 July 1971: Annex 74.

⁵⁹⁵ “British Indian Ocean Territory” Notice No. 7 of 1985: MM, Annex 98.

⁵⁹⁶ Telegram No. 150 dated 18 September 1981 from UK Foreign and Commonwealth Office to British High Commission, Port Louis: Annex 82.

the FCO's East Africa Department, dated 5 August 1983, asked: "[W]as the undertaking with the Mauritians to give them exclusive fishing rights in the Chagos Archipelago?"⁵⁹⁷ Implicit in the query was the FCO's acceptance that Mauritius had fishing rights, as the only question asked was whether they were "exclusive" (Mauritius notes that the memorandum refers to "Mr Whomersley's minute", a document that is not available to Mauritius but which would suggest that the UK Agent in these proceedings has had knowledge of the rights of Mauritius for more than three decades). In 1990, the FCO referred once more to the fact that "in 1965 ... the UK undertook to permit access to Mauritians who had traditionally fished in the area, so far as was practicable."⁵⁹⁸ None of these documents confines the rights of Mauritius (or the obligations of the UK) to the matter of "good offices".

6.41 The UK continued to accept that the undertakings required it to protect Mauritian rights, even after the "MPA" was purportedly established. In a memorandum dated 19 July 2010, the FCO stated:

"Negotiations in 1965 to get Mauritian Ministers' consent to the excision of the Chagos Archipelago took place in side meetings during the constitutional talks at Lancaster House. HMG gave an undertaking to ensure that certain facilities, including fishing rights, would remain available to the Mauritian government as far as was practicable. This was written into the agreed record of the meeting. Since the establishment of the Territory's Fishing and Conservation Management Zone in 1991, these fishing rights have meant free licences to Mauritian-flagged vessels."⁵⁹⁹

The memorandum further states: "We should make clear the distinction between Mauritius and Chagossian rights. We may have to consider agreeing to any inshore fishing licence requests from Mauritian-flagged vessels in line with historical fishing rights."

6.42 Another FCO memorandum, dated 1 September 2010, interprets the "undertaking that HMG" gave "in 1965" in the following terms: "Over the years, these rights have come to mean free fishing licences to Mauritian-flagged vessels upon application."⁶⁰⁰ As with the other documents discussed above, there is no suggestion that the undertaking only commits the UK to using its good offices.

⁵⁹⁷ Minute dated 5 August 1983 from Maritime, Aviation and Environment Department to East Africa Department, UK Foreign and Commonwealth Office, "BIOT: Fishing Ordinance": Annex 88.

⁵⁹⁸ Submission dated 17 September 1990 from East African Department, UK Foreign and Commonwealth Office to the Private Secretary to Mr. Waldegrave, "British Indian Ocean Territory (BIOT) Fisheries Limit": Annex 97.

⁵⁹⁹ Submission dated 19 July 2010 from Joanne Yeadon, Head of "BIOT" & Pitcairn Section, UK Foreign and Commonwealth Office, to the Private Secretary to Henry Bellingham, "British Indian Ocean territory: BIOT Policy": Annex 162.

⁶⁰⁰ Submission dated 1 September 2010 from Joanne Yeadon, Head of "BIOT" & Pitcairn Section, to Colin Roberts, Director, Overseas Territories Directorate, UK Foreign and Commonwealth Office, the

(iii) The Undertaking Is Not Limited to Fishing as Practised in 1965

6.43 The Counter-Memorial falls into further error by arguing that the scope of the undertaking is limited to the fishing practices in existence in September 1965.⁶⁰¹ Leaving aside the fact that the UK misstates the actual fishing practices at the time, no such limitation was stated by the UK at Lancaster House, nor can it be implied from the undertakings themselves. Moreover, the UK understood, and openly accepted, that the undertakings were intended to protect the future development of Mauritian fishing, and of other rights given in 1965.

6.44 In a note dated 15 March 1966, the Colonial Office accepted that the Mauritian rights protected by the undertaking included the future development of the Mauritian fishing industry. It states that “with Mauritius’ rapidly increasing population, fishing in the Chagos Archipelago is an important potential source of food,” and that the protection of Mauritius’ fishing rights should take account of “the extent to which the Chagos Archipelago is or is likely to be an important fishing ground from the point of view of Mauritius.”⁶⁰² The Governor of Mauritius shared this interpretation of the undertaking, and in that regard, emphasised on 25 April 1966 that “it could certainly be argued that the increasing population of Mauritius and the restricted potential for the production of protein foods in the island made the Chagos Archipelago of importance of Mauritius.”⁶⁰³ Similarly, a June 1966 memorandum from the Colonial Office to the Governor of Mauritius addressed the “undertaking given to Mauritius Ministers in the course of the discussions on the separation of Chagos from Mauritius.” It stated that “we are very much concerned to keep in mind the importance of the fishing grounds to Mauritius, for instance the possible importance of fishing in Chagos as a source of food, in view of the rapidly increasing population.”⁶⁰⁴

(iv) Legal Issues

6.45 As regards the legal principles applicable to a unilateral declaration made by a State, Mauritius and the UK agree that:

Private Secretary to Henry Bellingham and the Private Secretary to the Foreign Secretary, “British Indian Ocean Territory (BIOT): Marine Protected Area (MPA): Implementation and Financing”: Annex 164.

⁶⁰¹ UKCM, para. 8.11. The UK misstates the actual fishing practices in place at the time of the Lancaster House discussions. In fact, there was significant fishing at the time. See, e.g., “Brief Reference Note on the British Indian Ocean Territory” by C.B.B. Heathcote-Smith, UK Foreign and Commonwealth Office, 19 December 1968: Annex 70, which reports that: “The Chagos has good fishing on the Great Chagos Bank, and has been a source of supply of turtles and fish for Mauritius.” The note concluded that there should be an “exclusive fishing zone up to a 12 mile limit” where “BIOT would grant rights to Mauritius ... fishermen and fishing companies.”

⁶⁰² Minute by Mr Fairclough of the Colonial Office, 15 March 1966: UKCM, Annex 16. The Colonial Office therefore solicited from the Governor of Mauritius “any plans that you may know of to increase fishing activities there.” Minute by Mr Fairclough of the Colonial Office, 15 March 1966: UKCM, Annex 16.

⁶⁰³ Letter from Governor of Mauritius, 25 April 1966: UKCM, Annex 17.

⁶⁰⁴ Draft Letter dated June 1966 from A. J. Fairclough to Sir John Rennie, Governor of Mauritius: Annex 53.

- (i) A unilateral declaration publicly made and manifesting the will to be bound may have the effect of creating legal obligations, and States concerned may then rely on them and are entitled to require that such obligations be respected.
- (ii) To determine the legal effects of such declaration, it is necessary to take account of its content, of all the factual circumstances in which it was made, and of the reactions to which it gave rise.
- (iii) A unilateral declaration entails obligations for the declaring State only if it is stated in clear and specific terms.

However, the Parties disagree on the result that follows from the application of these principles to the facts of this case, and to the undertakings given in 1965.

6.46 First, the UK argues that the 1965 undertaking to respect fishing rights lacks clarity.⁶⁰⁵ But the result that the 1965 undertaking is intended to achieve is stated in plain language: to “ensure that [rights] would remain available to Mauritius,” and its meaning was clear to the UK until the commencement of this arbitration. The UK’s current position is belied by its own interpretation and practice, including the views of its legal advisers, discussed above, to the effect that the UK must itself ensure that, as far as practicable, Mauritius’ fishing rights are protected.

6.47 The UK also argues that the 1965 undertaking lacks sufficient specificity because “the reference to ‘fishing rights’ is unparticularised and general in scope.”⁶⁰⁶ This argument is hopeless. The absence of qualification underlines the fact that the undertaking was intended to cover all rights relating to fish and, as described below, sedentary species (regulated by Part VI of the Convention). Again, this is consistent with the historical evidence, discussed above, as to how the UK has historically interpreted the undertakings.

6.48 Second, the UK is wrong to suggest that the undertaking does not impose a positive obligation because it does not demonstrate an intention by the UK to be bound.⁶⁰⁷ The UK argues that if it “had intended to bind itself, it would have used quite different language”, such as that used “in respect of payment of compensation, or the position in respect of any mineral or oil resources, or cession to Mauritius when BIOT is no longer required for defence purposes.”⁶⁰⁸ However, as mentioned above, Mr Aust, one of its legal advisers, made clear in his 1971 legal memorandum that the “undertakings as to oil and fishing rights” were all equally “binding upon” the UK.⁶⁰⁹ Moreover, the Counter-Memorial’s position cannot be reconciled with the UK’s practice before this arbitration began, which demonstrates nearly four decades of

⁶⁰⁵ UKCM, para. 8.19(b).

⁶⁰⁶ UKCM, para. 8.19(b).

⁶⁰⁷ UKCM, para. 8.20.

⁶⁰⁸ UKCM, para. 8.20.

⁶⁰⁹ Minute dated 26 February 1971 from A.I. Aust to Mr. D. Scott, “BIOT Resettlement: Negotiations with the Mauritius Government”: Annex 73.

consistent recognition that treated the undertakings as binding commitments which it was obliged to honour. It is significant that, as discussed above, since 1965 the UK has repeatedly used the term “undertaking” in its diplomatic communications and internal correspondence to describe the legal status of the commitment made at Lancaster House.

6.49 The UK argument is further undermined by the assertion that Mauritian Ministers had allegedly characterised the undertakings as a “mere assurance.” The UK does not cite any Mauritian source for this claim. Instead, the Counter-Memorial relies upon the report of a British official (the Governor of Mauritius).⁶¹⁰ In any event, even if the 1965 undertakings were ever referred to as an “assurance,” it would not assist the UK’s case. An “assurance” is defined as a “pledge or guarantee.”⁶¹¹ For that reason, in the *Nuclear Tests* case (*New Zealand v France*), the ICJ held that:

“[New Zealand] has sought from France an assurance that the French programme of atmospheric nuclear testing would come to an end. While expressing its opposition to the 1974 tests, the Government of New Zealand made specific reference to an assurance that ‘1974 will see the end of atmospheric nuclear testing in the South Pacific’. On more than one occasion it has indicated that it would be ready to accept such an assurance. Since the Court now finds that a commitment in this respect has been entered into by France, there is no occasion for a pronouncement in respect of rights and obligations of the Parties concerning the past – which in other circumstances the Court would be entitled and even obliged to make – whatever the date by reference to which such pronouncement might be made.”⁶¹²

6.50 This is consistent with the view of the ILC’s Special Rapporteur on Unilateral Acts of States:

“The Special Rapporteur went on to recall that the principle *pacta sunt servanda* was the basis of the binding nature of treaties, as was apparent from article 26 of the 1969 Vienna Convention. He suggested that a parallel principle, such as *promissio est servanda*, could be said to found the binding character of unilateral acts of promise. Appeal might also be made to broader principles, such as *acta sunt servanda* or, for unilateral declarations, *declaratio est servanda*.⁶¹³

6.51 Third, the UK alleges that the circumstances in which the 1965 undertaking on fishing rights was made indicate that it has no binding effect. The “key circumstances”

⁶¹⁰ UKCM, para. 8.21.

⁶¹¹ *Black’s Law Dictionary*, 9th ed. See also *Shorter Oxford English Dictionary*, 5th ed. (defining “assurance” as a “formal guarantee, engagement, or pledge”).

⁶¹² *Nuclear Tests (New Zealand v France)*, Judgment, ICJ Reports 1974, p. 457, para. 54 (emphasis added).

⁶¹³ Report of the International Law Commission on the work of its fiftieth session (20 April – 12 June and 27 July – 14 August 1998).

which the UK highlights are that there was “only limited and casual” fishing in 1965, and that it remained small in scale thereafter.⁶¹⁴ The UK misses the point. The relevant context for interpreting the undertakings is to be found in the 1965 Lancaster House meeting between the official representatives of the UK and Mauritian Ministers. Their discussion of inducements offered by the UK for the detachment of the Chagos Archipelago concerned the legal rights and obligations of both parties, and the UK committed itself to a range of undertakings. Those undertakings were given specifically to Mauritius, in the context of sensitive negotiations over independence and the excision of territory. The representations and statements by the representatives of the UK were solemnly made, in a deliberative manner, for the record, repeated in writing and confirmed in subsequent communications with Mauritius. There was nothing “casual” about those statements, nor were they made in the heat of argument. There was “ample opportunity to retract,” but rather than retract, the UK continued to confirm its legal commitments under the 1965 undertaking.

6.52 Unable to refute the proposition that the 1965 undertaking is legally binding, the UK offers a further fallback argument, namely the assertion that the undertakings should be given a restrictive interpretation.⁶¹⁵ However, a restrictive interpretation is called for (if ever) only “[i]n the case of doubt as to the scope of the obligations” resulting from a unilateral undertaking,⁶¹⁶ or where the unilateral undertaking is “not directed to any particular recipient.”⁶¹⁷ As demonstrated above, there can be no doubt as to the scope of the obligations which the UK undertook in 1965, or that they were specifically made to Mauritius. Indeed, the UK’s practice is inconsistent with what it now asserts in its Counter-Memorial: in its 1996 memorandum on Mauritian fishing rights it stated that “HMG’s interpretation of its 1965 undertaking on fishing has tended towards a liberal, or permissive, interpretation – as in the licensing of Mauritian purse-seiners.”⁶¹⁸

6.53 Nor is the UK assisted by arguing that Mauritius is estopped from asserting its fishing rights on the ground that Mauritius allegedly failed to invoke them earlier.⁶¹⁹ Not only has Mauritius repeatedly asserted its fishing rights based on the 1965 undertaking: it has also done so in connection with the dispute over the “MPA”.⁶²⁰ In fact, it is the UK which, having on many occasions stated that the undertaking is binding, is now estopped from claiming otherwise in these proceedings. As the Arbitral Tribunal held in the *Argentine-Chile Frontier Case*:

“there is in international law a principle, which is moreover a principle of substantive law and not just a technical rule of evidence, according to which ‘a State party to an international litigation is bound by its previous

⁶¹⁴ UKCM, para. 8.22.

⁶¹⁵ UKCM, para. 8.23.

⁶¹⁶ ILC, Principle 7 and Commentary (2) to this principle.

⁶¹⁷ *Frontier Dispute (Burkina Faso v Mali)*, Judgment, ICJ Reports 1986, p. 554, para. 39.

⁶¹⁸ UK Foreign and Commonwealth Office, African Research Group Research Analysts Paper, “BIOT/Mauritius: Fishing Rights”, 11 October: Annex 101.

⁶¹⁹ UKCM, paras. 8.26-8.27.

⁶²⁰ Paras. 4.17-4.63 above.

acts or attitude when they are in contradiction with its claims in the litigation.”⁶²¹

Accordingly, “inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible (*allegans contraria non audiendus est*).”⁶²² These principles are highly applicable to the UK’s dramatic change of position after these proceedings were initiated.

6.54 Seeking to extricate itself from its undertakings, the UK now argues that it is entitled to terminate them, and to do so unilaterally without notice.⁶²³ This argument is hopeless: even if, *quod non*, the UK had the right to terminate the undertakings, it has not purported to do so. Regardless, while it may be the case that international law recognises a State’s right to terminate or modify a unilateral undertaking in some circumstances, it prohibits the State from revoking the unilateral undertaking arbitrarily.⁶²⁴ To determine whether revocation is arbitrary, consideration should be given to:

- (i) any specific terms of the declaration relating to revocation;
- (ii) the extent to which those to whom the obligations are owed have relied on such obligations;
- (iii) the extent to which there has been a fundamental change in circumstances.⁶²⁵

The UK plainly does not meet these criteria for unilateral termination. It does not point to any “specific terms of the declaration” that set out the circumstances in which it may be terminated. Indeed, it is plain on its face that the undertaking was not intended to be revocable, and would subsist until the Chagos Archipelago reverted to the effective control of Mauritius. Nor does the UK consider “the extent to which those to whom the

⁶²¹ *Argentine-Chile Frontier Case (Argentina v Chile)* (quoting Separate Opinion of President Alfaro in *Temple of Preah Vihear (Cambodia v Thailand)*, Merits, ICJ Reports 1962, p.6), Award, 9 December 1966, 16 R.I.A.A. 109, 164 (1969); *Legal Status of Eastern Greenland (Denmark v Norway)*, Judgment, 5 April 1933, PCIJ, Ser. A/B, No. 53, at pp. 68-69 (The Court stated that because “Norway reaffirmed that she recognised the whole of Greenland as Danish,” Norway “has debarred herself from contesting Danish sovereignty over the whole of Greenland.”); *The S.S. Lisman (U.S. v. U.K.)*, Award, 5 October 1937, 3 R.I.A.A. 1767, 1790 (1950) (The sole arbitrator held: “By the position he deliberately took in the British Prize Court, that the seizure of the goods and the detention of the ship were lawful ... claimant affirmed what he now denies, and thereby prevented himself from recovering there or here upon the claim he now stands on, that these acts were unlawful, and constitute the basis of his claim.”)

⁶²² *Argentine-Chile Frontier Case (Argentina v Chile)*, Award, 9 December 1966, 16 R.I.A.A. 109, 164 (1969). This is a general principle of law that reflects maxims such as *venire contra factum proprium* (no one may set himself in contradiction to his own previous conduct) and *allegans contraria non audiendus est* (one making contradictory statements is not to be heard). See B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1987), p. 142 *et seq.*

⁶²³ UKCM, paras. 8.28-8.29.

⁶²⁴ *Nuclear Tests (Australia v France; New Zealand v France)*, ICJ Reports 1974, p. 270, para. 51, and p. 475, para. 53.

⁶²⁵ ILC, Guiding Principles on Unilateral Declarations, Principle 10.

obligations are owed have relied on such obligations.”⁶²⁶ Finally, the UK has failed to demonstrate that there has been a fundamental change of circumstances within the meaning and limits of the customary rule codified in Article 62 of the 1969 Vienna Convention on the Law of Treaties.⁶²⁷

6.55 It follows from the foregoing that the UK’s 1965 undertakings are binding, and that they create an obligation to ensure that all the rights therein remain available to Mauritius. By purporting to declare an “MPA” which *inter alia* prohibits Mauritian vessels from fishing in the territorial sea of the Chagos Archipelago, the UK has acted in manifest violation of its undertakings. The consequence of this is that it has violated its obligations to Mauritius under Article 2(3) of the Convention.

b. Traditional Fishing Rights

6.56 In its Memorial, Mauritius demonstrated that it has acquired rights to access the natural resources in the territorial sea of the Chagos Archipelago. In response, the UK’s principal argument in its Counter-Memorial is simply to deny that any such rights exist. To that end, the UK now makes the bold claim that “[t]here are no traditional fishing rights at issue.”⁶²⁸ Such a claim obviously contradicts decades of the UK’s own practice, and the evidence before the Tribunal, which confirms unambiguously that Mauritius has longstanding rights in the territorial sea of the Chagos Archipelago, consistently acknowledged by the UK.⁶²⁹

6.57 Mauritius’ rights in the territorial sea of the Chagos Archipelago were directly recognised in a letter dated 2 July 1971, sent by the FCO to the British High Commission in Port Louis. This stated that the “BIOT” fishing zone included “certain waters which have been traditionally fished by vessels from Mauritius.” The formulation was acknowledged by the Office of the Deputy Governor in Seychelles on 26 May 1972 (“Mauritians have been declared as traditional fishermen in BIOT as the

⁶²⁶ ILC, Principle 10(2).

⁶²⁷ ILC, Principle 10(3).

⁶²⁸ UKCM, para. 8.31.

⁶²⁹ For their part, Mauritian officials have also on many occasions affirmed Mauritius’ traditional fishing rights. For example, on 31 May 1977 the Mauritian Prime Minister confirmed that Mauritius continued to possess “fishing rights” in the Chagos Archipelago, stating that “[a]s far as our fishing rights are concerned the fact is the Government of the BIOT has accepted them. I do not think there is any dispute with our neighbours, as far as I know.” Prime Minister, 31 May 1977, p. 2778-9: Second Reading of Maritime Zones Bill (No. XVII of 1977), 31 May 1977: Annex 78. On 5 July 1978, Mauritius’ Minister of Fisheries stated “[i]n connection with Chagos ... we have fishing rights.” He then reaffirmed: “the point is that the fishing rights are still there and our companies are free to go and fish there.” (Minister of Fisheries, 5 July 1978, p. 3116: MM, Annex 84). The same point was made by Mauritius’ Minister of Fisheries and Co-operatives and Co-operative Development on 13 May 1980, when he observed that in the Chagos Archipelago “Mauritians have exercised traditional fishing rights for a long, long time,” and noted that “[t]he future needs of Mauritius in fish reside in these waters.” (Minister of Fisheries and Co-operatives and Co-operative Development, 13 May 1980, p. 935: MM, Annex 90). In June 1980, the Prime Minister of Mauritius stated that “We, by arrangement with Great Britain, have preserved our ... fishing rights.” (Port Louis, telno 104 of 28 June 1980: UKCM, Annex 36).

islands formerly formed part of Mauritius”).⁶³⁰ Eight years later, an FCO Note referred to the “traditional fishing rights” of Mauritius “around the islands of the Chagos Archipelago,” and recalled that Mauritius had been informed in 1969 that those rights “would be upheld” throughout the Archipelago’s “12 mile fishing zone.”⁶³¹ On 19 January 1982 the FCO wrote to a FCO Legal Adviser to express the “understanding” that “[t]he Mauritians have traditional fishing rights within the contiguous zone (3-12 nautical miles).”⁶³² The UK recognised Mauritian fishing rights in the Chagos Archipelago in the 1984 “BIOT” Fishery Limits Ordinance, which stated:

“In exercise of the power vested in him by Section 4 of the Fishery Limits Ordinance, 1984, the Commissioner has been pleased to designate Mauritius for the purpose of enabling fishing traditionally carried on in areas within the fishery limits to be continued by fishing boats registered in Mauritius.”⁶³³

6.58 The traditional rights of Mauritius were referred to in a Speaking Note prepared by the British High Commission in Port Louis in August 1990, which referred to “Mauritian traditional fishing boats” having “[a]ccess” to “the 12 mile limit” around the Chagos Archipelago.⁶³⁴ On 13 December 2007, when UK Prime Minister Gordon Brown wrote to his Mauritian counterpart, he repeated the point, affirming that “Mauritius has historically exercised [fishing] rights over the waters of the Chagos Archipelago.”⁶³⁵ When the “MPA” was proposed, the UK’s reaction was to highlight (in April 2008) that “Mauritius did have some [fishing] rights”⁶³⁶ and to acknowledge again (in April 2009) that “Mauritians have got historic fishing rights.”⁶³⁷

6.59 As noted in Chapter 3 above,⁶³⁸ the UK’s recognition of Mauritius’ traditional rights has persisted even after it declared the “MPA”. On 19 July 2010, the FCO’s Overseas Territories Directorate prepared a memorandum entitled “British Indian Ocean

⁶³⁰ MM, para. 3.96.

⁶³¹ Note from East Africa Department dated 29 September 1980: UKCM, Annex 41.

⁶³² Minute dated 19 January 1982 from [name redacted], East African Department, UK Foreign and Commonwealth Office to Mr. Berman, Legal Advisers, “BIOT Maritime Zones”: Annex 85.

⁶³³ MM, para. 3.98. See also “British Indian Ocean Territory” Notice No. 7 of 1985, 21 February 1985: Annex 90 (“In the exercise of the power vested in me by section 4 of the Fishery Limits Ordinance, 1984, I hereby designate Mauritius for the purpose of enabling fishing traditionally carried on in areas within the fishery limits to be continued by fishing boats registered in Mauritius.”)

⁶³⁴ Letter dated 8 August 1990 from East African Department, UK Foreign and Commonwealth Office to British High Commission, Port Louis, transmitting Speaking Note: Annex 96.

⁶³⁵ MM, para. 3.120.

⁶³⁶ UKCM, Annex 87.

⁶³⁷ Email dated 21 April 2009 from Joanne Yeadon, Head of “BIOT” & Pitcairn Section, to Colin Roberts and Andrew Allen, Overseas Territories Directorate, UK Foreign and Commonwealth Office: Annex 130.

⁶³⁸ Para. 3.74.

Territory (BIOT): Secondary Issues and Next Steps.”⁶³⁹ The section on “Fishing Rights” stated that “Mauritius (not Chagossians) has historical fishing rights in BIOT.”

6.60 Against the background of this evidence, the UK’s claim that there are no traditional rights is untenable. Its further fallback position is that “entitlements” must have been “exercised continuously through the ages”,⁶⁴⁰ and that this standard is not met. There is no such standard, as Sir Gerald Fitzmaurice recognised when he stated that traditional rights may arise through fishing practices that occur “over a long period.”⁶⁴¹ The ICJ in *Fisheries Jurisdiction (Germany v Iceland)* applied this standard, and held that it was sufficient that Germany had “for many years been engaged in fishing in the waters in question.”⁶⁴²

6.61 The fishing practised by Mauritians in the Chagos Archipelago is comparable to that in the *Fisheries Jurisdiction* case. A 1999 report states that: “Fishing within the Chagos Archipelago has occurred for decades, by both local inhabitants and commercial vessels from Mauritius.”⁶⁴³ By the mid-1960s, Mauritians had already acquired historic rights to fish in the waters of the Chagos Archipelago. This is clear from the September 1965 Lancaster House undertakings themselves, where the UK promised that Mauritius’ “fishing rights” would “remain available ... as far as practicable.” This makes clear that “fishing rights” already existed at that time, as recognised by a letter from an official at the UK Foreign Office to the Colonial Office, written in April 1966, which states that: “I assume that you will consider it necessary to do all that can reasonably be done to preserve the traditional rights of fishermen from Mauritius ... to fish in the area.”⁶⁴⁴ It is only possible to preserve that which already exists.

6.62 In its Memorial, Mauritius described at length the jurisprudence establishing that the detachment of the Chagos Archipelago from Mauritius could not have nullified existing rights of access or use, or other rights related to the exploitation of natural resources.⁶⁴⁵ The UK’s Counter-Memorial has almost nothing to say about the law on historically acquired rights to natural resources, other than to make the brief and entirely unsupported assertion that the “jurisprudence concerning the entitlement to artisanal fishing notwithstanding a maritime delimitation (*Eritrea v Yemen*) is not relevant and

⁶³⁹ Submission dated 19 July 2010 from Joanne Yeadon, Head of “BIOT” & Pitcairn Section, UK Foreign and Commonwealth Office, to the Private Secretary to Henry Bellingham, “British Indian Ocean territory: BIOT Policy”: Annex 162.

⁶⁴⁰ UKCM, para. 8.33(b).

⁶⁴¹ Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Cambridge University Press, 1986, p. 181.

⁶⁴² *Fisheries Jurisdiction*, para. 54.

⁶⁴³ C.C. Mees, G.M. Pilling and C.J. Barry, “Commercial inshore fishing activity in the British Indian Ocean Territory,” in *Ecology of the Chagos Archipelago* (ed. C.R.C. Sheppard & M.R.D. Seaward), 1999. Mees, C.C., Pilling, G.M. and Barry, C.J., “Commercial inshore fishing activity in the British Indian Ocean Territory” in “Ecology of the Chagos Archipelago” (ed. C.R.C. Sheppard & M.R.D. Seaward, 1999): Annex 106.

⁶⁴⁴ Letter dated 29 April 1966 from A. Brooke Turner, UK Foreign Office to K.W.S. Mackenzie, Colonial Office: Annex 52.

⁶⁴⁵ MM, paras. 7.9-7.21.

does not assist Mauritius.”⁶⁴⁶ This argument is mistaken. As the Arbitral Tribunal in the *Abyei* case noted, the “principle that ... the transfer of sovereignty in the context of boundary delimitation should not be construed to extinguish traditional rights to the use of land (or maritime resources)” is an application of the broader principle that “[c]ustomary rights ‘run with the land’” because they are “servitudes *jure gentium* or ‘servitudes *internationales*.”⁶⁴⁷ It is for this reason that the ICJ in the *Fisheries Jurisdiction* case, which did not involve a boundary delimitation, held that Iceland’s newly asserted “preferential rights” in a 50 nautical mile fishing zone had to “be reconciled with the traditional fishing rights of the [United Kingdom].”⁶⁴⁸ The principle is equally applicable where a colonial power seeks to dismember a colony in anticipation of the grant of independence.

6.63 Nor is the UK assisted by its cryptic assertion that “UNCLOS does not accord to traditional fishing rights the impact for which Mauritius contends,” and the claim that Mauritius “has been unable to point to a single provision of UNCLOS on which it can rely.”⁶⁴⁹ The UK chooses to ignore Article 2(3), which requires coastal States to comply with “other rules of international law”.

6.64 The UK is equally wrong to claim that Article 51(1) (which provides that archipelagic states must “recognise traditional fishing rights ... of the immediately adjacent neighbouring States in certain areas falling within archipelagic waters”) is irrelevant, because its rationale is purportedly limited to the protection of “traditional fishing rights exercised in what had formerly been the high seas, but were now to be the equivalent of internal waters under a new regime specifically created by UNCLOS.”⁶⁵⁰ The UK has it backwards. If Article 51(1) recognises the obligation to respect traditional fishing rights in what have become archipelagic waters, then the obligation applies equally (at least) in the territorial sea, where a coastal State’s rights may be more limited than in archipelagic waters.

c. Breach of the commitment given by Prime Minister Gordon Brown

6.65 As described above, during their 27 November 2009 meeting, the UK Prime Minister promised the Prime Minister of Mauritius that the “MPA” would be put “on hold”.⁶⁵¹ In these circumstances, Prime Minister Brown’s commitment can only be understood as having established a legal obligation. The PCIJ held that an analogous mutual understanding was legally binding in the *Eastern Greenland* case. There, the Court was faced with a dispute between Denmark and Norway over sovereignty in Eastern Greenland. During negotiations, Denmark offered certain concessions on

⁶⁴⁶ UKCM, para. 8.33.

⁶⁴⁷ *Abyei Arbitration*, para. 754 (quoting *Eritrea v Yemen*, First Stage of the Proceedings, para. 126)

⁶⁴⁸ *Fisheries Jurisdiction*, paras. 60-61.

⁶⁴⁹ UKCM, para. 8.33.

⁶⁵⁰ UKCM, para. 8.33(a).

⁶⁵¹ Para. 3.60 above.

another matter (Spitzbergen) that were important to Norway. In this context, the Norwegian Foreign Minister made the “Ihlen Declaration”, as to which the PCIJ stated:

“The Declaration which the Minister for Foreign Affairs gave on July 22nd, 1919, on behalf of the Norwegian Government, was definitely affirmative: ‘I told the Danish Minister to-day that the Norwegian Government would not make any difficulty in the settlement of this question.’ The Court considers it beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs.”

The PCIJ thus held that :

“It follows that, as a result of the undertaking involved in the Ihlen declaration of 22 July 1919, Norway is under an obligation to refrain from contesting Danish sovereignty over Greenland as a whole, and *a fortiori* to refrain from occupying a part of Greenland.”⁶⁵²

6.66 Further and alternatively, the UK Prime Minister’s commitment is legally binding as an unilateral act in the sense held to be enforceable in the *Nuclear Tests* case, where the ICJ held that:

“It is well recognised that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. ... When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding.”⁶⁵³

6.67 However, despite having made this commitment, the UK did not put the “MPA” “on hold.” Instead, it proceeded with the public consultation, refused to engage in meaningful bilateral consultations with Mauritius, and declared the “MPA” on 1 April 2010. In so doing, the UK failed to honour the commitment given by its Prime Minister. That commitment gave rise to an obligation under a “rule of international law”. In this way the UK has violated Article 2(3) of the Convention.

d. Consultations

6.68 Mauritius demonstrated in its Memorial that (i) the UK has repeatedly recognised that Mauritius has special interests and rights that entitle it to be consulted

⁶⁵² *Legal Status of Eastern Greenland (Norway v Denmark)*, 1933 PCIJ Ser. A/B, No. 53, 71.

⁶⁵³ *Nuclear Tests Case (Australia v France)*, 1974 ICJ Reports 253, para. 43.

on actions proposed by the UK in relation to the maritime zones adjacent to the Chagos Archipelago;⁶⁵⁴ and that (ii) the UK failed to consult with Mauritius prior to declaring the “MPA”. As a result, the UK has breached Article 2(3) of the Convention, which encompasses the obligation under general international law to consult with interested States in relation to matters that affect their rights.⁶⁵⁵

6.69 The UK responds by arguing that “there is no general international law rule of consultation that would apply where a State chooses to establish a specific regime (such as the MPA) in its territorial waters.”⁶⁵⁶ This argument is wrong. As the ICJ held in *Fisheries Jurisdiction (UK/Germany v Iceland)*, the obligation to consult and negotiate “flows from the very nature of the respective rights of the Parties.”⁶⁵⁷ Because the rights of one State are not absolute in relation to the rights of another State, “negotiations are required in order to define or delimit the extent of those rights”, which must “be reconciled ... to reach an equitable solution.”⁶⁵⁸ This general rule of international law was applied in the *Lac Lanoux* arbitration, where the treaty at issue did not expressly require consultation. Nonetheless, the Tribunal held that such an obligation exists where unilateral measures by one State may affect the interests of another. The Tribunal considered that a State adopting a unilateral measure “cannot decide whether another State’s interest will be affected”, since “the other State is the sole judge of that”. It considered that “the conflicting interests ... must be reconciled” through “consultations and negotiations between the two States.” Such consultations “must be genuine” and “must comply with the rules of good faith.”⁶⁵⁹ The UK has identified no reason why this obligation of general application does not apply in relation to rights to be exercised in the territorial sea. It plainly does.⁶⁶⁰

6.70 Despite the obligation to consult, the UK failed to do so adequately. Consultation implies the provision of timely information, yet the UK did not inform Mauritius in advance of the “MPA” proposal, leaving Mauritius to learn about it from reports in the media.⁶⁶¹ The UK failed to inform Mauritius of the proposed “MPA” during the bilateral talks in January 2009, even though it was by then well aware that the “MPA” would directly impinge upon the rights of Mauritius.⁶⁶²

6.71 Further, as explained in detail in Chapter 3, the UK never engaged in serious bilateral discussions with Mauritius about the “MPA”. Most significantly, the UK failed

⁶⁵⁴ MM, paras. 7.48-7.54.

⁶⁵⁵ MM, paras. 7.38-7.41.

⁶⁵⁶ UKCM, para. 8.41.

⁶⁵⁷ *Fisheries Jurisdiction*, paras. 74-75.

⁶⁵⁸ *Fisheries Jurisdiction*, paras. 74-75.

⁶⁵⁹ *Lac Lanoux*, pp. 15-16.

⁶⁶⁰ *North Sea Continental Shelf Case (Federal Republic of Germany v Denmark)*, Judgment, ICJ Reports 1969, p. 3, at para. 85(a) (“The Parties are under an obligation to enter into negotiations with a view to arriving to an agreement, and not merely to go through a formal process of negotiation; they are under an obligation so to conduct themselves that the negotiations are meaningful.”)

⁶⁶¹ MM, para. 4.39.

⁶⁶² Paras. 3.23-3.30 above.

to honour the commitment, discussed above, made by its Prime Minister to the Prime Minister of Mauritius that the “MPA” would be put “on hold.”

6.72 In these circumstances, the UK has not satisfied its obligation to consult with Mauritius and, accordingly, has breached Article 2(3).

e. Conclusion

6.73 For the reasons set out above, the purported establishment of the “MPA” violates Article 2(3) of the Convention by preventing Mauritius from exercising its rights in the territorial sea, and by failing to respect the procedural rights of Mauritius. The facts, evidence and legal arguments referred to in this section apply equally to the sections that follow, as appropriate, but in the interests of brevity will not be repeated.

(b) Part V of the Convention

6.74 In Chapter 7 of its Memorial, Mauritius showed that the UK has breached Part V of the Convention by failing to respect Mauritius’ rights in the EEZ, and by failing adequately to consult with Mauritius about the “MPA”, in breach of Articles 55 and 56(2) of the Convention.

6.75 In the Counter-Memorial, the UK denies that the Convention imposes any relevant obligations, asserting that Article 56(2) does not require coastal States to comply with the rules of international law, including the obligation to fulfil undertakings in regard to the EEZ, the obligation to respect historic rights to access natural resources, and the obligation to consult in regard to actions that could affect the rights of other States. The UK further denies having undertaken to respect Mauritian rights of access in the EEZ, rejects the suggestion that Mauritius possesses historic rights of access, and denies there is any obligation to consult with Mauritius. The UK is wrong in all these assertions.

(1) The Obligations Imposed by Article 56(2)

6.76 The UK attempts to avoid having to comply with international legal obligations in the EEZ by suggesting that States are not required by Article 56(2) to comply with such obligations, notwithstanding the fact that the Article requires coastal States to have “due regard” to “the rights and duties of other States,” and that it further requires them to “act in a manner compatible with the provisions of this Convention.” The Counter-Memorial summarises the UK’s position as being that the obligation to “have due regard” under Article 56(2) “stops well short of an obligation to give effect to such rights.”⁶⁶³

6.77 This ignores the ordinary meaning of Article 56(2), which provides that:

⁶⁶³ UKCM, para. 8.36.

“In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.”

Although the Convention does not define the term “due regard,” the meaning of that phrase is clear. The word “due” describes something that is “required or owed as a legal or moral obligation.”⁶⁶⁴ “Regard” means “attention to or concern for something.”⁶⁶⁵ Used in combination and in the context of Article 56(2), the phrase sets out a positive obligation to respect the rights of other States in the EEZ.

6.78 This interpretation is confirmed by the *Virginia Commentary*, which clarifies that this Article imposes an affirmative obligation to “refrain from activities that interfere with the exercise by other States of [their rights].”⁶⁶⁶ To the same effect are the ILC Commentaries on the 1958 Convention on the High Seas, which make clear that States are required to have “reasonable regard” for the interests of other States. To fulfil that obligation, “States are bound to refrain from any acts that might adversely affect the use of the high seas by nationals of other States.”⁶⁶⁷

6.79 The fact that the reference in Article 56(2) to “due regard” requires compliance with international legal rules, including historic rights of access, is clear from the ICJ’s interpretation of the 1958 Geneva Convention on the High Seas. In *Fisheries Jurisdiction (UK v Iceland/Germany v Iceland)*, the UK and Germany challenged Iceland’s extension of its exclusive fishery jurisdiction beyond 12 nautical miles because it was said to have disregarded their fishing rights in the areas in question. The Court held that “the provisions of the Icelandic Regulations ... and the manner of their implementation disregard[ed] the fishing rights of the Applicant[s].” It therefore concluded that Iceland’s actions breached the principle enshrined in Article 2 of the Convention on the High Seas, which requires, as noted above, that States, “in exercising their freedom of fishing,” pay “reasonable regard to the interests of other States.”⁶⁶⁸ The Court held that “the principle of reasonable regard for the interests of other States enshrined in Article 2 of the Geneva Convention on the High Seas of 1958 requires Iceland ... to have due regard to ... the interests of other States, in those resources.” It therefore follows, the Court held, that any “preferential fishing rights of Iceland” must be reconciled with the traditional fishing rights of the Applicant.⁶⁶⁹ In short, the historic fishing rights of the UK and Germany had to be accommodated, and could not be ignored by Iceland.

(2) *The UK’s Breaches of Article 56(2)*

⁶⁶⁴ New Oxford American Dictionary.

⁶⁶⁵ New Oxford American Dictionary.

⁶⁶⁶ *Virginia Commentary*, Vol. III, p.86.

⁶⁶⁷ ILC Commentaries on the 1958 Convention on the High Seas: see Nordquist et al., *United Nations Convention on the Law of the Sea 1982: A Commentary*, (1995) p. 86.

⁶⁶⁸ Fisheries Jurisdiction, para. 59.

⁶⁶⁹ Fisheries Jurisdiction, paras. 60-61.

a. Undertakings and Traditional Rights

6.80 The UK denies that it undertook to respect Mauritius' rights to access the natural resources of the Chagos Archipelago, and further denies that Mauritius possesses any traditional fishing rights. That is wrong, for the reasons described above. With specific regard to the EEZ, the Counter-Memorial states that "the United Kingdom did not somehow extend alleged fishing rights, or traditional fishing rights, to the FCMZ/EPPZ."⁶⁷⁰ This assertion is, however, contradicted by the UK's own statements, addressed above, which repeatedly acknowledge that the UK was obliged under the 1965 undertakings to give Mauritius access to the natural resources of the Chagos Archipelago to the 200 mile limit of those zones, and that Mauritius has traditional fishing rights there.

6.81 The Counter-Memorial incorrectly asserts that Mauritius did not object to the UK's extension of its fisheries zone to 200 miles.⁶⁷¹ By Note Verbale dated 7 August 1991, Mauritius informed the UK that, with respect to its "intention to extend from 12 to 200 miles the fishing zone around the British Indian Ocean Territory," "the Government of Mauritius does not accept the said declaration."⁶⁷² In the same Note, Mauritius made clear that its objection applied equally to the UK's fishing regime within 12 miles, stating that "The Ministry furthermore wishes to point out that, in the light of the above, the Government of Mauritius does not *ipso facto* accept the validity of the offer of free licences for inshore fishing." The UK acknowledged Mauritius' objection, interpreting the note as "a formal reservation of their position."⁶⁷³

6.82 In summary, the Counter-Memorial is wrong to suggest that the UK's undertakings to respect Mauritius' rights to access the natural resources of the Chagos Archipelago do not extend to the 200 mile limit of its EEZ. Since those undertakings do so extend, and since the "MPA" prohibits Mauritius from accessing those resources, the UK has breached those undertakings and, as a consequence, Article 56(2) of the Convention.

b. Consultations

6.83 Mauritius demonstrated in its Memorial that the UK has breached its obligation to consult about the "MPA" in relation to the EEZ.⁶⁷⁴ The UK argues that Article 56(2) is inapplicable because Mauritius is said to have no relevant rights which entitle it to be consulted.⁶⁷⁵ In light of the evidence before the Tribunal, including the new

⁶⁷⁰ UKCM, para. 8.37.

⁶⁷¹ UKCM, para. 8.38.

⁶⁷² Note Verbale dated 7 August 1991 from Ministry of External Affairs, Mauritius to British High Commission, Port Louis, No. 35(91)1311: Annex 98.

⁶⁷³ Internal telegram dated 31 August 1991 from Chalker, Foreign and Commonwealth Office to Port Louis, Mauritius, "BIOT: Extension of Fisheries Zone": Annex 99.

⁶⁷⁴ MM, paras. 7.43-7.47.

⁶⁷⁵ UKCM, para. 8.44.

documentary evidence submitted with this Reply, this is an untenable argument: Mauritius has rights in the EEZ which have been repeatedly recognised by the UK.

6.84 The UK further argues that Article 56(2) does not impose an obligation to consult because such an obligation is not expressly mentioned in that Article.⁶⁷⁶ But, as indicated above, Article 56(2) requires coastal States to “have due regard to the rights” of other States. Fulfilling this obligation necessarily requires States to consult, especially when the coastal State is aware that the exercise of its rights will affect the rights of another State. This proposition is supported by the ICJ decision in *Fisheries Jurisdiction (UK/Germany v Iceland)*, where the Court held that the obligation to have due regard required the parties to negotiate in order to reconcile their competing rights on an equitable basis.⁶⁷⁷

6.85 Article 56(2) also imposes a duty to consult by requiring coastal States to “act in a manner compatible with the provisions of this Convention.” These provisions include Article 61 and Article 197, both of which require consultation.

6.86 Article 197 provides that:

“States shall co-operate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.”

The UK’s only response is to suggest that Article 197 is “irrelevant” because it is not “concerned with one State’s declaration of a marine protected area.” This is not the view of the *Virginia Commentary*, however, which offers a broader interpretation of Article 197, noting that it “deals specifically with the duty of States to co-operate, either on a global or on a regional basis, directly or through competent international organisations, in developing international rules, standards and recommended practices and procedures concerning preservation of the marine environment.”⁶⁷⁸ There is nothing to suggest that this obligation does not apply to coastal States’ unilateral acts which are intended to protect the marine environment.

6.87 Article 61 also establishes an obligation to consult. It provides that:

“The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation. As appropriate, the coastal State and competent international organisations, whether subregional, regional or global, shall co-operate to this end.”

⁶⁷⁶ UKCM, para. 8.45.

⁶⁷⁷ *Fisheries Jurisdiction*, paras. 67-69, 73-74.

⁶⁷⁸ *Virginia Commentary*, Vol. IV, p.78.

Although Mauritius addressed Article 61 in its Memorial,⁶⁷⁹ the Counter-Memorial ignores it entirely.

(3) *Article 55*

6.88 The UK has also separately violated Article 55 of the Convention. As demonstrated in the Memorial, Article 55 requires that the exercise of rights in the EEZ be “subject to the specific legal regime established” in Part V of the Convention “under which the rights and jurisdiction of the coastal State are governed by the relevant provisions of the Convention.”⁶⁸⁰ This includes the obligation to have “due regard” for the rights of other States set forth in Article 56(2), and the obligation to consult established by Articles 61, 63, and 64. Nothing in the Counter-Memorial disproves the fact that, because the UK has purported to establish and implement the “MPA” in a manner that violates those provisions, it has also breached Article 55.

(c) *Part VI of the Convention*

6.89 Part VI of the Convention governs the continental shelf. As described in this Section, the UK has breached its obligations under Part VI by preventing Mauritius from exercising *inter alia* its right to harvest the sedentary species found on the continental shelf of the Chagos Archipelago.

6.90 Among the undertakings entered into by the UK in September 1965 during the Lancaster House discussions was the commitment that “the benefit of any minerals or oil discovered in or near the Chagos Archipelago should revert to the Mauritius Government.”⁶⁸¹ This plainly acknowledges that Mauritius possesses rights in the continental shelf of the Chagos Archipelago. On 6 May 2009, Mauritius submitted to the CLCS Preliminary Information concerning the Extended Continental Shelf in the Chagos Archipelago Region.⁶⁸² The Preliminary Information was notified to the UN Secretary-General and made publicly available on the web site of the United Nations.⁶⁸³ The UK has offered no objection to the preliminary information submitted by Mauritius.⁶⁸⁴ Nor has the UK made any submission to the CLCS in respect of the Chagos Archipelago, whether of a preliminary nature or otherwise. Since the 10-year time limit for making submissions to the CLCS has now elapsed, the UK is no longer entitled to make a submission. Having regard to the Counter-Memorial, this appears to be undisputed by the UK. In light of the principle that the continental shelf is

⁶⁷⁹ MM, para. 7.44.

⁶⁸⁰ MM, para. 7.33.

⁶⁸¹ Record of a Meeting held in Lancaster House at 2.30 p.m. on Thursday 23rd September, Mauritius Defence Matters, CO 1036/1253: MM, Annex 19.

⁶⁸² MM, paras. 4.31-4.35.

⁶⁸³ MM, Annex 144.

⁶⁸⁴ The practice of many States has been to introduce objections to preliminary information and full submissions (see http://www.un.org/depts/los/clcs_new/commission_preliminary.htm). On 6 August 2009 the UK objected to the full submission made by Argentina in respect of the Malvinas/Falkland Islands: see http://www.un.org/depts/los/clcs_new/submissions_files/arg25_09/clcs_45_2009_los_gbr.pdf.

indivisible, it is clear that Mauritius possesses rights in the continental shelf of the Chagos Archipelago.⁶⁸⁵

6.91 The UK, however, in breach of its obligations under Part VI of the Convention, has prohibited Mauritius from harvesting the sedentary species found on the Archipelago's continental shelf.

6.92 Article 76(1) defines the continental shelf. It provides:

“The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.”

6.93 For the purposes of Part VI, Article 77(4) provides that the “natural resources” referred to therein include the “living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.”

6.94 Article 78(2) requires coastal States purporting to exercise rights under Part VI not to infringe the rights and freedoms of other States as provided for in the Convention. It provides that:

“The exercise of the rights of the coastal State over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States as provided for in this Convention.”

6.95 The obligation in Article 78(2) applies in relation to any rights which the UK purports to exercise concerning the conservation or management of living resources found in the seabed or subsoil within the EEZ. In that regard, Article 56(3) provides that the “rights set out in [Article 56] with respect to the seabed and subsoil shall be exercised in accordance with Part VI.” Those rights include, under Article 56(1)(a), rights concerning “conserving and managing the natural resources, whether living or nonliving ... of the seabed and its subsoil.” Further, Article 68 provides that “Part [V] does not apply to sedentary species as defined in Article 77, paragraph 4.”

6.96 The “rights and freedoms” referred to in Article 78(2) include (a) the right to harvest sedentary species (whether characterised as fishing or other natural resource activity), pursuant to the undertakings given by the UK to Mauritius in 1965, (b) Mauritius' traditional fishing rights, and (c) the commitment given by UK Prime Minister Gordon Brown in November 2009 that the “MPA”, which would violate those

⁶⁸⁵ *Barbados v Trinidad and Tobago*, para. 213; *Bangladesh v Myanmar*, para. 362.

rights, would be put “on hold”. These give rise to rights provided for in this Convention by operation, *inter alia*, of Article 293. As the Annex VII Tribunal in *Guyana v Suriname* unanimously observed, ITLOS has “interpreted Article 293 as giving it competence to apply not only the Convention, but also the norms of customary international law.”⁶⁸⁶ The Tribunal in that case concluded that it is empowered “to adjudicate alleged violations of the United Nations Charter and general international law.”⁶⁸⁷ As demonstrated above, the obligations that Mauritius seeks to enforce are all rules of general international law. Since the “MPA” breaches those rights, it correspondingly breaches Article 78(2).

(d) Part XII of the Convention

6.97 Part XII of the Convention concerns the protection and preservation of the marine environment. The Counter-Memorial mischaracterises the “MPA” as a fisheries measure relating exclusively to living resources in the EEZ or their exercise. This is incorrect: consistent with MPAs generally, the “MPA” that the UK has purported to declare in the waters of the Chagos Archipelago is much broader in scope, and is intended to regulate not only fishing activities but also other activities as well, within the rubric of establishing a general marine reserve. The evidence on this point is considered in Chapters 3 and 7 of this Reply.⁶⁸⁸

(1) Article 194(1)

6.98 Mauritius demonstrated in its Memorial that the UK has breached its obligations under Article 194(1), which provides that:

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

6.99 This requires States to take measures to attempt to harmonise policies regarding pollution prevention, reduction and control, and, at a minimum, requires the UK to make pollution-related policies for the Chagos Archipelago “consistent or compatible” with those of regional States.⁶⁸⁹ Of necessity, this requires the UK to consult with Mauritius.

⁶⁸⁶ *Guyana v Suriname*, Annex VII Arbitral Tribunal, Award of 17 September 2007, para. 405, quoting *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v Guinea)*, Judgment, ITLOS Reports 1999, p. 7, para. 155.

⁶⁸⁷ *Guyana v Suriname*, Annex VII Arbitral Tribunal, Award of 17 September 2007, para. 406.

⁶⁸⁸ Paras. 3.72-3.73 and 7.89-7.101.

⁶⁸⁹ MM, 7.72-7.78.

6.100 The UK does not dispute this interpretation. Instead, it implausibly argues that the “MPA” does not address matters of pollution control. However, as explained in Chapters 3 and 7, that is incorrect. The “MPA”, like all other MPAs of comparable size and scope, is intended to address a range of matters, including marine pollution. Thus, insofar as the “MPA” purports to regulate marine pollution, or to protect the marine environment from pollution, it has done so without the UK having engaged in any attempt to harmonise its policies with Mauritius.

6.101 The UK claims that “it was Mauritius that refused to engage with the United Kingdom, not vice versa.”⁶⁹⁰ As described in Chapter 3, this is untrue. When establishing the “MPA,” the UK made no meaningful attempt to engage with Mauritius. It has made no attempt to harmonise marine pollution policies. Instead, the UK proceeded unilaterally and, as a result, breached Article 194(1).

(2) *Article 194(4)*

6.102 Article 194(4) requires the UK to refrain from unjustifiably interfering with activities carried out by Mauritius in the exercise of its rights in conformity with the Convention. It provides that:

“In taking measures to prevent, reduce or control pollution of the marine environment, States shall refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights and in pursuance of their duties in conformity with this Convention.

6.103 Since the “MPA” is intended to provide comprehensive environmental protection for the waters of the Chagos Archipelago, including its marine environment, Article 194(4) is applicable. Accordingly, any measures to “prevent, reduce or control” marine pollution may not unjustifiably interfere with Mauritius’ rights in the Chagos Archipelago. These rights include Mauritius’ historically acquired rights to the natural resources of the Chagos Archipelago, as well as the rights of Mauritius that the UK has undertaken to respect. Those rights, however, have been subjected to unjustifiable interference.

II. The UK’s Other Breaches of Obligations of Consultation

6.104 As set out in the Memorial, the UK has breached its obligations regarding consultations with respect to fishing on the high seas and in the EEZ of Mauritius in relation to straddling stocks and highly migratory species, as set out in Articles 63 and 64 of the Convention.⁶⁹¹

6.105 The UK denies that this is the case. It argues that the obligations described in Articles 63(2) and 64 apply only vis-à-vis the States fishing for such stocks, and that Mauritius is purportedly not one of those States. This is factually incorrect. As the facts

⁶⁹⁰ UKCM, para. 8.49.

⁶⁹¹ MM, 7.62-7.68.

set out in Chapter 2 show,⁶⁹² Mauritius is (a) a State fishing in the area adjacent to the EEZ within the meaning of Article 63(2), and (b) a State whose nationals fish in the region for the highly migratory species within the meaning of Article 64.

6.106 The UK is not aided by arguing that the co-operation called for by Articles 63(1) and 64 is to be fulfilled either “directly or through appropriate subregional or regional organisations” (Articles 63(1) and (2)) or “appropriate international organisations” (Article 64(1)). Plainly, the UK did not co-operate directly with Mauritius, and the UK does not attempt to assert otherwise. Nor did it co-operate via the IOTC. As Mauritius noted in the Memorial, the UK’s engagement with the IOTC in relation to the “MPA” was simply to inform the IOTC that the “MPA” was contemplated and that it “could have implications” for the organisation, without explaining them or seeking input from the IOTC or its Member States.⁶⁹³

6.107 To excuse its failure to consult, the UK argues that Article 116 of the Convention allows it to adopt conservation measures that have precedence over Mauritius’ rights under Articles 63 and 64. This is without foundation. Article 116 provides that:

“All States have the right for their nationals to engage in fishing on the high seas subject to:

...

(b) the rights and duties as well as the interests of coastal States provided for, inter alia, in article 63, paragraph 2, and articles 64 to 67...”

Contrary to the UK’s attempt to suggest otherwise, Article 116(b) does not elevate a coastal State’s conservation measures over the rights of a State engaged in fishing on the high seas. Rather, Article 116 accommodates these competing rights by referring back to Articles 63(2) and 64, which, as indicated, impose upon States the duty to consult. Accordingly, the UK cannot invoke Article 116 in order to escape that obligation.

6.108 With regard to the duty to consult as set out in Article 7 of the 1995 Agreement, the UK denies any such obligation. First, the UK contends that Article 7 does not apply because Mauritius is not a State “whose nationals fish for such stocks in the adjacent high seas area.”⁶⁹⁴ As demonstrated in Chapter 2,⁶⁹⁵ this argument is misplaced.

6.109 Second, the UK contends that it is not the UK which has an obligation to agree on compatible conservation and management measures, but rather that it is Mauritius which is obliged to take measures which are compatible with those taken by the UK.⁶⁹⁶

⁶⁹² Paras. 2.112-2129 above.

⁶⁹³ MM, 7.69-7.71.

⁶⁹⁴ UKCM, para. 9.18.

⁶⁹⁵ Paras. 2.112-2129 above.

⁶⁹⁶ UKCM, para. 9.19.

This is contrary to the ordinary meaning of Article 7, which makes clear in paragraph 2 that both “coastal States and States fishing on the high seas have a duty to co-operate for the purpose of achieving compatible measures in respect of [straddling and highly migratory fish stocks.]” The fact that this applies to both States is underlined by Article 7(3), which provides that “[i]n giving effect to their duty to co-operate, States shall make every effort to agree on compatible conservation and management measures within a reasonable period of time.” The UK, however, failed to make meaningful efforts to co-operate with Mauritius to try to agree on compatible conservation measures.

6.110 Third, the UK argues that Article 7(2) gives priority to conservation measures adopted by coastal States, overriding the obligation to co-operate with States fishing on the high seas. This is incorrect. As described above, Article 7(2) requires the co-operation of both coastal States and fishing States in regard to compatible conservation measures. If agreement cannot be reached, Article 7 does not give priority to conservation measures; rather, paragraph 3 directs the parties to the procedures for peaceful settlement of disputes, including the possibility of arbitration. Here, co-operation was not forthcoming from the UK.

6.111 Fourth, the UK argues that Article XVI of the IOTC Agreement gives the UK’s conservation measures precedence over Mauritius’s fishing rights. Article XVI provides that:

“This agreement shall not prejudice the exercise of sovereign rights of a coastal state in accordance with the international law of the sea for the purposes of exploring and exploiting, conserving and managing the living resources, including the highly migratory species, within a zone of up to 200 nautical miles under its jurisdiction.”

6.112 This does not relieve the UK from the obligation to consult with Mauritius. On the contrary, it confirms that the sovereign rights of a coastal State must be exercised in accordance with the international law of the sea, which, as already described, includes the obligation to consult.

6.113 Lastly, the UK argues that it has not breached Article 7 because the obligation to co-operate can be fulfilled either “directly or through appropriate subregional or regional fisheries management organisations.”⁶⁹⁷ Conceding that it did not co-operate directly with Mauritius, the UK argues that “the IOTC is the appropriate regional organisation through which both the UK (BIOT) and Mauritius have chosen to co-operate.”⁶⁹⁸ However, as indicated above, the UK did not engage the IOTC in co-operative efforts, but rather confined itself to informing the organisation of its plans.

⁶⁹⁷ UKCM, para. 9.22.

⁶⁹⁸ UKCM, para. 9.23.

III. Part XVI of the Convention: Article 300

6.114 In the Memorial, Mauritius demonstrated that, in addition to its other breaches of the Convention, the UK has also breached Article 300 because it has purported to exercise rights in ways that constitute an abuse of rights.⁶⁹⁹

6.115 The UK does not contest that Article 300 requires a State to balance the exercise of its rights “in a manner compatible with its various obligations arising either from treaties or from the general law.”⁷⁰⁰ Nor does it dispute the fact that the Convention’s prohibition on exercising rights in an abusive way is particularly important where “common space” and “matters of common concern” are concerned.⁷⁰¹ Further, the UK does not retract the position it took in the *Fisheries Jurisdiction* case, where it accepted that the “abuse of rights” doctrine has special importance where a coastal State exercises jurisdiction in waters that historically have been used by other States.⁷⁰²

6.116 Instead, the UK attempts to defend the “MPA” on the facts. None of its efforts is convincing, particularly in the light of the documents made available in the judicial review proceedings before the English courts, which are now available to this Tribunal. These documents make clear that the decision to adopt the “MPA” was taken by the UK Foreign Secretary against the advice of senior advisers, and that legal action by Mauritius was anticipated.⁷⁰³ The UK proceeded anyway. The extraneous political considerations which influenced the decision are clear from the discussion in Chapter 3, including the briefing paper presented by Colin Roberts to the UK Foreign Secretary on 5 May 2009.⁷⁰⁴ Under the heading “The Chagossian movements”, the paper states that “Assuming we win in Strasbourg (contingency for losing the case is dealt with in earlier submissions), we should be aiming to calm down the resettlement debate. Creating a reserve will not achieve this, but it could create a context for a raft of measures designed to weaken the movement.”⁷⁰⁵ The paper also discusses the “reputational / political

⁶⁹⁹ MM, paras. 7.81-7.99.

⁷⁰⁰ MM, para. 7.84 (quoting B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London: Stevens & Sons, 1953), 131, quoting in Michael Byers, “Abuse of Rights: An Old Principle, A New Age”, 47 McGill L.J. 389, 411 (2002)).

⁷⁰¹ MM, para 7.86 (quoting Michael Byers, “Abuse of Rights: An Old Principle, A New Age”, 47 McGill L.J. 389, 423 (2002)).

⁷⁰² MM, para. 7.86 (citing Memorial on the Merits of the Dispute Submitted by the Government of the United Kingdom of Great Britain and Northern Ireland, *Fisheries Jurisdiction (UK v Iceland)*, 1975 ICJ Pleadings, paras. 150, 153-154).

⁷⁰³ See paras. 3.31-3.71 above.

⁷⁰⁴ Paper submitted on 5 May 2009 by Colin Roberts, Director, Overseas Territories Directorate, to the Private Secretary to the Foreign Secretary, “Making British Indian Ocean the World’s Largest Marine Reserve?”: Annex 133.

⁷⁰⁵ When cross-examined about this part of the briefing paper, at the hearing in the case of *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2013] EWHC 1502 (Admin), Mr Roberts described this proposal as “speculative and hypothetical”, and stated that “it is suggesting that in a situation where the government has won its case in Strasbourg, we might want to present some evidence to help convince the supporters of resettlement that there is still a major problem.” Extract of Transcript, *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs*, Examination and Cross-Examination of Mr. Colin Roberts, 15-17 April 2013, Day 1, p. 150: Annex 174.

benefits” (“it should also help to promote a positive image of the overseas territories in the public’s mind and offset some of the negative associations with Diego Garcia”).⁷⁰⁶

6.117 The UK declared the “MPA” in the full knowledge that Mauritius possesses rights to the natural resources of the Chagos Archipelago, and notwithstanding Mauritius’ insistence that it be consulted in regard to the proposal. As noted above, this was done in the face of decades of consistent legal advice from the UK’s international lawyers about Mauritius’ rights.

6.118 Not only was the “MPA” contrary to longstanding legal advice and common acceptance of Mauritian rights, but it is now plain that there is no scientific or environmental justification to support the creation of the “MPA”, as announced. Prior efforts to manage the Archipelago’s fisheries had been successful. The Chagos Conservation Management Plan, which was prepared for the FCO by the environmental adviser to the “BIOT” in October 2003 states that, “Fisheries management provides a good example of successful management in BIOT. BIOT waters are one of the very few large areas of the Indian Ocean with demonstrable and beneficial husbandry.”⁷⁰⁷

6.119 Although the Counter-Memorial asserts that the “establishment of the MPA has followed detailed scientific consideration,” the UK fails to disclose that its own advisers on the management of the Chagos Archipelago’s fisheries, MRAG Ltd, strongly advised against adopting the “MPA”. MRAG warned that “[c]losure of the BIOT FCMZ will not address all conservation concerns, and that “after the initial political impact, the conservation outcomes of the closure are likely to fall short of expectations and may be negative in some cases.”⁷⁰⁸ In that regard, MRAG advised that the “MPA” would be likely to be “of limited applicability to highly migratory species such as tuna, which in the Indian Ocean follow an annual migration around the ocean and are in abundance in the BIOT FCMZ in the period November to February.” In fact, MRAG advised that the “MPA” could be counterproductive:

“Instead of providing protection of tunas the result of closure is likely to be displacement of fishing fleets and concentration of fishing elsewhere. In the Indian Ocean this problem is already exacerbated by the piracy spreading out from Somalia. The Somali problem illustrates what is currently happening and verifies this point – during 2009 the fishing

⁷⁰⁶ When cross-examined about this part of the briefing paper, at the hearing in the case of *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2013] EWHC 1502 (Admin), Mr Roberts stated: “I go back to the – one of the origins of our proposals in relation to strengthening environmental protection in the British Indian Ocean Territory. We recognised that the government was in a very difficult public position. Not only was there a great deal of political pressure relating to the Chagosian movement but we also were dealing with a series of allegations relating to rendition and we were looking to see what we could do to try and improve the reputation of the government in relation to the British Indian Ocean Territory specifically but also other territories.” Extract of Transcript, *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs*, Examination and Cross-Examination of Mr. Colin Roberts, 15-17 April 2013, Day 1, p.147 line 22: Annex 174.

⁷⁰⁷ UKCM, Annex 76, p. 8.

⁷⁰⁸ Email dated 9 July 2009 from Development Director of MRAG to Joanne Yeadon, Head of “BIOT” & Pitcairn Section, UK Foreign and Commonwealth Office, & “MRAG Comments on the proposal to designate the BIOT FCMZ as a marine reserve”: Annex 137.

fleets have remained fishing in the Mozambique Channel and have fished close to the BIOT EEZ at times when they would otherwise have been in the Somali EEZ, maintaining fishing despite the de facto Somali closure.”

6.120 Instead of reducing fishing in the waters of the Chagos Archipelago, MRAG warned that the “MPA” could increase illegal fishing, stating that “[c]losure of the BIOT FCMZ is likely to lead to an increased risk of illegal, unregulated and unreported (IUU) fishing activity, and therefore the costs of controlling this area are likely to be significantly greater than at present.” It explained that:

“Following early prosecution of IUU activity by industrial tuna fishing vessels shortly after the declaration of the BIOT FCMZ, and common knowledge that BIOT operates a patrol vessel and applies high fines, there has not been an IUU problem associated with tuna vessels (apart from minor infractions related to terms and conditions of licence). Offered licences to fish legally, it is not currently worth taking the risk of fishing illegally. Furthermore, it is in the interests of licenced vessels to report any illegal activity to the BIOT authorities, thus providing additional surveillance capacity to that of the BPV.

Should the FCMZ be declared a closed area, in the absence of the opportunity to fish legally, the incentive to fish illegally is increased, particularly if the perceived risk of detection is considered to be low. This implies the need for greater and faster patrolling capacity (more patrol vessels to cover the entire zone, faster to match the speed of tuna vessels). Remote vessel monitoring systems apply only to licensed vessels and would not necessarily be helpful in this respect, particularly if not turned on.

Currently the main IUU problem in BIOT is illegal fishing by Sri Lankan vessels, primarily within the shallow island and banks areas of the Chagos Archipelago (the most recent was on 1 July 2009). The declaration of BIOT as a closed area will have no impact on this IUU activity. A BPV will still be required to patrol the ‘inshore’ areas (and indeed other types of patrolling may be needed to address this IUU threat), and as noted above, greater potential for IUU fishing in the offshore areas would increase the requirements for patrolling.”

6.121 The UK’s suggestion that the “MPA” is based on a scientific evaluation simply cannot be reconciled with the views of the UK’s own fisheries advisers.

6.122 The abusive nature of the UK’s actions is accentuated by its refusal to engage in even minimal consultations with Mauritius, despite both the UK’s repeated acknowledgment of Mauritius’ rights and interests in the Chagos Archipelago, and Mauritius’ clear and frequently conveyed insistence that it be consulted. As noted above, the UK even declared the “MPA” despite the UK Prime Minister’s explicit commitment to his Mauritian counterpart that the “MPA” would be put “on hold.”

6.123 As is evident, the UK Foreign Secretary proceeded on his own accord and in the face of strenuous objections from the British High Commissioner in Port Louis and his senior advisers on the “BIOT”, who advised in the strongest of terms not to declare the “MPA”.⁷⁰⁹ Fully aware of Mauritius’ rights in the Chagos Archipelago, these advisers had no doubt that the UK’s action risked precipitating what the British High Commissioner referred to on 31 March 2010 – the eve of the declaration – as “a legal challenge to the MPA”⁷¹⁰ and what the “BIOT” Administrator the same day called the “threat of legal action.”⁷¹¹

6.124 The fact that the “MPA” was adopted for reasons other than environmental protection is evidenced by what the UK has done after it was declared, or more accurately, what it has not done. Mauritius’ Memorial pointed out that the UK’s failure to promulgate any laws or regulations to implement the “MPA” calls into question whether it is a *bona fide* environmental measure, especially in light of the UK’s 1 April 2010 declaration, which had announced that such laws and regulations would be enacted, and the fact that detailed laws and regulations have been promulgated for other MPAs of comparable size and scale.⁷¹² The Counter-Memorial merely states that “legislation implementing the MPA is being prepared.”⁷¹³ Conspicuously absent is any explanation for why, as of 15 July 2013, no such legislation had yet been enacted. Nor does the Counter-Memorial indicate when the necessary legislation will be adopted. Mauritius notes that as of the date of this Reply, the UK has still not promulgated any regulations, and invites the UK to explain in its Rejoinder the reasons for this omission.

6.125 The Memorial also observed that the failure of the UK to secure adequate funds to implement the “MPA” undermines the UK’s claims about its strictly environmental objectives.⁷¹⁴ In response, the Counter-Memorial confines itself to referring vaguely to a “public-private partnership between the BIOT Administration and private sector NGOs.” It notably does not provide any information about any budget for the “MPA”, or even say whether the funds that are said to be provided by the public-private initiative are enough to replace the revenue that was lost when the UK discontinued licensing non-Mauritian fishing vessels.

6.126 Mauritius’ Memorial also pointed out that the fact that the UK allows a substantial amount of fishing in the waters of the Chagos Archipelago, notwithstanding the “MPA”, raises doubts as to the effectiveness of the “MPA” and, therefore, its objectives. The Counter-Memorial attempts to minimise the extent of fishing,

⁷⁰⁹ Paras. 3.62-3.71 above.

⁷¹⁰ Email dated 31 March 2010 from John Murton, British High Commissioner to Mauritius, to Colin Roberts, Director, Overseas Territories Directorate and Joanne Yeadon, Head of “BIOT” & Pitcairn Section, UK Foreign and Commonwealth Office: Annex 156.

⁷¹¹ Email dated 31 March 2010 from John Murton, British High Commissioner to Mauritius, to Colin Roberts, Director, Overseas Territories Directorate and Joanne Yeadon, Head of “BIOT” & Pitcairn Section, UK Foreign and Commonwealth Office: Annex 156.

⁷¹² MM, paras. 7.93-7.98.

⁷¹³ UKCM, para. 8.63(a).

⁷¹⁴ MM, para. 7.95.

describing it as “very small.”⁷¹⁵ Although “small” is a relative term, it is fair to say that the UK stretches it beyond recognition by using it to refer to annual catches in the order of 28 tonnes.⁷¹⁶ That such considerable amounts of fish may be taken in what is ostensibly a “no-catch” zone does indeed suggest the “MPA” is not entirely a conservation measure. As Ms Yeadon observed on 14 July 2009, less than a year before the “MPA” was declared, “it would be difficult to impose any kind of no-take zone in the rest of BIOT waters but permit” recreational fishing “to carry on in [Diego Garcia].”⁷¹⁷ However, this is precisely what the UK elected to do.

6.127 In these circumstances, the abusive nature of the “MPA” is plain. In 1991, the British High Commissioner in Port Louis learned that the UK was contemplating the possibility of charging licensing fees to Mauritian vessels to fish in the waters of the Chagos Archipelago, a far less serious violation of Mauritius’ rights than the complete prohibition on fishing that is imposed by the “MPA”. He warned that, “I do not see how a convincing case can be made for charging Mauritian vessels for licences to fish in ‘BIOT’ waters,” and predicted that the proposal would open the UK to “charges of more than insensitivity.”⁷¹⁸ Among the reasons cited by the High Commissioner was: “Our 1965 obligation” in regards to “fishing rights.” He stated that:

“Whatever view the Legal Advisers takes it is clearly against the spirit of that agreement to charge Mauritian vessels on the same basis as all other vessels. You know it. I know it. The Mauritians will know it.”

In the event, the proposal, unlike the “MPA”, was never adopted.

6.128 In summary, nothing in the Counter-Memorial disproves the fact that the UK, by adopting the “MPA”, has engaged in an abuse of rights in breach of Article 300 of the Convention. The documents to emerge from the judicial review proceedings have confirmed it.

IV. Conclusion

6.129 In conclusion, nothing in the Counter-Memorial disproves that, as shown in the Memorial, the UK has breached the Convention. The documents to emerge from the judicial review proceedings in the English courts, which the UK elected not to bring to the Tribunal’s attention, confirm that its international responsibility has been engaged.

⁷¹⁵ UKCM, para. 8.63(d).

⁷¹⁶ MM, para. 4.84.

⁷¹⁷ Email exchange between Colin Roberts, Director, Overseas Territories Directorate, and Joanne Yeadon, Head of “BIOT” & Pitcairn Section, UK Foreign and Commonwealth Office, 13-14 July 2009: Annex 138.

⁷¹⁸ Letter dated 15 November 1991 from M.E. Howell, British High Commissioner to Mauritius, to [name redacted], East African Department, UK Foreign and Commonwealth Office: Annex 100.

CHAPTER 7: THE JURISDICTION OF THE TRIBUNAL

I. Introduction

7.1 The UK devotes three chapters of the Counter-Memorial to its argument that the Tribunal does not have jurisdiction over the dispute, or even any part of it. Chapter IV argues that the Tribunal has no jurisdiction over what the UK calls the “sovereignty claim”: Mauritius’ response to this claim is set out in Part II below. Chapter VI of the Counter-Memorial argues that the claim that the “MPA” is incompatible with the Convention “is not within the jurisdiction of the Tribunal”. This argument is addressed in Part III below. These matters are properly addressed in light of the facts and the legal arguments, which assist in understanding the proper characterisation of the dispute, and which make clear that all aspects of the dispute submitted by Mauritius to the Tribunal fall within its jurisdiction. The approach taken in this Reply follows the decision of the Tribunal to join the UK’s preliminary objections to the merits.

7.2 The UK’s remaining argument – that the requirements of Article 283 of the Convention have not been met in respect of those parts of the claim that are not related to the “sovereignty claim” – is addressed in Chapter V of the Counter-Memorial. This argument has been fully addressed in Chapter 4 of this Reply, which sets out the exchanges between the parties. The facts speak for themselves. On the basis of nothing more than the exchanges that took place between the Prime Ministers of the two countries in November 2009, and the developments that followed, the UK’s claim that the requirements of Article 283 have not been met is unarguable.

II. The Tribunal has Jurisdiction Over the Claim that the UK was not Entitled to Create the “MPA”

7.3 As set out in the following sections, the UK is quite wrong to claim that the Tribunal has no jurisdiction over the claim argued in Chapter 6 of the Memorial and Chapter 6 of this Reply. The UK’s argument is based on a series of presumptions that are not substantiated by the text of the Convention or its negotiating history. The correct approach to the interpretation and application of the Convention provides that a dispute, such as the present one, which includes a question of sovereignty falls within the dispute settlement system established under Part XV. There is nothing in the ordinary meaning of the Convention, to which the UK professes such attachment, to exclude the Tribunal from interpreting the words “coastal State”, as used in the Convention, and applying them to the facts of this case.

7.4 The claim by the UK that any dispute which includes a question of sovereignty is automatically excluded from the system established under Part XV is supported neither by the text of the Convention nor its *travaux préparatoires*. Indeed, to hold that there is such an automatic exclusion would realise the fears of numerous States during the negotiation of the Convention that the automatic exclusion from Part XV of any dispute involving a “claim to sovereignty” “would be used as a pretext for completely

excluding from the compulsory procedures all legitimate delimitation disputes.”⁷¹⁹ To accede to the UK’s argument would denude the Convention of much of its practical effect, and deprive the bodies charged with the resolution of disputes under the Convention – the International Tribunal for the Law of the Sea, the International Court of Justice and Annex VII arbitral tribunals – of an effective role.

(a) *Questions arising under Article 288(1)*

7.5 The Tribunal has, as the UK repeatedly emphasises,⁷²⁰ jurisdiction over any “dispute concerning the interpretation or application of this Convention” under Article 288(1). The UK contends that this is not such a dispute because there is a long-standing question between Mauritius and the UK regarding sovereignty over the Chagos Archipelago, a question which “has been the subject of extended exchanges over many years”.⁷²¹ The UK seeks to persuade the Tribunal that the fact that the UK disputes Mauritian sovereignty over the Chagos Archipelago precludes a finding that there is *any* dispute between the parties within the jurisdiction of the Tribunal. This should be a heavy burden to discharge.

7.6 It is for the Tribunal to characterise the dispute between the Parties, and in doing so to determine whether any aspects of that dispute fall outside its jurisdiction. Mauritius submits that there are no grounds for determining that any aspect of the dispute is beyond the Tribunal’s jurisdiction, based on an ordinary interpretation of the Convention.

7.7 As noted in the Memorial, the dispute between the Parties has two essential aspects:

- (i) The entitlement of the UK to proclaim a “Marine Protected Area” around the Chagos Archipelago; and
- (ii) The compatibility of that “Marine Protected Area” with the Convention.

Both matters are properly characterised as “concerning the interpretation or application” of the Convention. As regards the first, which is the most fundamental aspect of the dispute, the UK’s only possible legal basis to claim authority to enact a “Marine Protected Area” is that it claims the powers of a coastal State in the maritime areas surrounding the Chagos Archipelago, including the Exclusive Economic Zone and (up to 200 miles only) the continental shelf. Mauritius recalls again the recognition by Professor Alan Boyle (which is not challenged by the UK) that a dispute over a State’s entitlement to proclaim an EEZ is a question which can be addressed within the framework of the Convention:

⁷¹⁹ Adede, A.O., “The system for settlement of disputes under the United Nations Convention on the Law of the Sea: A drafting history and a commentary” (M. Nijhoff, 1987), Annex 93, 175.

⁷²⁰ UKCM, paras 4.2 and 4.15-17.

⁷²¹ UKCM, para. 4.3.

“Take a dispute involving EEZ claims around a disputed island or rock, such as Rockall, and the exercise of fisheries jurisdiction by one State within this EEZ. How do we categorise this dispute? Does it relate to the exercise of sovereign rights and law enforcement within the EEZ, excluded under Articles 297 and 298 from compulsory jurisdiction? Is it a maritime boundary dispute concerning the interpretation or application of Article 74 and excluded from binding compulsory jurisdiction under Article 298 if one of the parties has opted out under that Article? Does it necessarily involve disputed sovereignty over land territory so that even compulsory conciliation is excluded? Or is it a dispute about entitlement to an EEZ under Part V and Article 121(3) of the Convention? If it is the last, it is not excluded from compulsory jurisdiction under either Article 297 or 298. Much may thus depend on how our hypothetical dispute is put. If it is misuse of fisheries jurisdiction powers within the EEZ then it will surely be excluded under Article 297. But if it is an invalid claim to an EEZ contrary to Article 121(3) then it would appear not to be excluded.”⁷²²

Mauritius notes that the UK has not challenged the proposition that Article 297(1) of the Convention is concerned only with the exercise of sovereign rights or jurisdiction, not the entitlement to exercise such rights or jurisdiction. Mauritius does not contest any questions properly excluded under Article 297, and notes that the UK has not entered a relevant declaration “opting out” under Article 298(1)(a). In Professor Boyle’s terms, therefore, this dispute is one concerning, *inter alia*, “an invalid claim to an EEZ contrary to Article 121(3)”. Such a claim falls within the Convention. As Professor Boyle puts it:

“a dispute about entitlement to an EEZ under Part V ... is not excluded from compulsory jurisdiction under either Article 297 or 298.”⁷²³

The same point may be made in relation to the entitlement to submit information to the Commission on the Limits of the Continental Shelf. Mauritius notes that the UK has cited with approval Judge Wolfrum’s 2006 statement, speaking as President of ITLOS, that determinations of:

“entitlements over maritime areas ... concern the interpretation or application of the Convention and therefore fall within its scope.”⁷²⁴

7.8 The mere fact that this dispute necessarily raises questions of sovereignty, as further explained below, does not automatically exclude the Tribunal’s jurisdiction. The dispute is one concerning rights and obligations under the Convention; albeit that those

⁷²² Boyle, A.E., “Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction” (1997) 46 International and Comparative Law Quarterly, Annex 103, 44.

⁷²³ *Ibid.*, as cited at MM, para. 5.30.

⁷²⁴ UKCM, para. 4.58, citing speech of Judge Wolfrum given at the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, New York, on 23 October 2006.

rights or obligations can only be properly interpreted in light of general rules of international law and specific legal undertakings made by the UK.

(b) Questions arising under Article 288(2)

7.9 The UK relies on Article 288(2) of the Convention as part of its submissions on the characterisation of the dispute. In particular it contends that, as regards legal obligations raised by Mauritius in Chapter 6 of its Memorial, Mauritius could rely on those obligations:

“Only if the other rules of international law ... were contained in an agreement that provides for UNCLOS dispute settlement”⁷²⁵.

It will be recalled that those “other rules” include the norms associated with self-determination and the UK’s own unilateral undertakings regarding the living and non-living marine resources of the Chagos Archipelago. The UK’s argument mischaracterises both the relationship between the Convention and general international law, and the Convention’s plain words governing the applicable law in dispute resolution. It also ignores the applicable case-law under Part XV.

7.10 Article 288(2) states:

“A court or tribunal referred to in article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement.”

The words mean what they say and nothing more: international agreements related to the law of the sea may provide for dispute settlement under Part XV of the Convention. What Article 288(2) does not say is that other rules of public international law (“other rules”) may only be relied upon between parties to an existing dispute within Article 288(1) if those other rules are contained in an Article 288(2) agreement expressly providing for Part XV dispute settlement. To accept the UK’s argument is to turn Article 288(2) from a simple conferral of jurisdiction clause into a substantive limitation on the operation of Part XV.

7.11 This argument of the UK’s also flatly contradicts the plain words of Article 293(1) of the Convention:

“A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.” (Emphasis added)

Mauritius’ dispute with the UK involves, *inter alia*, a dispute as to whether the UK is “a” or “the coastal State” with respect to the Chagos Archipelago for the purposes of Part V of the Convention. If that is a dispute about the interpretation of the Convention

⁷²⁵ UKCM, para. 4.18.

and is therefore within the jurisdiction of the Tribunal (and Mauritius submits that it is), then on a plain reading of the text, the Tribunal shall apply other rules of international law not incompatible with the Convention.

7.12 This interpretation of the plain meaning of Article 293(1) is supported by the case law of ITLOS and other arbitral tribunals. In *MV Saiga (No. 2)* ITLOS found it had jurisdiction not only to adjudicate the legality of the arrest of the *Saiga* but the lawfulness of the force used in the course of that arrest, stating:

“In considering the force used by Guinea in the arrest of the *Saiga*, the Tribunal must take into account the circumstances of the arrest in the context of the applicable rules of international law. Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances.”⁷²⁶ (Emphasis added.)

On the same basis the Arbitral Tribunal in *Guyana v Suriname* held that Article 293 conferred upon it jurisdiction to adjudicate both “alleged violations of the United Nations Charter and general international law”, in addition to matters falling directly within the Convention.⁷²⁷ Suriname presented extensive arguments to the Tribunal offering a contrary view: they were unanimously rejected by the Tribunal.⁷²⁸ Self-evidently, neither the United Nations Charter nor rules of general international law make express provision for their use in UNCLOS dispute settlement. The contention of the UK that “other rules of international law” can only be relied upon to the extent they are “contained in an agreement that provides for UNCLOS dispute settlement” is thus contrary to both the plain words of the Convention and the established case law.

7.13 The only limitations arising under Articles 288(1) and 293(1) on the role of “other rules of international law” are that those rules are relevant to determining the dispute and are not incompatible with the Convention. It is hard to see how either norms of self-determination, or the UK’s own unilateral undertakings made from 1965 right up to Prime Minister Gordon Brown’s commitment to the Prime Minister of Mauritius in November 2009,⁷²⁹ are both: (a) irrelevant to the subject matter of the dispute; and (b) incompatible with the Convention. Indeed, both sources of legal obligation are relevant to the question of whether the UK may proclaim a “Marine Protected Area” surrounding the Chagos Archipelago without the consent of Mauritius (or, indeed, whether it may do so at all).

⁷²⁶ *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v Guinea)*, Judgment, ITLOS Reports 1999, p. 7, at para. 155.

⁷²⁷ *Guyana v Suriname*, Award of the Arbitral Tribunal, 17 September 2007, para. 406.

⁷²⁸ *Guyana v Suriname*, Rejoinder of Suriname, 1 September 2006, Vol. I, paras. 4.5-4.11; and Transcript, 13 December 2006, pp. 716-17.

⁷²⁹ Statement of Dr the Honourable Navinchandra Ramgoolam, Prime Minister of the Republic of Mauritius, 6 November 2013, Annex 183.

7.14 In any event, that other rules of international law may be relevant to the interpretation and application of a treaty upon which the jurisdiction of a Tribunal is founded is a commonplace. As the ICJ observed in the *Bosnian Genocide Case*:

“The jurisdiction of the Court is founded on Article IX of the Convention, and the disputes subject to that jurisdiction are those “relating to the interpretation, application or fulfilment” of the Convention, but it does not follow that the Convention stands alone. In order to determine whether the Respondent breached its obligation under the Convention, as claimed by the Applicant, and, if a breach was committed, to determine its legal consequences, the Court will have recourse not only to the Convention itself, but also to the rules of general international law on treaty interpretation and on responsibility of States for internationally wrongful acts”.⁷³⁰

The UK and Mauritius are in agreement regarding the principle that determining the legal consequences of a breach of a treaty provision will necessarily require recourse to the relevant rules of general international law.⁷³¹ Mauritius further agrees with the UK’s proposition that the interpretation of a treaty may well require, in accordance with Article 31(3)(c) of the Vienna Convention on the Law of Treaties, account to be taken of “any relevant rules of international law applicable in the relations between the parties”.⁷³² That is precisely what Mauritius has contended from the outset, especially as regards the UK’s unilateral Lancaster House undertakings.

7.15 The UK’s argument that Mauritius is relying upon Article 293(1) to attempt to expand the jurisdiction of the Tribunal misrepresents the case being put. Accepting the UK’s argument would mean that *no* principles of international law beyond the Convention could ever be argued before a Tribunal or Court having jurisdiction under Part XV unless those principles were independently contained in an agreement of the type contemplated by Article 288(2). The argument is impossible to reconcile with Article 293(1).

7.16 To observe further, as the UK does, that other rules of international law existing beyond the Convention cannot *per se* be the subject matter of a dispute within the scope of Article 288(1) is irrelevant.⁷³³ It is, again, an argument that simply ignores the plain words of Article 293(1). The UK argument would have merit only if the Tribunal determined this to be a case lacking any foundation in the Convention; the UK cannot, however, use Mauritius’ reliance on other sources of legal obligation in precisely the manner contemplated by Article 293(1) to plead that this is a dispute falling outside the scope of the Convention.

⁷³⁰ *Application of the Genocide Convention, Judgment (Merits)*, ICJ Reports (2007), para. 149, (emphasis added).

⁷³¹ UKCM, para. 4.30.

⁷³² UKCM, para. 4.35(b).

⁷³³ UKCM, para. 4.20.

7.17 The UK's further argument, put at some length, that an applicable law clause cannot expand the jurisdiction of an international tribunal is also beside the point.⁷³⁴ It ignores the case as put by Mauritius and is presented only, it appears, to bolster its misconceived argument that the Tribunal may not have recourse to sources of law beyond the Convention in interpreting and applying the Convention. The question is: having raised a dispute within the Convention, what law must a Part XV Tribunal apply in resolving the relevant issues? The answer is provided by the plain words of Article 293(1) along with the principle enunciated in the *Bosnian Genocide Case* and Article 31(3)(c) of the Vienna Convention on the Law of Treaties; it is not provided by the uncontroversial case law on jurisdiction rehearsed by the UK in its Counter-Memorial.⁷³⁵

(c) *Jurisdiction over issues of sovereignty under Part XV*

(1) *Introduction*

7.18 Despite the comments in the UK's Counter-Memorial that Part XV "is what it is", and the only question is one of construing "straightforward language",⁷³⁶ the UK nonetheless seeks to bring to the Convention a series of interpretative assumptions which are not supported either by the text or – to the extent of any ambiguity – by reference to the *travaux préparatoires*. Principal among these is the claim that in negotiating Part XV of the Convention it was "not intended [by negotiating States] to establish jurisdiction over long-standing disputes over territorial sovereignty" ("mixed disputes").⁷³⁷ Any assumption that there was clear agreement by the parties to the Convention to exclude questions of territorial sovereignty from the ambit of Part XV finds no support in the historical record; nor is it a view borne out by sustained scholarly argument.

7.19 One should note that scholars who assert there was such a clear agreement or understanding to exclude mixed disputes, such as Professors Oxman and Sohn, were often themselves part of national delegations to the UNCLOS diplomatic conferences which adopted a particular view. Their views on matters of historical context (rather than strict legal analysis) will thus inevitably be coloured by national understandings of, and positions taken during, the negotiations, including by them personally.

7.20 The UK has also sought to portray Mauritius' invocation of the Tribunal's incidental or ancillary jurisdiction over questions of territorial sovereignty as going a step beyond the concept of mixed disputes thus far debated in the literature, a category it asserts is limited to delimitation cases which raise incidental questions of sovereignty over territory. "Mixed disputes" is neither a term of art, nor is it a term found anywhere in the Convention. As noted at para. 7.7 above, there is ample authority for the

⁷³⁴ UKCM, paras. 4.20-4.29.

⁷³⁵ UKCM, paras. 4.21-29.

⁷³⁶ UKCM, para. 4.12.

⁷³⁷ UKCM, para 4.44(b).

proposition that a dispute regarding whether a State is entitled to proclaim an EEZ may both fall within Part XV and incidentally raise the question of sovereignty over “disputed islands”. The present facts are, of course, narrower than that hypothetical case, as the UK has expressly acknowledged in the Lancaster House undertakings (and subsequently) that Mauritius enjoys certain sovereign rights in relation to the Chagos Archipelago, and has reversionary rights over the Chagos Archipelago as a whole (the UK describes itself in internal materials that it has chosen not to share with the Tribunal as a “temporary freeholder”).⁷³⁸ Those undertakings are relevant to the interpretation of the UK’s Convention obligations, both as a matter of Article 31(3)(c) of the Vienna Convention on the Law of Treaties and Article 300 of the Convention (as explained in Chapter 6).

7.21 To appreciate fully why the UK’s argument is misconceived, it must be placed in the context of Part XV dispute settlement as a whole, to which Mauritius now turns.

(2) *The structure of Part XV dispute settlement*

7.22 The general structure of Part XV is straightforward. Article 286 provides that a court or tribunal under Part XV can hear “any dispute concerning the interpretation or application of this Convention” (emphasis added). The starting point, then, is that any question under the Convention which is not specifically excluded by other provisions falls within Part XV. For present purposes, there are only two relevant sets of limitations upon the jurisdiction of a Part XV court or tribunal:

- (i) the automatic limitations or exclusions found in Article 297; and
- (ii) the optional exclusions found in Article 298.

These provisions were subject to extensive negotiation, and represent a hard-fought compromise. As explained further below, the majority of States participating in the UNCLOS negotiations wanted a comprehensive dispute settlement system without any exclusions. Moreover, the dispute settlement provisions were generally understood to be a vital part of the package deal as a whole: the “exceptions [were] carefully determined in order to enhance the obligatory character of the settlement regime.”⁷³⁹ During the negotiations, numerous States spoke in favour of a system of compulsory dispute settlement as integral to the maintenance of the package deal, through upholding the delicate compromises embodied in the Convention and ensuring the uniformity of its interpretation.⁷⁴⁰

⁷³⁸ See para. 3.12 above.

⁷³⁹ Klein, N., *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge University Press, 2005), Annex 110, p. 21.

⁷⁴⁰ For example, in the Summaries of the 57th-65th Plenary Session meetings of the Third United Nations Conference on the Law of the Sea, Official Records Vol. V, UN Docs. A/Conf.62/SR.57-65, (Annex 76) see the comments of: El Salvador, V Official Records p. 9, para 10; Singapore, V Official Records p. 10, paras. 20 and 22; Sri Lanka, V Official Records p. 17, para 39; Denmark, V Official Records p. 19, para 54; Netherlands, Belgium and Luxembourg, V Official Records p. 22, para 11; Sweden, V Official

7.23 The limitations to jurisdiction found in Articles 297 and 298 should therefore be seen as precisely crafted, and the division of limitations upon jurisdiction between them should be seen as important in correctly interpreting the Convention. In particular, the placement of any limitation to jurisdiction in the Article 298 optional exclusions is clearly significant. The obvious inference where an express, textual limitation to jurisdiction is found only in Article 298 must be that, unless a State has exercised the option to exclude it, the relevant subject matter otherwise falls within a State party's compulsory dispute settlement obligations.⁷⁴¹

(3) *The placement and significance of the words “dispute[s] concerning sovereignty” in Part XV*

7.24 In assessing whether a Part XV Tribunal has jurisdiction over disputes which incidentally raise the question of sovereignty over an island, the key provision for interpretation is Article 298(1)(a)(i). This optional exclusion from jurisdiction exempts from the application of Part XV:

“disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission”.

Read literally, the effect of Article 298(1)(a)(i) is plain. First, it is an optional exception. Second, under it States may exclude jurisdiction over “sea boundary delimitations, or those involving historic bays or titles”. Third, where such an exclusion has been made either party to a covered dispute may nonetheless refer such disputes to conciliation (under Annex V, section 2). Fourth, the scope of such conciliation proceedings is limited to exclude “concurrent consideration of any unsettled dispute concerning sovereignty or other rights over ... land territory”. Put simply, Article 298(1)(a)(i) applies only where *inter alia*:

- (i) there is a delimitation dispute;

Records p. 30, para 2; Bangladesh, V Official Records p. 41, para 65; Philippines, V Official Records p. 42, para 85; Uruguay, V Official Records p. 43, para 88 and 91; Zambia, V Official Records p. 45, para 18; Ireland, V Official Records p. 47, para 5 and p. 48, para 12; Fiji, V Official Records p. 48, para 21 and p. 49, para 23; Canada, V Official Records p. 50, para 5; and Greece, V Official Records p. 51, paras 14 and 17.

⁷⁴¹ T. Treves, “What have the United Nations Convention and the International Tribunal for the Law of the Sea to offer as regards maritime delimitation disputes?” in R. Lagoni and D. Vignes (eds.), *Maritime Delimitation* (2006), p. 77 (UKCM, Authority 104).

- (ii) one party has exercised the Article 298 option to exclude such disputes from Part XV jurisdiction; and
- (iii) nonetheless, conciliation proceedings are commenced.

Then, and only in such a case, Article 298(1)(a)(i) has the effect that sovereignty disputes are excluded from those conciliation proceedings. The scope of the limitation on “concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory” is thus extremely limited.

7.25 The ordinary result of such a specific and limited exclusion is straightforward: unless the option in Article 298(1)(a)(i) is exercised to exclude such disputes from the scope of Part XV procedures, such disputes otherwise fall within Part XV. Professor Treves agrees that this logical *a contrario* argument from Article 298(1)(a)(i) prevents any sweeping assertion that mixed disputes do not fall within Part XV.⁷⁴² Thus, as Judge Rao has concluded, where not excluded under Article 298(1)(a)(i) “a mixed dispute, whether it arose before or after the entry into force of the Convention, falls within the jurisdiction of a compulsory procedure” under Part XV.⁷⁴³ Further, Judge Rao notes that if Part XV did not cover mixed disputes, this would “denude the provisions of the Convention relating to sea boundary delimitations of their full effect.”⁷⁴⁴

7.26 It is thus difficult to contend that this exceptionally limited reference – on its face applying only as a limitation to certain conciliation proceedings – was intended to reflect a general exclusion applying to the rest of the Convention. Certainly no such principle was agreed in the negotiations. While Article 298(1)(a)(i) was a minimum guarantee of participation for some States,⁷⁴⁵ it also represented the maximum possible concession for others who wanted the widest possible application of the Part XV compulsory dispute settlement system.⁷⁴⁶ This balance needs to be borne in mind in interpreting the effect which should be given to Article 298(1)(a)(i).

7.27 Before turning to the drafting history of Article 298(1)(a)(i) it is necessary to consider one further argument made by the UK. If the UK is right to suggest that the exclusion of territorial questions is vital to the consent to be bound of numerous parties to the Convention, one would expect that (if only out of an abundance of caution) every such State would make an Article 298(1)(a)(i) declaration. Only 27 States parties (of

⁷⁴² T. Treves, “What have the United Nations Convention and the International Tribunal for the Law of the Sea to offer as regards maritime delimitation disputes?” in R. Lagoni and D. Vignes (eds.), *Maritime Delimitation* (2006), p. 77 (UKCM, Authority 104).

⁷⁴³ Rao, P.C., “Delimitation Disputes under the United Nations Convention on the Law of the Sea: Settlement Procedures”, in T. M. Ndiaye and R. Wolfrum (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah*, (Nijhoff, 2007), Annex 114, p. 877. (As noted in MM, paras. 5.27-5.28.)

⁷⁴⁴ *Ibid.*, p. 891.

⁷⁴⁵ Nordquist, M.H., Rosenne, S. and Sohn, L.B., (eds), “United Nations Convention on the Law of the Sea 1982: A Commentary”, Vols. V, VI (Nijhoff, Dordrecht, 1989), Annex 94, pp. 87-88.

⁷⁴⁶ *Ibid.*, pp. 122 ff.

164 States parties plus the European Union) have done so.⁷⁴⁷ The UK also quotes Professor Oxman in 2007 as suggesting that “improvident speculation regarding the scope of the compulsory dispute settlement obligations under the Convention” and its coverage of mixed disputes could result in an increase in Article 298(1)(a)(i) declarations. Similarly, there was some academic speculation that Judge Wolfrum’s speech of 2006 might prompt such declarations.⁷⁴⁸ There have, however, been precisely four such declarations since 2006, and none more recently than 2009. Professor Oxman’s concerns would appear to have been overstated.

7.28 All of this suggests the obvious fact that the great majority of States participating in Convention negotiations did not favour the exclusion of mixed disputes, and were prepared to concede only a limited optional exception in Article 298(1)(a)(i) (which in the event relatively few States have exercised). This conclusion is borne out by the historical record. It is helpful to review the negotiations chronologically. Such a review demonstrates that any draft suggesting questions of sovereignty over territory should be automatically excluded from the dispute settlement system was contested and rejected. This history reveals that the consensus in negotiations only ever supported the idea of an optional exception to jurisdiction, allowing the exclusion of boundary delimitation disputes (and associated questions of sovereignty).⁷⁴⁹ *A contrario*, it must have been understood that such disputes would otherwise fall within the Convention’s dispute settlement system.

(4) *The drafting history of Article 298(1)(a)(i)*

7.29 As early as 1975, the substance of the final provision adopted in 1982 was clearly discernible in the drafts of the informal working group on the settlement of disputes. Included in the group’s 1975 draft list of possible categories of dispute which could be optionally excluded from the dispute settlement system was:

“(b) Disputes concerning sea boundary delimitations between adjacent States, or those involving historic bays or titles, provided that the State making such a declaration shall indicate therein a regional or other third-

⁷⁴⁷ Article 298(1)(a) declarations have been made by: Argentina, Australia, Belarus, Canada, Chile, China, Denmark, Ecuador, Equatorial Guinea, France, Gabon, Ghana, Iceland, Italy, Mexico, Nicaragua, Norway, Portugal, Republic of Korea, Palau, Russia, Slovenia, Spain, Thailand, Trinidad and Tobago, Tunisia and Ukraine. A useful table is provided in Keyuan, Z., “The International Tribunal for the Law of the Sea: Procedures, Practices and Asian States” (2010) 41 *Ocean Development and International Law* 131, Annex 149.

⁷⁴⁸ Buga, I., “Territorial Sovereignty Issues in Maritime Disputes: A Jurisdictional Dilemma for Law of the Sea Tribunals” (2012) 27 *The International Journal of Marine and Coastal Law* 59, Annex 168, pp. 59–95, 66 at n. 42.

⁷⁴⁹ Third United Nations Conference on the Law of the Sea, “Australia, Belgium, Bolivia, Colombia, El Salvador, Luxembourg, Netherlands, Singapore and United States of America: working paper on the settlement of law of the sea disputes”, Official Records Vol. III, 27 August 1974, A/CONF.62/L.7, Annex 75, (Australia et al), p. 85 at 92.

party procedure, [whether or not] entailing a binding decision, which it accepts for the settlement of these disputes.”⁷⁵⁰

7.30 The relevant paragraph from the Informal Consolidated Negotiating Text (ICNT) of 1977 prepared by the President of the Conference read:

“(a) Disputes concerning sea boundary delimitations between adjacent or opposite States, or those involving historic bays or titles, provided that the State making such a declaration shall, when such a dispute arises, indicate, and shall for the settlement of such disputes accept a regional or other third-party procedure entailing a binding decision, to which all parties to the dispute have access; and provided further that such procedure or decision shall exclude the determination of any claim to sovereignty or other rights with respect to continental or insular land territory.”⁷⁵¹

7.31 Comparison with the final text of UNCLOS 1982 shows that in the further five years of negotiation all that changed was:

- (i) the insertion of a direct cross-reference to articles 15, 74 and 83 concerning the delimitation of the territorial sea, EEZ and continental shelf; and
- (ii) the replacement of the requirement that the States concerned “accept a regional or other third-party procedure entailing a binding decision” with a requirement that they seek to negotiate and, failing that, have recourse to Annex V conciliation.

More importantly, the provision remained firmly placed in all negotiating texts among the optional exceptions to Part XV.

7.32 A running debate through the 1975-8 Geneva and New York sessions was conducted between, on the one hand, delegations which considered that maritime delimitation in general was not suitable for compulsory third party dispute resolution and, on the other hand, delegations calling for such sovereignty disputes to be subject to the Convention’s compulsory procedures. This division of views obviously made the idea of such disputes being subject to anything other than an optional exception unlikely to gain consensus.⁷⁵² In this context, extensive debates on the scope of the dispute settlement system were conducted in the 58th-65th plenary meetings in 1976. Not once

⁷⁵⁰ Platzöder, R. (ed), *Third United Nations Conference on the Law of the Sea: Documents* (New York: Oceana Publications, 1982), Annex 84, Article 17(3).

⁷⁵¹ Nordquist, M.H., Rosenne, S. and Sohn, L.B., (eds), “United Nations Convention on the Law of the Sea 1982: A Commentary”, Vols. V, VI (Nijhoff, Dordrecht, 1989), Annex 94, Vol VIII. 112 – 113.

⁷⁵² Adede, A.O., “The system for settlement of disputes under the United Nations Convention on the Law of the Sea: A drafting history and a commentary” (M. Nijhoff, 1987) Annex 93, pp. 60, 78-9, 88-89, 105, 108, 128-129, 132, 175.

in these debates was the exclusion of questions of title to territory (in any form) expressly raised.⁷⁵³

7.33 Nonetheless, in 1979 a proposal was raised in informal consultations on

“strengthening the exception relating to ‘mixed’ disputes involving both land and sea delimitation, namely, disputes ‘which necessarily involve a concurrent determination of any previously established conflicting claims to sovereignty over, or other rights with respect to, any continental or insular land territory’”.⁷⁵⁴

Thus, one of Professor Louis B. Sohn’s 1979 papers for the Informal Working Group on the Settlement of Disputes proposed moving the language now found at the end of Art 298(1)(a) into its own paragraph among the automatic exclusions to jurisdiction. This would have created an Article 297(1)(a)(bis) entirely excluding from the scope of Part XV “Disputes concerning sea boundary delimitations between States with opposite or adjacent coasts, which necessarily involve a concurrent determination of any previously established conflicting claims to sovereignty over, or other rights with respect to, any continental or insular land territory.”⁷⁵⁵ This proposal was, obviously, never incorporated into the Convention.

7.34 Indeed, proposals regarding the optional exclusion of maritime disputes from the scope of the dispute settlement system cast in similar language to the final Convention attracted significant criticism. A 1979 draft text on maritime delimitation dispute settlement prepared by the Chairman of Negotiating Group 7 would have allowed States optionally to exclude by declaration:⁷⁵⁶

“Disputes concerning sea boundary delimitations between States with opposite or adjacent coasts, or those involving historic bays or titles, provided that the State having made such a declaration shall, when, thereafter, such a dispute arises and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute ... accept submission of the dispute to the conciliation procedure provided for in Annex IV; and provided further that such procedure shall exclude the determination or any claim to sovereignty or other rights with respect to continental or insular land territory.”

⁷⁵³ Third United Nations Conference on the Law of the Sea, Summary Records of the 57th-65th Plenary Sessions, Official Records Vol. V, UN Docs. A/Conf.62/SR.57-65, Annex 76, pp. 8-54

⁷⁵⁴ Nordquist, M.H., Rosenne, S. and Sohn, L.B., (eds), “United Nations Convention on the Law of the Sea 1982: A Commentary”, Vols. V, VI (Nijhoff, Dordrecht, 1989), Annex 94, p. 121.

⁷⁵⁵ Platzöder, R. (ed), Third United Nations Conference on the Law of the Sea: Documents (New York: Oceana Publications, 1982), 27 March 1979, p. 438 at 440 (Annex 84).

⁷⁵⁶ “Report of the Chairman of Negotiating Group 7”, 20 April 1979, NG7/39, reproduced in: Platzöder, R. (ed), Third United Nations Conference on the Law of the Sea: Documents (New York: Oceana Publications, 1982): Annex 84, p. 459, 462.

7.35 Despite this formula being quite similar to the one finally adopted, Chile, speaking for a majority of participating States, objected in strong terms to a precisely because this drafting allowed for the optional exclusion of territorial disputes, saying in 1979:

“that almost all the proposals submitted to Negotiating Group 7 [on the question of maritime boundary disputes] contained a compulsory dispute settlement element. Unfortunately, the Chairman of the Group had selected a formulation for article 297 [now Article 298], paragraph 1 (a), which not only appeared to exclude compulsory settlement of [boundary] disputes but might even exclude compulsory conciliation. The formulation related only to future disputes; it established an obligation to agree to compulsory conciliation only within a “reasonable period of time” whose duration was not specified, and it contained no reference to settlement of disputes concerning territories and islands. In short, either on the grounds that all disputes involved past elements or a territorial element, or on the grounds that the “reasonable period of time” was not specified, a party would be able to exclude itself not only from the compulsory dispute settlement but also from compulsory conciliation.” (emphasis added).⁷⁵⁷

7.36 Chile further stated:

“The [original informal consolidated] negotiating text envisaged a compulsory system of settlement of disputes that had commanded the support of an ample majority which had also expressed its views in the Negotiating Group. Admittedly a fairly large minority had voiced objections to such a system and Mr. Sohn had suggested alternative solutions. The Chairman of the Group, however, was now suggesting a system of compulsory conciliation [regarding maritime boundary disputes] which would deal only with future disputes. Moreover, the compulsory nature of the conciliation was relative, because it was stated that the parties would be allowed “a reasonable period of time” to reach agreement and no specific time-limit for reaching agreement was fixed. Again, the [Chairman’s proposed] system did not cover disputes pertaining to territories or islands. The text proposed by the Chairman of the Group was not consistent with the opinion of the majority of the Conference or of the majority of the members of the Group itself; nor was it in keeping with three of the four formulations proposed by Mr. Sohn.”⁷⁵⁸

⁷⁵⁷ Third United Nations Conference on the Law of the Sea, Summary Records of the Plenary and Second Committee, Official Records Vol. XI, 112th Plenary Meeting, 25 April 1979, A/CONF.62/SR.112; 57th Meeting of the Second Committee, 24 April 1979, A/CONF.62/C.2/SR.57, 58th Meeting of the Second Committee, 24 April 1979, A/CONF.62/C.2/SR.58, Annex 80 (112th Plenary meeting), p. 11, para. 28.

⁷⁵⁸ *Ibid.*, (57th meeting of the Second Committee), p. 60, para. 49 (emphasis added).

Thus in Chile's view there was an "ample majority" supporting a compulsory dispute settlement system which: (a) did not allow for the optional exclusion of maritime delimitation disputes; and (b) did cover questions of sovereignty over territory. Other States noting the existence of "a clear majority in the discussion in favour of compulsory third-party adjudication" over maritime boundary disputes did not contest Chile's characterisation that the majority view was in favour of compulsory procedures in respect of maritime boundary delimitation, extending to encompass questions of sovereignty over territory.⁷⁵⁹

7.37 Therefore, to the extent that Article 298(1)(a) may be ambiguous (and Mauritius submits that it is not), it is clear that the majority of negotiating States favoured the application of the compulsory dispute settlement system to maritime delimitation disputes and questions of sovereignty. The plain inference that such disputes are included within the dispute settlement system unless optionally excluded under Article 298 is thus not contrary to the intention of the parties. Indeed, it would be contrary to the intention of the majority of negotiating States if such disputes were not covered by Part XV. That view explains why the exclusion of mixed disputes from the dispute settlement system is placed within the optional exceptions under Article 298.

7.38 The UK contends that:

"Even assuming in Mauritius' favour that article 298(1)(a) was correctly interpreted as implying that, where there is no article 298(1)(a) declaration, a court or tribunal may rule on matters of territorial sovereignty that arise incidentally where there is a maritime delimitation dispute under articles 15, 74 or 83 ... , it is inconceivable that States Parties to the Convention would have agreed to the determination of matters of territorial sovereignty that arose in other contexts without an equivalent opt out provision." (Emphasis added).⁷⁶⁰

The failure of negotiators to create a separate automatic exclusion from jurisdiction under Part XV, despite the question being directly raised in negotiations, should be fatal to this line of reasoning. No broader opt-out was included because no consensus could be reached that such an opt-out was desirable or necessary, beyond the very limited concession in Article 298(1)(a). Indeed, many negotiating States desired that there be precisely such an incidental jurisdiction, for fear that legitimate disputes would be excluded from the scope of the system merely because they included a territorial element.⁷⁶¹

⁷⁵⁹ *Ibid.*, (58th meeting of the Second Committee), p. 63, para. 4 (Peru); p. 64, para. 13 (Malta); Pakistan, para. 14 (expressly endorsing Chile's position) and para. 11 (Greece).

⁷⁶⁰ UKCM, para. 4.48.

⁷⁶¹ See the comments of Chile above, para. 7.35, and Adede, A.O., "The system for settlement of disputes under the United Nations Convention on the Law of the Sea: A drafting history and a commentary" (M. Nijhoff, 1987), Annex 93 p. 175.

7.39 In 1980 it was once again suggested in informal negotiations that the draft dispute resolution provisions be amended to include an automatic exclusion for disputes concerning questions of sovereignty over territory. The proposal envisaged:

“the exclusion of past or existing delimitation disputes as well as disputes relating to sovereignty over land or insular territories from the compulsory dispute settlement procedures and from compulsory submission to conciliation procedures as provided in article 298, paragraph 1(a). These should be included in article 296 [now article 297] with the other [general] exceptions in that article. The exclusion of future delimitation disputes by declaration would remain in article 298. Where no settlement had been reached, such disputes would be submitted to conciliation at the request of any party, and the other party would be obliged to accept this procedure.” (Emphasis added.)⁷⁶²

The President of the Conference noted that such “proposals to transfer, as general exclusions, the exclusions relating to past disputes or existing disputes and to disputes relating to sovereignty over land or insular territories, from article 298, paragraph 1(a), to article 297, could not be accepted.”⁷⁶³ As the President made clear in a note to the Dispute Settlement Group dated 6 August 1980: “Part XV, like the rest of the Informal Composite Negotiating Text/Revision 2 has been the product of long and intensive negotiations and incorporates compromises which have been carefully formulated. Precisely for that reason, it provides a complex interrelationship between its sections and its articles. The examination of the text must be on the clear understanding that the substance of the text should not be affected.”⁷⁶⁴

7.40 Further, as noted above, the possibility of such a “transfer” was considered by Negotiation Group 7, and no consensus on the point could be reached.⁷⁶⁵ This is important: the UK suggests that the wording is confined to Art 298(1)(a) simply because the focus of Negotiation Group 7 was “on the area of delimitation and maritime boundaries and the settlement of disputes thereon, which most obviously brought to the fore issues of territorial sovereignty”, and that this focus accounts for the positioning of the wording.⁷⁶⁶ This contention makes little sense in historical context. Negotiating Group 7 was concerned with the dispute settlement provisions generally: its remit was limited neither to disputes over “delimitation and maritime boundaries”, nor to the consideration of the provision dealing with optional exceptions. Its mandate was to consider the entire question of the limitations to be placed upon the Convention dispute

⁷⁶² Third United Nations Conference on the Law of the Sea, Official Records Vol. XIV, Report of the President on the work of the informal plenary meeting of the Conference on the settlement of disputes, 23 August 1980, A/CONF.62/L.59, Annex 81, p. 130, para. 6

⁷⁶³ Nordquist, M.H., Rosenne, S. and Sohn, L.B., (eds), “United Nations Convention on the Law of the Sea 1982: A Commentary”, Vols. V, VI (Nijhoff, Dordrecht, 1989), Annex 94, p. 132.

⁷⁶⁴ Platzöder, R. (ed), Third United Nations Conference on the Law of the Sea: Documents (New York: Oceana Publications, 1982), Annex 84, p. 239.

⁷⁶⁵ See also: P.C. Irwin, “Settlement of Maritime Boundary Disputes: An Analysis of the Law of the Sea Negotiations” (1980) 8 ODIL 105, 114-15 (UKCM, Authority 73).

⁷⁶⁶ UKCM, para. 4.66(b).

settlement system, including the question of which subject matters potentially warranted exclusion (to ensure maximum participation in the final Convention), and whether those subject matters should be placed among the automatic or optional exceptions to jurisdiction.

7.41 Further, the drafting history makes it clear that the parties rejected the option of changing “the exclusion of past or existing delimitation disputes as well as disputes relating to sovereignty over land or insular territories from the compulsory dispute settlement procedures” from an optional to an automatic exclusion from jurisdiction.⁷⁶⁷ The conclusion must be that the proposal had neither clear majority support nor any prospect of attracting consensus. The claims that:

- (i) the conference was virtually of one mind that such disputes should be excluded in all cases; or
- (ii) the reference in Article 298(1)(a) was the accidental result of myopic drafting and alternatives were not considered

are contrary to the record. The issue of the exclusion of disputes relating to sovereignty over territory was debated, alternatives were considered, and the text that resulted “is what it is”.⁷⁶⁸ The fact that that text provides only a limited and optional exception to the dispute settlement system is beyond serious dispute.

(5) *Interpreting the effect of Article 298(1)(a)(i) in textual and historical context*

7.42 In interpreting the Convention’s provisions on dispute resolution, its exceptions or exclusions should be construed with great care as, according to the Virginia Commentary: “the basic idea of the Conference was to limit to the maximum extent possible the available exceptions” (emphasis added).⁷⁶⁹ Indeed, the drafting history supports the idea that only a minority of States supported the idea of jurisdictional exclusions – and even then such States were typically preoccupied with preserving “exclusive” jurisdiction over the EEZ (the concern being that allowing the dispute resolution system to touch on their discretionary sovereign rights regarding resource management could subject all EEZ resource management decisions to international judicial review).⁷⁷⁰ Jurisdictional exclusions were only reluctantly conceded by other

⁷⁶⁷ Third United Nations Conference on the Law of the Sea, Official Records Vol. XIV, Report of the President on the work of the informal plenary meeting of the Conference on the settlement of disputes, 23 August 1980, A/CONF.62/L.59, Annex 81, para 6.

⁷⁶⁸ UKCM, para. 4.12.

⁷⁶⁹ Nordquist, M.H., Rosenne, S. and Sohn, L.B., (eds), “United Nations Convention on the Law of the Sea 1982: A Commentary”, Vols. V, VI (Nijhoff, Dordrecht, 1989), Annex 94, p. 115.

⁷⁷⁰ See the comments in Third United Nations Conference on the Law of the Sea, Summary Records of the 57th-65th Plenary Sessions, Official Records Vol. V, UN Docs. A/Conf.62/SR.57-65 (Annex 76) of: India, V Official Records, p. 18, para 44; Argentina, V Official Records, p. 18, para 48; Chile, V Official Records, p. 19, para 63; Iceland, V Official Records, p. 28, para 62; Peru, V Official Records, p. 33, para 37; Kenya, V Official Records, p. 34, para 49; Brazil, V Official Records, p. 35-36, para 63; Mauritius, V Official Records, p. 36, para 10; Ecuador, V Official Records, p. 39, para 44; Pakistan, V Official

States as part of the package deal. The majority of participants favoured wide application of the compulsory dispute settlement system⁷⁷¹ – and voices within that majority clearly considered that the system should apply to disputes concerning sovereignty over lands and islands.⁷⁷² Giving the exclusion found (and only found) in Article 298(1)(a) any effect going beyond its literal wording would be to distort the package deal.

7.43 Oxman may have contended (in 1980, in a footnote) that although:

“the exclusion for land territory disputes is drafted so that it does not literally apply to adjudication or arbitration under the Convention when a state does not elect to reject such procedures, it would seem that this is a mere drafting point. In any event, the same result seems implicit in the fact that the jurisdiction of a judicial or arbitral tribunal under the Convention is limited to the interpretation or application of the Convention. The Convention does not deal with questions of sovereignty or other rights over continental or insular land territory – questions that can hardly be regarded as incidental or ancillary”.⁷⁷³

7.44 But here Professor Oxman has had, effectively, to concede the point being defended: as a matter of the literal text “the exclusion for land territory disputes ... [from] adjudication or arbitration under the Convention” applies only where a State “elect[s] to reject such procedures” as provided for under the Convention. The UK has made no such election. Similarly, when a commentator such as Irwin argues against any *a contrario* inferences being drawn from Article 298(1)(a) by saying that “simple clarification of the fact that the optional exclusion and substituted procedure does not somehow operate to wipe out the otherwise automatically applicable territorial

Records, p. 45, para 21; Democratic People’s Republic of Korea, V Official Records, p. 47, para 2; United Arab Emirates, V Official Records, p. 49, para 32; and Senegal, V Official Records, p. 51, para 20.

⁷⁷¹ *Ibid.*, Australia, V Official Records, p. 10, para 18; Singapore, V Official Records, p. 10, paras 20 and 22; New Zealand, V Official Records, p. 11-12, para 35; Federal Republic of Germany, V Official Records, p. 12, para 37; UK, V Official Records, p. 15, para 17; Sri Lanka, V Official Records, p. 17, para 39; Denmark, V Official Records, p. 19, para 49; Mexico, V Official Records, p. 23, para 23; Cyprus, V Official Records, p. 26, para 49; Thailand, V Official Records, p. 27, para 52; Austria, V Official Records, p. 28, para 62; Republic of Korea, V Official Records, p. 29, para 70; Bulgaria, V Official Records, p. 29, para 80; Sweden, V Official Records, p. 30, para 3; USA, V Official Records, p. 31, para 18; Yugoslavia, V Official Records, p. 32, para 27; Poland, V Official Records, p. 33, para 34; Nigeria, V Official Records, p. 35, para 57 and 60; Bahrain, V Official Records, p. 36, para 6; Tunisia, V Official Records, p. 38, para 30; Hungary, V Official Records, p. 41, para 61; Bangladesh, V Official Records, p. 41, paras 65 and 69; Philippines, V Official Records, p. 42, paras 82 and 85; Uruguay, V Official Records, p. 43, paras 88 and 91; Zambia, V Official Records, p. 45, para 18; Ireland, V Official Records, p. 47, para 5 and p. 48, para 12; Fiji, V Official Records, p. 48, para 21 and p. 49, para 23; Canada, V Official Records, p. 50, para 5, 10-11; Greece, V Official Records, p. 51, para 14 and 17.

⁷⁷² See the position of Chile (speaking for a broader majority), para. 7.35 above, and Adede, “The system for settlement of disputes under the United Nations Convention on the Law of the Sea: A drafting history and a commentary” (M. Nijhoff, 1987), Annex 93, p. 175 (States feared such exclusions would be invoked to frustrate Part XV’s application to delimitation disputes).

⁷⁷³ B. H. Oxman, “The Third United Nations Conference on the Law of the Sea: The Ninth Session” (1981) 75 AJIL 211, 233 fn. 109 (UKCM, Authority 87).

exclusion”,⁷⁷⁴ this presupposes the object of his argument. One does not prove the existence of an “automatically applicable territorial exclusion” in the absence of any express textual provision by simply asserting its existence. Nonetheless, the great majority of commentators who hold that there is a general “territorial exclusion” do precisely that: they assert without reference to any compelling evidence that a consensus to that effect existed at the Convention negotiations.⁷⁷⁵

7.45 The UK further relies upon the first edition of Sohn and Gustafson’s *The Law of the Sea in a Nutshell*, for the general proposition that the Convention does not cover sovereignty disputes over territory.⁷⁷⁶ The relevant passage reads:

“mixed disputes, i.e., disputes involving the concurrent consideration of sea boundaries and of any unsettled dispute concerning sovereignty over any part of the mainland or over an island or group of islands will be totally exempt from dispute settlement under the Convention”.⁷⁷⁷

Without any analysis, this is proffered by the authors as a consequence of Article 298(1)(a). However, a different and preferable interpretation of the plain words of Article 298(1)(a) is offered in the second (and later) edition of *The Law of the Sea in a Nutshell*:

“Old boundary delimitation or historic bay disputes, i.e., those that arose before the entry into force of the LOS Convention, may be declared totally exempt from the LOS Convention’s third-party dispute settlement procedures. Disputes arising after the entry into force of the LOS Convention will, however, at least be subject to compulsory conciliation ... although “mixed” disputes that necessarily involve the concurrent consideration of sea boundaries and of any unsettled dispute concerning sovereignty over part of the mainland or over an island or group of islands are excluded from [such] submission to compulsory conciliation.”⁷⁷⁸ (Emphasis added.)

The reference to sovereignty-related claims is simply an exception to an exception excluding them from the conciliation procedure.⁷⁷⁹ This, on any plain reading, is all that Article 298(1)(a) provides. Reading its exclusion of “disputes concerning sovereignty”

⁷⁷⁴ P.C. Irwin, “Settlement of Maritime Boundary Disputes: An Analysis of the Law of the Sea Negotiations” (1980) 8 ODIL 105, 138-9 (UKCM, Authority 73).

⁷⁷⁵ E.g. K. Kittichaisaree, *The Law of the Sea and Maritime Boundary Delimitation in South-East Asia* (OUP 1987), 140 (UKCM, Authority 76) simply quotes Article 298(1)(a)(i) and, without any further explanation or textual analysis, baldly asserts: “Therefore, disputes over the sovereignty of the aforementioned islands or any other territorial disputes are not covered by the law of the sea.”

⁷⁷⁶ L.B. Sohn and K. Gustafson, *The Law of the Sea in a Nutshell* (1984), 244 (UKCM Authority 100).

⁷⁷⁷ *Ibid*, 244.

⁷⁷⁸ Sohn, L.B., Noyes, J.E., Gustafson Juras, K., Franckx, E., “Law of the Sea in a Nutshell” (2nd ed. West, 2010), Annex 150, p. 504 and compare p. 169.

⁷⁷⁹ Gautier, P., “The International Tribunal for the Law of the Sea: Activities in 2006” (2006) 5 Chinese Journal of International Law 389, 395, Annex 112, 389; Rao (above n. 25), 889.

across to the rest of the Convention would defeat the very careful crafting of the exclusions from jurisdiction within the dispute settlement system.

7.46 As the UK has put it, the Convention's language "is what it is".⁷⁸⁰ The Tribunal should be reluctant to give effect to a purported legislative policy that sovereignty disputes were to be excluded under all circumstances from Part XV when there is no evidence of any consensus in favour of such an approach. Indeed, there is evidence to the contrary. All that the majority were prepared to accept in negotiations on this point was the very limited exception actually found in the text. As for the purported value of the contemporaneous writings of commentators, some of whom were involved in the negotiations, the question is not what those individual negotiators subjectively intended or appreciated, but what the treaty drafters as a legislative body intended collectively, construed according to ordinary legal principles.⁷⁸¹

7.47 The result of the application of the ordinary principles of interpretation to Article 298(1)(a)(i) is plain. The reference to sovereignty disputes is an exception arising only within the optional clause allowing delimitation disputes to be excluded from the scope of the ordinary Part XV dispute settlement system (and giving rise instead to an obligation to negotiate and, failing that, have recourse to compulsory conciliation). The wording was deliberately placed among the optional, not the automatic, limitations to Part XV. The possibility of creating a separate automatic exclusion to Part XV covering sovereignty disputes was considered and rejected. Numerous States participating in the negotiations spoke out strongly in favour of the most comprehensive possible system of dispute settlement, including one covering sovereignty disputes, and Articles 297 and 298 must be seen, just as the rest of the Convention, as the result of "long and intensive negotiations and [as] incorporat[ing] compromises which have been carefully formulated".⁷⁸² Thus, to the extent that sovereignty disputes are not expressly excluded by Article 298, they may arise incidentally to any other dispute within the Convention. Any other conclusion risks revising the package deal and giving effect to the views of a handful of commentators (many of whom served on national delegations) that a consensus on point existed during the negotiations. Even the most cursory examination of the historical record shows that this was not the case.

(d) Conclusion

7.48 Mauritius' claim raises the question of whether the UK was entitled to declare the purported "MPA". That issue is one over which the Tribunal is entitled to exercise jurisdiction. The UK characterises its own situation as no more than a "temporary freeholder", and recognises the rights that Mauritius has in the waters around the Chagos Archipelago, including the right as a "coastal State" to make a submission to the Commission on the Limits of the Continental Shelf. It appears to accept that this case is

⁷⁸⁰ UKCM, para. 4.12.

⁷⁸¹ P. Allott, "Power Sharing in the Law of the Sea" (1983) 77 AJIL 1, 5 (UKCM Authority 45).

⁷⁸² Platzöder, R. (ed), Third United Nations Conference on the Law of the Sea: Documents (New York: Oceana Publications, 1982), Annex 84, p. 239 (Note from the President of the Conference to the Dispute Settlement Group dated 6 August 1980).

sui generis, and has identified no other analogous case. In such circumstances, the exercise of jurisdiction by the Tribunal over this aspect of the claim is entirely well-founded.

III. The Tribunal has Jurisdiction to Determine that the “MPA” is Incompatible with the Convention

7.49 In the alternative, even if the Tribunal should find that the UK is a coastal State, or that the Tribunal has no jurisdiction over that issue, the Tribunal has jurisdiction to decide whether or not the UK has, by purporting to establish the “MPA”, violated specific substantive provisions of the Convention.

(a) Introduction

7.50 This issue was addressed by Mauritius in Chapter 5 of the Memorial. This aspect of jurisdiction relates to the merits argument which was summarised at paragraph 5.2(ii) of the Memorial, namely that:

“[5.2] (ii) Independently of the question of sovereignty, the “MPA” is fundamentally incompatible with the rights and obligations provided for by the Convention, which means that, even if the UK were entitled in principle to exercise the rights of a coastal State, the purported establishment of the “MPA” is unlawful under the Convention.”

In the following paragraph of the Memorial Mauritius went on to explain that, in regard to this claim:

“there is no dispute between the parties that Mauritius has certain specific rights in relation to the maritime area over which the purported “MPA” is to be applied. Although the UK denies that Mauritius has sovereignty over the Chagos Archipelago, it has accepted that Mauritius has *inter alia* fisheries rights, rights in mineral resources, and rights in relation to the continental shelf (including the extended continental shelf). The dispute centres on the extent and consequences under the Convention of Mauritius’ rights, and the extent to which the purported “MPA” is compatible with them.”

Mauritius addressed these matters in more detail at paragraphs 5.15-5.19 and 5.35 of the Memorial, and in the arguments on the merits, in Chapter 7. Specifically, Mauritius there set out its arguments in support of the conclusion that the Tribunal has jurisdiction over *inter alia*:

- (i) the dispute concerning the interpretation and application of Articles 2(3), 194 and 300, which are not covered by Article 297; and
- (ii) the dispute concerning the interpretation and application of Article 55, 56(2), 62(5), 63(1) and (2), 64(1) and Article 7 of the 1995 Agreement,

as jurisdiction is provided by Article 297(1)(c) and is not excluded by Article 297(3)(a).

7.51 The UK response to these jurisdictional arguments is set out at Chapter VI of its Counter-Memorial. The UK argues that all of the claims set out in Chapter 7 of the Memorial “are excluded from the Tribunal’s jurisdiction by section 3 of Part XV” of the Convention.⁷⁸³ In order to make this argument, the UK in effect divides the issues into two. First, with regard to Articles 2(3), 55 and 56(2), 78, 194 and 300, the UK argues that there is no dispute, or no dispute that comes within the compulsory dispute settlement provision of Article 297. Second, with regard to all the other Articles under which a claim is made, the UK argues that the disputes are excluded by Article 297.

7.52 To succeed on this second point, the UK has the burden of proving that:

- (i) each cause of action relied upon by Mauritius regarding this second group of Articles concerns the interpretation or application of the Convention “with regard to the exercise by [the UK as] a coastal State of its sovereign rights or jurisdiction” provided for in the Convention” (Article 297(1)); and
- (ii) none of the parts of the dispute covered by the second group of Articles comes within subparagraphs (a), (b) or (c) of Article 297(1): that is, none of them relates to the freedoms and rights of other States mentioned in subparagraphs (a) and (b), and none of them relates to “specified international rules and standards for the protection and preservation of the marine environment ... established by [the Convention] or through a competent international organization or diplomatic conference in accordance with this Convention”] (Article 297(1)(c)); and
- (iii) the disputes covered by the second group of Articles concern “the interpretation or application of the provisions of [the] Convention with regard to fisheries” (Article 297(3)(a)).

7.53 The UK has failed to prove these three points. This is because, in regard to the third point, the UK’s attempt to exclude the dispute by reference to Article 297(3)(a) is premised on an erroneous assumption that the “MPA” is no more than a measure relating to “the living resources in the exclusive economic zone or their exercise”, and for that reason may be excluded from the jurisdiction of the Tribunal by operation of Article 297(3) of the Convention. As the UK puts it in the heading to Section C of Chapter 6, “Article 297(3)(a) excludes jurisdiction over MPA fisheries disputes” (emphasis added). The UK recognises that Article 297(3)(a) does not exclude the jurisdiction of the Tribunal over any aspect of the dispute that is not (in its words) a “fisheries dispute”.⁷⁸⁴ The UK has mischaracterised the “MPA”, to bring itself within the Article 297(3)(a) exception, and has the burden of persuading the Tribunal that the

⁷⁸³ UKCM, para. 6.2.

⁷⁸⁴ See *Guyana v Suriname*, Award, at para. 415 (“Sovereign rights over non-living resources do not fall under this exception.”)

“MPA” is no more than a fisheries measure, and that the dispute concerns “its sovereign rights with respect to the living resources in the [EEZ]”. The dispute is far wider than that.

7.54 Against this background, this Chapter proceeds by addressing a number of general matters. It then explains why the Tribunal has jurisdiction in respect of the claims under Articles 2(3), 194 and 300 of the Convention, none of which the UK seriously argues is to be excluded by Article 297. It then explains why the Tribunal has jurisdiction in relation to all the other claims, none of which are excluded by Articles 297(1)(c) and 297(3)(a), as the UK seeks to argue. The Chapter ends with some brief concluding observations.

(b) General observations: points of agreement

7.55 The exchange of the first round of pleadings indicates that the parties agree on a number of matters. They agree that the relevant provisions mandating compulsory dispute settlement are contained in Part XV of the Convention, and that the Tribunal’s jurisdiction turns on the interpretation and application of those provisions. They agree, too, that the Tribunal has jurisdiction to interpret and apply those provisions, in particular Article 297(1)(c) and 297(3)(a). The parties also agree that the Tribunal should interpret the provisions in accordance with “the ordinary meaning of the text of UNCLOS”, even if the UK prefers to depart from the ordinary meaning where that is unhelpful to its argument⁷⁸⁵ (for example, for jurisdictional purposes the UK now seems to want to treat the “MPA” as nothing more than a fisheries conservation measure, notwithstanding the fact that it has labelled the “MPA” a “nature reserve” that will protect biodiversity at sea and on “the land territory of the islands”: see further below).

7.56 The parties also agree on a number of factual points relevant to the legal framework of the Convention, namely that:

- (i) the UK declared the “MPA” unilaterally;
- (ii) the “MPA” governs *inter alia* the territorial sea (over which the UK claims sovereignty) and the EEZ and continental shelf up to 200 miles (over which the UK claims sovereign rights);
- (iii) the “MPA” does not purport to govern the continental shelf beyond 200 miles, over which the UK has not claimed sovereign rights; and
- (iv) as set out in Chapter 6, Mauritius has certain fishing, mineral and other rights within the maritime zones of the Chagos Archipelago.

7.57 In regard to the UK’s arguments more generally, it is appropriate to make three further points.

⁷⁸⁵ See UKCM, para. 6.71(c).

(1) *The Tribunal has jurisdiction to determine ‘entitlements’*

7.58 First, as noted in the earlier section, the UK has not challenged the proposition that Article 297(1) of the Convention is concerned only with the “exercise” of sovereign rights or jurisdiction, as distinguished from the entitlement to exercise such rights or jurisdiction.

(2) *The UK mischaracterises the “MPA”*

7.59 A second general observation with respect to Chapter 6 of the UK Counter-Memorial concerns its mischaracterisation of the “MPA”. The UK’s pleading proceeds on the erroneous basis that the “MPA” is to be characterised as a fisheries measure, relating solely to “the living resources in the exclusive economic zone or their exercise” so as to bring it within the Article 297(3) exclusions. In the heading of Section C of Chapter 6 of the Counter-Memorial, which is entitled “Article 297(3)(a) excludes jurisdiction over MPA fisheries disputes” (emphasis added), the UK implicitly recognises that Article 297(3)(a) does not exclude jurisdiction where the dispute is not a “fisheries dispute”. The UK has the burden of persuading the Tribunal that its “MPA” is no more than a fisheries measure. But the “MPA” plainly has a wider purpose.

7.60 When it established the “MPA” in 2010, the UK declared that:

“There is established for the British Indian Ocean Territory a marine reserve to be known as the Marine Protected Area, within the Environment (Protection and Preservation) Zone which was proclaimed on 17 September 2003”.⁷⁸⁶ (Emphasis added)

The announcement went on to state that detailed legislation and regulations governing the “MPA” marine reserve and “the implications for fishing and other activities” within it would be addressed in the future (emphasis added). It is plain that the aim of a genuine “marine reserve” is to protect and preserve the environment, in the sense “generally accepted in international law and practice”,⁷⁸⁷ and not to safeguard fisheries stocks to allow for their future harvesting. The purpose of the “MPA”, on the other hand, was not stated to be, and is not, “to conserve and manage living resources”.⁷⁸⁸

7.61 In its pleading, however, the UK adopts a different approach, obviously motivated by a desire to squeeze itself into the limited jurisdictional exceptions in Section 3 of Part XV. This effort gives rise to some striking inconsistencies in the Counter-Memorial. For example, as Chapter 6 proceeds on the basis that the “MPA” is nothing more than a fisheries measure, Chapter 3 describes the aims of the “MPA” as

⁷⁸⁶ MM, para. 4.79.

⁷⁸⁷ *Ibid.*, p. 462 (para. 71).

⁷⁸⁸ See *Fisheries Jurisdiction (Spain v Canada)*, 1998 ICJ Reports 432, at p. 461 (para. 70).

being to “encompass the land territory of the islands, as well as their internal waters and maritime zones”.⁷⁸⁹ It is difficult to see how a measure addressing the protection of biodiversity on land territory could properly be characterised as a fisheries measure. In announcing the “MPA”, the UK Foreign Secretary stated that “This measure is a further demonstration of how the UK takes its international environmental responsibilities seriously.”⁷⁹⁰ In describing the “MPA”, the UK has subsequently confirmed its broad aims as a measure intended to protect and preserve the marine environment; that “the decision to implement the MPA can only be fully understood against the background of the United Kingdom’s longstanding policy on the environment...and the growing international consensus on the role and necessity of marine protected areas”.⁷⁹¹ The UK has further stated that a new “MPA” Ordinance “is in the course of being prepared”, and that it will “replace the existing BIOT legislation protecting the environment, flora and fauna of the islands and their waters”.⁷⁹² Chapter 3 of the Counter-Memorial thus undermines the UK’s efforts to characterise the “MPA” as a fisheries conservation measure which is excluded from the jurisdiction of the Tribunal by Article 297(3).

(3) *The UK misunderstands Section 3 of Part XV*

7.62 The third preliminary point is that the UK proceeds on a misunderstanding of the scheme set up by Section 3 of Part XV. Article 297(1)(c) makes clear that disputes relating to international rules for the protection and preservation of the marine environment fall within compulsory jurisdiction. Article 297(3)(a) states the general principle that disputes “with regard to fisheries” are also subject to compulsory jurisdiction. As Sir Kenneth Keith put it in the Southern Bluefin Tuna Award, “the general run of fisheries disputes, such as the present, is not subject to the limitations in Section 3. Section 2, it is expressly said, continues to apply to them in full (article 297(3)).”⁷⁹³ That provision goes on to offer only a limited exclusion, in relation to any “dispute relating to [the UK’s] sovereign rights with respect to the living resources in the [EEZ]”. This is not properly to be characterised as such a dispute.

7.63 In support of its claim that it is such a dispute, the UK invokes the award in *Barbados v Trinidad & Tobago*. However, the Tribunal was there confronted with a different factual scenario and different legal arguments. The UK refers to paragraph 276 of the Award,⁷⁹⁴ but ignores the very next paragraph. There the Tribunal stated that “no dispute [relating to the coastal State’s sovereign rights with respect to the living resources in the exclusive economic zone] was put as such before the Tribunal”, and the pleadings of the parties were not directed to a dispute over their respective rights and duties in respect of the fisheries in the EEZ of Trinidad and Tobago. The UK relies on *obiter dicta* that were not the subject of argument by the parties. More significantly, the

⁷⁸⁹ UKCM, para. 3.3.

⁷⁹⁰ MM, Annex 166.

⁷⁹¹ UKCM, para. 3.5.

⁷⁹² UKCM, para. 3.3.

⁷⁹³ *Southern Bluefin Tuna Case, (Australia and New Zealand v Japan)*, Award of 4 August 2000, Separate Opinion of Justice Sir Kenneth Keith, para. 22.

⁷⁹⁴ UKCM, para. 6.38.

UK also ignores the fact that the Arbitral Tribunal in that case did proceed to exercise jurisdiction in respect of Article 63(1) of the Convention (a provision on which Mauritius relies),⁷⁹⁵ and ruled that Barbados and Trinidad & Tobago were “under a duty ‘to agree upon the measures necessary to co-ordinate and ensure the conservation and development’ of the flyingfish stocks”. The Tribunal further ruled that Trinidad & Tobago was “obliged to negotiate in good faith an agreement with Barbados that would give Barbados access to fisheries within the EEZ of Trinidad and Tobago, subject to the limitations and conditions spelled out in that agreement and to the right and duty of Trinidad and Tobago to conserve and manage the living resources within its jurisdiction”.⁷⁹⁶ That Award supports the proposition that procedural obligations found in Part V of the Convention (e.g. to negotiate; to consult; to co-operate) relating to the coastal State’s sovereign rights with respect to the living resources in the EEZ are not excluded from compulsory Part XV jurisdiction, because they are obligations that are distinct and are not to be equated to “sovereign rights ... or their exercise” in the EEZ.

7.64 Contrary to the position adopted by the UK, as the Award in *Barbados v Trinidad & Tobago* makes clear, this is not a dispute that falls within the limited exception provided by Article 297(3)(a). To the extent that a conflict might be said to arise between the Articles 297(1)(c) and 297(3)(a), it is easily resolved by looking at the object and purpose, as well as the nature, of the measure that gives rise to the dispute. If the measure is properly characterised as a fisheries conservation measure, then it might come within Article 297(3)(a); but if it is properly characterised as something else – a measure for the protection and preservation of the marine environment – then it falls within Part XV compulsory jurisdiction and is not excluded by Section 3.

7.65 Against this background, Mauritius turns to the Tribunal’s jurisdiction over individual claims.

(c) *The Tribunal has jurisdiction over the claims relating to violations of Articles 2(3), 55 and 56(2), 78, 194 and 300, which the UK does not argue to be excluded by Article 297*

7.66 The UK has made only a half-hearted attempt to argue that the Tribunal does not have jurisdiction to rule that the “MPA” violates Articles 2(3), 194 and 300, and

⁷⁹⁵ Article 63(1) provides: “Where the same stock or stocks of associated species occur within the exclusive economic zones of two or more coastal States, these States shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary to co-ordinate and ensure the conservation and development of such stocks without prejudice to the other provisions of this Part.”

⁷⁹⁶ Paras. 286 and 292; see also the Dispositif, at paragraph 385(3) of the Award (“Trinidad and Tobago and Barbados are under a duty to agree upon the measures necessary to co-ordinate and ensure the conservation and development of flyingfish stocks, and to negotiate in good faith and conclude an agreement that will accord fisherfolk of Barbados access to fisheries within the Exclusive Economic Zone of Trinidad and Tobago, subject to the limitations and conditions of that agreement and to the right and duty of Trinidad and Tobago to conserve and manage the living resources of waters within its jurisdiction.”)

Articles 55 and 56(2). These arguments are addressed in a short section of the Counter-Memorial entitled “Other claims over which the Tribunal has no jurisdiction”. These may be easily addressed.

a. Article 2(3)

7.67 At paragraph 5.18 of the Memorial, Mauritius made the point that “a dispute concerning the interpretation or application of the Convention with regard to fisheries in the territorial sea, for example, is subject to compulsory jurisdiction”. The UK has not challenged that interpretation, which is based on the ordinary meaning of the relevant provisions of the Convention (an interpretative principle to which the UK professes attachment: see Counter-Memorial, para. 6.71(c)), and does not argue that the jurisdiction of the Tribunal over Article 2(3) is excluded by Article 297 of the Convention. In respect of this issue, at least, the UK appears to accept the ordinary meaning of Article 297.

7.68 Nevertheless, the UK argues that there is no dispute as to the interpretation or application of Article 2(3).⁷⁹⁷ The arguments set out in Chapter 6 above make it clear that there is indeed a dispute in relation to the interpretation and application of Article 2(3). The UK argues that references to the words “other rules of international law” relate only to the definition of the legal regime of the territorial sea itself,⁷⁹⁸ and that accordingly no dispute falls within the jurisdiction of the Tribunal. This argument is misconceived.

7.69 The UK argues that Article 2(3) does nothing more than “state an obvious fact”,⁷⁹⁹ and claims that the provision does not incorporate other treaties or “unilateral undertakings” into the Convention.⁸⁰⁰ Mauritius disputes that interpretation, for the reasons set out in the Memorial and addressed in further detail in Chapter 6 of this Reply. The dispute over the meaning and application of Article 2(3) is one over which the Tribunal has jurisdiction.

7.70 For the reasons set out in Chapter 6, the UK derives no assistance from Article 293 of the Convention, or from the judgment of the International Court of Justice in the *Pulp Mills* case. Further, the views of the English Administrative Court, as set out in the *Bancoult* judgment of 11 June 2013, are wholly irrelevant, as the Court did not have before it the evidence available to this Tribunal. In any event, the English Court went out of its way to make clear that it did not wish to express any view on the nature of the dispute between Mauritius and the UK, which it stated was entirely a matter for this Tribunal.⁸⁰¹

⁷⁹⁷ UKCM 6.62

⁷⁹⁸ *Ibid.*

⁷⁹⁹ UKCM, para. 6.62.

⁸⁰⁰ *Ibid.*

⁸⁰¹ *R (Bancoult) v Secretary of State for Foreign Affairs and Commonwealth Affairs* [2013] EWHC 1502 (Admin) [153]: “If and to the extent that Mauritius wishes to assert such rights, it can do so in the context of the claim that it has brought against the UK under UNCLOS. That arbitration is the appropriate forum

b. Article 55 and 56(2)

7.71 Article 56(2) of the Convention imposes on the UK the obligation to have “due regard to the rights and duties of [Mauritius]” and to act “in a manner compatible with the provisions of the Convention”. As set out in Chapter 6, in purporting to exercise rights to protect and preserve the marine environment, pursuant to the jurisdiction granted by Articles 55 and 56(1)(b)(iii), the UK has violated the rights of Mauritius in relation to minerals, fisheries and other resources, including in relation to the substantive rights of Mauritius and procedural right of co-operation and consultation arising under other rules of international law (under Article 293). The UK has violated Article 56(2) by failing to act compatibly with the Convention, *inter alia* by unjustifiably interfering with activities carried out by Mauritius (Article 194(4)) and failing to co-operate directly with Mauritius (Article 63(1)). The full details are set out in Chapter 6 of this Reply.

7.72 The provisions violated by the UK – *inter alia* Articles 56(2), 63(1) and 194(4) – are “specified international rules and standards for the protection and preservation of the marine environment” which are applicable to the UK and established by the Convention. The requirements of these provisions, and the respects in which they have been violated by the UK, are set out in Chapter 6. The claim that Article 56(2) has been violated is therefore covered by Article 297(1)(c) of the Convention and falls within compulsory dispute settlement under section 2 of Part XV.

7.73 As the dispute relates to “specified international rules and standards for the protection and preservation of the marine environment” and is not a dispute “relating to sovereign rights with respect to living resources in the [EEZ]”, Article 297(3)(a) does not operate to exclude the jurisdiction of the Tribunal. Even if it could be hypothesised, *quod non*, that some part of the dispute concerning the “MPA” might be said to relate to “sovereign rights with respect to living resources in the [EEZ]”, jurisdiction is not excluded in relation to non-living resources, or procedural obligations relating to consultation and cooperation.

c. Article 78

7.74 As set out in Chapter 6, the proposed “MPA” also violates the rights of Mauritius in respect of the continental shelf, as provided by Part VI of the Convention. In particular, there is a violation of the right to harvest sedentary species, in accordance with Article 78(2) of the Convention.⁸⁰² The specificity of this claim has only become clear in light of the proposed “MPA” as a nature reserve. To the extent that such a claim may be characterised as a dispute “with regard to fisheries”, it falls within the jurisdiction of the Tribunal by operation of Article 297(3)(a). To the extent that it is to

for the determination of such an issue. This court should, moreover, avoid any pronouncement that might compromise the position of the UK in those proceedings”.

⁸⁰² Paras. 6.91-6.96 above.

be characterised as a dispute with regard to the exploitation of natural resources of the continental shelf (see Article 77(1)) then the claim falls within the jurisdiction of the Tribunal by operation of Article 297(1)(c).

d. Article 194(1) and (5)

7.75 The UK does not dispute the principle that the Tribunal has jurisdiction in relation to a dispute concerning Article 194 of the Convention, and that section 3 of Part XV cannot operate to exclude such a dispute. Instead, the UK asserts in Chapter VI (without a single reference to Mauritius' Memorial), that "[s]ince there is no dispute between the parties about international rules and standards concerning pollution of the marine environment ... the Tribunal cannot have jurisdiction under Article 297(1)".⁸⁰³ The Counter-Memorial provides no further assistance in Chapter VIII on the merits, when it offers an entirely circular argument, simply asserting that "as follows from Chapter VI above, Article 194(1) is not applicable in the circumstances of the current case".⁸⁰⁴

7.76 The Tribunal will note the circularity of the UK argument: the Tribunal does not have jurisdiction because there is no dispute, and there is no dispute (the UK asserts) because Article 194(1) is not applicable. As set out in more detail in Chapter 6,⁸⁰⁵ Article 194(1) is applicable, and prohibits the UK from adopting a measure which purports to protect and preserve the marine environment of the islands, the territorial sea and the maritime areas beyond the territorial sea, without taking the necessary steps to "endeavour to harmonise" its policy with Mauritius, having regard to the rights of Mauritius in those maritime areas.

7.77 Moreover, as noted in Chapter 6, Article 194(4) of the Convention requires the UK to

"refrain from unjustifiable interference with activities carried out by [Mauritius] in the exercise of [its] rights ... in conformity with [the 1982] Convention".

As set forth in Chapter 6, the purported establishment of the "MPA", which is intended to prevent all activities in the territorial sea and the area beyond, *inter alia* to protect biodiversity, is an unjustifiable interference with Mauritius' rights under the Convention.

7.78 There can be no doubt, therefore, that there is a dispute in relation to Article 194, that the Tribunal has jurisdiction to resolve that dispute under Article 288, and there is nothing in Section 3 of Part XV to exclude such jurisdiction.

e. Article 300: abuse of rights

⁸⁰³ UKCM, para. 6.22.

⁸⁰⁴ UKCM, para. 8.49.

⁸⁰⁵ Paras. 6.91-6.101 above.

7.79 The UK argues that Article 300 “does not purport to give rise to an independent basis for the compulsory settlement of disputes”, and that “if the Tribunal lacks jurisdiction to decide the dispute, invoking Article 300 will not rectify the problem”.⁸⁰⁶ The argument is misconceived and easily rebutted: the Tribunal has jurisdiction under Article 288 to resolve the dispute in relation to Article 300, and the UK accepts that Section 3 of Part XV does not operate to exclude the exercise of jurisdiction.

7.80 In support of its argument, the UK invokes paragraph 137 of the judgment of ITLOS in the *M/V “Louisa”* case, where the Tribunal ruled that:

“it is apparent from the language of article 300 of the Convention that article 300 cannot be invoked on its own. It becomes relevant only when ‘the rights, jurisdiction and freedoms recognised’ in the Convention are exercised in an abusive manner”.⁸⁰⁷

Mauritius notes that ITLOS has adopted a ‘plain meaning’ interpretation of that provision, and has done so correctly. Proceeding on the basis there set out, it is readily apparent that the UK’s “rights, jurisdiction and freedoms” recognised in the Convention have been exercised in an abusive manner. One need only have regard to the “rights, jurisdiction and freedoms” set out in Article 2(3) of the Convention, the dispute over which plainly falls within the jurisdiction of the Tribunal, to recognise that the violation of the rights of Mauritius in the territorial sea gives rise to an additional cause of action under Article 300. This is compounded by the obligations of the UK under Article 194(4) of the Convention to refrain from unjustifiable interference with activities carried out by [Mauritius] in the exercise of [its] rights ... in conformity with [the 1982] Convention].”

7.81 As set out in Chapter 3 of this Reply, the evidence shows that the UK established the “MPA” for reasons which were far from limited to a desire to protect the marine environment, but included a range of extraneous political objectives. Mr Colin Roberts made clear some of those reasons.⁸⁰⁸ The new evidence available to the Tribunal, which the UK failed to disclose, shows that the decision to establish the “MPA” was taken by the UK Secretary of State, Mr David Miliband (acting alone and directly against advice received from his advisers in London and from the UK High Commissioner in Mauritius) ignored the environmental and legal advice and must thus be presumed to have been taken for other reasons.⁸⁰⁹

⁸⁰⁶ UKCM, paras. 6.63 and 6.64.

⁸⁰⁷ UKCM, 6.65; *MV Louisa (Saint Vincent and the Grenadines v. Kingdom of Spain)* Judgment of 28 May 2013 para. 137.

⁸⁰⁸ Paper submitted on 5 May 2009 by Colin Roberts, Director, Overseas Territories Directorate, to the Private Secretary to the Foreign Secretary, “Making British Indian Ocean Territory the World’s Largest Marine Reserve” (version with fewer redactions): Annex 132; para. 3.34 above.

⁸⁰⁹ See Chapter 3 above.

7.82 With regard to the arguments made by the UK as to the “high threshold for abuse of rights claims”, that is not a matter that goes to the Tribunal’s jurisdiction under Article 300, but rather to the merits. It is addressed in Chapter VI.⁸¹⁰

(d) *Conclusions on jurisdiction under Articles 2(3), 78, 194 and 300, and 55 and 56(2)*

7.83 The UK accepts that the Tribunal has jurisdiction under Article 288 to resolve the disputes concerning the interpretation and application of Articles 2(3), 194 and 300 of the Convention. It does not argue that such jurisdiction is excluded by Section 3 of Part XV of the Convention. Such other arguments as it makes in support of the view that the Tribunal should not exercise its jurisdiction under Article 288 are manifestly ill-founded and should be rejected. In short, there is no real difference between the parties that the Tribunal is entitled to exercise jurisdiction in respect of the dispute to the extent that the “MPA” does not concern fisheries matters. With respect to those matters, the UK makes arguments in relation to Section 3 of Part XV, and it is to these matters that Mauritius now turns.

(e) *The Tribunal’s jurisdiction over violations of other provisions of the Convention is not excluded by Section 3 of Part XV*

7.84 The main thrust of the UK’s arguments in Chapter 6 of its Counter-Memorial is premised on the claim that the “MPA” is merely an EEZ fisheries measure. Thus, the chapter devotes five sections to jurisdictional arguments (sections B to F), of which all but one (section F) treat the dispute as a fisheries matter. The headings used by the UK are indicative of its approach.⁸¹¹

7.85 The UK seeks to transform the dispute over the creation of a “nature reserve” into a dispute over fisheries. To achieve this, the UK seeks to limit the dispute, firstly by characterising the “MPA” as nothing more than a fisheries measure, and secondly by attributing to Mauritius nothing more than fishing rights in the Chagos Archipelago. On this basis, the UK argues that the Tribunal has no jurisdiction over those parts of Mauritius’ case relating to Articles 62(5), 63(1), 63(2) and 64(1) of the Convention, and Article 7 of the 1995 Agreement.

7.86 The UK’s arguments are misconceived. The “MPA” is not a fisheries measure, and Mauritius has far more than just fishing rights, including the rights of a coastal State that relate to the resources on sea-bed and subsoil (up to and then beyond 200 miles).

7.87 The UK advances two arguments in support of its attempt to evade jurisdiction. Firstly, it argues that Article 297(1)(c) “does not confer jurisdiction over MPA Fisheries Disputes”, and exclusively provides for jurisdiction under section 2 of Part XV of the

⁸¹⁰ Paras. 6.114-6.128 above.

⁸¹¹ Section B, for example, is headed “Article 297(1)(c) does not confer jurisdiction over MPA Fisheries Disputes”; Section C is titled “Article 297(3)(a) excludes jurisdiction over MPA fisheries disputes” (emphases added).

Convention in relation to disputes that concern “the protection and preservation of the marine environment”, which the UK claims is limited to obligations arising under Part XII of the Convention.⁸¹² Secondly, the UK argues that jurisdiction in relation to the dispute over the establishment of the “MPA” is precluded by the terms of Article 297(3)(a), which “excludes jurisdiction over MPA fisheries disputes”.⁸¹³

7.88 These arguments are misconceived:

- (i) To the extent that any part of the dispute is “with regard to the exercise by [the UK] of its sovereign rights or jurisdiction” (and Mauritius disputes that the UK is entitled to any sovereign rights or jurisdiction), jurisdiction is confirmed by Article 297(1)(c), because the UK has “acted in contravention of specified international rules and standards for the protection and preservation of the marine environment ... which have been established by [the Convention]”: such rules and standards include, by way of example, Mauritius’ right under Article 194(1) and (4) not to be subject to “unjustifiable interference” by the adoption of the “MPA”, which is a measure to prevent, reduce or control pollution of the marine environment.
- (ii) To the extent that it is argued that Article 297(3)(a) is relevant to any aspect of the dispute:
 - (a) that provision does not operate to exclude jurisdiction over any elements of the “MPA” that are not “with regard to fisheries”, such as, *inter alia*, the natural resources of the sea-bed and subsoil up to and beyond 200 miles (including sedentary species as per Articles 68 and 77(4)), which are not to be treated as living resources in the EEZ;
 - (b) nor does Article 297(3)(a) exclude elements “with regard to fisheries” outside the EEZ (i.e. in relation to the territorial sea and in relation to areas beyond the EEZ).
 - (1) *The Tribunal has jurisdiction over disputes concerning the “MPA” because they are disputes relating to the “protection and preservation of the marine environment” under Article 297(1)(c)*

7.89 Article 297(1)(c) provides in positive terms that an Annex VII Tribunal has jurisdiction over disputes concerning “specified international rules and standards for the protection and preservation of the marine environment”. Environmental protection is addressed in Part V (e.g. at Article 56(b)(iii)), and in Part XII, which is entitled “Protection and Preservation of the Marine Environment”. That Part includes Article 194(5), as the UK notes,⁸¹⁴ which provides that the measures taken for the “protection

⁸¹² UKCM, paras. 6.28-6.31

⁸¹³ UKCM, paras. 6.32-6.39.

⁸¹⁴ UKCM, para. 6.28.

and preservation of the marine environment” in Part XII include “those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life”.

7.90 It is evident that the “MPA” has been established to “protect and preserve” the marine environment of the Chagos Archipelago. Its lawfulness under the Convention falls to be considered by reference, *inter alia*, to Parts V, VI and XII of the Convention, and not just the fisheries conservation provisions of Part V, as the UK mistakenly asserts in its Counter-Memorial. The UK ignores those rules in Part V regarding its right to adopt measures relating to “the protection and preservation of the marine environment” (see Article 56(1)(b)(iii): “in the exclusive economic zone, the coastal state has ... jurisdiction ... with regard to ... the protection and preservation of the marine environment”).

7.91 The “MPA” has been established pursuant to Article 56(b)(iii), for the reasons noted above. In accordance with its general practice, the UK treats the “MPA” as an environmental protection measure, not a fisheries measure. Natural England, which is the “executive non-departmental public body” responsible for these matters and reports to the Secretary of State for the Environment, Food and Rural Affairs, is the UK Government’s principal advisor on MPAs. It characterises an MPA as an “environmental management measure”, not a fisheries conservation measure. Its web site states that:

“Marine Protected Areas (MPAs) are zones of the seas and coasts where wildlife is protected from damage and disturbance. The Government is committed to establishing a well-managed ecologically coherent network of MPAs in our seas.”⁸¹⁵

7.92 According to Natural England, an MPA is used to “promote the recovery and conservation of marine ecosystems”, including “habitats and species”, with a view to “achieving biodiversity goals”. In addressing the question of why MPAs are needed, Natural England describes MPAs as being:

“essential for healthy, functioning and resilient ecosystems – they help us deliver the Government’s vision of a clean, healthy, safe, productive and biologically diverse oceans and seas. Some human activities damage or cause disturbance to marine habitats and their species. Within an MPA such activities will be managed or restricted.

Specifically, MPAs enable us to:

- Protect and restore the ecosystems in our seas and around our coasts.
- Ensure that the species and habitats found there can thrive and are not threatened or damaged.

⁸¹⁵ Natural England, Marine Protected Areas, Definition, 11 November 2013, Annex 184.

- Maintain a diverse range of marine life that can be resistant to changes brought about by physical disturbance, pollution and climate change.
- Provide areas where the public can enjoy a healthy marine environment learn about marine life and enjoy activities such as diving, photography, exploring rock pools and coastal walking.
- Provide natural areas for scientific study.”

7.93 It is readily apparent that an MPA is not a fisheries measure, and that it encompasses pollution and a whole raft of human activities totally unrelated to fisheries. Such other activities might include tourism, navigation, energy generation and mineral resource exploitation. All of these activities are affected by the creation of a nature reserve.

7.94 The approach actually adopted by the UK Government (as distinguished from the way it has been characterised in the Counter-Memorial) is entirely consistent with international standards. In 2004 the Conference of the Parties to the Convention on Biological Diversity adopted *Decision VII/5 on Marine and Coastal Biological Diversity*. It drew on a definition of marine and coastal protected areas adopted by an Ad Hoc Technical Expert Group:

“‘Marine and coastal protected area’ means any defined area within or adjacent to the marine environment, together with its overlying waters and associated flora, fauna and historical and cultural features, which has been reserved by legislation or other effective means, including custom, with the effect that its marine and/or coastal biodiversity enjoys a higher level of protection than its surroundings.”⁸¹⁶

7.95 The definition makes clear that an MPA is directed to the protection of biodiversity, not the conservation of fisheries. Decision VII/5 also confirms that the legislation or other effective means to establish and maintain an MPA will necessarily affect a wide range of activities that normally constitute a legitimate use of the sea. Decision VII/5 emphasises that:

“key factors for achieving effective management of marine and coastal protected areas include effective governance, clear national legal or customary frameworks to prevent damaging activities, effective compliance and enforcement, ability to control external activities that affect the marine and coastal protected area, strategic planning, capacity-building and having a sustainable financing for management” (paragraph 25)

7.96 Decision VII/5 urges parties “to urgently address ... all threats, including those arising from the land (e.g. water quality, sedimentation) and shipping/transport, in order to maximise the effectiveness of marine and coastal protected areas”.⁸¹⁷ It does not limit

⁸¹⁶ Convention on Biological Diversity, Marine Coastal and Biological Diversity, COP Decision VII/5 (2004), p. 2: Annex 107.

⁸¹⁷ *Ibid.*, para. 26.

such actions to fisheries matters. It emphasises that “the full participation of indigenous and local communities and relevant stakeholders is important ... for the establishment and maintenance of individual marine and coastal protected areas ... in line with decision VII/28 on protected areas.”⁸¹⁸ It recognises that “the law of the sea provides a legal framework for regulating activities in marine areas beyond national jurisdiction”⁸¹⁹, and does not characterise the creation of such marine areas as being a fisheries conservation measure.

7.97 These matters have also been addressed by the International Union for Conservation of Nature (IUCN), an international organisation to which Mauritius and the UK are both parties. In 2012 the IUCN adopted Guidelines for Applying the IUCN Protected Area Management Categories to Marine Protected Areas.⁸²⁰ The IUCN Guidelines identify six different categories of MPA, and state unequivocally that “fisheries management areas with no wider stated conservation aims” are not to be automatically classified as MPAs.⁸²¹ The IUCN Guidelines make clear that:

“Temporary or permanent fishing closures that are established primarily to help build up and maintain reserve stocks for fishing in the future, and have no wider conservation aims or achievements are not considered to be MPAs.”⁸²²

7.98 The Guidelines recognise that such areas may be “important components of the management of an MPA”.⁸²³ The UK has not characterised the “MPA” as a temporary or permanent fishing closure: it has characterised it as a Marine Protected Area, which the IUCN describes as:

“a clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values”.

7.99 Table 5 of the IUCN Guidelines is helpful in identifying the broad range of activities that are affected by an MPA. These number eighteen in total, of which only a small number (three) relate to fisheries:

- Research: non-extractive.
- Non-extractive traditional use.
- Restoration/enhancement for conservation (e.g. invasive species control, coral reintroduction).

⁸¹⁸ *Ibid.*, para. 27.

⁸¹⁹ *Ibid.*, para. 31.

⁸²⁰ International Union for Conservation of Nature, Guidelines for Applying the IUCN Protected Area Management Categories to Marine Protected Areas (2012), Annex 169.

⁸²¹ *Ibid.* p. 10.

⁸²² *Ibid.* p. 16.

⁸²³ *Ibid.* p. 16.

- Traditional fishing/collection in accordance with cultural tradition and use
- Non-extractive recreation (e.g. diving).
- Large scale low intensity tourism.
- Shipping (except as may be unavoidable under international maritime law).
- Problem wildlife management (e.g. shark control programmes).
- Research: extractive.
- Renewable energy generation.
- Restoration/enhancement for other reasons (e.g. beach replenishment, fish aggregation, artificial reefs).
- Fishing/collection: recreational.
- Fishing/collection: long term and sustainable local fishing practices.
- Aquaculture.
- Works (e.g. harbours, ports, dredging).
- Untreated waste discharge.
- Mining (seafloor as well as sub-seafloor).
- Habitation.

7.100 It is plain that the “MPA” is intended to address far more than fisheries, and that it affects the rights of Mauritius in relation to a wide range of activities. In its Counter-Memorial, the UK belatedly seeks to re-characterise the “MPA” as having been established as a fisheries measure, in exercise of “sovereign rights with respect to the living resources in the [EEZ]”. It asserts that “[t]he MPA is not directed at a threat of marine pollution”, which it recognises as a risk but one that is “hypothetical”.⁸²⁴ Instead, the UK says that the “MPA” is a measure aimed at “conserving and protecting biodiversity and the marine ecosystem from the impact of harmful fishing practices”.⁸²⁵ The claim is made without any evidence to support the contention that there are any “harmful fishing practices”, and despite the fact that the one area in which there is fishing activity, and which allowed a take in 2012 of 21 tonnes of tuna, has been excluded from the “MPA”.⁸²⁶ The Counter-Memorial recognises grudgingly that the “MPA” may serve broader environmental conservation objectives,⁸²⁷ but fails to draw the necessary conclusions. A measure aimed at “conserving and protecting biodiversity”, and at serving “broader environmental objectives”, is a measure over which the Tribunal has jurisdiction under Article 297.

⁸²⁴ UKCM, para. 6.31.

⁸²⁵ *Ibid.*

⁸²⁶ Indian Ocean Tuna Commission, “Catch and bycatch composition of illegal fishing in the British Indian Ocean Territory (BIOT)”, IOTC–2013–WPEB09–46 Rev_1, Annex 179, p.2.

⁸²⁷ UKCM, para. 6.31.

7.101 It is plain that the “MPA” is a measure taken to “protect and preserve the marine environment”, in the sense envisaged by Article 56(1)(b)(iii) of the Convention and Part XII, and that it therefore falls squarely with Article 297(1)(c). The total ban on all fishing activity in the “MPA” is not a fisheries measure, as it is not intended to conserve fisheries for their future exploitation. It is a biodiversity conservation measure, intended to protect and preserve the marine environment. Having so characterised the “MPA”, the UK cannot take refuge in the claim it now makes in relation to Article 297(1)(c).

7.102 As regards the “specified rules and standards for the protection and preservation of the marine environment” that have been violated by the UK, these include both procedural obligations (consultation, co-operation, etc.) and substantive obligations. These rules are addressed in more detail in Chapter 6.

(2) *Article 297(3)(a) does not exclude the jurisdiction of the Tribunal over the dispute concerning the “MPA”*

7.103 The UK’s argument on Article 297(3)(a) is equally misconceived. To rely upon that provision, the UK has to persuade the Tribunal that the dispute about the “MPA” is a dispute about fisheries: that is, that the “MPA” is solely a fisheries measure. In an attempt to do that, the UK argues that the “MPA” does no more than “implement a prohibition on commercial fishing within the 200 nm [FCMZ]”, and that “as such it represents an exercise by the UK of the sovereign rights and jurisdiction” under Part V of the Convention.⁸²⁸ Having re-characterised the measure in this way, the UK asserts that jurisdiction in relation to the “MPA” is – to the extent that it concerns “living resources within 200 nautical miles” – excluded from binding compulsory dispute settlement under Article 297(3)(a).

7.104 This argument is wrong. Firstly, the “MPA” applies to land territory, on which there is (as far as Mauritius is aware) no commercial (or indeed any) fishing. Secondly, even on the UK’s own argument, the dispute in relation to fishing in the territorial sea is not excluded.⁸²⁹ Thirdly, even accepting the UK’s argument on its own terms, those aspects of the “MPA” that are concerned with the protection and preservation of the marine environment other than the conservation of living resources within 200 miles cannot be excluded from jurisdiction by Article 297(3)(a). Fourthly, the UK is wrong to characterise what remains of the dispute as one relating to sovereign rights with respect to the living resources in the EEZ, or their exercise: the dispute concerns the claim by the UK that it has lawfully exercised rights to protect and preserve the environment in the EEZ.

7.105 In addition, it is obvious from the *travaux préparatoires* that there was no intention on the part of States participating in the negotiation of UNCLOS that the very limited categories of dispute excluded from jurisdiction by operation of Article 297(3)(a) would have any affect on the categories of dispute expressly included by

⁸²⁸ UKCM, para. 6.32.

⁸²⁹ The exceptions under Article 297 only apply to the EEZ, and the UK does not refute this: UKCM, paras. 6.5, 6.40-6.49, 6.59-6.62.

Article 297(1). This follows from the pivotal debates on the scope of the dispute settlement system conducted in 1976 in the plenary meetings of the Third United Nations Conference on the Law of the Sea. These debates made it clear that:

- (i) numerous States considered that a compulsory dispute settlement system was vital in upholding the balance struck within the Convention as a package deal through ensuring uniformity of interpretation;⁸³⁰
- (ii) a further group stressed that at most the dispute settlement system should be as comprehensive as possible,⁸³¹ and many within that group stressed that EEZ-related disputes should clearly be included with any dispute settlement system⁸³² (some contended that only a dispute settlement system with no exclusions or exceptions at all would be acceptable);⁸³³
- (iii) while certain States contended that the exercise of a State's sovereign rights and discretionary powers with respect to the living resources in the EEZ should be completely exempt from jurisdiction under the dispute settlement system,⁸³⁴ many nonetheless acknowledged that there were

⁸³⁰ Third United Nations Conference on the Law of the Sea, Summary Records of the 57th-65th Plenary Sessions, Official Records Vol. V, UN Docs. A/Conf.62/SR.57-65, Annex 76: see the comments of: El Salvador, V Official Records p. 8, para 4 and p. 9, para 10; Singapore, V Official Records p. 10, paras 20 and 22; Sri Lanka, V Official Records p. 17, para 39; Denmark, V Official Records p. 19, para 49; Netherlands, Belgium and Luxembourg, V Official Records p. 22, para 11; Sweden, V Official Records p. 30, para 3; Bangladesh, V Official Records p. 41, para 65 and 69; Philippines, V Official Records p. 42, para 82 and 85; Uruguay, V Official Records p. 43, para 88 and 91; Zambia, V Official Records p. 45, para 18; Ireland, V Official Records p. 47, para 5 and p. 48, para 12; Fiji, V Official Records p. 48, para 21 and p. 49, para 23; Canada, V Official Records p. 50, paras 5, 10-11; and Greece, V Official Records p. 51, paras 14 and 17.

⁸³¹ *Ibid*: Australia, V Official Records p. 10 para. 18; Singapore, V Official Records p. 10 para. 20 and 22; New Zealand, V Official Records p. 11-12 para. 35; Federal Republic of Germany, V Official Records p. 12 para. 37; UK, V Official Records p. 15 para. 17; Sri Lanka, V Official Records p. 17 para. 39; Denmark, V Official Records p. 19 para. 49; Mexico, V Official Records p. 23 para. 23; Cyprus, V Official Records p. 26 para. 49; Thailand, V Official Records p. 27 para. 52; Austria, V Official Records p. 28 para. 62; Republic of Korea, V Official Records p. 29 para. 70; Bulgaria, V Official Records p. 29 para. 80; Sweden, V Official Records p. 30 para. 3; USA, V Official Records p. 31 para. 18; Yugoslavia, V Official Records p. 32 para. 27; Poland, V Official Records p. 33 para. 34; Nigeria, V Official Records p. 35 para. 57 and 60; Bahrain, V Official Records p. 36 para. 6; Tunisia, V Official Records p. 38 para. 30; Hungary, V Official Records p. 41 para. 61; Bangladesh, V Official Records p. 41 para. 65 and 69; Philippines, V Official Records p. 42 para. 82 and 85; Uruguay, V Official Records p. 43 para. 88 and 91; Zambia, V Official Records p. 45 para. 18; Ireland, V Official Records p. 47 para. 5 and 48 para. 12; Fiji, V Official Records p. 48 para. 21 and 49 para. 23; Canada, V Official Records p. 50 para. 5, 10-11; and Greece, V Official Records p. 51, paras 14 and 17.

⁸³² *Ibid*: Singapore, New Zealand, Federal Republic of Germany, UK, Mexico, Austria, Bulgaria, USA, Bahrain, Tunisia, Hungary, Bangladesh, Canada and Greece above.

⁸³³ *Ibid*: USSR, V Official Records p. 11 para. 28; Netherlands, Belgium and Luxembourg, V Official Records p. 22 para. 11; Colombia, V Official Records p. 23 para. 18; Cyprus, V Official Records p. 26 para. 49; Japan, V Official Records p. 27 para. 57; Yugoslavia, V Official Records p. 32 para. 27; Nigeria, V Official Records p. 35 para. 57 and 60; and Greece, V Official Records p. 51, paras 14 and 17.

⁸³⁴ *Ibid*: India, V Official Records p. 18 para. 44; Argentina, V Official Records p. 18 para. 48; Chile, V Official Records p. 19 para. 63; Iceland, V Official Records p. 28 para. 62; Peru, V Official Records p. 33 para. 37; Kenya, V Official Records p. 34 para. 49; Brazil, V Official Records p. 35-36 para. 63;

legitimate interests held by the international community in the EEZ (e.g. navigation) which should be protected through access to the dispute settlement system.⁸³⁵

7.106 Thus, in interpreting Article 297 it must be borne in mind that the exclusions to jurisdiction found in Article 297(3) and in the *chapeau* to Article 297(1) represented an extraordinary and narrow concession on the part of the great majority of States participating in the negotiations. The price of that concession was the protection accorded to the rights and interests set out in Article 297(1)(a)-(c), including those related to the protection and preservation of the marine environment. The purpose of the carefully crafted compromise found in Articles 297(1) and (3) was that while “the exercise by a coastal State of its sovereign rights and jurisdiction” in the EEZ – with respect to fisheries management – would generally be excluded from the dispute settlement system, it was equally intended that access to dispute settlement in respect of the subject matters listed in Article 297(1)(a)-(c) was to be preserved. To conclude otherwise, as the UK argues, would re-balance the package deal represented by the Convention. Article 297 is the result of “long and intensive negotiations and incorporate[es] compromises which have been carefully formulated”.⁸³⁶ Those compromises, and the intention which the ordinary terms of the Article reflect, must be given effect in the interpretation of Article 297. That end is not served by interpreting Article 297(3)(a) so widely as to vacate Article 297(1)(a)-(c) of its content.

7.107 For these reasons, Article 297(3)(a) cannot operate to exclude the jurisdiction of the Tribunal in relation to a dispute that arises when the UK purports to adopt a measure for the protection of the marine environment that unjustifiably interferes with the rights of Mauritius.

(3) *The Tribunal has jurisdiction in relation to the dispute relating to specific provisions of UNCLOS*

7.108 The claims relating to violations of Articles 2(3), 194 and 300, and Articles 55, 56(2) and 78, are discussed above in Section III. Beyond these claims, the Tribunal also has jurisdiction over the claims in relation to all the other provisions of the Convention in respect of which violations have been claimed.

a. Article 63(1)

7.109 Article 63(1) imposes on the UK the obligation to “seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures

Mauritius, V Official Records p. 36 para. 10; Ecuador, V Official Records p. 39 para. 44; Pakistan, V Official Records p. 45 para. 21; Democratic People’s Republic of Korea, V Official Records p. 47 para. 2; United Arab Emirates, V Official Records p. 49 para. 32; Senegal, V Official Records p. 51 para. 20.

⁸³⁵ See the comments, above, of India, Argentina, Chile, Peru and Senegal.

⁸³⁶ Platzöder, R. (ed), Third United Nations Conference on the Law of the Sea: Documents (New York: Oceana Publications, 1982), Annex 84 (Note from the President of the Conference to the Dispute Settlement Group dated 6 August 1980).

necessary to co-ordinate and ensure the conservation and development of such stocks without prejudice to the other provisions” of Part V of the Convention, where “the same stock or stocks of associated species occur within the exclusive economic zones” of Mauritius and the UK. As set out in Chapter 6, in purporting to exercise rights to protect and preserve the marine environment, pursuant to the jurisdiction granted by Articles 55 and 56(1)(b)(iii), the UK has violated this procedural obligation for the reasons set out in Chapter 6, including *inter alia* the failure to raise the issue in the IOTC.⁸³⁷

7.110 Article 63(1) of the Convention is a “specified international rule and standard for the protection and preservation of the marine environment”, which is applicable to the UK and established by the Convention. The claim that Article 63(1) has been violated is therefore covered by Article 297(1)(c) of the Convention and falls within compulsory dispute settlement under section 2 of Part XV.

7.111 Further or alternatively, to the extent that the dispute in relation to Article 63(1) is to be characterised as a dispute “concerning the interpretation or application of [the 1982] Convention with regard to fisheries”, it falls to be settled in accordance with section 2 of Part XV, because (i) it is a dispute relating to procedural obligations under the Convention, in the sense recognised by the Tribunal in *Barbados v Trinidad & Tobago*, and/or (ii) is not one relating exclusively (or at all) to sovereign rights of the UK with respect to the living resources in the EEZ of the UK, so is not excluded by operation of Article 297(3)(a) of the Convention.

b. Article 63(2)

7.112 Article 63(2) imposes on the UK the obligation, where “the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone” of the UK, to “seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary to co-ordinate and ensure the conservation and development of such stocks without prejudice to the other provisions” of Part V of the Convention. As set out in Chapter 6, in purporting to exercise rights to protect and preserve the marine environment, pursuant to the jurisdiction granted by Articles 55 and 56(1)(b)(iii), the UK has violated this procedural obligation for the reasons set out in Chapter 6, including *inter alia* the failure to raise the issue in the IOTC.⁸³⁸

7.113 Article 63(2) of the Convention is a “specified international rule and standard for the protection and preservation of the marine environment” which is applicable to the UK and established by the Convention. The claim that Article 63(2) has been violated is therefore covered by Article 297(1)(c) of the Convention and falls within compulsory dispute settlement under section 2 of Part XV.

7.114 Further or alternatively, to the extent that the dispute in relation to Article 63(2) is to be characterised as a dispute “concerning the interpretation or application of [the] Convention with regard to fisheries”, it falls to be settled in accordance with section 2 of

⁸³⁷ Para. 6.106 above.

⁸³⁸ Para. 6.106 above.

Part XV, because (i) it is a dispute relating to procedural obligations under the Convention, in the sense recognised by the Tribunal in *Barbados v Trinidad & Tobago*, and/or (ii) is not one relating to exclusively (or at all) to sovereign rights of the UK with respect to the living resources in the EEZ, so as to be excluded by operation of Article 297(3)(a) of the Convention.

c. Article 64(1)

7.115 Article 64(1) imposes on the UK the obligation to “co-operate directly or through appropriate international organizations” with Mauritius (as a State “whose nationals fish in the region for the highly migratory species listed in Annex I [of the Convention]”), “with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone”. As set out in Chapter 6, in purporting to exercise rights to protect and preserve the marine environment, pursuant to the jurisdiction granted by Articles 55 and 56(1)(b)(iii), the UK has violated this procedural obligation for the reasons set out in Chapter 6, including *inter alia* the failure to raise the issue in the IOTC.⁸³⁹

7.116 Article 64(1) of the Convention is a “specified international rule and standard for the protection and preservation of the marine environment” which is applicable to the UK and established by the Convention. The claim that Article 64(1) has been violated is therefore covered by Article 297(1)(c) of the Convention and falls within compulsory dispute settlement under section 2 of Part XV.

7.117 Further or alternatively, to the extent that the dispute in relation to Article 64(1) is to be characterised as a dispute “concerning the interpretation or application of [the] Convention with regard to fisheries”, it falls to be settled in accordance with section 2 of Part XV, because (i) it is a dispute relating to procedural obligations under the Convention, in the sense recognised by the Tribunal in *Barbados v Trinidad & Tobago*, and/or (ii) is not one relating exclusively (or at all) to sovereign rights of the UK with respect to the living resources in the EEZ, so is not excluded by operation of Article 297(3)(a) of the Convention.

d. Article 7 of the 1995 Agreement

7.118 Article 7 of the 1995 Agreement imposes on the UK the obligation to “make every effort to agree on compatible conservation and management measures within a reasonable period of time”. As set out in Chapter 6, in purporting to exercise rights to protect and preserve the marine environment, pursuant to the jurisdiction granted by Articles 55 and 56(1)(b)(iii), the UK has violated this procedural obligation for the

⁸³⁹ Para. 6.106 above.

reasons set out in Chapter 6, including *inter alia* the failure to raise the issue in the IOTC.⁸⁴⁰

7.119 Article 7 of the 1995 Agreement is a “specified international rule and standard for the protection and preservation of the marine environment” which is applicable to the UK and established by the Convention. The claim that Article 7 has been violated is therefore covered by Article 297(1)(c) of the Convention and falls within compulsory dispute settlement under section 2 of Part XV.

7.120 Further or alternatively, to the extent that the dispute in relation to Article 7 of the 1995 Agreement is to be characterised as a dispute “concerning the interpretation or application of [the 1982] Convention with regard to fisheries”, it falls to be settled in accordance with section 2 of Part XV, because it is a dispute relating to procedural obligations under the Convention, in the sense recognised by the Tribunal in *Barbados v Trinidad & Tobago*, and is not one relating to sovereign rights with respect to the living resources in the EEZ which is excluded by operation of Article 297(3)(a) of the Convention.

e. Articles 281 and 282

7.121 In its effort to avoid having its actions subjected to critical scrutiny by the Tribunal, the UK offers a further argument on which it places misguided reliance. In relation to the claims by Mauritius relating to the failure to co-operate under Articles 63 and 64, and on Article 7 of the 1995 Agreement, the UK argues that the Tribunal has no jurisdiction because of Articles 281 and/or 282, in conjunction with Article XXIII of the IOTC Agreement.

7.122 Article 282 provides that:

“If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.”

The UK purports to place great store on the “ordinary meaning” of the text of the Convention, yet once again it ignores the ordinary meaning when it is unhelpful. Article 282 operates to exclude jurisdiction where the parties have agreed to another binding dispute settlement procedure to resolve a dispute between them concerning “the interpretation or application of [the] Convention”. There is no such agreement between Mauritius and the UK in any bilateral, regional or general agreement. As is clear from its text, Article XXIII of the IOTC Agreement is limited to the resolution of disputes concerning the interpretation or application of the IOTC Agreement, not the Convention, and any court or tribunal with jurisdiction to resolve a dispute under Article

⁸⁴⁰ Para. 6.106 above.

XXIII of the IOTC Agreement would not have jurisdiction to resolve the dispute that has been brought by Mauritius under the Convention. As Mauritius has only invoked violations of Articles 63 and 64 of the Convention, and Article 7 of the 1995 Agreement, Article 282 and XXIII of the IOTC Agreement are wholly irrelevant to the present case.⁸⁴¹

7.123 Article 281 of the Convention provides *inter alia* that:

“If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.”

The UK argues that Article XXIII of the IOTC Agreement is a provision by which Mauritius and the UK have agreed to settle the dispute concerning the interpretation or application of Articles 63 and 64 of the Convention and Article 7 of the 1995 Agreement. This argument ignores the ordinary meaning of Article 281, as it is clear on its face that Article XXIII of the IOTC Agreement is not the provision that the UK claims it to be, and that on any ordinary meaning of Article 281 and Article XIII the argument of the UK is bound to fail.

7.124 In support of this argument, the UK invokes the award of the Arbitral Tribunal in the *Southern Bluefin Tuna* case.⁸⁴² That award was handed down by a majority, has never been followed, and has been the subject of severe criticism in the academic literature.⁸⁴³ There is widespread support for the separate opinion of Sir Kenneth Keith, who addressed the wording of Article 281(1) as follows:

“The requirement is that the Parties have agreed to exclude any further procedure for the settlement of the dispute concerning UNCLOS. The French and Spanish texts have the same wording and structure. They require opting out. They do not require that the Parties positively agree to the binding procedure by opting in, by contrast to other provisions of Part XV: articles 282, 284(2) and (4) and 288(2).”⁸⁴⁴

⁸⁴¹ For an example of the situation in which Article 282 did come into play, see the *MOX Plant Case (Ireland v UK)*, Procedural Order No. 3, 24 June 2003, at para. 22 (“While neither the UK nor Ireland sought to sustain the view that the interpretation of the Convention in its entirety fell within the exclusive competence of the European Court of Justice as between Member States of the European Union, it cannot be said with certainty that this view would be rejected by the European Court of Justice. The Parties agreed in argument that, if this view were to be sustained, it would preclude the jurisdiction of the present Tribunal entirely, by virtue of article 282 of the Convention.”)

⁸⁴² See UKCM paras. 6.36-6.37, 6.55-6.57, 6.66-6.67; XXIII RIAAA 1, UKCM, Authority 16.

⁸⁴³ For example see: A. Boyle, “Some Problems of Compulsory Jurisdiction before Specialised Tribunals: The Law of the Sea”, in Capps, Evans and Konstandinidis, *Asserting Jurisdiction: International and European Legal Perspectives* (2003) p. 243: pp. 248 – 251.

⁸⁴⁴ *Southern Bluefin Tuna Case, (Australia and New Zealand v Japan)*, Award, Separate Opinion of Justice Sir Kenneth Keith, at para. 17.

His view appears to be reasonable and correct, on an ordinary reading of the words of Article 281, from which the majority departed. The majority award is widely recognised to have been wrongly decided, and it is a matter of some surprise that the UK should inscribe itself among the few who would seek to place any reliance on it.

IV. Conclusions

7.125 The Tribunal has jurisdiction in respect of all the claims made by Mauritius. The dispute between the two Parties relates to a “nature reserve” and “Marine Protected Area” established by the UK as a measure to protect and preserve the environment, including but not limited to the marine environment. That measure is not to conserve fisheries, either in whole or in part, because it is not its purpose to conserve stocks of fish today in order that they may be fished tomorrow. It is intended to protect biodiversity, and its far-reaching effects prevent Mauritius from exercising its rights in the waters of the UK’s purported EEZ, as well as on the seabed and subsoil of the continental shelf over which the UK claims rights.

7.126 The UK asserts that Mauritius seeks to challenge the UK’s broad discretion in relation to the adoption of fisheries conservation and regulatory measures.⁸⁴⁵ Mauritius does nothing of the sort. It challenges the UK’s right under the Convention to create a wilderness area in which all human activity is to be limited or prohibited in order to protect the environment. The UK argues that Mauritius has reformulated the dispute “as one concerning protection of the environment rather than conservation of marine living resources”.⁸⁴⁶ Yet the charge of reformulation is one to be laid at the door of the UK, which has sought by pleading to turn its “MPA” into a fisheries measure rather than the general “nature reserve” that was actually established (“doesn’t a marine park enjoy some sort of environmental protections?”, an unnamed official in the UK Foreign Office asked rhetorically, in June 2009).⁸⁴⁷

7.127 The UK has argued that to accept jurisdiction “would subject the exercise of coastal State sovereign rights over living resources to challenge and interference by other States”.⁸⁴⁸ It would do nothing of the sort. It would do no more than confirm that the Tribunal is entitled to decide whether the UK was entitled to create a “nature reserve” and “MPA” around the Chagos Archipelago in the manner that it has done, in prejudice of Mauritius’ rights, and would have no consequences for the lawful exercise

⁸⁴⁵ UKCM, para. 6.43.

⁸⁴⁶ UKCM, para. 6.46.

⁸⁴⁷ Email exchange between Joanne Yeadon, Head of “BIOT” & Pitcairn Section, UK Foreign and Commonwealth Office and Ian [surname redacted], 4 June 2009, Annex 135. This is the meeting also recorded in the US cable discussed at MM, paras. 4.45-4.49, in which the US author records Mr Roberts as having assured him that “establishing a marine park would, in effect, put paid to resettlement claims of the archipelago’s former residents.” (MM, Annex 146). In the 4 June email, Ms Yeadon also notes that “I told Chris [presumably the name of a US official] that any marine park established in BIOT would have to be administered in accordance with UNCLOS which insisted on the right of innocent passage.”

⁸⁴⁸ UKCM, para. 6.71(b).

by coastal States of sovereign rights which are intended to conserve and regulate fishing resources in the manner intended by the drafters of the Convention.

7.128 The UK further asserts that the exercise of jurisdiction “would upset the carefully balanced scheme for management of the EEZ by the coastal State”.⁸⁴⁹ That too is wrong. Part V of the Convention certainly allows the coastal State to exercise certain discretions for the “management of the EEZ”, but the “MPA” is not a fisheries management measure in the sense envisaged by the drafters of the Convention. The “MPA” purports to restrict a whole raft of human activities on land and sea, in the waters and on the sea-bed and in the subsoil. It is not a measure to “manage” the EEZ, but a measure to limit, if not prevent, all human activity in the areas it purports to cover.

7.129 For the reasons set out in this Chapter, the Tribunal has jurisdiction over all of the claims brought by Mauritius, in relation to the territorial sea and in the maritime areas beyond the territorial sea.

⁸⁴⁹ UKCM, para. 6.71(c).

RELIEF

Mauritius requests the Annex VII Arbitral Tribunal to declare, in accordance with the provisions of the Convention and the applicable rules of international law not incompatible with the Convention that, in respect of the Chagos Archipelago:

- (1) The United Kingdom is not entitled to declare an “MPA” or other maritime zones because it is not the “coastal State” within the meaning of *inter alia* Articles 2, 55 and 76 of the Convention; and/or
- (2) Having regard to the commitments that it has made to Mauritius in relation to the Chagos Archipelago, the United Kingdom is not entitled unilaterally to declare an “MPA” or other maritime zones because Mauritius has rights as a “coastal State” within the meaning of *inter alia* Articles 2, 55 and 76 of the Convention; and/or
- (3) The United Kingdom’s purported “MPA” is incompatible with the substantive and procedural obligations of the United Kingdom under the Convention, including *inter alia* Articles 2, 55, 56, 63, 64, 194, 300, as well as Article 7 of the 1995 Agreement.

Mauritius reserves the right to supplement and/or amend its claim and the relief sought as necessary, and to make such other requests from the Arbitral Tribunal as may be necessary to preserve its rights under the Convention.



Dheerendra Kumar Dabee G.O.S.K., S.C.
Solicitor-General of Mauritius
Government of the Republic of Mauritius Agent

18 November 2013

CERTIFICATION

I certify that the annexes are true copies of the documents referred to.

A handwritten signature in black ink, consisting of a circled 'D' followed by the name 'Dabee' in a cursive script, underlined.

Dheerendra Kumar Dabee G.O.S.K., S.C.
Solicitor-General of Mauritius
Government of the Republic of Mauritius Agent

18 November 2013

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